

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: 21089-18-19

Child's Name: J. T.

Date of Birth: [redacted]

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.E., J.D.

Date of Decision: 1/30/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student),¹ is a mid-teenaged student residing within the District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the bases of Specific Learning Disability, Other Health Impairment, and Speech/Language Impairment. Student has attended a private school since the 2013-14 school year, but at the end of the 2017-18 school year had reached the highest grade level that was available in that specific setting. In the summer of 2018, the District proposed a special education program that returned Student to the District in one of its high schools. Student's Parents did not agree with that recommendation, and filed a Due Process Complaint asserting that the District's proposal did not offer a free, appropriate public education (FAPE) under the IDEA, and education-based discrimination under Section 504 of the Rehabilitation Act of 1973³ and the Americans with Disabilities Act (ADA).⁴ They also asserted violations of the federal and state regulations implementing those statutes.

The case proceeded to an efficient due process hearing.⁵ Prior to the initial session, an order for pendency maintained Student in a private school placement.⁶ On the merits, the

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information in this decision, including details appearing on the cover page, 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. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

⁵ This hearing officer sincerely appreciates the parties' use of all Joint Exhibits and their participation in the electronic exhibit program. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Joint Exhibits (J-) followed by the exhibit number, and the single Hearing Officer Exhibit (HO-1). References to Parents in the plural will be made where possible where it appears that one was acting on behalf of both; the reference to Parent in the singular is to Student's mother who was the more active participant for the time period at issue.

⁶ HO-1.

Parents sought to establish that Student continues to require a small educational setting such as had been provided at the former private school, while the District countered that its special education program, as offered, was appropriate for Student and complied with the least restrictive environment mandates in the IDEA.

For the reasons set forth below, the claims of the Parents must be granted in part, and an Independent Educational Evaluation will be ordered.

ISSUES⁷

1. Whether the program proposed by the District for the 2018-19 school year is appropriate for Student;
2. If the program proposed for the 2018-19 school year is not appropriate, does Student require a small, structured private school environment; and
3. Whether the District should be ordered to fund any independent evaluations?

FINDINGS OF FACT

1. Student is a resident of the District and is eligible for special education under the IDEA classifications of Specific Learning Disability, Other Health Impairment, and Speech/Language Impairment. (N.T. 30; J-4 at 13.)
2. Student has been prescribed medication for Attention Deficit Hyperactivity Disorder (ADHD) symptoms in the past but discontinued its use because of side effects. (N.T. 246-47; J-3 at 7.)

⁷ An issue was raised at the start of the hearing for compensatory education from the start of the 2018-19 school year until the unknown date that Student began attending the current private school. There was a suggestion made on the record that that claim was in process of being resolved by the parties (N.T. 22), and that claim is not mentioned in either party's written closing statement, nor was there any evidence regarding that claim during any of the testimony or in any of the exhibits. Thus, it is considered either resolved or abandoned for purposes of this hearing.

HISTORY OF EDUCATIONAL PLACEMENTS

3. Student previously attended school in the District for Kindergarten and first and second grades, then attended a cyber charter school for the 2012-13 school year. Prior to school-age programming, Student reportedly received early intervention services. (J-8 at 2.)
4. The cyber charter school evaluated Student in the summer of 2013 and determined that Student was eligible for special education on the basis of Other Health Impairment due to ADHD. (J-8.)
5. Beginning in the fall of 2013, Student began to attend a private school (now the former private school (*see* HO-1 at 2-3)). (J-9 at 4.)
6. The former private school serves children with language-based learning disabilities through eighth grade. The environment is structured with small class sizes (approximately six to nine students in each class) and a small student to staff ratio. Students are provided with significant individualized attention and supervision in that setting. (N.T. 43-44, 212-14, 217-18, 225, 245-46, 429-31.)
7. Student remained in the former private school for the 2016-17 and 2017-18 school years at District expense. (HO-1 at 4, 30-43.)
8. Student has attended a different private school (the current private school) since the fall of 2018 pursuant to a pendency order. (N.T. 30; HO-1.)

2016 REEVALUATION

9. The District evaluated Student in the spring of 2016 and issued a reevaluation report (RR) in June of that year. (N.T. 265; J-9.)
10. The District school psychologist who conducted the 2016 RR learned from Student that Student was concerned about returning to public school because of bullying by certain peers that Student explained had occurred prior to attending the former private school. (N.T. 278-79, 282; J-9 at 9.)
11. The 2016 RR summarized previous evaluation reports incorporating information on family, developmental, health, and educational history including the ADHD diagnosis. That RR also summarized assessments in those previous evaluation reports. (J-9 at 1-4, 6-7.)
12. Parent input into the 2016 RR included concerns with reading comprehension, written expression, fine motor skills, mathematics skills, and remaining on task. (J-9 at 5-6; J-11.)
13. The District school psychologist who conducted assessments for the 2016 RR observed Student at the former private school. He also obtained input from its teachers, who reported Student's difficulties with peer interactions and fine motor skills. (J-9 at 8-9.)

14. Cognitive assessment for the 2016 RR (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded scores between the low average to extremely low range on the Composites with wide variability among those indices. The District school psychologist concluded that Student’s scores were negatively impacted by anxiety, inattention, and fine motor skill deficits and that Student’s cognitive ability fell between the low average and well below average ranges, with verbal reasoning skills better developed than other domains. (J-9 at 11, 18-20.)
15. Student’s reading ability was assessed for the 2016 RR (Woodcock Reading Mastery Tests), reflecting weaknesses with comprehension. Mathematics achievement was also assessed (Key Math – Third Edition) revealing deficits in the below average to well below average range across areas assessed. (J-9 at 20-21.)
16. Assessment of speech/language skills for the 2016 RR revealed difficulties with pragmatic language, and with both expressive and receptive language skills. (J-9 at 13-14.)
17. Occupational therapy assessment for the 2016 RR revealed below average range scores on several measures of fine motor skills including visual motor integration. (J-9 at 16-18.)
18. Social/emotional/behavioral functioning for the 2016 RR involved the Behavior Assessment System for Children – Third Edition (BASC-3), with rating scales completed by the Parent and a teacher. The Parent’s rating scales reflected at-risk concerns with anxiety and activities of daily living, and on the Internalizing Problems Composite. The teacher’s rating scales endorsed clinically significant concerns with hyperactivity, aggression, withdrawal, bullying, and developmental social disorders, and on the Externalizing Problems, Behavioral Symptoms Composites; and at-risk concerns with conduct problems, attention problems, learning problems, atypicality, adaptive skills, social skills, study skills, anger control, executive functioning, negative emotionality, and resiliency, and on the School Problems Composite. (J-9 at 21-26.)
19. The Parent completed a Gilliam Autism Rating Scale, Third Edition, for the 2016 RR, with results suggesting that diagnostic criteria were not met. She also completed rating of Student’s adaptive behavior (Adaptive Behavior Assessment System – Third Edition), yielding low to below average range scores. (J-9 at 26-27.)
20. The 2016 RR determined that Student was eligible for special education on the bases of Specific Learning Disability and Other Health Impairment; and speech/language support was also recommended. (J-9 at 12-13.)
21. Recommendations by the District school psychologist in the 2016 RR included counseling and social skills instruction; presentation of instruction using verbal information; use of visuals; provision of examples for multi-step tasks and assignments; specially designed instruction for reading and mathematics in small groups; and testing accommodations. There was also a specific recommendation for continuation of Student’s attendance at the former private school. (J-9 at 27-28.)

2018 REEVALUATION

22. In early May 2018, the Parent requested that the District develop and offer a special education program for Student. The District then sought permission to conduct a reevaluation of Student to include academic achievement, speech/language, occupational therapy, social/emotional/behavioral functioning. The Parents provided consent on May 7, 2018, and also granted permission for the District to obtain records from Student's pediatrician and the former private school. (J-2.)
23. An RR issued on or about August 23, 2018. (J-4.)
24. The District school psychologist observed Student at the former private school for the 2018 RR. (N.T. 34-35, 37-38.)
25. The District school psychologist spoke briefly with the Parent during the process of obtaining information for the 2018 RR, but was not able to have a conversation with either of the Parents about Student in the course of conducting that reevaluation. (N.T. 48-49.)
26. Written Parent input into the 2018 RR revealed concerns with certain academic skills (reading comprehension, mathematics, written expression (primarily organization and completing assignments)); social/emotional/behavioral skills (anxiety); and a few life skills. (J-3 at 3; J-4 at 3; J-11.)
27. The District school psychologist interviewed two teachers at the former private school for the 2018 RR. Their concerns for Student were focused primarily on attention difficulties. (N.T. 62-63, 65.)
28. Teacher input into the 2018 Psychoeducational Reevaluation Report and the 2018 RR reflected below expected scores in reading comprehension and, to a lesser degree, word identification; below average range scores across mathematics skills; and deficits in written expression skills including handwriting. Student also exhibited difficulty with maintaining attention, initiating and completing of tasks, and organizing materials, as well as social skills. Student reportedly benefitted from direct, explicit, multisensory instruction; small group instruction; small class sizes; chunking of information and directions; graphic organizers; frequent monitoring of attention to task; an adapted curriculum; and social skills support. (J-3 at 1-3, 6; J-4 at 8-10.)
29. The 2018 RR included summaries of previous evaluations in 2010, 2013, and 2016. (J-3 at 3-6; J-4 at 3-6.)
30. The 2018 RR summarized a classroom observation of Student by the District school psychologist at the former private school. In the classroom observation, Student was reportedly attentive and asked questions when clarification was needed during one-on-one and independent work. Student relayed experiences with peer interactions, including bullying, in the public school prior to enrolling at the former private school. Student reported that the former private school was a "better fit". (J-3 at 6; J-4 at 7-8.)

31. The 2018 RR described an interview of Student, wherein Student told the District school psychologist that Student had been bullied at school while attending public schools and would leave the building to get away. The District school psychologist believed that Student was less affected by those circumstances in 2018 than Student had been at the time of the previous evaluation in 2016. (N.T. 53-54, 58-60, 83; J-3 at 6; J-4 at 8.)
32. Attendance reported for the 2018 RR indicated that during the 2017-18 school year, Student was absent twenty-three days. (J-3 at 3; J-4 at 8.)
33. Cognitive assessment for the 2018 RR (WISC-V) were consistent with the previous administration for the 2016 RR. Student's composite scores were quite variable, ranging from an 89 on the Verbal Comprehension Index to a 53 on the Processing Speed Index. The Full Scale IQ was not indicative of Student's potential because of that variability and the impact of Student's ADHD; Student's cognitive ability was estimated to be in the low to low average range. (N.T. 77-79; J-3 at 7, 9-10; J-4 at 13-15.)
34. Assessment of academic Achievement (Wechsler Individual Achievement Test – Third Edition) for the 2018 RR revealed strengths and weaknesses, with the latter in the areas of reading comprehension, math problem solving, numerical operations, sentence composition, essay composition, and spelling. (J-3 at 10-11; J-4 at 15-17.)
35. Informal and formal assessment of speech/language skills for the 2018 RR revealed significant weaknesses in listening comprehension and oral expression. (J-3 at 14-15; J-4 at 23-24.)
36. Social/emotional/behavioral functioning was assessed for the 2018 RR through BASC-3 rating scales completed by two teachers (who completed a single rating scale together) and the Parent, and Student completed a Self-Report. A majority of the Parent's ratings reflected that Student was functioning as would be typical of peers, with the exception of at-risk concerns with attention and adaptability. The teachers' ratings were in the clinically significant range for attention and on the School Problems Composite; and in the at-risk range for hyperactivity, aggression, and learning problems, and on the Behavioral Symptoms and Adaptive Skills Composites. Student's own Self-Report revealed at-risk concerns with social stress and self-reliance, although the results suggested a need to interpret those rating scales with caution. (J-3 at 11-14; J-4 at 17-23.)
37. No occupational therapy evaluation was conducted for the 2018 RR because there was no occupational therapist available to conduct such assessment in the summer of 2018. (N.T. 457-58; J-4.)
38. Student was determined to remain eligible for special education in the 2018 RR on the bases of Specific Learning Disability, Other Health Impairment, and Speech/Language Impairment. (J-4 at 13.)
39. The District school psychologist made recommendations in the 2018 RR: approaches to instruction that emphasize verbal ability, structure and practice; chunking of major assignments and projects; extended time for assignments and assessments; repetition of multi-step directions; redirection and prompting; support for organizational and study

skills; use of a planner and timer; and regular meetings with teachers for organization and to address learning challenges. She also recommended consideration of medication for ADHD and community-based counseling. (J-3 at 8; J-4 at 24-25.)

40. The District school psychologist who conducted the 2018 RR determined that Student should be slowly transitioned back to the public school setting. (N.T. 71, 84, 96.)

2018 PROPOSED INDIVIDUALIZED EDUCATION PROGRAM (IEP)

41. In the spring of 2018, the District special education case manager responsible for some of its out of District placements, including the former private school, began to compile information about Student for a program for the fall of 2018. (N.T. 115-17.)
42. A draft IEP was developed for the 2018-19 school year based on the intention of the District members of the IEP team to return Student to the District. (N.T. 130; J-14.)
43. A meeting convened at the end of August 2018 to review the 2018 RR and draft IEP. The Parent attended the meeting as did a number of District professionals. (N.T. 105-06, 111, 118-19, 162, 353.)
44. The Parent asked some questions about the size of certain classes in the District based on recommendations in the draft IEP, and became upset at the answers. The Parent also explained that Student would experience anxiety over returning to the District and expressed a desire for Student to continue in a private school, but a District professional advised the Parent that it would not discuss an out of District placement for Student at the August 2018 meeting. The Parent left the meeting before the RR or IEP could be discussed in any detail. (N.T. 105-07, 109, 111, 149-50, 163-64, 174, 192, 353, 376.)
45. After the August 2018 meeting, a goal was added to the draft IEP to address social skills, and supports were added to the program modifications/items of specially designed instruction section, including for Student's transition back into a District placement. Emotional support was also noted to be part of Student's program. In all other respects, the draft IEP and the proposed IEP are virtually identical, but it was the proposed IEP that was provided to the Parents for approval or disapproval and is the IEP at issue. (N.T. 111-12, 134, 148-48; J-5 (compare with J-14).)
46. Needs identified in the proposed IEP were for reading comprehension and mathematics operations involving fractions, as well as maintaining on-task behaviors. (J-5 at 10.)
47. Annual goals in the proposed IEP addressed reading comprehension (answering literal and inferential questions, both oral and written, on text at Student's instructional reading level); written expression (developing a variety of informational writing pieces earning scores based on a rubric); solving two-step mathematics word problems using all operations; social communication skills (taking others' perspectives during conversations and discussions); increasing time on task and assignment completion; using prosocial skills in natural situations throughout the school day; introducing self and engaging in conversations in social situations; demonstrating organizational skills; and completing a career interest survey. (J-5 at 16-36.)

48. The goals for the proposed IEP were developed based on needs identified by the 2018 RR, but baselines were not obtained for those goals because there was not specific information from the former private school and Student was not yet attending school in the District in order to conduct probes. (N.T. 135-39, 145-46, 434-35, 438-39, 469.)
49. The District members of the IEP team intended to obtain baseline data for the IEP goals upon Student's return to one of its high schools in the fall of 2018, and make any necessary revisions to the IEP at that time. (N.T. 366-67, 382, 408-10.)
50. There are program modifications and items of specially designed instruction in the proposed IEP set forth for each goal, and included testing and assignment accommodations; teaching of learning strategies; practice and repetition; pre-teaching; use of models and graphic organizers; clear and simplified directions; prompts and cues; organizational support; and positive reinforcement. The IEP also provided for a plan for Student's transition back to the public school setting: curb to curb transportation; morning and afternoon check-ins with the emotional support teacher or school counselor; a "meet and greet" with teachers before the first day of school (J-5 at 38); and an assigned teacher mentor and "safe space" (*Id.*); and communication with the Parents. (J-5.)
51. The transition plan in the proposed IEP, as described more fully at the hearing, consisted of a tour of the school building and an opportunity to meet teachers and other staff; daily check-in and check-out with a mentor; a designed safe place to use when needed; peer buddies; and daily communication with the Parents. (N.T. 153-54, 189-90, 192, 361-62, 365-66, 454-55.)
52. The proposed IEP provided for speech/language therapy in small groups and individual occupational therapy, both for sixty minutes each month. (J-5 at 38.)
53. The proposed IEP does not include any specific post-secondary transition planning other than completing a career interest survey; the document incorrectly stated that Student was "not of transition age."⁸ However, a goal for organizational skills did refer to that as a need for post-secondary education/training. (J-5.)
54. The proposed IEP proposed a supplemental level of emotional and learning support at a District high school, with Student not participating with peers in regular education for all major content areas. (J-5 at 41-42.)
55. Student would be provided learning support for content-area classes by teachers certified in those content areas. Student would be in small class sizes of up to twelve students at the proposed high school. Student would have a regular education homeroom/advisory period each day for approximately twenty five minutes; would be in regular education for special classes; and would also participate in lunch with the ninth grade class unless Student exhibited anxiety over that large, unstructured setting. (N.T. 107, 150-51, 378-80, 382, 384, 420, 443-44, 460-63.)

⁸ 22 Pa. Code § 14.131(a)(5).

56. Student would be provided with emotional support through a forty-five minute weekly class that focuses on communication and social skills, managing behavior, and regulating emotions. Students often work in small groups based on their individual needs and IEP goals. At times, this emotional support is pushed into the content area classes. (N.T. 332-35, 337-38, 340, 343, 35, 379, 403.)
57. The Notice of Recommended Educational Placement (NOREP) accompanying the proposed IEP was for a return to public education, with regular education with supplementary aids and services as the only other option noted to have been considered. (J-5 at 45-48.)
58. The District members of the IEP team did not consider any options other than returning Student to its proposed high school. (N.T. 130, 390, 476-77.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized 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 must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

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 generally credible, and there was little inconsistency in the recounting of factual events. None of the witness testimony was accorded significantly more or less weight than any other.

In reviewing the record, the testimony of all witnesses and the content of each exhibit that was admitted were thoroughly considered in issuing this decision, as were the parties' written closing statements.

RELEVANT IDEA PRINCIPLES

The IDEA, in addition to the implementing federal and state regulations, obligate local educational 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. *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 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. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

There can be no question under *Endrew*, *Rowley*, and the IDEA that the IEP must be appropriately 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). In other words, the law does not demand that LEAs provide services beyond those that are reasonable and appropriate in light of a child's unique circumstances, such as those that "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). 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).

PROCEDURAL FAPE

From a procedural standpoint, the family plays "a significant role in the IEP process." *Schaffer*, *supra*, at 53. 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), 1414(e); 34 C.F.R. § 300.116; *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994); *see also Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988). The critical concept of meaningful parental participation in placement decisions is explicit in the IDEA. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001)(confirming the position of OSEP that local educational agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents); *Spielberg*, *supra*, 853 F.2d at 259. And, undeniably, a FAPE deprivation 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). Nevertheless, a procedural violation is actionable under the IDEA only if there is a consequent loss of educational opportunity for the student, a parent is seriously denied the right to participate, or a deprivation

of educational benefit results. *D.S., supra*, 602 F.3d at 565; 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

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

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

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 under 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, all of which challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA, will be addressed together.

LEAST RESTRICTIVE ENVIRONMENT

One crucial component of the IDEA is the 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).

THE DISTRICT’S PROPOSED PROGRAM

The first issue to be addressed is whether the District committed a procedural violation that amounted to a denial of FAPE by depriving the Parents of the ability to participate meaningfully in making decisions about the program proposed for the 2018-19 school year. That question must be answered in the affirmative.

As set forth above, the IDEA and its implementing regulations require that an IEP be developed by a team that includes the parents. It is only after the IEP has been created that the IEP team should move toward a discussion of placement, since the placement decision must be “based on” that IEP. 300 C.F.R. § 300.116. While the District was not required to accede to the Parents’ and Student’s stated preference for another private school, it was obligated to give consideration to their concerns and input.

The proposed IEP was initially drafted by an IEP team whose LEA members intended throughout its development that Student would return to one of its high schools. While it is logical that the District professionals would be mindful of the IDEA’s LRE principles, the law does not permit the LEA to have predetermined a program and placement without evidencing an open mind to consideration of alternatives. *See, e.g., Deal v. Hamilton County Board of Education*, 392 F.3d 840, 858 (6th Cir. 2004); *Letter to Veazey, supra*. Here, there was candid, credible testimony by a District witness that, when the Parent asked about placement including a private school at the August 2018 IEP meeting, she was definitively told that the District would not consider such a placement (N.T. 163-64). Indeed, the proposed IEP was not materially different from the draft IEP because of the lack of any real discussion about its content. This circumstance amounts to a lack of open-mindedness on the part of the District and evidences a significant impediment to meaningful parent participation such that a denial of FAPE clearly occurred.

This conclusion does not mean that the District erred in developing a draft IEP, even one that specified a potential school placement; or that it should not hold conversations among its staff in the development of a draft IEP. The fatal flaw here was the outright refusal to even discuss, much less meaningfully consider, the Parents’ input and preferences in the special

education program and placement decision-making process. Even the NOREP reflects that the options considered did not include that suggested by the Parents.

Where, as here, there is a significant impediment to the parent's ability to participate in special education program decisions, a denial of FAPE is established on procedural grounds and it may not be necessary to go on to review the substance of the document. *See, e.g., L.B. v. Gloucester Township School District (In re D.B.)*, 489 F. App'x 564, 567 (3d Cir. 2012); *C.H. v. Cape Henlopen School District*, 606 F.3d 59, 66 (3d Cir. 2010). Nonetheless, there are aspects of the proposed IEP that merit some discussion beyond the FAPE conclusion already reached, particularly in light of the relief ordered below.

The District school psychologist who conducted the 2018 RR determined that Student should be "slowly" transitioned back to the public school setting (Finding of Fact 40; N.T. 71 L-15, 84 L-5) in order to determine if Student could be successful there (N.T. 97-98, 103). As noted above, the IEP must be judged based on information that is known at the time the program is offered, and be reasonably calculated to enable progress based on Student's unique circumstances. The proposed IEP provided for a few supports to assist Student with returning to a District high school that could not be considered a slow transition, but instead offered only minimal opportunities to get acclimated to the new environment as the school year began. These supports, while perhaps a start to a discussion regarding transition, are not only contrary to the District school psychologist's recommendations, but largely ignored Student's reported concerns in 2018 related to a return to public school. Moreover, the District school psychologist was not able to offer an opinion at the hearing session in the fall of 2018 on whether the plan for transitioning back to the District in the August 2018 proposed IEP was reasonably calculated to permit Student to benefit meaningfully.

On the other hand, the proposed IEP and the record as a whole do not support the Parents' demand for an order that Student requires continuation of a private school placement. In this respect, there are a number of substantively appropriate aspects of the proposed IEP itself. The proposed IEP responded to the needs identified by the 2018 RR (reading comprehension, mathematics, written expression (organization), and social/emotional/behavioral functioning (completing tasks and maintaining on-task behaviors)), with annual goals addressing each of those areas in addition to goals relating to social skills. The proposed IEP included occupational therapy and speech/language therapy as related services. The proposed IEP incorporated the recommendations in the 2018 RR, and it and the proposed NOREP offered many of the supports that were provided at the former private school, including small class sizes for content area courses. And, Student's proposed IEP offered a high level of learning support and regular emotional support. Moreover, though not raised as an issue, there is nothing in the record to suggest that the 2018 RR was anything but comprehensive and in compliance with the law. 20 U.S.C. §§ 1414(a) – (c); 34 C.F.R. §§ 300.303 – 300.306.

Nevertheless, the District's refusal to consider anything but a program and placement at one of its high schools has been met by what was likely an equally adamant position on the part of the Parents,⁹ who clearly preferred continuation of private schooling for Student. Although these positions are grounded in sincere (but somewhat competing) beliefs, and the relationship between the parties is undoubtedly strained to some extent, it is critical that the process of collaborating *as a team* on Student's educational programming going forward be made with more open minds by both parties. The record contains evidence that Student's anxiety by the time of the 2018 RR was much less reduced than was reported in the 2016 RR, as were many

⁹ Since there was no real discussion of the 2018 RR and IEP at the August 2018 meeting, the position of the Parents can only be surmised from the parties' positions in connection with the hearing.

other behavioral manifestations. In addition, there was testimony at the second hearing session about placement options that the team should seriously consider for future school years, including the fall of 2019. Although the denial of FAPE conclusions above will maintain Student in the private school placement at this time, the remedy discussed below is intended to assist the parties with a plan for beginning the annual process of review and development of a new IEP as Student continues to make the transition toward adulthood.

REMEDY

Having found those specific procedural violations that operated as a denial of FAPE, the next question is what remedy is due. Despite the above conclusion regarding the 2018 RR, in an exercise of the hearing officer's broad discretion to fashion an appropriate remedy under the IDEA,¹⁰ and consistent with the Parents' alternative request for relief, the District will be ordered to provide an independent educational evaluation (IEE) of Student, which shall be comprehensive and include recommendations for Student's program that will in turn help guide placement decisions for consideration of the IEP team upon its completion. This remedy involving impartial third parties is also intended to foster a more trusting and cooperative relationship between the Parents and the District since they will be required to work together for years to come.

Accordingly, an IEE to encompass comprehensive psychoeducational, speech/language, and occupational therapy assessments will be ordered at public expense. Any additional evaluations as recommended by the professional who conducts the psychoeducational evaluation must also be provided by qualified independent evaluators at public expense. That remedy should serve a number of critical functions, including considerations for Student's now-current

¹⁰ See, e.g., *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009).

and future educational programming needs. *See Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012)(explaining that the remedy of a publicly funded IEE serves to “guarantee meaningful participation [of the Parents] throughout the development of the IEP” and placement decision going forward)(quoting *Schaffer, supra*, 546 U.S. at 60-61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child)).

The attached Order shall include timing provisions so that this process moves forward to completion in a timely manner so that the IEP team may meet and consider its results and recommendations well before the end of the current school year.¹¹

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the Parents were deprived of the ability to meaningfully participate in the decision-making process regarding the August 2018 proposed IEP, amounting to a denial of FAPE. The Student shall undergo a comprehensive independent educational evaluation at public expense to remedy that denial with other directives given to the IEP team.

¹¹ The team may wish to consider including a facilitator at the meeting described in the accompanying order.

ORDER

AND NOW, this 30th day of January, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents were denied the procedural protections in the IDEA for meaningful parental participation in the development of the proposed program and placement for the 2018-19 school year.
2. Student is awarded independent evaluations at public expense to include comprehensive psychoeducational, speech/language, and occupational therapy evaluations.
 - a) Within seven calendar days of the date of this Order, the District through counsel shall provide to the Parents through counsel a list of not less than five qualified individuals to perform a comprehensive psychoeducational evaluation of Student; a list of not less than three qualified individuals to perform a comprehensive speech/language evaluation of Student; and a list of not less than three qualified individuals to perform a comprehensive occupational therapy evaluation of Student. The qualified individuals shall be geographically reasonably accessible to the Parents and Student.
 - b) Within five business days of receipt of the lists of qualified individuals to perform each component of the Independent Educational Evaluation, the Parents through counsel shall notify the District through counsel of their selections.
 - c) The selected evaluators shall determine the scope of his/her evaluation including what assessments and observations are necessary. The professional who conducts the psychoeducational evaluation may recommend further assessments by other professionals that shall be provided at District expense.
 - d) The arrangements with the selected evaluators shall include a requirement that each shall provide a written report of his/her component of the Independent Educational Evaluation within a reasonable time, not to exceed sixty calendar days from the date of engagement.
3. Following completion and receipt of the all of the reports comprising the components of the Independent Educational Evaluation, and within ten business days of receipt by the District and Parents, Student's IEP team shall meet with the participation of the independent evaluators (in person, remotely, in writing, or otherwise based on the availability of the evaluators). Attendance or other participation of the evaluators at the IEP meeting shall also be at the District's expense, but their unavailability in person or remotely shall not delay the timing of the meeting.
4. The Parents shall be afforded reasonable opportunity to attend the meeting described in ¶ 3 and to participate meaningfully in the development of an IEP and determination of placement based on that IEP.

5. The IEP team shall consider the IEE Reports and all other relevant information at that meeting and proceed to development of an IEP and a discussion of placement based on that IEP. The District is not precluded from preparing a draft IEP for discussion at that meeting. A final proposed IEP as developed in connection with the meeting, together with an accompanying NOREP, shall be completed and provided to the Parents within ten business days of the date of the meeting described in ¶¶ 3 and 4.
6. Student shall remain in the placement identified by the September 12, 2018 pendency order pending completion of the IEE and an agreed NOREP.
7. Any remaining claim for compensatory education for the start of the 2018-19 school year until Student began attending the current private school, and any defenses thereto, are DISMISSED without prejudice.
8. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21089-1819KE