

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: 21615-18-19

Child's Name: E. B.

Date of Birth: [redacted]

Parents:
[redacted]

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

Date of Decision: 06/10/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student),¹ is a primary elementary school-aged student residing in the Downingtown Area School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the bases of an Other Health Impairment and a Speech/Language Impairment.

Student began school in the District in kindergarten and also attended first grade there, but attended a private school at the Parents' election for the 2018-19 repeating first grade school year. That decision was made following the District's proposed program for that school year. Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes. The claims related to the 2016-17 and 2017-18 school years, as well as the program proposed for the summer of 2018 and the 2018-19 school year.

The case proceeded to a due process hearing which convened over three sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parents sought compensatory education, reimbursement for tuition and related expenses at the private school,

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, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 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 References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The record is voluminous and citations to duplicative or similar exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

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

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

ISSUES

1. Whether the District provided Student with a free, appropriate public education during the 2016-17 and 2017-18 school years including extended school year (ESY) services in 2017;
2. If the District failed to provide a free, appropriate public education to Student at any time during the 2016-17 and 2017-18 school years including ESY in 2017, is Student entitled to compensatory education;
3. Whether the program proposed by the District for ESY in 2018 and for the 2018-19 school year was appropriate for Student;
4. If the program proposed by the District for ESY in 2018 and/or the 2018-19 school year was not appropriate for Student, should the Parents be reimbursed for tuition at the private school and related expenses; and
5. Whether the Parents should be reimbursed for two independent evaluations.

FINDINGS OF FACT

1. Student is primary elementary school-aged and resides within the geographical boundaries of the District. (N.T. 18-19.)
2. Student is eligible for special education under the IDEA on the basis of an Other Health Impairment and a Speech/Language Impairment. (N.T. 19; S-48.)

3. Student attended a developmental preschool through the local intermediate unit (IU) on the basis of Developmental Delay prior to entering the District. Student was provided speech/language and occupational therapy as well as specialized instruction through the IU pursuant to an Individualized Family Service Plan/Individualized Education Program (IFSP/IEP). Student also had goals for maintaining attention, making transitions, functional play, and labeling letters. (N.T. 210-11; S-1; S-3 at 2.)

ENTRY INTO DISTRICT

4. The District evaluated Student in the spring of 2016 as preparation for Student's transition to school-age programming, and issued a Reevaluation Report (RR) that March. In addition to summarizing available information, the District conducted assessment in the areas of occupational therapy, speech/language, executive functioning, and behavior, as well as academic achievement. (S-3.)
5. Parent input into the March 2016 RR reflected concerns with expressive language, fine motor skills, and behaviors including personal space. (S-3 at 2-3.)
6. On the Wechsler Individual Achievement Test – Third Edition (WIAT-III) for the 2016 RR, Student scored generally below age expectations across subtests, but administration was discontinued when Student failed to cooperate. (S-3 at 23-24.)
7. Occupational therapy evaluation for the 2016 RR revealed needs in fine motor skills (including developing a tripod grasp of writing instruments), motor coordination, and sensory processing, with the latter related to difficulty maintaining attention and focus and following multi-step directions. Continued occupational therapy services were recommended. (S-3 at 14-17.)
8. Speech/language evaluation for the 2016 RR reflected age-appropriate articulation, oral fluency, and voice, but weaknesses in pragmatic communication related at least in part to difficulty with impulse control. Speech/language therapy was recommended. (S-3 at 17-20.)
9. The Behavior Rating Inventory of Executive Functions – Preschool rating scale was completed by the Parents and the preschool special education teacher for the 2016 RR. Student's teacher's ratings reflected more difficulty at school than at home, with the former including difficulty with inhibiting impulsive responses, modulating emotions, sustaining working memory, and planning/organizing. (S-3 at 21-23.)
10. Rating scales from the Behavior Assessment System for Children (BASC) – Second Edition – Preschool were also completed by the Parents and preschool teacher. The teacher endorsed clinically significant concerns with aggression and at-risk concerns with hyperactivity, depression, and attention problems. The Parents endorsed clinically significant concern with activities of daily living and at-risk concern for attention problems. (S-3 at 25-26.)
11. On a rating scale for Attention Deficit Hyperactivity Disorder (ADHD) for the 2016 RR, where Student was below the age range of the norms, scores were overall in the clinically

significant range for the Parents for both hyperactive-impulsive and inattentive features; and in the clinically significant range for the teacher for hyperactive-impulsive features. Both raters indicated a tendency toward leaving seat, difficulty with engaging in activities quietly, “on the go”, talking excessively, easily distracted, difficulty waiting for turns, and interrupting/intruding on others. (S-3 at 24-25.)

12. The 2016 RR determined that Student was eligible for special education on the bases of Other Health Impairment (due to the ADHD presentation) and a Speech/Language Impairment. Needs were identified in the areas of speech/language; occupational therapy (fine motor and sensory processing skills), pre-academic skills (early reading, and mathematics reasoning and problem solving); and behavioral/emotional regulation including attention and listening to and following directions. Recommendations for the IEP team were also included in this RR. (S-3.)
13. An IEP was developed at a meeting in April 2016 for the 2016-17 school year (kindergarten). That IEP included a summary of the results of the 2016 RR. (S-4.)
14. Annual goals in the April 2016 IEP addressed occupational therapy (fine motor skills (grasping a writing instrument with tripod grasp, with the present levels indicating Student needed to acquire an efficient tripod grasp) and sensory processing (following two-step directions to complete fine motor tasks in a designed time period, although there is no baseline)); speech/language (pragmatic and expressive language skills: verbally requesting items/actions with a baseline to be determined at the start of the school year; following directions and completing four-step tasks with the baseline to be determined at the start of the school year; and using grammatically and syntactically correct sentences, with the baseline to be determined at the start of the 2016-17 school year); initiating and remaining on task for a designated time period (with no baseline); and expressing wants and needs (with no baseline). (S-4.)
15. Program modifications/items of specially designed instruction in the April 2016 IEP included clear and consistent review of rules, directions, and expectations with multisensory presentation; modeling appropriate sentence structure and interactions with prompts as needed; a daily schedule; visual checklist; notice of changes to routine; access to learning support classroom for sensory/movement breaks as needed; reduced distractions; peer role model; variations of task difficulty throughout the day; wait time for processing; use of cues; chunking of assignments; and completion of a Functional Behavioral Assessment (FBA). (S-4 at 28-30.)
16. The April 2016 IEP proposed supplemental learning support with Student provided thirty minutes per week of speech/language therapy (alternating pushed in and outside of the classroom) and thirty minutes per week of occupational therapy. The Parents approved the Notice of Recommended Educational Placement (NOREP). (S-4.)

2016-17 SCHOOL YEAR (KINDERGARTEN)

17. Student attended a regular education, full-day kindergarten classroom beginning in the fall of 2016. Students are screened for whether they might benefit from a full-day

program at that grade level, but parents make the decision if a child is provided with that option. There were approximately fifteen students in Student's classroom. (N.T. 335, 368-69, 371.)

18. All students were provided with a period of Multi-Tiered System of Support (MTSS) in kindergarten based on benchmark scores in pre-reading/reading skills. Student was in the Tier 1 group, the least intensive level. (N.T. 372-73, 397, 619.)
19. Students in the kindergarten classroom typically were beginning to learn social skills and becoming acclimated to the structured school environment, including following directions and understanding personal space. (N.T. 338, 340, 376.)
20. Student, like Student's kindergarten classmates, sometimes needed reminders to follow rules such as raising a hand to speak and respecting personal space. However, Student exhibited more difficulty than many peers and needed to develop social skills. (N.T. 338, 340-41, 347-48, 381; P-7; S-7; S-11; S-13.)
21. Early in the kindergarten school year, the teacher and Parents agreed that Student should have a specified seat during unstructured time in the morning to help Student recognize personal space. (N.T. 346-48, 353; S-14.)
22. Student had a combination of push-in and pull-out speech/language therapy in kindergarten. (N.T. 342.)
23. The kindergarten classroom used a systematic phonics-based program that also addressed handwriting. That school year the class focused on letter formation and letter sounds before moving on to decoding small words. Students were also exposed to early writing and early mathematics skills, science, and special subjects. (N.T. 343-44; S-30.)
24. The kindergarten teacher used a classroom-wide positive behavior plan with individual behavior charts. By mid-October, Student's Parents and the kindergarten teacher began to divide Student's day into morning and afternoon for purposes of the behavior charts. Student also had a specific behavior punch card that could lead to rewards such as taking a break, and had worksheets for reflecting on behaviors. Student could also take breaks as needed. (N.T. 337, 344-45, 349-51, 360, 377, 381-82, 444; P-7; S-17.)
25. An FBA was conducted in October 2016 targeting three specific behaviors: physical contact with peers; disengagement from tasks; and noncompliance with tasks or directions. The hypothesis of the functions of the problem behavior was to gain attention from adults and to gain sensory input. A meeting convened to review the results of that FBA and Student's IEP was revised to add a Positive Behavior Support Plan (PBSP). The PBSP added thirty minutes of social skills per cycle (fifteen minutes each inside and out of the regular classroom); and new goals addressed those skills (identifying behaviors as appropriate or not, identifying feelings, and using replacement behaviors in four of five opportunities; expressing wants and needs; neither had baselines). A new program modification/item of specially designed instruction provided for direct instruction in social skills. No baselines were added from the initial IEP. The Parents approved the NOREP accompanying the new revised IEP. (N.T. 223, 348, 415; S-5; S-12.)

26. The social skills pull-out sessions were fifteen minutes once per cycle, usually during calendar time, during kindergarten. The social skills instruction was individual at the start of the school year and addressed demonstration of appropriate and expected behaviors using the Social Skills Improvement System. Later in the school year, two other kindergarten students joined for small group instruction. Student also had fifteen minutes per cycle of push-in support for social skills. (N.T. 416-17, 441-44, 446-47, 457.)
27. By the middle of the kindergarten school year, Student was learning to identify feelings and emotions, and exhibited less defiance. Student used a social story to help demonstrate expected behaviors. (N.T. 350-51, 356, 449-50.)
28. A behavior plan conference was held in December 2016 with the Parents. No revision was made to the IEP or PBSP at that time. (S-15.)
29. Benchmarks from the winter of the 2016-17 school year reflected that Student was exceeding expectations in three of four reading skills but below expectations in Nonsense Word Fluency (scoring 13 compared to a benchmark of 19). Student scored well below expectations on a measure of reading level, performing below 90% accuracy on the first (pre-primer) level; however, many peers also scored at the pre-primer level in the winter of that school year. (N.T. 358, 388, 398; S-22 at 7.)
30. Progress monitoring from December 2016 reflected that Student was using a tripod grasp with a pencil grip but not without, and was copying letters with cues and prompts; was following directions and maintaining attention for up to one minute in occupational therapy sessions with a prompt (no baseline); was requesting items/activities 60% of the time with adults and 47% of time with peers with a prompt (no baseline); was following two-step directions 70% of the time in speech/language therapy sessions and 30-50% of the time in a large group setting with minimal prompts (no baseline); was completing three-step tasks with 67-85% accuracy; was producing grammatically/syntactically correct sentences with 89% accuracy during speech/language therapy (no baseline); was inconsistently using cues to express needs and wants (0-100% of opportunities; no baseline); was initiating and completing tasks 100% of the time with prompting (no baseline); and was identifying expected/unexpected behaviors 40% of the time (no baseline). (S-16.)
31. In March 2017, Student was determined to be eligible for ESY services in the summer of 2017 to address social skills and occupational therapy needs. The Parents approved the NOREP for ESY. (N.T. 232; S-18; S-19.)
32. Also in March 2017, the Parents requested a new evaluation of Student. The District proposed a review of records as well as new assessment of cognitive ability, academic achievement, and adaptive skills; and the Parents provided consent; they did not consent to assessment of Autism. (S-23; S-24; S-25.)
33. A new IEP was developed in early April 2017. Needs were identified for speech/language (social communication and using language skills in authentic situations);

occupational therapy (fine motor and sensory processing skills); regulation of emotions, behavior, attention, and impulsivity; and listening and following directions. (S-22.)

34. Annual goals in the April 2017 IEP addressed occupational therapy (fine motor skills: writing letters from memory legibly and with specified size, and writing sentences with samples, with present levels providing detailed description of current functioning); and completing specifically identified fine motor activities (coloring, cutting, tracing) to specified criteria, with no baseline and only limited related information in the present levels); speech/language (pragmatic and expressive language skills (initiating and maintaining conversations with baselines); following directions and completing five-step sequencing tasks with baselines); initiating and remaining on task for designated time period (with no baseline); social skills (demonstrating expected behaviors with faded prompts (with no baseline); and expressing wants and needs (with no baseline)). (S-22.)
35. Program modifications/items of specially designed instruction in the April 2017 IEP were largely unchanged from previous IEPs and included: clear and consistent review of rules, directions, and expectations with multisensory presentation; modeling appropriate sentence structure and interactions with prompts as needed; a daily schedule; visual checklist; notice of changes to routine; direct social skills instruction; access to the learning support classroom as needed for sensory/movement breaks; reduced distractions; peer role model; variations of task difficulty throughout the day; wait time for processing; use of cues; chunking of assignments; and a new FBA. (S-22.)
36. The PBSP in the April 2017 IEP was identical to the previous PBSP. Information in the present levels indicated that Student was using the visual checklist with 66% accuracy (goal of 80%); had met the goal for identifying whether behavior was expected or unexpected; and had met the goal for expressing wants and needs. (S-22.)
37. The April 2017 IEP continued to determine that Student was eligible for ESY services to address occupational therapy and social skills needs since Student exhibited difficulty with recoupment in those areas. (S-22 at 33-37.)
38. The April 2017 IEP proposed supplemental learning support with Student provided sixty minutes per week of speech/language therapy (alternating pushed in and outside of the classroom), thirty minutes per week of occupational therapy, and thirty minutes per cycle of social skills instruction outside of the regular education classroom. The Parents approved the NOREP accompanying this IEP. (S-22.)
39. In the spring of 2017, Student was below benchmark expectations in three of the four reading skill areas and remained below expectations on a measure of reading level, although Student was then at the pre-primer level. (P-1; S-28 at 10-11; S-113.)
40. Parental input into the new reevaluation was provided in late April. At that time, the Parents expressed concerns with Student's ability to maintain attention to task, impulsivity, sensory needs, difficulty with transitions and social skills, and unspecified behavior. They requested a personal care assistant (PCA) for Student as well as the addition of a reading specialist. (S-25 at 6-10.)

41. The District issued an RR in June 2017. That RR included the input from the Parents, a summary of previous evaluations, and current grades and progress toward IEP goals. Teacher input reflected minimal need for prompts and redirection but continued needs in social skills, occupational therapy skills, and speech/language. (S-26.)
42. Assessment of cognitive ability (Wechsler Preschool Primary Scale of Intelligence) for the June 2017 RR reflected average range scores in all areas with the exception of Verbal Comprehension (low average) with an average-range Full Scale IQ of 91. WIAT-III scores were in the average range on all subtests and composites with the exception of oral word fluency (standard score 83). Notably, Student earned a standard score of 105 in Early Reading Skills. (S-26 at 14-16.)
43. Assessment of adaptive skills was conducted through rating scales completed by the Parents and kindergarten teacher. The General Adaptive Composite scores were 85 (Parents) and 75 (teacher), indicating overall skills below expectations; areas of weakness generally related to behavior, social skills, and communications. (S-26 at 16-17.)
44. The 2017 RR maintained Student's eligibility under the Other Health Impaired and speech/language Impairment classifications. No new needs were identified. (S-26.)
45. An IEP meeting convened in June 2017 after the recent RR. This IEP identified a new need in self-help adaptive skills. In all other respects, this document was the same as that from April 2017, and the Parents approved the NOREP accompanying this IEP. (S-28.)
46. Progress monitoring in June 2017 reflected that Student was writing upper case letters of correct size and position, and other letters with prompts and visual cues; making some unquantified improvement with coloring and cutting skills with prompts; following two-step directions independently with better accuracy than the baseline; and demonstrating expecting behaviors with prompts in 60% opportunities (with no baseline to compare). Unspecified progress on using cues to express wants and needs and no indication on progress toward initiating and completing tasks were also reported at that time. (S-29.)
47. By the end of the kindergarten school year, Student demonstrated improvement in respecting personal space and communicating emotions and feelings, as well as following rules. (N.T. 378-79, 384, 391-93.)
48. Student's grades at the end of the 2016-17 school year reflected that Student was exhibiting progress toward or competence in learner traits, with some weaknesses in some reading and writing skills as well as speaking and listening. (S-30.)
49. The District and Parent engaged in regular communication about Student throughout the 2016-17 school year. (P-1; P-7; P-31; S-7; S-8; S-9; S-10; S-17; S-23; S-24; S-27.)
50. In late June 2017, the District was informed that Student was provided outside behavioral health services. (S-33.)
51. Student worked on and maintained occupational therapy skills and social skills in ESY 2017. Student also participated in the District's camp program that was available to all

students in the District to address academic skills; Student worked on reading skills. The District proposed to make up a missed occupational therapy session in the fall of 2017. (N.T. 363-64; P-9; P-27; S-36; S-37; S-39.)

2017-18 SCHOOL YEAR (FIRST GRADE)

52. Student's IEP team met at the end of August 2017. The team added the option to take assessments in the learning support class but otherwise the document was identical to the June 2017 IEP. The Parents approved the NOREP, but requested a new reevaluation to include assessment for Autism, to which they had not previously consented. (N.T. 241-42, 244; S-24; S-41; S-43.)
53. The Parents provided their consent to a new reevaluation to include assessment for Autism, reading achievement, occupational therapy; speech/language, social/emotional functioning, and social skills. (S-45.)
54. Student began the first grade school year exhibiting difficulty remaining focused and on task. Other behaviors that Student had demonstrated in kindergarten were not observed. (N.T. 502-03, 506, 512.)
55. At the start of the first grade school year, Student had social skills for fifteen minutes per cycle during a period other than any academic instruction. That increased to thirty minutes per cycle but again not during academic instruction. The District began implementing the Zones of Regulation program. (N.T. 416-17, 433, 452-55.)
56. Student's pull-out services did not take place during reading or mathematics instruction during first grade. (N.T. 474, 477-79, 506.)
57. Benchmark assessment in the fall of the 2017-18 school year reflected that Student remained well below expectations in Reading on a curriculum based measure, on two of the four early reading skills, and at an overall instructional reading level below expectations. By November 2017, Student remained below expectations but had gained one level on a measure of reading level over the end of the prior school year. (S-47; S-113; S-114; S-115.)
58. Student's difficulty remaining focused impacted Student's reading skills and the first grade teacher became concerned about Student's phonics skills. Student continued with phonics instruction, whole group reading instruction, and guided reading small group; Student also moved to Tier 2 MTSS, a more intensive level, for thirty minutes five days out of every six-day cycle, and that was provided by a reading specialist in November 2017. (N.T. 480-81, 504-06, 508-11, 593, 625; P-12 at 4-5.)
59. Benchmark assessment in the winter of the 2017-18 school year reflected that Student had met expectations in two areas of early reading skills but was below expectations in two other areas (phoneme segmentation fluency and nonsense word fluency) with some variability among scores in those two latter areas. Student was reportedly at a beginning reader lexile level. Student moved to Tier 3 MTSS, the most intensive level. (P-12 at 7-8; S-62.)

60. Another RR issued in November 2017. This RR summarized results from the June 2017 RR and provided updated information from the 2017-18 school year including input from the Parents and teacher, with the latter expressing concern over Student's need for redirection in all environments. The teacher also indicated that behaviors continued despite the use of charts and implementation of the PBSP. (S-48.)
61. On assessment of academic achievement in reading for the November 2017 RR, Student's standard scores were in the average range for all subtests with the exception of passage comprehension (below average range). The basic reading skills score was in the average range (standard score 95). (S-48 at 22, 31.)
62. Reevaluation of speech/language and occupational therapy-related needs for the November 2017 RR revealed strengths and weaknesses with needs demonstrated for continued therapy services at school, particularly with pragmatic language. Social skills evaluation indicated ongoing need for acquiring certain skills. (S-48.)
63. Social/emotional/behavioral functioning for the November 2017 RR was assessed through a variety of measures. The Conners-Third Edition reflected that inattention and hyperactivity/impulsivity were significant concerns of both the Parents and the teacher, with ADHD suggested. In executive functioning, the Parents endorsed concerns with inhibition and self-monitoring, while the teacher endorsed concerns with working memory and task monitoring. (S-48.)
64. An administration of the Third Edition of the BASC for the November 2017 included Autism Spectrum Rating Scales. The Parents' scores were in the elevated or slightly elevated range on some of the Autism scales (social/communication, unusual behaviors, and self-regulation) as well as peer socialization, adult socialization, social/emotional reciprocity, behavioral rigidity, sensory sensitivity, and attention; however, the DSM-5⁵ Scale reflected an average total score. The teachers' scores were in the slightly or very elevated range on one of the Autism scales (self-regulation) and social/emotional reciprocity and attention. For both teachers who completed these scales, the DSM-5 Scale was in the average range. (S-48 at 19-21.)
65. The Autism Diagnostic Observation Schedule – Second Edition (ADOS-2) was also administered for the November 2017 RR. Although Student required frequent redirection, Student's scores did not meet the threshold for an Autism Spectrum Disorder. (S-48 at 21-22.)
66. The November 2017 RR maintained eligibility under the Other Health Impairment and Speech/Language Impairment classifications; however, recommendations included individualized instruction in reading. (S-48 at 23.)
67. Progress monitoring reported in December 2017 reflected that Student was copying a sentence with errors and writing upper and lower case letters with models with errors; making some unquantified improvement with cutting skills with prompts; following two-step sequencing tasks with 67% accuracy; demonstrating increased eye contact with

⁵ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013).

faded prompts during speech/language therapy, and initiating and maintaining conversations with peers with prompts; and following two-step directions and sequenced five-card stories with 80-100% accuracy. Widely variable progress toward initiating and completing tasks as well as unclear demonstration of skills for using cues were also reported at that time. (S-49.)

68. Between November 2017 and January 2018, a literacy specialist worked with Student on a phonics program and another reading intervention five days per six day cycle in small groups for MTSS. (N.T. 592-93.)
69. An IEP was developed in January 2018 following the recent RR; the delay was due to difficulty with scheduling for both parties. This IEP incorporated information from that RR and included new Parent concerns with Student's safety in talking to strangers. Needs identified in this IEP were for speech/language (pragmatic language) skills; occupational therapy (visual memory and motor planning); regulation of attention, behavior, and impulsivity; individualized reading instruction; and social skills instruction. (N.T. 561-62; S-52.)
70. Annual goals in the January 2018 IEP addressed occupational therapy needs (copying upper and lower case letters and sentences, and writing them without a model, from a baseline of inconsistent performance for these tasks); independently providing eye contact with communications partners and engage in conversational turn taking in a small group, from a baseline of needing prompts for all skills); following multi-step sequencing tasks presented verbally from a baseline of three of five); initiating and completing tasks with one prompt (with no baseline); identifying expected behaviors with faded prompts (from a baseline); increasing nonsense word fluency at a first grade level to 46 (with present levels indicating a baseline of 30); and producing 39 correct sounds on phoneme segmentation fluency probes at a second grade level (with present levels indicating a baseline of 26). (S-52.)
71. Program modifications/items of specially designed instruction in the January 2018 IEP were similar in many respects but added others: clear and consistent review of rules, directions, and expectations with multisensory presentation; notice of changes to routine; reduced distractions; a peer role model; wait time for processing; use of cues; direct phonemic-phonetic reading instruction; direct social skills instruction; accommodations for tests and assignments; close monitoring of progress; structured breaks; assistance with the morning and afternoon routines; and a new FBA. The PBSP in the January 2018 IEP incorporated these changes, but otherwise was largely unchanged from the previous PBSP. (S-52.)
72. The January 2018 IEP proposed supplemental learning support with Student provided thirty minutes of daily reading instruction, thirty minutes per week of speech/language therapy (alternating pushed in and outside of the classroom), thirty minutes per week of occupational therapy, and thirty minutes per cycle of social skills instruction outside of the regular education classroom. The Parents approved the NOREP accompanying this IEP. (S-52.)

73. The District conducted another FBA in January 2018 after the Parents requested one. Off-task and non-compliance were the targeted behaviors that were defined in the FBA. Over the observations, Student exhibited behavior of concern most frequently when new direction was given, and stopped engaging in the problem behavior a majority of the time. The hypotheses of the function of those behaviors was to gain attention when new directives were given. A meeting convened to discuss that FBA. (N.T. 225, 434, 563; S-57; S-61; S-62; S-63.)
74. Student's learning support reading instruction after the January 2018 IEP meeting addressed decoding, encoding, sight words, and provided practice and repetition. (N.S. 562-63.)
75. Student received one behavior report in March 2018 for touching and hitting other students two days in a row; and another in April 2018 for kicking a peer during recess. The teacher discussed the latter incident with Student and Student completed a behavior sheet. (P-17; S-58; S-76; S-81.)
76. Student was referred for an assistive technology evaluation and a SETT⁶ evaluation was conducted in April 2018 with a meeting convened to review the results. By that time, Student was exhibiting difficulty with writing tasks including spelling. Recommendations included access to a digital device and programs providing reading support as well as text to speech. Continued use of graphic organizers and teacher scribing as well as a typing program were determined to be action steps. (N.T. 257; S-66; S-71.)
77. The Parents began to explore alternative placements in March 2018, including a summer program at a private school. (N.T. 260; S-68; S-82; S-85.)
78. In April 2018, the Parents asked that the District fund a private summer camp program for Student. The program was described as a language arts program with recreation. (P-19; S-78.)
79. Assessment of Student's phonological awareness in April 2018 reflected scores in the mid-kindergarten to mid-first grade range. (S-74.)
80. Student's IEP was revised in May 2018. At the time, the Parents expressed concerns with Student's reading progress, handwriting skills, and distractibility during larger group settings. Student had nearly mastered the writing goal, and the team agreed to substitute a new goal for functional writing (demonstrating control and coordination) to score 6 out of 8 on a checklist and to introduce keyboarding skills. A new oral reading fluency goal for second grade passages was also added, as was a goal for executive functioning (initiating and remaining on tasks following a directive for 8 of 10 minutes). A few revisions were made to the program modifications/specially designed instruction (removal of multisensory presentation of directions and structured break; and additions of a checklist for morning routine; executive functioning instruction; a behavior reflection sheet; colored cards to indicate need for help; writing support (daily writing support;

⁶ This type of evaluation considers four areas: Student, Environment, Tasks, and Tools.

introduction to keyboarding, lined paper; practice, assessments taken in learning support classroom, an application for the iPad, teacher scribing, a modified writing rubric, slant board); graph paper for mathematics; and librarian support. (S-87.)

81. The PBSP was revised for the May 2018, removing physical contact with peers as a behavior of concern. Additional new antecedent strategies and replacement behaviors were added, such as a requirement for Student to repeat directions back to the teacher and a colored card to indicate a need for help or understanding and to practice self-advocacy. (S-87.)
82. The executive functioning instruction was provided through a program that addressed both social skills and executive functioning skills with role modeling. This was small group instruction for thirty minutes per cycle. (N.T. 557, 646-47.)
83. ESY services were also specified in the May 2018 IEP, with full time learning support. Those services were comprised of reading (with goals for phoneme segmentation fluency and nonsense word fluency probes), occupational therapy (continuing the goal for handwriting goal and coordination), and social skills (identifying expected behaviors including respecting personal space). Reading was a new need, and occupational therapy and social skills were area identified as in danger of regression. (S-87.)
84. The Parents approved the May 2018 NOREP. (S-87 at 61-64.)
85. Toward the end of the 2017-18 school year, the learning support teacher began working with Student on executive functioning skills for thirty minutes per cycle in a small group. (N.T. 557.)
86. Student began receiving wraparound services in the spring of 2018 and also started medication trials at the same time. (N.T. 272-73.)
87. Progress monitoring reported in late spring 2018 reflected that Student was demonstrating increased eye contact with faded prompts during speech/language therapy (approaching the goal with some variability), and initiating and maintaining conversations with peers with a visual prompt (approaching the goal with variability); sequencing up to five out of five steps and retelling a story (approaching 100% accuracy and mastery); variably initiating tasks with prompts (no baseline); identifying expected behaviors and respecting personal space in small group setting with prompts (approaching mastery in that setting); was producing 27 correct sounds (goal 46) on nonsense word fluency probes; and producing 46 correct sounds (goal 39) on phoneme segmentation fluency probes. (S-65.)
88. After the May 2018 IEP meeting, Student's special education reading instruction was increased to forty five minutes. (N.T. 571.)
89. A final IEP was provided to the Parents on June 2018 that was not substantively changed from the May 2018 IEP. (S-95.)

90. Student ended the 2017-18 school year exhibiting progress toward or competence in learner traits, with some weaknesses in some reading and writing skills. All grades were in the proficient range or better with the exception of foundational reading skills. (S-96.)
91. Progress monitoring reported in June 2018 reflected that Student was demonstrating increased eye contact and initiating and maintaining conversations with peers with minimal cues during speech/language therapy (approaching mastery independently); was sequencing four or five out of five steps and retelling a story (mastering the goal using picture cards; exhibited widely variable success with initiating tasks with prompts (no baseline); was maintaining identification of expected behaviors and respecting personal space in small group setting with prompts (approaching mastery in that setting); was producing 29-42 correct sounds (goal 46) on nonsense word fluency probes; was producing 29-64 correct sounds (goal 39) on phoneme segmentation fluency probes; was reading up to 18 words correct per minute with multiple errors on second grade passages (goal 55); was copying letters with 99% accuracy but with inconsistent size and spacing; and on the executive functioning goal was remaining on task for up to ten minutes but with some variability (goal eight of ten minutes). (S-101.)
92. In May and June 2018, the Parents provided notice that Student would not attend ESY services in the District in 2018. Student attended the private camp program. (P-20; P-52; P-61; P-62; S-103.)
93. The District and Parent engaged in regular communication about Student throughout the 2017-18 school year. (P-31; S-32; S-42; S-44; S-46; S-47; S-50; S-51; S-53; S-55; S-59; S-60; S-64; S-70; S-72; S-73; S-79; S-81; S-83; S-84; S-86; S-88; S-89; S-92; S-93; S-94; S-100.)
94. The Parents withdrew Student from the District at the end of the 2017-18 school year. They gave notice to the District on July 11, 2018, that they intended to place Student at a private school (Private School) for the 2018-19 school year and seek tuition reimbursement. (N.T. 203-04; P-36; S-104.)

INDEPENDENT EDUCATIONAL EVALUATION

95. Student was evaluated by a private neuropsychologist in June 2018, and a report of that Independent Educational Evaluation (IEE) was issued. (N.T. 28-29; S-106 at 8-30.)
96. For testing for the IEE, Student exhibited significant distractibility but was easily redirected. (N.T. 30-31.)
97. The private neuropsychologist observed Student at school for the IEE. Student exhibited difficulty with organization and planning during that observation. (N.T. 33-35; P-50.)
98. Cognitive assessment for the IEE included the Wechsler Intelligence Scale for Children – Fifth Edition, on which Student exhibited relative strengths and weaknesses, with both the Full Scale IQ and General Ability Index score in the average range (101 and 107, respectively). Relative strengths were noted on the Visual Spatial and Fluid Reasoning

Indices, and a relative weakness on the Working Memory Index. More specific memory strengths and weaknesses were also assessed. (S-106.)

99. On the Kaufman Tests of Educational Achievement, Third Edition (KTEA-3), for the IEE, Student earned scores in the average range in mathematics, reading comprehension, and word reading. Student scored in the low average range in real word and nonsense word decoding, and spelling. Despite noting in the report that grade equivalency scores should be interpreted with caution, did not mean that the student was performing at that level, and could be unpredictable,⁷ the independent evaluator nonetheless emphasized those scores on the KTEA-3 in the report. (S-106.)
100. Neuropsychological assessment of executive Functioning skills for the IEE revealed some weaknesses including impulsivity. However, children at that age are not expected to demonstrate a high level of executive functioning skills. Fine motor and visual motor skills were all determined to be average to high average. (N.T. 37, 50-51, 646; S-106.)
101. Rating scales of social/emotional/behavioral functioning were completed for the IEE by two teachers and the Parents. On the BASC-3, the Parents endorsed concerns with hyperactivity, aggression, and attention problems, while one teacher reported concerns with aggression, attention problem, atypicality, withdrawal, and functional communication. Scales for Attention Deficit Disorder and Social Responsiveness yielded more significant concerns by teachers than by the Parents. (S-106.)
102. The IEE conclusion was that Student was eligible for special education under Other Health Impairment, but also suggested consideration of Specific Learning Disability in reading, spelling, and writing essentially based on grade equivalency scores. The neuropsychologist made a number of recommendations including Wilson Reading, social skills, a highly structured classroom with small group instruction where possible. A number of recommendations were consistent with those in the most recent District IEPs for Student. (S-106.)
103. The private neuropsychologist also observed Student at the Private School. She reported that Student continued to require frequent redirection and exhibited organizational skill deficits. (N.T. 52-53.)

PRIVATE READING EVALUATION

104. The Parents had Student evaluated by a private reading specialist also in June 2018. Like the private neuropsychologist, she noted in her report that grade equivalencies “do not indicate the grade level at which the child is functioning.” (S-107 at 2; emphasis in original.) (N.T. 260; S-107.)
105. A Standardized Reading Inventory was administered as part of the reading evaluation, with Student was not able to progress beyond the primer level on words in isolation (50%

⁷ See also N.T. 43-44; Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

accuracy). On a test of phonemic awareness, Student exhibited weaknesses with phoneme and sentence segmentation, and consonant blends and digraphs. Assessment of phonological processing reflected weak skills across subtests and composites. (S-107.)

106. The private reading specialist made recommendations to include Wilson Reading (based on its focus on auditory and visual processing, scaffolding, and repetition) and other strategies for spelling and reading. (S-107.)

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107. The Parents provided reports to the District of the IEE and the private reading specialist. (N.T. 260-61.)
108. An IEP meeting convened on July 31, 2018 to discuss a draft IEP following the District's receipt of the private evaluations. At that time, the Parents asked for a Wilson Reading program but the District did not agree because its team members considered Student to be making progress in the programs it was using. (N.T. 642, 644-45; S-105; S-108.)
109. The July 31, 2018 IEP added information from the most recent progress monitoring report. Parent concerns were with academic, social, and emotional progress, including the need for a smaller, more structured classroom; and social skills and pragmatic language instruction and generalization. (S-108.)
110. A new goal in reading comprehension was added to the July 2018 IEP (using learned strategies to answer questions). A few additional program modifications/items of specially designed instruction included a nonverbal cue for remaining on tasks. This IEP confirmed that Student would participate in the regular education classroom with the exception of thirty minutes of occupational therapy each week, thirty minutes of speech/language therapy every two weeks, forty five minutes of reading support per day, thirty minutes of social skills instruction per cycle, and thirty minutes of executive functioning instruction three times per cycle; however, the proposed program remained learning support at an itinerant level. (S-109.)
111. On August 1, 2018, the Parents confirmed their intention to the District to enroll Student at the Private School. (P-65.)

THE PRIVATE SCHOOL

112. The Parents made a deposit on the tuition for the Private School on or about August 1, 2018. They are responsible for a fee for transportation. (N.T. 205-06; P-21; P-32.)
113. The Private School serves children with learning differences from kindergarten through eighth grade. For the 2018-19 school year, Student repeated first grade in the lowest grade level grouping, which is kindergarten through grade two. (N.T. 108-09, 123-24.)
114. Student's first grade classroom was comprised of seven students with a teacher certified in special education. The classroom was structured and Students follow a regular routine

- throughout the day. All students at the Private School were prepared for transitions throughout the day and were assigned a laptop. (N.T. 109-10, 113, 121-22, 126, 130-31.)
115. Students at the Private School were provided with small group for the Orton-Gillingham reading and mathematics block. Students were grouped based on strengths and needs; however, for the kindergarten through second grades, all groups began the 2018-19 school year at or near the very first levels of the program. The groups did not move up to the next level until all students in the group have mastered the current level. (N.T. 110-11, 146-47, 154-55.)
 116. The Private School follows a teaching approach that focuses on social and emotional skills as well as academic skills. Students participated in active, engaging learning activities with an emphasis on collaboration and developing and maintaining relationships with peers and teachers. (N.T. 98-101, 135-36, 167.)
 117. Students in the lower grades at the Private School were provided with an older peer buddy. Regular contact with buddies occurs throughout the school year. (N.T. 107.)
 118. Student's classes during the 2018-19 school year at the Private School consisted of Wilson Reading (an Orton-Gillingham-based sequential reading instruction program), reading, mathematics, art, physical education, music, science/social studies, and writing. Other portions of the school day included assembly, morning meeting, snack, lunch, recess, and closing circle. All of its teachers are certified to teach the program, which addresses reading decoding, encoding, comprehension, vocabulary, and fluency. (N.T. 97-98, 109, 113, 117-18, 146; P-47.)
 119. Students are also placed in reading groups of approximately six students for guided reading. Students in the same groups as for the Wilson Reading program instruction and practice those skills in guided reading. (N.T. 118-19, 169.)
 120. Student was provided speech/language therapy in a small group at the Private School. (N.T. 111, 135, 182-83.)
 121. Student was provided outside occupational therapy beginning in October 2018. (P-25.)
 122. The Private School has a school counselor who meets with all students twice each week. At those times, the students learn and practice social skills and share feedback with peers. Students also work on using Zones of Regulation. (N.T. 101-03, 120-21, 177.)
 123. Student demonstrated an increased ability to resolve conflicts with peers at the Private School. (N.T. 102-03, 105-06.)
 124. Student demonstrated progress on speech/language therapy skills during the first trimester of the 2018-19 school year. (P-23.)
 125. At the end of the second trimester of the 2018-19 school year, Student continued to demonstrate developing progress toward expectations at the Private School in reading,

writing, mathematics, science, social studies, art, art, music, and physical education, as well as work habits/social skills/behavior. (P-68.)

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 this 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.

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, with the minor inconsistencies generally attributable to memory or individual perspectives. However, the testimony of one of the Parents that the District failed to engage in adequate communication with them and keep them apprised of how Student was doing on a regular basis was wholly belied by the record and, thus, not accorded any weight.⁸

⁸ The Parents are clearly very loving and devoted parents who are advocating for what they believe is best for Student. However, this hearing officer is unaware of any requirement in the law or even best teaching practices that

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision,⁹ as were the parties' closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to its students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed.

Local educational agencies (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). Fairly recently, the U.S. Supreme Court considered once again 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.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

would suggest that the District should have involved the Parents more in day-to-day instruction and continual reports of the results of summative and formative assessments (*see, e.g.*, N.T. 294-95).

⁹ It should be noted, however, that portions of the witness testimony that consisted of nothing more than confirming what documents stated was unnecessary. A majority of the exhibits were admitted at the start of the hearing by agreement.

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).

As *Endrew*, *Rowley*, and the IDEA make exceedingly 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). 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 his or her “loving parents” might desire. *Endrew 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). Nevertheless, the IEP team is required to monitor a student’s progress toward IEP goals and make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

IDEA CHILD FIND/ELIGIBILITY PRINCIPLES

The IDEA and its implementing state and federal regulations obligate school districts 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. This obligation is commonly referred to as “child find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic

impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Merely having a disability, however, does not automatically mean that a child is eligible, since it is a two-part test. With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

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

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

34 C.F.R. § 300.39(b)(3).

ESY PRINCIPLES

The FAPE requirements extend to provision of ESY services as necessary for the child.

34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code § 14.132(a)(2). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1). In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied, since ESY services must be provided in accordance with the child's IEP. 34 C.F.R. § 106(b).

GENERAL IDEA PRINCIPLES: PROCEDURAL FAPE

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

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).

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 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). In this case, the claims that challenge the obligation to provide FAPE under the IDEA and Section 504 are based on the same grounds and will be addressed together.

THE PARENTS' CLAIMS

The first issue is whether the District provided an appropriate program for Student over the 2016-17 and 2017-18 school years. This claim may be broken down into two issues: whether the District failed to identify a disability, and whether the programming met the standards of FAPE. For purposes of both issues, there is nothing in the record to suggest that the District failed to consider the Parents' concerns or to permit them to participate in the process.

CHILD FIND

A major issue is whether the District complied with its obligations under the IDEA in its failure to identify Student as eligible for special education on the basis of a reading disability and then provide a program addressing those needs. Although it is evident that the Parents expressed concerns with Student's reading skills during both school years Student was in the District, Student's winter 2016-17 benchmark testing revealed that Student was below expectations in only one of the four early reading skills assessed. The record also reflects that Student was not 100% accurate at a pre-primer level at that time, but it is important to keep in mind that Student was in kindergarten and that the classroom as a whole included students with varied reading skills. Student continued with regular education reading instruction including MTSS support, and it was at the end of that school year that Student began to display weaknesses in other early reading skills on the benchmark assessments. Notably, however, Student attained an average

score on a test of academic achievement in April 2017 and on that measure attained a low average score only in oral reading fluency; Student had also moved into a pre-primer reading level.

By the start of the 2017-18 school year, Student's reading skills remained below expectations in a number of areas, and the District moved Student to a more intensive level of MTSS. By the time of the November 2017 RR, individualized reading instruction was recommended and Student began working with a reading specialist while the IEP team attempted to schedule a meeting that was ultimately held in January 2018. Although Student was not identified as having a specific learning disability in reading, Student began receiving reading instruction with the learning support teacher addressing needs in decoding, encoding, and sight words, with two goals in the IEP directly related to Student's areas of early reading skills deficits.

The record as a whole supports the conclusion that the District recognized Student's reading skill weaknesses as they were manifested and responded with increasingly more intensive supports through the 2016-17 and 2017-18 school years. Educational interventions must be given some time in order to determine whether they are working or not working for a particular child. This is not a case where MTSS was used to delay an evaluation; Student was evaluated twice by the District during the relevant time period without identification of a specific learning disability. It also merits repeating that, although the private neuropsychologist recommended that the District program for a specific learning disability in reading and the related areas of writing and spelling, she did not base that recommendation on the eligibility criteria in the IDEA. Moreover, the fact that the private evaluators recommended, and Student reportedly benefitted from, a Wilson Reading program, does not establish that the District failed

to offer or implement an appropriate program in reading and related areas. With respect to written expression and spelling, concerns with those (beyond fine motor skills) were not raised until April 2018 and the District responded with a SETT evaluation and action plan. In short, the Parents have not met their burden of establishing that the District violated the IDEA in failing to identify Student as a child with a specific learning disability in any of these related areas.

IEP DEVELOPMENT AND IMPLEMENTATION: 2016-17 SCHOOL YEAR

With respect to the 2016-17 school year, the IEP that was developed following the District's first evaluation identified a number of needs: speech/language; occupational therapy (fine motor and sensory processing skills), pre-academic skills (early reading, and mathematics reasoning and problem solving); and behavioral/emotional regulation including attention and listening to and following directions. The IEP contained annual goals, related services, and program modifications/specially designed instruction to address a majority of those needs; in addition, Student attended a full day of kindergarten that allowed for additional exposure to the structured routine and development of early readiness skills; and, the kindergarten curriculum including early reading and mathematics skills in addition to other content. Student's behavior plan was individualized for Student, and an FBA in the fall informed a PBSP. Student reportedly exhibited progressively fewer problem behaviors over the school year. A new IEP in April 2017 addressed the identified needs through annual goals, related services, and program modifications/specially designed instruction. A new reevaluation in the spring of 2017 did not reflect a need for revisions to the IEP. ESY services targeted occupational therapy and social skills, the areas where Student demonstrated a need for services over the summer break, and Student was able to participate in the District's camp program due to the Parents' concerns with academic skills.

The one problem with the 2016-17 IEP and its implementation in this case, however, is a significant one: most of the IEP goals over the course of the 2016-17 school year lacked baseline information, and progress on the goals is therefore impossible to glean. As such, the progress monitoring reports and other available information did not adequately inform the Parents, or the hearing officer, on whether and how Student was achieving the individualized expectations on IEP goals in occupational therapy, speech/language, and social skills with behavioral components. This is particularly concerning given Student's impulsivity and other behaviors that interfered with Student's learning, and will be remedied through compensatory education.

IEP DEVELOPMENT AND IMPLEMENTATION: 2017-18 SCHOOL YEAR

As in the prior year, the District revised Student's IEP on an ongoing basis to respond to needs. A new RR in November 2017 and a new FBA in January 2018 provided updated and useful information. As set forth above, the District responded appropriately to Student's increasingly more evident early reading skill weaknesses until proposing individualized reading instruction in January 2018.¹⁰ By that point in time, and continuing through the end of the 2017-18 school year, Student was not meeting grade level expectations in reading skills and the more intensive level of support was warranted and, thus, appropriate. Merely because Student did not immediately begin to attain grade-level reading skills in the spring of 2018 is not a basis for finding the program inappropriate, however. Special education programming takes time to produce results and, as *Andrew* emphasized, progress must be judged based on a child's unique circumstances. In addition, the proposed ESY program for 2018 targeted reading as a new area

¹⁰ Contrary to the Parents' assertion, the record does not establish that the District failed to provide individualized reading instruction (which is not necessarily one-on-one instruction).

of need, and two other areas where regression and recoupment were concerns (occupational therapy and social skills).

In addition to the foregoing, the Parents challenged the speech/language and executive functioning program development and implementation for the 2017-18 school year (Parents' Closing at 6-8). This hearing officer cannot find fault with the IEP documents themselves in these areas, or with the implementation of speech/language, executive functioning, and social skills goals through interrelated goals and approaches. There was no dispute that executive functioning skills were at the developmental stage for Student's age, and it is wholly reasonable to tie them in to social skills deficits that were directly related. And, unlike in the prior school year, there was more information about Student's baselines on the goals and progress toward those areas over the first grade year that, when considered together with all of the other information provided to the Parents, did not amount to a denial of FAPE.¹¹

Next, the Parents contended that programming for behavioral needs was not addressed appropriately in the 2017-18 school year (Parent's Closing at 6-8). The Parents correctly observe that Student's identified behaviors remained essentially constant over the two year period that Student was in the District. By first grade, however, Student's impulsivity and lack of focus and attention was negatively impacting academic skills including reading to a marked extent, but the PBSP was not revised. Although academic interventions were implemented, a new FBA in February 2018 did not result in any changes to the PBSP to any meaningful degree until the May 2018 that added interventions based on the FBA recommendations. Progress on many goals including those that did relate to behavior remained less than clear, and was

¹¹ See *Colonial School District v. G.K.*, 763 Fed. Appx. 193 (3d Cir. 2019)(affirming a District Court decision that concluded a lack of precise measurement in subjective goals such as may be the case in speech/language and social skills did not amount to a denial of FAPE).

important to understanding whether and how Student was or was not provided FAPE in addressing behaviors appropriately during the 2017-18 school year. For the reasons discussed above for the 2016-17 school year, compensatory education for the 2017-18 school year is also warranted.

Finally, the Parents' additional complaints notwithstanding, this hearing officer finds that the program for the 2017-18 school year was appropriate for Student in all other respects. After all, "FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education." *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff'd*, 581 Fed. App'x 141 (2014).

IEP DEVELOPMENT FOR ESY 2018 THE 2018-19 SCHOOL YEAR

Many facets of the IEP proposed in May 2018 for the 2018-19 school year and ESY 2018 have been discussed above. That IEP was responsive to Student's identified needs including in reading, written expression, and spelling. By that time, more detailed relevant baseline information was available for the goals, and the PBSP had been revised to address the data from the February 2018 IEP to add strategies pursuant to that new information. The proposed ESY services targeted the areas that Student needed to maintain over the summer: reading, occupational therapy, and social skills. That the Parents may have wanted Student to make more progress over the summer of 2018, especially in reading, is not a basis to fault the District's ESY proposal. Moreover, after receipt of the Parents' private evaluations, the District convened a meeting to consider the new information as it was required to do and suggested a revision to the IEP in accordance therewith. 34 C.F.R. § 300.502(c). The denial of FAPE does not extend to the offer for ESY in 2018 or the 2018-19 school year.

REMEDIES

COMPENSATORY EDUCATION

As a remedy for the FAPE denial found above, the Parents seek compensatory education, an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has more recently also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award; and, the denial of FAPE was rather limited in this matter. The standard method of providing an award equal to the amount of the deprivation shall therefore be utilized.

As discussed above, this hearing officer concludes that the District denied Student FAPE with respect to providing sufficient baseline and other quantifiable information in order to assess progress on IEP goals over the course of the 2016-17 school year. Using the amount of special education specified in April 2017 IEP as an equitable and reasonably-related number to quantify the compensatory education, Student shall be awarded two hours of compensatory education for each week that the District was in session for students over the 2016-17 school year. No period of rectification is made because the flaws were apparent on the face of the IEP from the start.

With respect to the 2017-18 school year, where FAPE was denied on the basis of behavioral programming but other interventions were appropriate, this hearing officer concludes that the increase in special education support leads to an equitable adjustment to one half of the amount of compensatory education for the 2016-17 school year. Thus, one hour of compensatory education is due for each week that the District was in session for students over the 2017-18 school year.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. Should Student return to the District, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents.

The hours of compensatory education may be used at any time from the present until Student turns age fourteen (14). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

TUITION REIMBURSEMENT

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). Such 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. Here, however, the District's proposed program was appropriate and this remedy is not warranted.

REIMBURSEMENT FOR PRIVATE EVALUATIONS

When parents disagree with an LEA'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). Here, the Parents obtained on their own, and seek reimbursement for, two private evaluations, but not because they disagreed specifically with the District's evaluations.

The Parents also did not specifically challenge the propriety of the District's evaluations. In any event, there is no rational basis for ordering reimbursement for two evaluations that did not contribute in any meaningful way to an understanding of Student's education-related needs.

Both evaluators made recommendations that aligned with the Parents' wishes, but did not convincingly discount the District's own evaluations and IEPs beyond that addressed and otherwise remedied above.

ORDER

AND NOW, this 10th day of June, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate the IDEA in failing to identify Student under the IDEA based on a specific learning disability.
2. The District did deny Student FAPE limited to the above respects over the course of the 2016-17 and 2017-18 school years.
3. The District did not otherwise deny Student FAPE during the 2016-17 and 2017-18 school years, including ESY in 2017 and 2018.
4. The program proposed by the District in May 2018 for ESY in 2018 and the 2018-19 school year was appropriate for Student under the applicable law.
5. Student is entitled to compensatory education for the FAPE denial in the amount of (a) two hours per week for each school day that the District was in session for students over that the 2016-17 school year; and (b) one hour per week for each school day that the District was in session for students over the 2017-18 school year. The award of compensatory education is subject to the above stated conditions and limitations.
6. The Parents are not entitled to reimbursement for tuition or related expenses for the Private School or the private camp.
7. The Parents are not entitled to reimbursement for the privately obtained evaluations.
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**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21615-1819AS