

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 21732-18-19

Child's Name: Z. R.

Date of Birth: [redacted]

Parent:
[redacted]

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

Date of Decision: 06/28/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late teenaged student residing in the District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of an Other Health Impairment. Student attended school in the District beginning in the spring of the 2016-17 school year, and remained there through the end of the 2017-18 school year when Student enrolled in a private school.

Student's Parent filed a due process complaint against the District in January 2019, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ seeking both compensatory education and reimbursement for tuition to the private school. The District maintained that the special education program implemented for Student met all of its obligations and that no relief was due.

The case proceeded to a due process hearing⁴ at which the parties presented evidence in support of their respective positions, with the Parent limiting the claims to the time period beginning in January 2017 forward.⁵ For the reasons set forth below, the Parent's claims will be granted in part but not in their entirety.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifying 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).

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, School District Exhibits (S-) followed by the exhibit number, and the single Hearing Officer Exhibit (HO-1).

⁵ HO-1.

ISSUES

1. Whether the District provided an appropriate special education program for Student between January 2017 and the end of the 2017-18 school year including extended school year services;
2. If the District did not provide an appropriate special education program at any time between January 2017 and the end of the 2017-18 school year, should Student be awarded compensatory education;
3. Whether the District's program as proposed for the 2018-19 school year was appropriate for Student;
4. If the District did not propose an appropriate special education program for the 2018-19 school year, should the Parent be awarded reimbursement for tuition and related expenses at the private school?

FINDINGS OF FACT

1. Student is late teenaged and is a resident of the District. Student has been identified as eligible for special education on the basis of an Other Health Impairment. (N.T. 45.)
2. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by a pediatrician at an early age. At some point, Student was provided behavioral health services. (N.T. 49.)
3. Student began treating with a counselor at the age of five for mild depression after the death of a parent. Student continued with therapy with some interruption at points in time, and later was diagnosed with Oppositional Defiant Disorder (ODD). Student also took various medications throughout. (N.T. 65-66, 68, 151, 160-61, 172; S-13.)

EDUCATIONAL HISTORY

4. Student attended a private parochial school beginning in kindergarten through the spring of 2016 (seventh grade). (N.T. 47-48; S-1 at 2; S-6; S-8.)
5. Student was evaluated by the local Intermediate Unit (IU) in the fall of 2012 (fourth grade). At the time, teachers reported concerns with problematic behaviors (motivation, task completion) as well as social skills. Student attained a full scale IQ score in the superior range (composite score of 125) on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) resulted in an average range

score on the Reading Composite, an above average score on the Mathematics Composite, and generally average range scores on the Written Expression Composite and subtests. (S-1 at 4-7.)

6. Behavioral assessment in the fall of 2012 by the IU revealed some areas of significance on the Conners-3, with the Parent reflecting more elevated concerns than did the teacher. Maintaining attention and remaining on task, as well as disorganization, were areas of concern in the classroom. (S-1 at 8-10.)
7. The District conducted an initial evaluation in late 2012 and issued an Evaluation Report (ER) in February 2013 with the Parent's consent. The Parent provided input indicating previous diagnoses of ADHD and Oppositional Defiant Disorder (ODD) and a concern with Student's defiance. (S-2; S-3.)
8. The February 2013 ER reported on the recent cognitive, achievement, and other assessments by the IU. The Behavior Assessment System for Children – Second Edition (BASC-2) reflected more significant concerns of the Parent compared to the teacher and Student. The teacher indicated at-risk concerns with attention problems, social skills, and functional communication and no clinically significant concerns. The Parent endorsed clinically significant concerns with hyperactivity, attention problems, and activities of daily living; and at-risk concerns with aggression, conduct problems, depression, and adaptability. Student's rating indicated an at-risk concern with attention problems only. (S-3 at 5-8.)
9. The Behavior Rating Inventory of Executive Functioning (BRIEF) was completed by the Parent and teacher for the February 2013 ER. The teacher endorsed clinically significant concerns with initiation and working memory; the Parent endorsed clinically significant concerns with inhibition, emotional control, and working memory. In overall executive functioning, the teacher's ratings were typical while the Parent's ratings indicated significant concerns. (S-3 at 8.)
10. The February 2013 ER determined that Student did not have a disability and was not eligible for special education. (S-3.)
11. A Notice of Recommended Educational Placement (NOREP) issued in March 2013 declining special education services was approved by the Parent. (S-4.)
12. [redacted]

ENTRY INTO DISTRICT SPRING 2016

13. Student enrolled in the District in March 2016 (seventh grade). Student had experienced difficulty transitioning to that grade at the former parochial school and exhibited problematic behaviors including disruption, opposition, lack of motivation and focus, and non-cooperation in that environment during the 2015-16 school year. That school dis-enrolled Student in early March. (N.T. 60; P-2; P-3; S-6; S-9.)

14. After enrollment in the District, the Parents communicated with Student's teachers regularly throughout Student's tenure there, frequently discussing Student's lack of work completion, disruptions, and perceived low motivation and effort. (P-13; P-14; P-15.)
15. [redacted]
16. The District conducted another evaluation in the spring of 2016 at the request of the Parent, who gave consent. Another ER issued in May of that year. (S-10; S-13.)
17. Parent input into the May 2016 ER reflected diagnoses of ADHD, ODD, and mild depression. Concerns were noted for respecting authority, inflexibility, and failing to work to Student's potential. (S-10; S-13 at 1-2.)
18. Input from former and District teachers into the May 2016 ER included difficulty with writing tasks, following directions, cooperating with others, completing assignments, and with organizational skills; Student was also reportedly distractible and unprepared, and engaged in behaviors distracting to others. (S-13.)
19. The May 2016 ER summarized previous evaluation reports including the BASC-2 and BRIEF; no new cognitive or achievement testing were conducted. (S-13.)
20. The District utilized rating scales from the Third Edition of the BASC (BASC-3), the BRIEF, and the Conners-3 for the May 2016 ER. On the BASC-3, where teachers from the former and current school completed rating scales, one or more teachers endorsed clinically significant concerns with hyperactivity, adaptability, social skills, study skills, functional communication, and adaptive skills; one or more indicated at-risk concerns with attention problems, school problems, and leadership. The Parent reflected at-risk concerns with hyperactivity, aggression, attention problems, and activities of daily living; Student's ratings identified only attention problems at an at-risk level. The Conners-3 ratings revealed very elevated scores in many areas and both the Parent and teacher's scores indicated criteria was met for ADHD (all three types), Conduct Disorder, and ODD. It is unclear from the ER who completed the BRIEF. (S-13.)
21. On the Gilliam Autism Rating Scale – Third Edition, scores reflected a very high likelihood that Student met criteria for Autism, but caution was urged because of Student's other presenting disabilities including ADHD. (S-13 at 13-14.)
22. The May 2016 ER concluded that Student had a disability and that ADHD was supported by the evaluation, but that Student did not need specially designed instruction. A Section 504 Service Agreement was recommended to provide for modifications and accommodations such as a reduced workload and chunking of assignments; assistance with organization, work completion, and problem solving; feedback on behavior; movement breaks and access to fidget items; and clear expectations with reminders as needed. The Parent indicated agreement with the May 2016 ER. (S-13.)
23. [redacted]

24. A meeting convened in June 2016 to develop a Section 504 Service Agreement. The accommodations mirrored those in the May 2016 ER: test and assignment accommodations (modified assignments requiring mastery for a reduced workload, quiet environment for testing, chunking of tasks and assignments); assistance with organization (including graphic organizers), work completion, and problem solving; movement breaks and access to fidgets; preferential seating; access to choices; and clear expectations of behavior with reminders, feedback, and positive reinforcement. The Parent approved the Service Agreement. (S-14; S-15; S-16.)

2016-17 SCHOOL YEAR

25. Student was promoted to eighth grade for the 2016-17 school year. (N.T. 75.)
26. A Functional Behavioral Assessment (FBA) was initiated in October 2016 by a District behavior specialist and updated in February 2017. Identified behaviors of concern were failing to participate in class; failing to complete assignments; work refusal; engaging in disruptive behaviors (tapping feet or talking to peers); engaging in off-task behaviors (accessing incorrect resources, putting head down); and sitting inappropriately. Student completed a questionnaire and several observations were conducted; no data was collected, however. The hypothesized function of all of those behaviors was to escape academic demands. A behavior chart was recommended with a reward for completing tasks, following directions, and raising hand. (P-14 at 4; S-20; S-23.)
27. The behavior chart was implemented for Student beginning in early November 2016 for all classes and Student agreed to complete the chart. However, Student never did so by the time the FBA was completed. By the end of the second quarter, Student was failing most courses and reportedly did not care for reading and writing. ((S-20; S-23 at 2, 6.)
28. The Parents had Student privately evaluated by a neuropsychologist in December 2016 – January 2017. Measures included the Autism Diagnostic Observation Schedule – Second Edition that reflected scores “on the cusp of non-autism to low autism spectrum level” (S-22 at 5). The private neuropsychologist diagnosed ADHD with executive functioning and sensory processing deficits; ODD; and Autism Spectrum Disorder with anxiety and emotional regulation weaknesses. (N.T. 83, 92; S-22.)
29. The District arranged for an occupational therapy screening in February 2017 that revealed no significant sensory processing weaknesses, and a full evaluation was not recommended at that time. (S-24.)
30. The FBA was updated in late February 2017. At that time, Student’s grades in some classes had improved but Student was still failing English, reading, and science. No recommendations were made beyond the behavior chart that Student had not used. (S-23.)
31. In March 2017, the Parent requested an Individualized Education Program (IEP) for Student and provided the private neuropsychological evaluation. The District sought and obtained permission to reevaluate Student. (S-23 at 8; S-25; S-26.)

32. A new Section 504 Service Agreement was developed in April 2017. Maintained from the previous version were test and assignment accommodations (modified assignments requiring mastery for a reduced workload, quiet environment for testing, chunking of tasks and assignments); assistance with organization, work completion, and feedback on behavior; movement breaks and access to fidget items; preferential seating; access to choices; and clear expectations of behavior with reminders, feedback, and positive reinforcement. Newly added were opportunities to stand; access to music for focus; tests and assignments read aloud if requested; access to a trusted adult for problem solving; and an extra set of textbooks. The Parent approved the Service Agreement. (S-28.)
33. [redacted]
34. The District issued another ER in May 2017. This evaluation included a summary of previous evaluations including the April 2016 ER as well as classroom observations by the school psychologist. (S-30 at 2-4, 13-16.)
35. Teacher input into the May 2017 ER indicated that Student failed to complete work, exhibited difficulty with social skills and peer communications, required frequent prompts and redirection, and failed to follow directions; several teachers reported that Student needed one-on-one attention (S-30.)
36. Cognitive assessment for the May 2017 ER (Fifth Edition of the WISC (WISC-V)) yielded a full scale IQ score (94) in the average range.⁶ On the Woodcock Johnson Tests of Achievement – Fourth Edition for the May 2017 ER, Student earned scores in the average range across all Composites and subtests. (S-30 at 17-18, 27.)
37. Social/emotional/behavioral functioning for the May 2017 ER included the BASC-3 and the Conners-3. On the BASC-3, the Parent's ratings (which were flagged as needing a cautionary interpretation) indicated clinically significant or at-risk concerns across all subscales and Indices with the exceptions of anxiety and somatization. At least one of the two teachers who completed the BASC-3 endorsed clinically significant concerns with aggression, conduct problems, atypicality, withdrawal, attention problems, and school problems; and at-risk concerns with hyperactivity and learning problems. Student's BASC-3 self report reflected a clinically significant concern with attention problems and an at-risk concern with hyperactivity. The Conners-3 yielded results consistent with ADHD, Conduct Disorder, and ODD (Parent and a teacher). On the Scale for Assessing Emotional Disturbance – Second Edition for the May 2017 ER, a teacher's ratings were not indicative of an emotional disturbance. (S-30 at 18-21, 27-29, 31.)
38. On an executive functioning assessment for the May 2017 ER (BRIEF completed by the Parent), significant deficits across skills were reflected. (S-30 at 20, 30.)
39. Autism Spectrum Rating Scales completed for the May 2017 by the Parent yielded a very elevated total score and elevations across most subscales. (S-30 at 20, 30.)

⁶ The WISC-V Index scores are not included in the May 2017 ER.

40. On a speech/language assessment for the May 2017, a below average score for following directions was obtained, but no expressive or receptive language deficits were identified (Clinical Evaluation of Language Fundamentals – Fifth Edition and The Word Test 2: Adolescent). No pragmatic language weaknesses were revealed, and speech/language services were not recommended. (S-30 at 23-26.)
41. Occupational therapy evaluation for the May 2017 ER reflected sensory processing difficulties resulting in over-response to auditory and visual stimuli. There were no concerns with fine motor or visual processing skills. Occupational therapy was not recommended but continuation of movement breaks and access to fidget items was suggested. (S-30 at 21-23.)
42. The May 2017 ER concluded that Student was eligible for special education on the basis of an Other Health Impairment. Recommendations to address Students inattention, hyperactivity, defiant behavior, and weak social skills and executive functioning skills were: allow wait time for process with check-ins; test and assignment accommodations including timelines for due dates; access to choices in the daily routine; simple positive directions; review of behavioral expectations; and social skills instruction. (S-30 at 32-34.)
43. Student ended the 2016-17 school year with grades of 70 or lower in English, Reading, Science, Civics, Family and Consumer Science, Tech Education, and Computer Skills., with passing grades in all other subjects (Music, Health/Physical Education, Pre-Algebra, and Art). Student was recommended for but did not attend summer school in 2017 at the request of the Parent. Student was promoted to ninth grade. (N.T. 108, 371-72; P-7; S-32.)

2017-18 SCHOOL YEAR

44. An IEP team meeting convened for Student in the middle of September 2017. The team, including Student, reviewed the IEP and discussed post-secondary transition programming including a technical school. (N.T. 275-77, 307; S-35.)
45. The initial September 2017 IEP identified Student's strengths as all academic areas, and needs with respect to completing tasks, attention and focus, and organization. (S-35.)
46. Student did not engage in problematic behavior at the start of the 2017-18 school year so there was not current data on behavior in the September 2017 IEP. (N.T. 278, 312.)
47. Annual goals in the September 2017 IEP addressed post-secondary transition (identifying disability, strengths, needs, outcomes, and accommodations in six categories (with no baseline); and completing assignments with 85% success (from no baseline). Program modifications/items of specially designed instruction provided for preferential seating; opportunities for movement; access to fidget items; clear behavioral expectations; redirection with positive reinforcement; use of a timer; textbooks at home; organizational assistance for work completion one day per cycle; skeletal notes; grade check-ins; and test and assignment accommodations (extra time, distraction-free environment, prompting). A Positive Behavior Support Plan (PBSP) incorporated the work completion

goal and reiterated the program modifications/items of specially designed instruction for antecedent strategies, with use of a daily checklist; consequences were identified as prompting, redirection, poor grades, loss of rewards, and detention. The proposed program was for learning support at an itinerant level, with Student not participating with regular education peers for post-secondary transition. The Parent approved the NOREP. (S-35.)

48. The District had an intervention period during the 2017-18 school year for four days per six-day cycle where students could work on assignments or seek assistance from teachers during the 2017-18 school year. Student's intervention period was with a special education teacher, who also checked in with Student regularly. (N.T. 280-82, 309, 321-22.)
49. Progress monitoring in November 2017 reflected that Student was completing 75% of assignments, but the post-secondary transition goal had not yet been addressed. (S-39 at 1-2.)
50. Another IEP meeting convened in November 2017 to address concerns that the teachers had. Specifically, teachers reported observing similar behaviors to those reflected in the November 2016/February 2017 FBA. Two new goals were added addressing demonstration of self-monitoring in hypothetical classroom situations with 100% accuracy (from no baseline) and in the mathematics class with 100% accuracy (with no baseline). Student also began a daily social skills class. New program modifications/items of specially designed instruction were added (access to a stability ball, rewards for task completion, checklists for expectations in classes), and helpful strategies for the PBSP were provided (group/partner work, oral assessments, one-on-one attention). The Parent approved the accompanying NOREP for continuation of learning support at the itinerant level. (N.T. 284-86, 288-89, 337; S-36.)
51. A District behavioral specialist was asked to review and revise the PBSP in December 2017. The behavior identified to target was homework completion, which was determined to serve the function of gaining attention, with an aim to address social skills so that Student would understand how to gain attention appropriately. (N.T. 285, 289, 338; S-43.)
52. Student was provided with a one-on-one paraprofessional for approximately two weeks during mathematics class in early 2018. Student did not cooperate with that person and Student's behavior did not improve, so that support was discontinued. (N.T. 347-48.)
53. Another IEP meeting convened in March 2018. The revised IEP that followed provided some updated information including statements that Student was failing all classes due to incomplete assignments and was not following directives. The Parent asked for tutoring, and the team agreed to encourage Student to seek tutoring from teachers. Two new goals were added addressing work completion (setting a goal and planning steps to meet that goal with 100% accuracy, with no baseline) and submitting a new work completion chart with 100% accuracy. In the section on program modifications/items of specially designed instruction, the stability ball was removed; provisions for a new daily reward for

completing the chart, access to class policies on late work and retaking assessments, and social skills instruction were added. This revised IEP maintained an itinerant level of learning support. Student was not determined to be eligible for extended school year services. (N.T. 291-93; S-38; S-42.)

54. Progress monitoring provided in early April 2018 reflected that Student had completed only 65% of assignments; had identified all areas in the post-secondary transition goal; and had mastered the self-monitoring goal in hypothetical classroom situation; but the self-monitoring goal in the real classroom had not been addressed. (S-39.)
55. Student exhibited increased difficulties in March and April 2018 requiring significant prompting and redirection, and was still failing to complete assignments. (N.T. 294, 300.)
56. Another meeting of the IEP team convened in May 2018. Teacher input at that time reflected that Student continued to exhibit off-task behavior and was failing to complete work. There was no new Parent input. Needs continued to be work completion, attention and focus, and organization. Student had been accepted into the technical school. (N.T. 295, 298; S-40.)
57. Annual goals in the May 2018 IEP addressed post-secondary transition (identifying disability, strengths, needs, outcomes, and accommodations in six categories with no baseline); completing assignments with 85% success (from no baseline); demonstrating self-monitoring in a preselected class with 100% accuracy (with no baseline); and setting a work completion goal and planning steps to meet that goal with 100% accuracy (with no baseline). Program modifications/items of specially designed instruction provided for preferential seating; opportunities for movement; access to fidget items; clear behavioral expectations; redirection with positive reinforcement; textbooks at home; organizational assistance for work completion one day per cycle; class expectations; , access to class policies on late work and retaking assessments; skeletal notes; grade check-ins; and test and assignment accommodations (extra time, distraction-free environment, prompting). A PBSP incorporated the goals, and program modifications/items of specially designed instruction for antecedent strategies, with use of a daily checklist and a strategy of engaging Student in conversations. Consequences were identified as prompting, redirection, poor grades, loss of rewards and detention. The proposed program was for learning support at an itinerant level, with Student not participating with regular education peers for social skills. The Parent approved the NOREP. (S-40.)
58. Progress monitoring provided in June 2018 reflected that Student's assignment completion had decreased to 57%; Student had maintained mastery of the post-secondary transition goal; Student had decreased use of the self-monitoring strategy as not needed; and Student was demonstrating increased ability over the final quarter to set, plan, and carry out a goal. (S-41.)
59. Student ended the 2017-18 school year with grades of 70 or below in English, Algebra I, Biology, American Cultures, Engineering Principles, and Transition. Student was offered summer school in 2018 due to failing Algebra I and Engineering Principles, but did not

attend. Student was promoted to tenth grade and would attend the high school. (N.T. 131, 352, 361; P-10; P-11; S-44.)

60. The Parent began to explore alternative schooling for Student in the spring of the 2017-18 school year, and ultimately enrolled Student in a private school (Private School) for the 2018-19 school year. (N.T. 132, 172.)
61. In the late evening of August 15, 2018, the Parent advised the District that Student would attend the Private School. The District convened an IEP meeting after the Parent's notice but the Parent did not change that decision and formally withdrew Student from the District on August 27, 2019, the first day of its school year. (N.T. 134, 359-60; P-16 at 3; S-47 at 1-3; S-50; S-51.)
62. At the August 2018 IEP meeting, the team discussed Student's schedule, the use of a behavior tracking sheet, and reward incentives for behavior including meeting with the special education teacher three times per cycle to monitor work completion and provide organizational support. The team determined that Student should have a daily social skills class as in the prior school year. The section of the IEP providing program modifications and items of specially designed instruction substituted the daily behavior tracking sheet for the class checklist of expectations. In all other respects, the August 2018 IEP was the same as the May 2018 IEP. (S-47; S-49.)

THE PRIVATE SCHOOL

63. Student was accepted at the Private School in March 2018 and the Parent signed a contract on August 5, 2018. (N.T. 215-16, 221-22, 243; P-1.)
64. The Private School is accredited by the Pennsylvania Association of Independent Schools to provide services from kindergarten through grade twelve. (N.T. 211, 266-67.)
65. The Private School services students with learning differences, many of whom have identified disabilities, between fifth and twelfth grades. There were approximately seventy five students during the 2018-19 school year. (N.T. 211-12, 247-48, 257.)
66. All teachers at the Private School are certified in the content areas they teach. (N.T. 214.)
67. Class sizes at the Private School are small, averaging five to eight students in a class to one teacher. Instruction is individualized for students. (N.T. 212-14.)
68. Students at the Private School are provided social skills instruction and have academic mentors with whom they meet daily; an instructional support teacher is also on staff. Counseling is provided in groups weekly and students have access to counselors as needed. (N.T. 212-13, 223, 233, 240, 254-55, 267.)
69. Student's classes at the Private School for the first semester of the 2018-19 school year were Freshman Seminar (writing and study skills), Literature, Algebra I, Biology, World Cultures, Health, and Physical Education. (N.T. 222; P-1.)

70. Although Student reportedly engaged in disruptive behavior at times at the Private School, Student earned an average grade of C or better by the end of the first semester in all classes during the 2018-19 school year with some accommodations. (P-1.)
71. Student resided at the Private School during the 2018-19 school year because of the distance that would result in a lengthy daily commute. Student stayed in a dormitory during the week with an adult counselor and several other students. (N.T. 135, 181-82, 231, 241-42.)

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 Parent who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “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, and the testimony

was not materially inconsistent with that of other witnesses for purposes of deciding the issues presented; thus, none of the testimony was accorded more or less weight.

In reviewing the record, 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.

IDEA CHILD FIND/ELIGIBILITY PRINCIPLES

The IDEA and its implementing state and federal regulations obligate local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as “child find.” LEAs 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, LEAs such as 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).

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 that the procedures set forth in the Act are followed.

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.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

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 extraordinarily 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). Stated differently, 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. *Andrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Critically, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). 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.

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). LEAs are required to provide FAPE to individuals with a disability under Section 504, including appropriate aids, services, and accommodations. See 34 C.F.R. § 104.33; 22 Pa. Code § 15.7. 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 first issue is whether the District failed to provide Student with an appropriate education beginning in January 2017 and continuing through the end of the 2017-18 school year. It should be noted that there was no evidence relating to Student’s need for extended school year services, however, so that contention will not be addressed further. The child find claim does require consideration of the Parents’ position that Student should have been identified as eligible under the IDEA much earlier than May 2017.

As set forth above, Student entered the District in March 2016 after attending a private parochial school since kindergarten. The District proceeded to conduct a timely evaluation that was completed that May and identified Student as a protected handicapped student under Section 504, and recommended accommodations related to Student’s ADHD presentation. There was nothing in that ER that suggested a need to consider another disability, particularly with respect to Autism Spectrum Disorder where the results were not conclusive; the record also failed to establish that, contrary to that ER’s conclusion, Student required specially designed instruction. The needs identified in the school environment related to maintaining focus and attention, completing assignments and writing tasks, and demonstrating distractible and distracting

behaviors. The Section 504 Service Agreement developed at the very end of the 2016-17 school year, with the Parent's participation, targeted all of those needs based on information known at the time. This record does not support a child find violation under the IDEA before the spring of 2017.

Student began the 2016-17 school year exhibiting problematic behaviors, and the District arranged for an FBA that was completed in the fall. That FBA did not include data collection, however, and the behavior chart that was developed was unused and clearly not successful. Student was failing many classes by the end of the second quarter and was not effectively accessing the general curriculum, but the update to the FBA in late February provided no new recommendations and the April 2017 Service Agreement did not increase behavioral supports. Fortunately, the Parent requested a new evaluation that was timely completed in May 2017, and found Student to be eligible for special education.

Student began the 2017-18 school year without engaging in problematic behavior at the level Student had exhibited in the spring. The IEPs that were developed in the fall of 2017, however, contained annual goals that did not include baselines from which one could discern progress. The goals themselves appeared to target identified needs, but the IEPs included no specially designed instruction for Student to acquire the skills needed to manage behaviors; rather, the expectation was that Student would simply begin to do so with sufficient prompts, redirection, and check-ins. While the social skills instruction does appear to be wholly appropriate, the September and November 2017 IEPs were not meaningfully calculated to address Student's unique needs that continued over the course of the school year. The one strategy that was reportedly successful was individualized (one on one) attention, but since the IEP did not provide for that, it is unclear whether and to what extent that may have occurred.

The District did convene several IEP meetings to review and revise the IEP over the 2017-18 school year again with the Parent's participation. Still, new goals lacked baselines from which to gauge progress; strategies that had not been successful in the past such as completing charts were maintained; and relevant specially designed instruction remained absent from the documents. By March and April 2018 when Student's behaviors were markedly more difficult to manage, revision to the IEP in May simply continued what had already been occurring and, thus, failed to respond appropriately or meaningfully. Furthermore, the IEP in August 2018 merely added more check-ins and resumed use of a behavior tracking sheet that had not been successful in the past. Accordingly, that IEP was not reasonably calculated to address Student's unique circumstances, particularly in light of the transition to the high school. For all of these reasons, the Parent has established a denial of FAPE from March 1, 2017 (after the update to the FBA that made no material revisions to the program) through the end of the 2017-18 school year by a preponderance of the evidence, but excluding extended school year programming.

REMEDIES

COMPENSATORY EDUCATION

As a remedy for the FAPE denial found above, the Parent seeks 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 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 failing to program appropriately for Student’s disability-related behavior. The March 1, 2017 start date provides a reasonable rectification period after the end of the second quarter. Student did not, however, wholly fail to derive meaningful educational benefit, and the evidence is clear that Student did well in some classes, and also that on some days Student performed much more in line with expectations than on others. Absent proof of what quantity of hours would provide equitable compensatory education, and balancing the positive and negative, this hearing officer concludes that three hours per day for each day that Student attended school (for at least part of the school day) from March 1, 2017 through the end of the 2017-18 school year provides an appropriate remedy for the FAPE denial, calculated by rounding up to the next

full hour half of the number of hours that a public school is required to provide to eighth and ninth grade students each school year.⁷

The award of compensatory education is subject to the following conditions and limitations. Student's Parent 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 Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. 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

⁷ 22 Pa. Code §§ 11.1, 11.3(a).

determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010).; *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

As explained above, the District's August 2018 IEP was not reasonably calculated to provide Student with meaningful educational progress for the 2018-19 school year. Turning to the second prong of this test, the Private School meets the standard of appropriateness. The Private School is accredited with certified teachers, and offers services to middle and high school students who exhibit learning differences. Student is provided with small class sizes that inherently allow for more individualized attention and instruction as even District teachers recommended for Student. All students are provided with social skills instruction and counseling, and have access to teachers and instructional support as needed. Student was earning C or better grades by the end of the first semester. Even without "special education" as is required in public schools, all of these factors combine to establish that the Private School was reasonably calculated to provide Student with educational benefit based on this test.

The District argues, among other things, that the Private School placement is not appropriate because Student repeated ninth grade. This hearing officer cannot find that fact to be a fatal flaw to reimbursement for tuition, however, particularly since Student failed multiple classes at the end of the 2017-18 school year in the District. The District also contends that equitable considerations warrant a denial of reimbursement since the Parent first toured the Private School in March 2018, and did not inform the District of the decision to enroll Student there until ten days after the contract was signed. The Parent's notice of the enrollment was not conveyed until eight business days before the formal withdrawal of Student and the start of the 2018-19 school year, and was ten calendar days after the decision on enrollment was made. In addition, the family's consideration of a private placement had been ongoing for at least six months. These circumstances merit an equitable reduction in the amount of tuition reimbursement which this hearing officer concludes in light of the record as a whole should be 10%. The award shall include tuition and the registration fee only and not residential expenses.

ORDER

AND NOW, this 28th 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 provisions of child find in the IDEA prior to the spring of 2017.
2. The District denied Student FAPE from March 1, 2017 through the end of the 2017-18 school year, excluding the summers of 2017 and 2018.

3. The program proposed by the District in May and August for the 2018-19 school year was not appropriate for Student under the applicable law.
4. Student is entitled to compensatory education for the FAPE denial in the amount of three hours for each day that Student attended all or part of the school day beginning on March 1, 2017 and continuing through the end of 2017-18 school year, excluding the summers of 2017 and 2018. The award of compensatory education is subject to the above stated conditions and limitations.
5. The Parent is entitled to reimbursement for tuition and the registration fee at the Private School for the 2018-19 school year less a reduction of 10% within ten business days of proof of payment by the Parent.
6. Nothing in this decision and order should be read to preclude 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. 21732-1819KE