

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: 21670-18-19

Child's Name: C. M.

Date of Birth: [redacted]

Parents:
[redacted]

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

Date of Decision: 06/20/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student residing in the Kennett Consolidated School District (District). Student was formerly determined by the District to be eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In February 2018, the District concluded that Student was no longer so eligible but was entitled to a Service Agreement under Section 504 of the Rehabilitation Act of 1973.³ The Parents disputed those determinations and obtained an Independent Educational Evaluation (IEE); thereafter, in December 2018, Student was enrolled in a private school.

Student's Parents then 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, as well as the federal and state regulations implementing those statutes. Specifically, they asserted that the District had improperly exited Student from special education and had deprived Student of FAPE for the two-year period prior to the filing of the Complaint until Student's enrollment in the private school. As remedies, they sought compensatory education, reimbursement for tuition and related expenses, and reimbursement for the IEE as well as a private speech/language evaluation. The District maintained that its educational program, as offered and implemented, and its February 2018 evaluation, were appropriate for Student and that no relief was due.

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. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

The case proceeded to a due process hearing which convened over two efficient sessions⁴ for the parties to present evidence in support of their respective positions. After review of the record, and for the reasons set forth below, the claims of the Parents must be denied in their entirety.

ISSUES

1. Whether the District denied Student FAPE in the educational program provided between January 2017 and December 2018 when Student enrolled in a private school;
2. Whether the District's proposed program for Student in the spring and fall of 2018 was appropriate for Student;
3. If the District denied Student FAPE in any respect, should Student be awarded compensatory education;
4. If the District's proposed program as of the fall of 2018 was not appropriate for Student, should Parents be awarded reimbursement for tuition and related expenses for the private school;
5. If the District's proposed program as of the fall of 2018 was not appropriate for Student, should Parents be awarded reimbursement for private tutoring services;
6. Whether the Parents should be awarded reimbursement for the IEE.⁵

FINDINGS OF FACT

1. Student is mid-teenaged and resides within the boundaries of the District. (S-32; S-67.)

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. Citations to duplicative exhibits (*i.e.*, P-1 and S-50) will be to P-1, the most complete version of that document. References to Parents in the plural will be made where it appears that one was acting on behalf of both to the extent possible.

⁵ In their Complaint, the Parents also sought an independent speech/language evaluation. However, there was little if any evidence presented on that claim and only passing reference to that issue was made in their closing statement.

EDUCATIONAL HISTORY

2. Student was eligible for speech/language services through the kindergarten school year that were provided by the local Intermediate Unit. (S-1.)
3. Student was first evaluated by the District during first grade (2010-11 school year), resulting in a May 2011 Evaluation Report (ER). That school year, Student had been provided Tier 3 instructional support in reading to address weaknesses in phonics and phonological awareness as well as oral reading fluency. Although Student was making steady progress in oral reading fluency and nonsense word fluency over the course of the first grade school year, at that time Student was below benchmark expectations for those skills. (S-2.)
4. Cognitive assessment for the May 2011 ER (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) yielded a Full Scale IQ score in the average range (102) with a relative weakness in Working Memory and a relative strength in Processing Speed (but with variability across subtests). (S-2.)
5. On the Wechsler Individual Achievement Test – Third Edition (WIAT-III), where Student's performance was variable due to inattention and some frustration, Student earned below average range scores on the Total Reading and Basic Reading Composites and on the Written Expression Composite (which Student did not complete). However, Student's early reading skills were reportedly in the average range. Scores on the Oral Language and Mathematics Composite were at the lower end of the average range and solidly within the average range, respectively. Weaknesses in speech/language (expressive language including vocabulary skills) were also reflected. (S-2.)
6. Student was determined to be eligible for special education on the bases of a Specific Learning Disability (basic reading, reading fluency, and written expression) and a Speech/Language Impairment following the May 2011 evaluation. (S-2 at 13-14.)
7. Student was reevaluated in early 2014 with a Reevaluation Report (RR) issued in January of that year (fourth grade). (S-3.)
8. The Kaufman Test of Educational Achievement – Second Edition was administered for the January 2014 RR. At that time, Student earned scores in the average range on the Reading, Math, and Written Expression Composites, but with a number of weaknesses identified: letter and word recognition, nonsense word decoding, oral expression, and spelling. Other measures indicated phonics deficits. (S-3.)
9. Student continued to be eligible for special education following the January 2014 RR on the bases of Specific Learning Disability (reading and written expression) and Speech/Language Impairment. A Wilson Reading Program was recommended to address decoding deficits. (S-3.)
10. Another RR issued in March 2015 (fifth grade). Parental input at that time reflected difficulties with following directions and attending to non-preferred tasks; expressive

language; and reading, writing, and mathematics skills. Teacher input indicated Student's difficulties with attention that adversely impacted performance. (S-4 at 2.)

11. The Fifth Edition of the WISC (WISC-V) was administered for the March 2015 RR. Student earned scores in the average range on the Verbal Comprehension and Processing Speed Composites; scores on the Visual Spatial, Fluid Reasoning, and Working Memory Composites were in or just below the borderline range. A Full Scale IQ was not calculated because of the significant variability. Student's impulsivity and difficulty with attention were believed to impact the scores such that they were not a fair representation of Student's ability. (S-4 at 10-12.)
12. On an administration of the WIAT-III for the March 2015 RR, Student earned an average range score on the Basic Reading Composite and in the below average range on the Total Reading and Reading Comprehension and Fluency Composites; in the average range on the Written Expression and Oral Language Composites; and in the below average range on the Mathematics and Math Fluency Composites. Some subtest scores indicated areas of relative strength and weakness. (S-4 at 12-16.)
13. Speech/language assessment for the March 2015 RR yielded nearly all average range scores and such support was no longer recommended. (S-4 at 19-23.)
14. Social/emotional/behavioral functioning was assessed for the March 2015 RR through rating scales (Behavior Assessment System for Children – Second Edition (BASC-2) and Behavior Rating Inventory of Executive Functioning (BRIEF)). On the BASC-2, the Parents endorsed a clinically significant concern with functional communication and at-risk concerns with attention problems and activities of daily living; while the teacher endorsed at-risk concerns with attention problem, learning problems, leadership, and social skills. On the BRIEF, significant concerns were indicated for initiation and working memory (Parents) and with organization of materials (Parents and teacher). The Parents and teacher also completed the Conners-3, which reflected more significant concerns at home with attention and hyperactivity than at school. (S-4 at 16-19.)
15. The March 2015 RR identified Student as eligible for special education on the bases of Specific Learning Disability (basic reading, reading comprehension, mathematics calculation, and mathematics problem solving) and Other Health Impairment (related to ADHD symptoms). The factors required to be considered for making a determination on specific learning disability were completed in the RR, which included an inquiry into cognitive strengths and weaknesses. This RR recommended accommodations to address attention difficulties. (S-4 at 23-24, 27-28.)
16. An Individualized Education Program (IEP) was developed in March 2016 for implementation into the 2016-17 school year. Identified needs in that IEP were for improvement in reading and written expression skills as well as accommodations for organization and attention. (S-5 at 7-12.)
17. The spring 2016 IEP as revised in May 2016 provided for Student to participate in regular education in mathematics and language arts classes. This IEP contained annual

goals addressing reading fluency/decoding (from a baseline of 120 to 153 words correct/minute on an unfamiliar fifth grade level; written expression (from a baseline of 27 timed correct word sequences following a prompt to 54 correct word sequences); and mathematics computation (scoring 57 correct responses on a fourth grade probe from a baseline of 37). Program modifications/items of specially designed instruction in the March 2016 IEP included attentional accommodations such as frequent checks for understanding, simplified/repeated directions, chunking of tasks, and cues; test and assignment accommodations; daily resource room intervention (after language arts and mathematics instruction was changed to the regular classroom and to add organizational support); and writing support. Student's program was itinerant learning support. The Parents approved the Notice of Recommended Educational Placement (NOREP) accompanying the May 2016 IEP. (S-5.)

18. By the end of the 2015-16 school year, though there was some slight variability among probes, Student was reading 136 word correct/minute on a fifth grade passage; was scoring between 34 and 62 points on timed correct word sequences; and had mastered the mathematics computation goal. (S-5 at 19, 21, and 23.)
19. Student ended the 2015-16 school year with grades of B- or better in all classes except Art (for which Student earned a C+). (S-6.)

2016-17 SCHOOL YEAR (SEVENTH GRADE)

20. Student's teachers were provided with a copy of Student's May 2016 IEP in August 2016. (S-7.)
21. In preparation for development of a spring 2017 IEP, the District collected information from Student's teachers. The main weaknesses noted were for class participation, asking for help, and completing or turning in assignments in some classes. (S-8; S-9; S-10; S-11.)
22. A meeting convened in February 2017 to develop a new IEP. Parent input into this IEP reflected continued concerns with reading and mathematics skills, while Student indicated a desire to pursue college but had not decided on any particular area. Identified needs at that time were for improved reading and mathematics problem solving skills. At that time, Student had maintained mastery of the mathematics computation goal; had very nearly met the written expression goal; and was demonstrating reading fluency/decoding skills on fifth, sixth, and seventh grade level passages. (S-13.)
23. Annual goals in the spring 2017 IEP addressed reading fluency/decoding (retaining the prior IEP goal); mathematics computation (operations involving fractions (from a baseline of 0 on multiplication and division)); and reading comprehension (answering comprehension questions on mid-fourth grade level passages with 100% accuracy from a baseline of 60%). Program modifications/items of specially designed instruction included checks for understanding and for work completion, encouragement to seek help, and test and assignment accommodations. The proposed program was for itinerant

learning support with full inclusion in the regular education environment. The Parents approved the NOREP. (S-13.)

24. By May 2017, Student was demonstrating progress toward the mathematics computation goal and had maintained baseline performance on the reading comprehension goal. (S-16.)
25. Student completed the 2016-17 school year with all grades of B- or better. (S-19.)

2017-18 SCHOOL YEAR (EIGHTH GRADE)

26. At the start of the 2017-18 school year, Student's teachers were provided with a copy of Student's then-current IEP. A meeting also convened in September with the Parents at a time that accommodated their schedules. (N.T. 270, 274-76; S-20; S-22.)
27. Student's teachers implemented the provisions for program modifications/items of specially designed instruction in the IEP. The District conducted probes for purposes of progress monitoring on Student's IEP goals during the 2017-18 school year. (N.T. 277-79.)
28. Student's language arts and Algebra I classes were co-taught with a special education teacher in the 2017-18 school year. (N.T. 271-72, 274, 278-79, 281-82, 291.)
29. By February 2018, Student had mastered the fluency goal at grade level and had mastered the mathematics computation goal. Probes of reading comprehension at that time reflected that Student was at an instructional reading level at eighth grade; probes of mathematics problem solving also reflected performance at grade level. (N.T. 291-93, 304, 309.)
30. Student required some prompting and redirection during the 2017-18 school year; however, Student did not require more prompting than most peers. (N.T. 278-79, 305.)

FEBRUARY 2018 REEVALUATION

31. The District conducted a reevaluation of Student and issued a report in February 2018. (N.T. 337.)
32. A meeting convened in early January 2018 to review existing data and describe the process for completing the reevaluation. One of the Parents attended that meeting, and they provided consent to the RR. At that meeting, the participants discussed the possibility of Student no longer needing special education. (N.T. 284, 337, 396; S-30; S-32 at 1-4.)
33. The February 2018 RR summarized results from previous testing and the Parents' concerns over time. It also included current performance including curriculum-based measures and other assessments and grades. Teacher input indicated a concern in some classes with class participation. (S-24; S-25; S-26; S27; S-28; S-29; S-32.)

34. No new cognitive assessment was attempted for the February 2018 RR. (S-32.)
35. The WIAT-III was administered for the February 2018 RR. Student was cooperative for WIAT-III for the RR but did make some impulsive errors, many of which Student self-corrected. Student's scores were in the average range on the Reading, Written Expression, and Mathematics Composites; and also in the average range across subtests with the exceptions of Sentence Composition, Sentence Combining, Math Problem Solving, Numerical Operations, and Oral Reading Accuracy; the two mathematics subtest scores were very near the average range. Student's impulsivity and inattention were noted on a number of the subtests. (N.T. 347-50; S-32 at 20-22.)
36. The Conners-3 rating scales were provided for the RR to consider attentional concerns. No other social or emotional concerns had been reported. The Parents did not complete their version of that rating scale because they had concerns with some of the questions on that measurement. (N.T. 209, 346-47, 357.)
37. At the time of the February 2018 RR, Student had mastered the reading fluency/decoding and mathematics computation goals. While Student had not attained 100% on the reading comprehension goal, Student was answering questions with 80-90% accuracy. In addition, Student was approaching expectations for oral reading fluency at grade level; and was demonstrating reading comprehension skills at an instructional level on eighth grade reading passages. Student was performing near or at grade level on mathematics computation and problem solving probes. (S-32 at 24-25, 28-29.)
38. The February 2018 RR indicated that Student had a disability (related to ADHD presentation) but was no longer eligible for special education. The RR recommended support for writing assignments and attentional difficulties, as well as test accommodations; all of these supports were to be provided through a Section 504 Service Agreement. The District school psychologist concluded that Student did not meet the criteria for a Specific Learning Disability for the February 2018 RR because, although Student exhibited some areas of relative strength and weakness in aptitude, Student's academic achievement was commensurate with prior cognitive ability and Student was performing in the average range in all academic areas with the exception of mathematics computation and problem solving, both of which were just below the average range. All of the factors required to be examined for making a determination on specific learning disability were completed in this RR, which reflected consideration of all relevant assessment and other data. (N.T. 355; S-32.)
39. Two days before a scheduled meeting to review the February 2018 RR, the special education teacher sent the document to the Parents via email and also sent a hard copy home with Student. A NOREP was also provided. (N.T. 286, 288-89; S-33.)
40. A meeting convened on February 22, 2018 to discuss the recent RR. Student's father attended but stated that he wanted to wait to make any decisions about programming until after he could discuss the matter with Student's mother. (N.T. 143-44, 148, 181, 184, 287-88, 290, 318, 356-57, 361.)

41. Neither of the Parents reviewed the RR before the February 2018 meeting. (N.T. 181, 220.)
42. The District representatives at the February 22, 2018 explained the RR and the accompanying NOREP that recommended exiting Student from special education. Student's father signed the NOREP at that meeting indicating approval. (N.T. 147-48, 184, 287-89, 329, 358-62, 392-93; S-34.)
43. The team reviewing the February 2018 RR also reviewed the proposed Section 504 Service Agreement. The proposed Section 504 Service Agreement contained the following provisions: graphic organizers, examples, and an editing checklist for writing assignments; preferential seating near the teacher and a role model; test and assignment accommodations (extended time, small group, study guides before assessments, prompts for writing); and repetition of directions with checks for understanding. (N.T. 289-90; S-34 at 5-7.)
44. The Parents did not agree to the February 2018 Section 504 Service Agreement and did not consent to its implementation. That Service Agreement was never implemented. (N.T. 149, 252, 290, 299.)
45. On March 6, 2018, the Parents advised the District that they had a number of questions about the RR and asked that the IEP remain in place. (S-35.)
46. On March 8, 2018 (a Thursday), the District responded to the Parents and reminded them that Student's father had signed the February 2018 NOREP and offered to convene another meeting the following week. The Parents advised that they had not intended to agree to exit Student from special education. However, it was not until approximately two weeks later that they explained that they were not available immediately for another meeting, and suggested convening in early April after spring break. (N.T. 295; S-36; S-38.)
47. A meeting convened on April 9, 2018, with both Parents attending. The District school psychologist reviewed the recent RR again. (N.T. 189, 238-39, 296-97, 363-64.)
48. A revised RR was issued after the April 2018 meeting to correct information about Student's ADHD presentation based on parental concerns. Specifically, the correction reflected that Student did not have a medical diagnosis of ADHD. (N.T. 365, 378-79, 380; S-40.)
49. The Parents, through counsel, requested an IEE at public expense in late April 2018; they also reiterated that they had not intended to agree to exit Student from special education. The Parents later withdrew the IEE request after the District filed a Due Process Complaint seeking to defend its evaluation. That case was closed on request of the District. (N.T. 153; S-41; S-43; S-44; S-45; S-46; S-47.)
50. Another meeting convened in May 2018 to discuss the Parents' concerns as well as the IEE request. The District offered to conduct another reevaluation but the Parents did not agree. (N.T. 191-92, 239-41, 298-99, 366-67, 416-18.)

51. Student completed the 2017-18 school year with all grades of B- or better. (S-48.)

INDEPENDENT EDUCATIONAL EVALUATION

52. The Parents had Student privately evaluated and an IEE issued in August 2018. (N.T. 30, 158, 217; P-1)
53. Assessments for the IEE were all completed in one day. Student completed the assessments with some impulsivity and exhibited difficulty with following directions that were presented verbally during administration. (N.T. 34, 62, 70; P-1 at 1, 9.)
54. On a measure of cognitive assessment for the IEE, the WISC-V, Student's Full Scale IQ score was in the low average range (80) as was the General Ability Index (83). Several Composite scores on this instrument were in the low average range (Verbal Comprehension, Visual Spatial, and Fluid Reasoning Indices); scores were in the extremely low range on the Working Memory Index, and in the average range on the Processing Speed Index. (P-1 at 10-11.)
55. The WIAT-III was administered to Student for the IEE. Student attained average range scores on nearly all Composites (Oral Language, Basic Reading, Reading Comprehension/Fluency, Total Reading, Mathematics Fluency, and Written Expression) with the sole exception of the Mathematics Composite (below average range at 82). The private psychologist suggested that Student was performing "well-below grade-level expectations in math fluency and math reasoning skills" (P-1 at 22), with weak math calculation skills.⁶ Student's Total Achievement Composite was in the average range (87). (P-1 at 19-22.)
56. Scored earned all average range scores on assessment of receptive and expressive vocabulary for the IEE. On a measure of phonological processing, Student exhibited deficits in ability to process verbal and/or written language, which the private psychologist suggested could lead to difficulty with reading decoding, fluency, and comprehension, . (P-1 at 15-17.)
57. A measure of orthographic competence for the IEE reflected poor to average range scores, with deficits noted on punctuation, abbreviations, and word scramble subtests. Spelling Accuracy and Conventions Composite scores were also poor. (P-18 at 17-18.)
58. The private psychologist placed great emphasis in the IEE on Student's "declining IQ test scores" compared to the earliest administration in 2011 (P-1 at 24),⁷ attributing those to research indicating that children who do not learn early reading skills experience later reading and related difficulties that can impact cognitive skills and academic performance. She further concluded that Student was performing "well-below age- and grade-level expectations in basic reading skills, reading fluency, reading accuracy,

⁶ The private psychologist clarified at the hearing that the math weaknesses she saw from her WIAT-III administration were limited to paper and pencil math calculation tasks. (N.T. 39.)

⁷ Student's WISC-V scores on the Visual Spatial and Fluid Reasoning Indices for the IEE reflect an increase over those obtained in 2015 when a Full Scale IQ was not calculated. (P-1 at 10-22; S-4 at 10-12.)

reading comprehension, math reasoning, math calculation skills, spelling and written expression” using listening comprehension as the measure of aptitude. (P-1 at 22-24.)

59. The private evaluator concluded in the IEE that Student should be classified as eligible for special education on the bases of Specific Learning Disability in mathematics calculation, and a Speech/Language Impairment due to phonological awareness, phonological memory, and rapid naming speed scores. She also explained that, if listening comprehension were the measure of aptitude, Student exhibited a learning disability in the areas of written expression, basic reading, reading fluency, reading comprehension, and mathematics calculation.⁸ (P-1 at 24-25.)
60. Recommendations in the IEE were numerous and broad. They included providing wait time for responding in the classroom; test and assignment accommodations such as oral testing and extra time for assessments in a separate environment; highlighting text while reading; support for written work including assistive technology and provision of samples; use of a calculator; repetition and clarification of directions; chunking of assignments with extra time and checklists; and teacher notes and study guides. She also recommended a direct, systematic, multisensory reading program for reading and spelling. (P-1.)
61. The IEE evaluator discussed private schools with the Parents. (N.T. 65, 155.)

2018-19 SCHOOL YEAR

62. The Parents provide a report of the IEE to the District in early September 2018; they also sought reimbursement for tuition to a private school. A meeting convened that month with the Parents to review the IEE. After that meeting, the District proposed a revised Section 504 Agreement based on all available information that provided for the following new accommodations: notice of assignments and tests with chunking and examples; wait time for responses; nonverbal prompts for focus and attention; use of a device for writing assignments; skeletal notes; use of a calculator; and checks of the agenda book. The Parents did not approve the revised Agreement. (N.T. 158-59, 173, 202, 235, 252, 446, 448-49; S-50; S-55.)
63. After receipt of the Parents’ September 2018 letter and the IEE, the District sought permission from the Parents to conduct a new reevaluation that would include consideration of the IEE and a review of records. The Parents never provided that consent. The District also denied reimbursement for private school tuition at that time. (N.T. 201, 419-20, 432, 455; S-51.)
64. Student had the following classes in the fall of 2018: Survey of Literature, Earth & Space Science, Algebra I World Studies, a foreign language, Health, and Physical Education; there were also advisory and test periods. (S-56.)

⁸ The terminology in the IDEA implementing regulations is used in this decision. 34 C.F.R. § 300.309(a)(1).

65. Student's grades as of December 2018 ranged from a D-range in Algebra I, Earth & Space Science, and World Studies; to A- to B-range grades in all other subjects. Those grades were generally a decline from the end of the first marking period. (S-57; S-63)
66. The Parents retained a private tutor for Student to provide Wilson reading instruction beginning in October 2018. (N.T. 154-55, 161, 199; P-4.)
67. In December 2018, the Parents provided another notice of their intention to place Student in a different private school (Private School) and seeking reimbursement for tuition and related expenses. (S-60.)
68. The District denied the request for payment of tuition at the Private School by a NOREP dated December 18, 2018. (S-61.)
69. Student enrolled in the Private School beginning in January 2019. (N.T. 108, 165; S-64; S-66.)

THE PRIVATE SCHOOL

70. The Private School services children with learning differences, including difficulties with reading, who benefit from individualized and small group instruction. (N.T. 104-06.)
71. The Private School provides small class sizes of up to twelve students. All students have a school-provided Chromebook that includes software such as speech-to-text and text-to-speech functions. (N.T. 104, 111-12.)
72. At the Private School, Student had classes in reading, Language Arts, Algebra 1, Foundations of Science, Spanish, and Social Studies/Civics. (N.T. 114; P-5.)
73. Student had an Accommodation Plan at the Private School that was developed in May 2019. That Plan adopted all of the diagnoses of the private psychologist in the IEE. A reading specialist began to work with Student in a small group after that date. (N.T. 113, 118, 130-31, 133, 140; P-3.)
74. As of early May 2019, Student had earned a C+ or better grade in all classes at the Private School. (N.T. 129; P-5.)
75. Student has made friends at the Private School and took on an active, participatory role in the classroom. (N.T. 111, 122.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, although the weight to be accorded certain testimony was limited. More specifically, the testimony of the Parents’ private psychologist was undermined to a significant degree, which thereby impacted the persuasive value of the IEE. Critically, the witness opined that Student did not receive meaningful educational benefit at the District despite generally making the expected year’s worth of progress in a year’s time during Student’s tenure there, and even with average range achievement test scores, because she was looking for Student to make a “big leap” (*see* N.T. 80-

82; compare P-2 at 3-5 and particularly n.5); thus, she considered lesser progress to be “trivial” (P-2 at 5). Also significantly, this witness explained her conclusions on special education eligibility based on Student’s lack of “stellar” achievement (N.T. 58). Further, although there was no dispute that a complete comparison between Student’s WISC-IV and WISC-V scores could not be made (N.T. 73-76, 94, 339, 341, 412), her conclusions on eligibility appeared to do essentially that. And, this witness also did not explain how one should, if at all, consider Student’s relatively young age at the time of the 2011 cognitive assessment in definitively concluding that those scores declined when compared to scores (on a newer and not truly comparable version of the instrument) obtained in 2018.

In reviewing the record, and with the above caveat, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, 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 again considered the application of the *Rowley* standard, and observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The Court 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 crystal 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 [educational program] 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).

ELIGIBILITY PRINCIPLES

The IDEA and its implementing state and federal regulations obligate 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. This obligation is commonly referred to as “child find” but applies equally to a reevaluation that concludes a student is no longer eligible under the IDEA. That statute 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).

As is relevant here, a specific learning disability is defined in the IDEA as follows:

The term “specific learning disability” means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

20 U.S.C. § 1401(30). In addition, the implementing regulations permit a finding that a child has a specific learning disability if:

- (1) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:
 - (i) Oral expression.
 - (ii) Listening comprehension.
 - (iii) Written expression.

- (iv) Basic reading skill.
 - (v) Reading fluency skills.
 - (vi) Reading comprehension.
 - (vii) Mathematics calculation.
 - (viii) Mathematics problem solving.
- (2) (i) [Section omitted as not relevant]; or
- (ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments[]; and
- (3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of -
- (i) A visual, hearing, or motor disability;
 - (ii) An intellectual disability;
 - (iii) Emotional disturbance;
 - (iv) Cultural factors;
 - (v) Environmental or economic disadvantage; or
 - (vi) Limited English proficiency.

34 C.F.R. § 300.309.

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).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

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

(i) Whether the child is a child with a disability under § 300.8; and

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

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

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

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

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).

THE PARENTS’ CLAIMS

The issues were set forth above. While it may appear logical to discuss continued eligibility first, the parties’ closing statements were well organized and allowed for consideration of the various issues in a chronological manner as will be done here.

PROGRAM DEVELOPMENT AND IMPLEMENTATION

JANUARY 2017 THROUGH FEBRUARY 2018

Aside from the private evaluator's rather sweeping pronouncement (*see* P-2) that the District deprived Student of FAPE in various areas, which was measured against an impermissibly high bar of "stellar" improvement as discussed above, the Parents have simply failed to meet their burden of establishing that the District failed in any of its obligations toward Student through the February 2018 RR that would amount to a denial of FAPE. Throughout this time period, the District developed IEPs that were based on Student's identified needs, and revised those documents as Student demonstrated growth especially in the areas of reading and mathematics skill deficits. Student was progress monitored on IEP goals, and teachers implemented the provisions for program modifications and specially designed instruction. Student also achieved better than passing grades during this time period and meeting or exceeding grade level expectations in many areas. The record does not support a conclusion that the District denied Student FAPE in any respect between January 2017 and February 2018.

FEBRUARY THROUGH DECEMBER 2018

The crux of the Parents' claims relates to the District's determination in February 2018 that Student was no longer eligible for special education but should be provided with accommodations pursuant to a Section 504 Service Agreement. Here again they rely almost exclusively on the testimony of their private psychologist. In addition to the discussion above regarding her testimony and opinions, her conclusions about Student's diminishing cognitive ability is simply not supportable nor persuasive in this case.

An underlying premise behind the conclusion regarding Student's IQ scores is that Student fits the pattern of a child who does not acquire early reading skills and begins to slip

further and further behind. In this case, Student was in Tier 3 reading intervention beginning in first grade, but was identified as eligible for special education later that school year. The District began to provide specially designed instruction to target Student's skill deficits, and Student made progress. While Student did not immediately make the great strides that may have been necessary in order to be on grade level after the initial IEP was in place, Student exhibited growth over time, narrowing the gap between performance and grade-level expectations until February of 2018 when Student had done so across the areas of concern: reading comprehension, reading fluency, mathematics computation, and mathematics problem solving. The facts developed in this case illustrate successful special education intervention rather than a flawed evaluation or program.

The Parents further contend that the District impermissibly relied on a single measure to determine eligibility for special education on the basis of a specific learning disability. The record wholly belies this contention. Among other things, the District considered input from the Parents and teachers, curriculum-based and other assessment data, IEP goal progress, and standardized test scores. The February 2018 RR itself contained a completed section on all of the required factors for such identification. The District, using the model it had chosen to identify learning disabilities, determined that Student was not failing to meet grade-level expectations in any area, including reading and mathematics skills. 34 C.F.R. § 300.309(a). That is precisely what the law required of the District, and this argument is accordingly unavailing.

An overarching theme of the Parents' position in this case throughout the hearing was that Student would likely continue to benefit from special education. The potential for benefit is not the question; eligibility is defined as a two-pronged test: having a suspected disability, and

by reason thereof requiring specially designed instruction. The Parents have not established by a preponderance of the evidence that, as of February 2018, Student had a specific learning disability (or other disability) as defined by the IDEA; nor did they present sufficient evidence here that Student was in need of specially designed instruction.

On final related concern on eligibility merits mention. The Parents suggested at the hearing that, because the District had already prepared a NOREP for the February 22, 2018 meeting to review that RR, it predetermined Student's eligibility without their input. This hearing officer cannot conclude that merely because the District had one or more completed NOREPs at the meeting that may or may not have been consistent with the team's ultimate decision, it engaged in predetermination. Here, the District spoke with the Parents about that possibility in January 2018, and provided a copy of the RR two days prior to the February 2018 meeting so that they could be prepared to discuss that document and conclusions to be drawn therefrom.

The Parents' signature on the February 2018 NOREP exiting Student from special education permitted the District to remove the services in the IEP and to wait for their approval of the February 2018 Section 504 Service Agreement. That document provided the accommodations identified in the District's RR that same month. It is unfortunate that the Parents did not consent to its implementation, even into the fall of 2018. Even assuming, which this hearing officer does not, that the District should have somehow rescinded the February 2018 NOREP after the Parents raised concerns in March and April 2018 and became available for a meeting, the evidence is preponderant that Student no longer required special education services, and that the accommodations in the Section 504 Service Agreement were appropriate to meet identified needs at the time. Furthermore, the document was revised again in September 2018

following review of the IEE and incorporated many of its recommendations, again based on information known at the time. That Student's grades declined toward the end of 2018 does not establish flaws in the February 2018 RR or in the proposed Section 504 Agreements. For all of these reasons, there was no denial of FAPE for the time period between February and December 2018.

REQUESTED REMEDIES

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.* Because there has been no denial of FAPE, such a remedy is not warranted.

The Parents also seek reimbursement for the Private School, which is relief potentially available for parents to recover 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; 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). The same grounds are raised for reimbursement of tutoring expenses. Here, however, the

District's proposed program in the fall of 2018 was appropriate and this remedy would thus be improper.⁹

REIMBURSEMENT FOR PRIVATE EVALUATION

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 sought an IEE at public expense, which the District denied. They then obtained one on their own and seek reimbursement.

It is prudent to mention the position initially taken by the District in April 2018 that an IEE was and is unavailable to a student who has been determined to be not eligible for special education. This hearing officer cannot accept that premise, even in view of the specific language in the applicable regulation at 34 C.F.R. § 300.502 relating to "the parents of a child with a disability". While not directly on point, the Office of Special Education Programs recently provided guidance on a very analogous question in *Letter to Zirkel*, 119 LRP 18141 (OSEP 2019). There, the agency explained that, "the term 'evaluation' means the procedures used...to *determine whether a child has a disability*" as well as the special education and related services that the child needs. *Id.* at 2 (quoting 34 C.F.R. § 300.15 (emphasis in original)). OSEP thus concluded that a finding of ineligibility did not preclude the right of the parents to seek an IEE at public expense. Although *Letter to Zirkel* involved an initial evaluation rather than a reevaluation, that guidance is instructive and the same principle applied here.

In any event, this hearing officer concludes that the District's February 2018 RR was comprehensive and met all of the requirements in the law. Specifically, the RR utilized a variety

⁹ The District also contends that, because Student was not eligible for special education as of February 2018, this remedy is unavailable. There is no need to analyze that argument in this decision.

of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. The District conducted assessment of Student's current academic achievement; summarized previous cognitive assessment as well as available curriculum-based and local assessment data; obtained and reported input from teachers; incorporated results of previous evaluations; obtained and summarized parental input; and provided rating scales to evaluate Student's attention and related manifestations. The results of the various testing instruments were analyzed to determine whether Student had a disability and, if so, would have informed programming for any special education needs Student demonstrated. All of this evidence supports the conclusion that the District's February 2018 RR was not deficient in any respect such that the IEE should not be reimbursed.

Even if reimbursement were considered under equitable grounds, there are a number of concerns with the IEE which were identified above. And, although the District did revise the proposed Section 504 Service Agreement to incorporate many of the suggestions of the Parents' private evaluator, those did not materially alter the District's February 2018 proposed Service Agreement.¹⁰ This hearing officer finds no basis on which to order reimbursement for the IEE in this case. Finally, to the extent that the Parents continue to seek an independent speech/language evaluation, the evidence does not support a conclusion that Student has such needs that should be independently assessed.

¹⁰ Furthermore, many of the recommendations in the IEE were not for special education and related services but rather accommodations or remedial strategies that Student might find useful.

CONCLUSION

Although the Parents certainly cannot be criticized for advocating for what they believe is best for Student, they have failed to meet their burden of persuasion on all of their claims.

ORDER

AND NOW, this 20th 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 deny FAPE to Student during any portion of the relevant time period.
2. The District's February 2018 RR was appropriate.
3. The Parents are entitled to no remedy and their claims are DENIED in their entirety.
4. The District is not ordered to take any action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21670-1819KE