

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:

22837-19-20

Child's Name:

M.D.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Pro Se

Local Education Agency:

Wissahickon School District
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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

12/21/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is a mid-teenaged student in the Wissahickon School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In October 2019, Student's Parent filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, raising procedural and substantive violations.

Specifically, the Parent claimed that the District has failed to recognize Student's underlying disability and, consequently, has failed to program appropriately upon Student's return in the fall of 2019 after an alternative education setting placement.³ She also challenged certain aspects of extracurricular activity opportunities; Student's class options; extended

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 This hearing officer concluded that the issue of a past manifestation determination was not properly before her. (Notes of Testimony (N.T.) 20-24.) References to the exhibits will be to cited as (P-) followed by the exhibit number for Parent exhibits, and (S-) followed by the exhibit number for School District Exhibits (S-). The following exhibits were admitted: P-1-13, 16-24, and 26; S-1-3, 6-8, 10-17, 20, 26, 27, 39-41, 43, 46, 49, 51, 53, 54, 56, 57, 59, 61, 62, 64, 67, 68, 70, 72, 74, 75, 77, 78, 81, 82, 86, 87, 88, 89, 91, 93, 96, 97, 99-108, 112-114, 116, 117, 122-126, and 128; and Hearing Officer Exhibit (HO-) 1. (N.T. 325-28.)

school year (ESY) services; and various asserted procedural errors on the part of the District. As remedies, she sought tutoring for Student and reimbursement for an independent educational evaluation (IEE). The District countered with its assertions that denied a failure to recognize Student's disability as well as its contention that its special education program, as offered and implemented, was appropriate for Student.

For all of the reasons set forth below, the claims of the Parent cannot be sustained and must be denied.

ISSUES

1. Whether the District denied Student a free, appropriate public education (FAPE) both procedurally and substantively in the preparation for Student's return to the District in the fall of 2019;
2. Whether the District should be directed to revise Student's Individualized Education Program (IEP) in any respect; and
3. Whether the Parent should be reimbursed for the cost of an independent educational evaluation?

FINDINGS OF FACT

1. Student is a mid-teenaged resident of the District who is eligible for special education under the classifications of an Other Health Impairment and a Specific Learning Disability pursuant to the IDEA. (S-116.)
2. Student was diagnosed with Fetal Alcohol Spectrum Disorder (FASD) at approximately the age of six [redacted]. Student also experienced a few seizures in early years related to the FASD. (N.T. 42-43, 49, 67-68.)

3. As characteristics of Student's FASD, Student has difficulty with language arts skills and understanding language, but mathematics is a relative strength. Student benefits from continued engagement in activities. (N.T. 42, 55, 59, 262.)
4. At earlier ages, Student was considered to be more receptive to rewards for exhibiting appropriate behavior rather than consequences for inappropriate behavior. (N.T. 61, 69-70.)
5. The District initiated a review of records for Student in the spring of 2016 and issued a Reevaluation Report (RR) in April 2016. (S-7.)
6. The RR summarized results of assessments from the summer of 2015 that reflected average to high average cognitive ability and variable academic achievement scores. Results of a Functional Behavior Assessment (FBA) in June 2016 when Student was in an alternative education setting were also included. The RR concluded with a determination that Student was eligible for special education on the basis of a Specific Learning Disability and an Other Health Impairment. The Parent did not indicate disagreement with the RR. (S-7.)
7. A meeting convened in 2016 to discuss the RR. The Parent did not express concerns with the RR at that time, nor did she request an independent educational evaluation (IEE).⁴ (N.T. 309.)
8. Student was not in the District from the middle of the 2016-17 school year through its conclusion. (S-16 at 6.)

⁴ The Parent had a special education advocate affiliated with a Pennsylvania law firm in the fall of 2016. (N.T. 79; S-8 at 3-6; S-10.)

2017-18 School Year

9. A new FBA was conducted in the fall of 2017 following Student's return to the District to consider concerning behaviors: being disrespectful, being disruptive, using abusive/aggressive language, damaging property, and acting out inappropriately. Interventions were suggested in the FBA for revision to the Positive Behavior Support Plan (PBSP), including strategies/instruction for remaining engaged, modified assignments for length/time, use of choices, notice of deadlines and transitions, adult proximity, reinforcement for appropriate behavior, and requesting a break when needed. (S-12.)
10. An IEP meeting convened in October 2017. The Parent's specialist in FASD attended and participated in that meeting. (N.T. 81-82, 235; S-11; S-13; S-15; S-16 at 6.)
11. Parent concerns noted in the October 2017 IEP were for fine motor (handwriting) and unspecified executive functioning skills; use of speech to text; positive reinforcement for appropriate language; opportunities for a break when needed; behavior contracts that include consequences; use of the executive function rubric; and Student's inability to complete assignments/homework at times. The IEP reflects discussion by the team of each of these concerns. (S-16 at 18.)
12. Strengths at the time of the October 2017 IEP included mathematics applications, improved reading comprehension and reading fluency, self-advocacy (identifying concerns), and technology. Needs identified were for written expression, word identification, reading comprehension, mathematics problem-solving, behavior (as set forth in the recent FBA), executive functioning (self-monitoring and organization), and assignment completion and test scores. (S-16 at 19.)

13. The October 2017 IEP provided for post-secondary transition services and addressed all of the identified needs through annual goals as well as program modifications/items of specially designed instruction, and included: a one-on-one assistant to escort Student between classes and be present with Student in classes for prompting and redirection; chunking of larger tasks; repetition, checklists, and reminders particularly for directions and expectations; instruction for organizational skills; check-ins with a counselor; opportunities for breaks; a specified maximum time for homework completion; and a PBSP that provided reinforcement for appropriate behaviors. The IEP provided for a supplemental level of learning support. (S-16.)
14. Another meeting convened later in October 2017 to discuss Student's significant increase in concerning behavior and possible placements outside of the District. The team agreed to pursue a private school placement. Those discussions continued in November 2017. (N.T. 89-90; S-27; S-43; S-46.)
15. No draft IEP was developed for the October 2017 IEP meeting because the team needed to discuss placement options. (N.T. 135-36.)
16. Between November 2017 and April 2018, Student was in a residential treatment facility outside of the District. (N.T. 92-93.)
17. In April 2018, the District placed Student at a private school with the consent of the Parent. The private school is an alternative education setting that provides emotional support for its students. (N.T. 94, 305; S-51; S-54.)
18. A new IEP was developed in May 2018 for Student at the private school. (S-56.)
19. The Parent supported Student's placement at the private school, even at the time of the due process hearing. (N.T. 314-16.)

20. The Parent obtained a private occupational therapy evaluation in May 2018. Weekly occupational therapy was recommended for a period of eight weeks to address difficulties with task initiation and completion and organizational skills. (P-22.)
21. At the private school, Student took a computer-based foreign language class that required Student to complete segments on Student's own as well as to complete worksheets. The class did not provide a typical school curriculum for a first year course in that language, and the teacher only monitored that Student was engaged in tasks related to the foreign language. (N.T. 171; S-88 at 8; S-91 at 1.)
22. Student was able to participate in a sport while attending the Private School. In order to do so, Student, like other students not attending school in the district, had to agree to the team's behavioral expectations for student athletes that are available on the District's website. Student was not precluded from participating in any sport for behavioral reasons, although sometimes Student was reminded about attending practice by the coach. (N.T. 99-100, 142-47, 151-52, 168-69, 258, 294; S-74.)

2018-19 School Year

23. The Parent had Student privately evaluated by a neuropsychologist in the fall of 2018. A report of that evaluation was issued in November 2018. (P-17.)
24. The IEE summarized results of cognitive testing (Wechsler Intelligence Scale for children – Fifth Edition (WISC-V)). Student attained a high average Full Scale IQ score⁵ with some variability among composites

⁵ Oddly, the IEE also states that Student's WISC-V scores were overall in the "Extremely Low Range of intellectual functioning and results are generally commensurate with reports

and subtests. Scores on additional assessment of visual and verbal memory skills were in the average range. (P-17 at 9-13, 15.)

25. Achievement testing (Wechsler Individual Achievement Test – Third Edition) for the IEE yielded scores in the average range on the Basic Reading and Mathematics Composites, and in the below average range for Written Expression (Standard Score 83) with a notably discrepant Sentence Composition subtest score (Standard Score 74). Results of additional tests of reading skills were similarly average or at grade level. (P-17 at 16-20.)
26. Assessment of executive functioning for the IEE revealed average- to above average-range scores on an administration of two separate instruments. However, on the Behavior Rating Inventory of Executive Functioning – Second Edition, the Parent and a teacher reflected concerns with Global Executive Functioning by one or both in the following areas: inhibition, emotional control, initiation, working memory, planning/organization, task monitoring, and organization of materials. (P-17 at 14, 16, 200-22.)
27. Additional assessment of social/emotional/behavioral functioning reflected only a mild concern by Student regarding the ability to sit still and to act without stopping to think. (P-17 at 20-23.)
28. Results of a variety of other assessment tools for the IEE reflected performance comparable to or better than peers in areas including speech/language, and visual-motor and visual-spatial skills. (P-17.)

of previous cognitive functioning (2018).” (P-17 at 10.) It is unclear what previous results were provided to her and why the results of her actual testing are wholly inconsistent with this statement.

29. The IEE made a number of recommendations for Student in the educational environment to accommodate needs across the curriculum: practice with reading comprehension and fluency; instruction for written expression as well as supports (such as graphic organizers, note-taking supports); adult assistance with organization (such as initiation and chunking of assignments); use of a keyboard and consideration of other assistive technology (with possible occupational therapy consultation); preview of core content vocabulary; test and assignment accommodations (such as extra time, small environment); and counseling. She also suggested that Student be exempt from foreign language requirements. (P-17 at 30.)⁶
30. An IEP meeting convened in March 2019. The Parent's specialist in FASD attended that meeting. (N.T. 212.)
31. At the March 2019 meeting, the Parent's specialist in FASD made recommendations for one-on-one support; for homework (providing sufficient time during the school day for completion so that little or none is required to be completed at home); for positive support that emphasizes success rather than failure such that any consequences are immediate; and for consistency and repetition of information. It was also noted that preparing Student for transitions is also important. (N.T. 213-16, 218-19, 222-23, 226-27, 231-32, 246, 270.)
32. The IEP was revised in March 2019 with additional supports at the private school through the PBSP. (S-75.)

⁶ The private neuropsychologist prepared an addendum to her IEE in November 2019 that merely reiterated some of the concerns the Parent raised at the hearing. (P-1.)

Transition for and Return to District

33. Another IEP meeting convened in May 2019. A new PBSP was developed to address inappropriate language, and included high rates of reinforcement for appropriate behavior and immediate response for engaging in inappropriate behavior. (S-87; S-88.)
34. The May 2019 IEP provided for Student's return to the District for the 2019-20 school year as well as attendance there for ESY services in the summer of 2019 as part of the transition. Student's eligibility for special education was identified under the classifications of Specific Learning Disability (reading, written expression, and mathematics) and Other Health Impairment, along with a diagnosis of FASD. (N.T. 179-80; S-88 at 6.)
35. The May 2019 IEP provided updates including to the post-secondary transition information. The Parent also relayed that she had obtained the private evaluation to be shared with the District. (S-88.)
36. Strengths in the May 2019 IEP maintained those in self-advocacy, mathematics applications, and technology, adding use of tools for written expression and notetaking as well as providing assistance to teachers. Needs at the time were for written expression, behavior (use of inappropriate language), social skills, focus and attention, and counseling. The May 2019 IEP continued to address the needs through annual goals, program modifications and specially designed instruction, and a PBSP. (S-88 at 15-16.)
37. Student completed the 2018-19 school year at the private school. (S-96.)

Preparation for Return to District

38. The District issued a Permission to Reevaluate Student in June 2019 and issued a form for the Parent's consent. The Parent declined to provide consent on the basis that a private evaluation had recently been completed and she understood that tests could not be repeated. She provided the IEE report to the district at that time. (N.T. 285, 290; S-93; S-100; S-103; S-104 at 4.)
39. The District would have been able to administer assessments of Student's cognitive ability and academic achievement for the 2019 reevaluation using different testing instruments than those for the IEE. (N.T. 303-04.)
40. Another IEP meeting convened in July 2019 to develop a new program and plan further for Student's return to the District. Specific activities to help Student prepare for the transition were attendance at ESY; Student choosing the schedule for the 2019-20 school year; a peer buddy as a positive role model at the start of the school year; daily check-ins and check-outs; and monitoring of dismissal. (N.T. 179-80; S-106; S-107 at 5-6.)
41. Parent concerns at the time of the July 2019 meeting were for transition back into the District, a second-year level of the foreign language, and a reevaluation consisting solely of a record review. (S-107 at 13.)
42. The discussion at the July IEP meeting included whether Student should take the first or second year of the foreign language, because the exposure to the language in the previous class at the private school through an online program was limited. The Parent asked that Student be placed in the second year of the foreign language with tutoring as a support, in part so that Student would not be bored by

repeating first year content. (N.T. 183-85, 187-88, 190, 262-65, 302; P-2 at 1.)

43. The July 2019 IEP summarized a discussion of Student's regular and special education classes, with the latter comprising classes for writing instruction, social skills instruction, and academic support. Student was to take a placement test for the foreign language during ESY for determining the level Student would take. (S-107 at 7.)
44. The IEP team discussed having Student tested in the foreign language to determine what level Student should take upon return to the District. The Parent suggested that if Student could not move on to the second year, another language could be considered. No such testing occurred, however. (N.T. 159-60, 187, 265.)
45. The July 2019 IEP added information from transition surveys. (S-107 at 12.)
46. The PBSP was revised for the July 2019 PBSP targeting inappropriate language. Skill deficits identified were in the areas of communication, behavior, self-regulation, and social skills. The PBSP provided antecedent strategies (minimizing unstructured time, providing leadership opportunities, modeling and instruction of appropriate peer interaction and problem-solving, preferential seating, and frequent check-ins); replacement behaviors (including use of coping strategies); consequences when appropriate behavior is exhibited (continuous reinforcement); and consequences for inappropriate behavior (verbal cues, redirection, adult modeling, and opportunities for restorative meetings). (S-107 at 12-13.)
47. The July 2019 IEP provided a post-secondary transition plan with goals for attending a two- or four-year college and independent living. (S-107 at 14-16.)

48. Annual goals in the July 2019 IEP were for written expression, social skills, and the behavior goal relating to appropriate language. A comprehensive set of program modifications/items of specially designed instruction addressed these areas: direct instruction for organizational skills and written expression, writing supports including use of a keyboard, organization checklists, encouragement of participation and engagement, preferential seating, access to a trusted adult, repetition, test and assignment accommodations and support, check-ins and check-outs, guided notes, and a peer buddy. Counseling was provided as a related service. (S-107 at 21-26.)
49. The July 2019 IEP proposed itinerant emotional support with Student participating in regular education for all classes except academic support, writing instruction, and social skills. (S-107 at 28-29.)
50. Student attended some sessions of ESY in 2019. Student's assigned teacher was the case manager for the 2019-20 school year. (S-107 at 5; S-108)
51. A District teacher gave Student a tour of the high school during the summer of 2019 and made arrangements for a peer buddy. However, Student explained that Student was familiar with the high school because of the sports team participation and did not need either the tour or the peer buddy. (N.T. 180-81.)

The 2019-20 School Year to Date

52. In the fall of 2019, Student was able to check in with the case manager most days in the morning or afternoon. (N.T. 181-82.)
53. Student was monitored at the start of the 2019-20 school year on a few occasions at dismissal time with no concerns reported on those or any other days. (N.T. 182.)

54. When Student returned to the District, Student experienced a big difference in the amount of homework required at the District high school compared to little or no homework in the private school. (N.T. 158, 164.)
55. Student's study skills class, which meets four days each cycle, is structured and provides an opportunity for Student to complete assignments/homework and prepare for tests. The students also work on organization, prioritizing tasks and chunking assignments, and review and remediation as needed. Student is usually able to complete all homework in that class. (NT. 161, 173, 192-94, 207.)
56. In addition to practice for the sports team several days a week and over weekends, Student has a number of appointments with outside service providers after school. (N.T. 172-73.)
57. Supports available for Student for the foreign language class included tutoring with a teacher of that language, or a peer, during an intervention/enrichment period or after school. However, Student did not want to take advantage of those options, and had resorted to skipping the foreign language class. (N.T. 175-76, 188-91.)
58. An IEP meeting convened in November 2019 to discuss Student skipping classes. The team agreed to a peer escort to assist Student in getting to classes, to be re-evaluated in thirty days. (N.T. 157, 199-200.)
59. The District issued a reevaluation report (FF) in September 2019. This RR noted Student's IDEA eligibility categories and FASD diagnosis. (S-116.)
60. The September 2019 RR summarized available information from past evaluations (including the IEE) and the revisions in the July 2019 IEP. Student was determined to be eligible for special education based on a

Specific Learning Disability in written expression and an Other Health Impairment. (S-116.)

61. A meeting convened to review the RR. (N.T. 309.)
62. The District provided an update to Student's behavioral functioning in October 2019. At that time, Student was exhibiting behaviors not previously identified: skipping or leaving classes and leaving school property. New strategies to address those concerns including a behavior contract were suggested, in addition to an emphasis on those already in the PBSP such as immediate positive reinforcement for appropriate behavior. (S-122.)
63. The Parent filed the Due Process Complaint on October 10, 2019. She had not requested public funding of IEE until that Complaint. (N.T. 289, 291; S-1.)
64. An IEP meeting convened on October 11, 2019 that the Parent attended. At that time, her concerns were for more advance notice for meetings with draft IEPs provided beforehand, fine motor skills (handwriting), ESY eligibility, the conclusions in the RR, and Student's difficulties with the second level foreign language class. The substance of the document was essentially the same as that in July 2019. (S-123.)
65. The District does not provide drafts for IEP meetings held to discuss possible revisions, particularly if the meeting was requested by a parent. Agendas are frequently also not provided if the meeting was requested by a parent. (N.T. 107, 108-09.)
66. The Parent has not provided consent for some private evaluators to share information with the District. (N.T. 138.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized that in this type of case, 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; although some of the testimony with respect to minor events not determinative were somewhat inconsistent, none of the witnesses appeared to be providing testimony with an intent to deceive or to exaggerate or minimize their recollection of what occurred. Any such inconsistencies are attributable to differences in perspective, perception, and memory. In addition, the Parent presented as a very dedicated advocate for Student whose concerns are genuine and understandable as a loving parent wanting what is best for Student.

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.

General IDEA Principles: Substantive FAPE

The IDEA requires that the states to provide a "free appropriate public education" (FAPE) to children 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 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. Thus, individualization is a core component of the IDEA. 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).

Pursuant to *Endrew, Rowley*, and the IDEA, the primary focus of a child's IEP is that it be responsive to his or her 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 another way, 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). Also critical is the recognition that, "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 the student's response to the programming that is provided, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 300.324.

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. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

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

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).). Full participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives," and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002)(explaining that "parents who seek public funding for their child's special education possess no automatic veto over" an LEA's decision). As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE) If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek

resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999) (same).

The Parent's Claims

The Parent's claims together raise both substantive and procedural issues. Specifically, she challenged her opportunity to meaningfully participate in educational decisions regarding Student; planning for Student's transition back to the District in the fall of 2019; the District's asserted denial of Student's FASD and its impact on Student's educational performance; the behavior plans as unsupported by her FASD specialist; and tutoring to permit Student to succeed in the second year foreign language class. She also continues to contest the District's request to conduct a reevaluation with administration of assessments in light of the IEE in the fall of 2018.

The procedural contentions, while certainly understandable from a parent's viewpoint, are not supported as violations by the LEA of the applicable law. There is no requirement that parents be provided with draft IEPs prior to an IEP meeting; while such may be a common or even preferred practice where practicable, the District's explanation that such drafts are not created for meetings to discuss potential revisions or placement questions is both reasonable and sound. If an LEA were to develop a draft IEP that proposed a specific placement, for example, such could be challenged as violating the requirement that placement be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116. The record does not establish any procedural violations in this case that denied the Parent the opportunity to participate in decision-making.

Next, with respect to the transition back to the District, a number of supports were proposed and provided to re-acclimate Student to the public school environment, many of which were determined to be not necessary. Of those that were not considered by Student and/or the Parent to be unnecessary, Student was afforded check-ins with the case manager on a regular (if not daily) basis; occasional monitoring of dismissals with no reports that more support was necessary; opportunities for homework completion and test preparation during the school day; and assignment accommodations, review, and remediation as needed. Additional opportunities for tutoring for the second year foreign language class both during the school day and after were also offered, but not routinely accepted. While it may be preferable to Student and the Parent to have teacher tutoring during school hours, the IDEA does not demand ideal provision of services that best accommodate a child; the question is whether the District's offer and implementation of programming is appropriate. This hearing officer cannot conclude that FAPE was denied on this basis.

The next two contentions involve the District's acknowledgement of Student's FASD and its manifestations in the school environment. The law does not require LEAs to list specific diagnoses as the bases for IDEA eligibility; rather, the law demands that LEAs determine whether a student meets criteria set forth in a two-part test. Specifically, 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." 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). "Special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Thus, a child's special education program is not dependent upon nor dictated by an eligibility classification; rather, a program needs to reflect careful consideration of Student's unique abilities and needs, and

provide appropriately ambitious goals. *See Andrew F., supra*, 137 S. Ct. at 1001, 197 L.Ed.2d at 352 (2017)(explaining that, “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”). Moreover, the District’s recent relevant special education documents explicitly reference the FASD diagnosis and its impact on Student’s educational and related performance. This hearing officer finds no reason to fault the District in this regard.

Furthermore, the recommendations and suggestions of both the Parent’s FASD specialist and private neuropsychologist have been incorporated into the July 2019 IEP, and implemented during the 2019-2020 school year. Far from refusing to acknowledge Student’s disabilities, the program has responded to the suggestions in meaningful and, in this hearing officer’s estimation, reasonable ways, for purposes of FAPE. It merits reiterating that a special education must be responsive to identified educational needs, but not necessarily ideal or optimal. While it may have been logical to have homework (not required at the private school) assigned in preparation for transition to the District, the provisions addressing transition and other IEP components complied with IDEA requirements; and, in any event, Student has been successful in completing homework at school for the majority of the time, with accommodations if such is not the case. Accordingly, no relief is due on the Parent’s IDEA claims relating to the substantive and procedural aspects of Student’s program.

Despite all of the foregoing, what is troubling to this hearing officer is the apparent discord between the parties as Student continues through the District in the high school and prepares for transition to adulthood. The parties have participated in numerous IEP meetings, many of which have been facilitated, and remain in a contentious posture. This hearing officer respectfully suggests that the parties set aside their differences and

concentrate on ongoing collaboration that will benefit Student in light of Student's needs as they may change, rather than on firm positioning. The IEP team may wish to consider whether an occupational therapy screening is warranted, as well as the recommendation to exempt Student from the foreign language with which Student is clearly struggling. The IEP team should also carefully monitor Student's impulsivity in the school environment on an ongoing basis and make potential revisions to the IEP as may be necessary.

Finally, the Parent seeks reimbursement for the IEE. 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 Parent obtained an IEE and, after the District sought to complete a mandatory reevaluation, she filed a complaint that also requested reimbursement for the IEE.

This hearing officer finds no basis on which to order reimbursement for the IEE in this case. Here, the Parent obtained an IEE before the District was required, or was requested, to conduct a reevaluation. Thus, there was no disagreement with a current evaluation that might prompt consideration of reimbursement for an IEE. Furthermore, the reasons for denying consent to the District's request for a reevaluation were not supported by the record.⁷

⁷ It should also be noted that the District's lack of access to certain evaluation reports may impede a collaborative IEP process. *See, e.g., Oconee County School District*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).

CONCLUSIONS

The claims of substantive and procedural denials of FAPE are not established by the record evidence, nor is the claim for reimbursement for the IEE.

ORDER

AND NOW, this 21st day of December, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claims are DENIED.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 22837-19-20