

*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: 21197-18-19**

**Child's Name:** A. B.

**Date of Birth:** [redacted]

**Parent:**  
[redacted]

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**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.

**Date of Decision:** 2/1/2019

## INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student),<sup>1</sup> is currently a late-teenaged student residing in the District (District). Student was previously identified by the District as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student has been attending a private school since the fall of 2016.

In the fall of 2018, Student's Parent filed a Due Process Complaint against the District asserting that its failure to offer a special education program to Student for the 2017-18 and 2018-19 school years operated to deny Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes. The Parent sought reimbursement for tuition and related expenses for the private school. The District maintained that it had no obligation to develop and offer a program under the circumstances presented and that no relief was due.

The case proceeded to an efficient due process hearing.<sup>4</sup> After careful review of the record and for the reasons set forth below, the claims of the Parent must be denied in their entirety.<sup>5</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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).

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

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and the single Hearing Officer Exhibit (HO-1). This hearing officer notes with appreciation that the parties participated in the electronic exhibits pilot program.

<sup>5</sup> The IDEA grants courts authority to award attorney fees, so the Parent's request for same is not within this hearing officer's authority. 20 U.S.C. § 1415(i)(3)(B); *see also B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837 (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").

## **ISSUES**

1. Whether the District had an obligation to develop and offer Student a special education program for the 2017-18 school year;
2. Whether the District had an obligation to develop and offer Student a special education program for the 2018-19 school year;
3. If the District was required to develop and offer Student a special education program for either or both of the 2017-18 and 2018-19 school years, is the private school appropriate for Student; and
4. If the District was required to develop and offer Student a special education program for either or both of the 2017-18 and 2018-19 school years, and the private school is appropriate for Student, are there equitable considerations to reduce or deny the request for tuition reimbursement?

## **FINDINGS OF FACT**

1. Student is late preteenaged and is a resident of the District. (N.T. 35.)
2. Student has weak social skills, and difficulty in expressing self, particularly with respect to needs. Student also exhibits sensory needs and a lack of self-advocacy skills, in addition to written expression deficits. (N.T. 40-41, 43, 47-48.)
3. Student began receiving early intervention services at approximately six months of age due to developmental delays. (N.T. 41-42; P-1; S-2 at 1-2.)
4. Student was evaluated in early 2012 by the District and an Evaluation Report (ER) issued in March 2012. That ER identified Student as eligible for special education under the IDEA classification of Autism. (P-2; S-2.)
5. For first through fourth grades (through the end of the 2015-16 school year), Student attended a District elementary school. (N.T. 38, 49.)
6. Student's most recent District Individualized Education Program (IEP) was developed in the fall of 2015 (fourth grade). Annual goals addressed written expression and social skills needs. Student was also provided with program modifications and specially designed instruction: test accommodations, preferential seating, graphic organizers and a writing checklist, social skills instruction, and the ability to meet with a special education

teacher when needed to manage emotions. Student's program was itinerant autistic support. (P-8; S-7.)

7. In the spring of 2016, the District received a request for records for Student from a local private school (Private School). (S-11.)
8. Student was withdrawn from the District in June 2016. The District sent notice to the Parent in September of that year that, if she wished to re-enroll Student in the District, she should begin the process of registering Student. (P-13, P-14; S-12, S-13, S-14.)

#### PRIVATE SCHOOL

9. Student attended the Private School during the 2016-17, 2017-18, and 2018-19 school years. The Parent decided to enroll Student in the Private School because she believed that it would be a more supportive environment. (N.T. 37-38, 49-51.)
10. The Private School is a small independent school serving students from preschool-age through age eighteen. There are approximately thirty to forty students in each grade, and class sizes at the middle school level where Student is are typically between twelve and fourteen students. (N.T. 163-64.)
11. Some students at the Private School have disabilities, but teachers at the Private School are not necessarily certified special education teachers. (N.T. 185-86.)
12. Team meetings of teachers for each grade occur on a weekly basis at the Private School to discuss the students and engage in planning for instruction. (N.T. 164-65.)
13. The Private School also has a team of professionals who create and provide a Formal Education Plan for its students who need additional support or enrichment. Those team meetings also occur weekly. (N.T. 65, 161-62, 165-66.)
14. A Formal Education Plan at the Private School contains accommodations and strategies that are suggested for a student by teachers as well as any other necessary support. The Plan is informally monitored and can be modified as a student's needs change, and they are updated at least once a year. (N.T. 167-68, 188-89, 196.)
15. Learning specialists at the Private School meet with students individually to provide support as needed. Students have a daily period for assistance from teachers and can also get additional assistance with writing. (N.T. 166-67, 177.)
16. Student has a Formal Education Plan at the Private School. That document is two pages long and lists Student's strengths as responding well to one-to-one instruction and having a positive attitude; and needs as math (multiple step problem solving), executive functioning, advocacy skills, and written organization. (N.T. 169-70; P-19.)
17. Student's Formal Education Plan lists eleven "strategy suggestions": previewing, assistance with organizational strategies and prompting, chunking of assignments and directions, checklists for long-term assignments, multisensory instruction in math,

nonverbal cues for task initiation, access to a counselor, immediate positive feedback, concrete goals for expectations, recording of oral presentations, and support for class participation. Preferential seating, a calculator, and test accommodations were also noted. (P-19 at 2.)

18. Student had the following classes at the Private School during the 2017-18 and/or 2018-19 school years: English, Mathematics, Science, Social Studies, a foreign language, Art, Health, Physical Education, Music, Chorus, Band, and Theatre. Student's progress notes were overall fairly positive for all subjects, with grades all C+ or better for subjects that reported letter grades. (P-17, P-18.)
19. Student has been provided support and assistance at the Private School for self-advocacy and organizational skills, written expression tasks, and managing larger assignments; Student also had regular check-ins with Student's advisor to address any academic or social/emotional needs that arose. (N.T. 174-76, 211.)
20. The Private School reported that Student demonstrated improvement with self-advocacy and organizational skills, managing assignments, and written expression tasks over the 2017-18 school year and the first half of the 2018-19 school year. (N.T. 180-81; P-17, P-18.)
21. The Parent has observed improvement in Student's self-advocacy skills, as well as mathematics and written expression skills including handwriting, since attending the Private School. (N.T. 67-68, 72-73.)
22. The Parent does not intend to remove Student from the Private School in the middle of the current school year. (N.T. 78.)

#### PARENT AND DISTRICT COMMUNICATIONS FALL 2017 THROUGH FALL 2018

23. In October 2017, the Parent via email contacted the principal of the District elementary school that Student had previously attended. She stated that she "was interested in finding out what programs the district can offer [Student]" and referenced a conversation the two had had in May 2016. The principal replied by email seeking confirmation that the message was not an old one just being delivered, and the Parent clarified in a reply to that message that she "was currently looking for information about programming for [Student] and the next steps [she] would take." The principal replied, asking her to call him. (N.T. 52; S-21 at 1, 3.)
24. The Parent and the elementary school principal attempted to speak on the telephone several times over the next four weeks, and ultimately had a conversation on December 21, 2017, approximately two months after the initial email in October 2017. The Parent asked what program options the District had available but did not specify whether it was for the current or following school year. (N.T. 54-57, 98, 102, 240-42, 252; P-14 at 1-4; S-21 at 1-4.)
25. The response the elementary school principal gave on the telephone was for the Parent to contact the Coordinator of Student Support Services at the junior high school

(Coordinator), because the principal believed that the Parent was asking about the following (2018-19) school year. He followed up with an email message to the Parent the day of their call confirming that contact to discuss “programming for next year.” The principal also contacted the Coordinator to alert him to the expected communication from the Parent about available programming options for the following school year. (N.T. 243, 248, 249. 263, 265-66; P-14 at 6-7; S-21 at 1, 5.)

26. Student would not have been in a grade served by the junior high school in the 2017-18 school year. (N.T. 243,249, 250.)
27. The elementary school principal did not seek permission from the Parent to conduct a reevaluation of Student after the December 2017 telephone conversation. (N.T. 256.)
28. The Parent next contacted the District through an email message to the Coordinator on January 29, 2018, asking “what programs the school district can offer.” The message did not name Student. (N.T. 57, 104; S-21 at 6.)
29. The Coordinator had a brief telephone conversation with someone soon after January 29, 2018 in which the Coordinator described the various types and levels of special education support in the junior high school. The Coordinator believed it was the Parent with whom he spoke. (N.T. 268-70.)
30. The District did not seek permission from the Parent to conduct a reevaluation of Student after the January 2018 communications. (N.T. 280, 320)
31. There were no further communications between the Parent and the Coordinator through the end of the 2017-18 school year. (N.T. 58, 106, 272-73, 279-80.)
32. In the spring of 2018, the Parent communicated with the District about Student’s sibling, who was attending a private school and not a District school, in the spring of 2018. The Parent requested that the sibling be evaluated for special education, and the District informed her that residency should be established before the requisite forms would be sent to her. In one of those communications, the Parent suggested that the District was not acting promptly on her evaluation request for the sibling. (N.T. 108-09, 113-14, 307; S-21 at 8-17.)
33. The next communication between the Parent and District about Student occurred on August 17, 2018. On that date, the Parent sent an email message to the Coordinator, stating that the District had not offered “an appropriate program and placement” for Student for the 2018-19 school year, and seeking reimbursement for tuition to the Private School. (N.T. 106; P-14 at 5; S-21 at 7.)
34. The District responded with a letter on August 20, 2018, denying the request to fund the Private School and proposing a new evaluation of Student. A Permission to Evaluate was enclosed. (P-15.)

35. The Parent provided consent for the evaluation of Student on August 30, 2018.<sup>6</sup> (P-16.)
36. The Parent did not register Student with the District after the withdrawal in 2016. (N.T. 89.)

## **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 in this type of proceeding.

*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 Parent 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 “equipose.” *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 all of the witnesses who testified to be generally credible, and the slight inconsistencies where there was overlap may be attributed to lapse in memory rather than

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<sup>6</sup> The District conducted its evaluation that was completed while this matter was pending, and a separate case proceeded wherein it sought to defend that evaluation. The District’s request to introduce that ER in this case was denied following the Parent’s objection. (HO-1.)

intentional deception. The one area where the reliability of certain testimony appears to be somewhat important to this decision is discussed below.

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

#### RELEVANT IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. Those laws also obligate LEAs to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11.

#### LEA OBLIGATION FOR STUDENTS NOT ENROLLED

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *James v. Upper Arlington City School District*, 228 F.3d 764 (6<sup>th</sup> Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP). *See also I.H. v. Cumberland*



*Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district’s motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018)(applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged). However, the trigger is that “parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE.” *I.H.*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073).

Very recently, in *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 (M.D. Pa. Sep. 28, 2017), the District Court reviewed a situation where the student was in a private school, but the parent had completed and provided forms to register and re-enroll that student in the school district, and the school district failed to respond by seeking an evaluation in order to develop a special education program to propose. The Court there concluded, under the specific facts presented, that the school district had an obligation to evaluate the student unless there was a clear expression by the parent that the student would not return: “it is not the parent’s obligation to clearly request an IEP or FAPE; instead, it is the school’s obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school.” *Id.* at \*41. The *Shane T.* Court also explained that, “it is not the secret desire of the parent that matters, but the objective manifestation of those desires that dictate whether or not the public school must offer a FAPE.” *Id.* at \*41.

### TUITION REIMBURSEMENT REMEDY

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). Here, the Parent's Complaint demanded tuition reimbursement and related expenses for the 2017-18 and 2018-19 school years, 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 public school did not offer 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); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Id.* The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

### THE PARENT'S CLAIMS

The primary issue is whether the District had any obligation to conduct an evaluation and propose a program for Student during the 2017-18 and/or 2018-19 school years. The two periods of time shall be addressed chronologically. However, as to both, the District first contends that the Parent failed to establish Student's eligibility for special education for either of the school years in question, and demands dismissal as a matter of law. This argument must be rejected. At the time Student withdrew from the District in 2016, Student was considered to be eligible for special education and had an IEP in place. If the District had an obligation to act during the 2017-18 and/or 2018-19 school years, the law dictates that it should have sought to evaluate

Student in order to determine eligibility and to develop and offer a program consistent with that evaluation. 20 U.S.C. §1414(a)(1)(C)(i) (stating that there are two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]”) Thus, Student’s eligibility or lack of eligibility is not dispositive as a matter of law in this case.

The first issue presented by the Parent is whether the District had an obligation to Student during the 2017-18 school year. The record is clear that the Parent communicated with the District elementary school principal in the fall of that school year in order to obtain information about available programs for Student. The elementary school principal understood that the request related to the 2018-19 school year, and he confirmed that understanding in writing to the Parent who did not correct or challenge that conclusion. Instead, over a month later, she contacted the Coordinator at the junior high school where Student would attend if enrolled for the 2018-19 (but not the 2017-18) school year. Her initial communication with the Coordinator did not name Student or describe in any way the type of program about which she sought information.

The Coordinator testified quite credibly that he spoke with someone whom he believed to be the Parent about available special education support at the junior high school, and little else, in early 2018. (N.T. 268-70.) The Parent’s contrary testimony was that she did not recall if they spoke, then she denied that there was any conversation. (N.T. 105.) The Coordinator’s testimony is deemed to be more reliable than that of the Parent on this specific fact. The Parent’s testimony, while clearly heartfelt and at times emotional, was not persuasive that the Coordinator failed to contact or otherwise respond to her at all. Nevertheless, even assuming that there was no such conversation between the Coordinator and the Parent herself, the Parent’s single

unspecific email message to him in January 2018, that was followed by total silence for the remainder of the 2017-18 school year, does not support a conclusion that she had conveyed any interest in a special education program for Student for that school year.<sup>7</sup> Furthermore, unlike the parent in *Shane T., supra*, 2017 U.S. Dist. LEXIS 163683, who enrolled the child then waited over a year for the school district to respond, the Parent here did not objectively manifest a desire for a proposed program for Student, nor did she register or enroll Student or even indicate that she might do so. Even accepting that she sincerely held such personal intentions, the LEA's obligation is not based on those. *Id.* at \*41. Moreover, while it is true that a parent need not use any specific language to trigger a resident school district's obligation to evaluate a student in order to propose an IEP, this hearing officer concludes that the vague questions that the Parent asked of the two District representatives over a several month time period were not sufficient to alert the District to any responsibility to do more than it did during the 2017-18 school year.

The same conclusion must be reached for the 2018-19 school year. Without any District obligation following the communication that ceased in January 2018, and no objective manifestation of a desire for a proposed program or even communication from the Parent to the District about Student between January and August 2018, there is no basis for finding any obligation on the part of the District for the 2018-19 school year. In short, the record simply does not establish that, before August 17, 2018, the District was on notice that it had a duty to evaluate Student and propose a program for the Parent to consider for the 2018-19 school year. Once it had that requisite notice in August 2018, the District did proceed as it was required to do. The law does not demand more.

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<sup>7</sup> Indeed, her much more specific communications regarding an evaluation of a sibling in the spring of 2018, including her suggestion that the District was not acting promptly in responding, evidences an understanding that she should not simply wait and see if any action regarding Student would be taken by the District for that school year, particularly as it was approaching its end.

The Parent makes an alternative argument that the District was required to offer a new IEP in October 2016 when the previous October 2015 IEP would have expired. This contention is not supported in any of the case law that requires some triggering event before an LEA is required to evaluate a student attending a private school in order to propose an IEP. *See, e.g., I.H., supra*, 842 F.Supp.2d at 772; *Moorestown, supra*, 811 F.Supp.2d at 1073. As discussed above, there was no point in time prior to August 17, 2018 that the District had any obligation toward Student while enrolled in the private school, and this alternative contention is therefore unavailing.

Finally, having found that the Parent has not established the first step of the *Burlington – Carter* analysis, there is no need to go on to the remaining prongs, and the claims must be denied.

## **CONCLUSION**

For all of the above reasons, this hearing officer concludes that the District had no obligation to evaluate Student or to develop a proposed special education program for the 2017-18 or 2018-19 school years.

**ORDER**

AND NOW, this 1<sup>st</sup> day of February, 2019 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District did not have an obligation to evaluate Student and propose a special education program for the 2017-18 or 2018-19 school years. The District is not required to take any action.

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*

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 21197-1819AS