

*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:**

25401-21-22

#### **Child's Name:**

L.Q.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents:**

Mark W. Voigt, Esquire  
600 West Germantown Pike, Suite 600  
Plymouth Meeting, PA 19462

#### **Local Education Agency:**

Rose Tree Media School District  
308 North Olive Street  
Media, PA 19063

#### **Counsel for LEA:**

Gabrielle Sereni, Esquire  
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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

04/04/2022

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, L.Q. (Student),<sup>1</sup> is a mid-teenaged student who resides in the Rose Tree Media School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and currently attends a private school at the option of the Parents.

In the fall of 2021, the Parents filed a Due Process Complaint against the District challenging the programs implemented and proposed for Student under the IDEA and Section 504 of the Rehabilitation Act of 1973.<sup>3</sup> Specifically, the Parents contended that Student should have been identified as eligible under the IDEA; and that the District's programming over the 2019-20 and 2020-21 school years, as well as its proposal for the 2021-22 school year, were not appropriate. As remedies, they sought compensatory education and reimbursement for tutoring, private school tuition, and related expenses. The District disputed all of the Parents' assertions and denied that any relief was warranted.

The case proceeded to due process hearing.<sup>4</sup> Following review of the record, and for all of the reasons set forth herein, the claims of the Parents must be granted in part and denied in part.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, 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).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by

## **ISSUES**

1. Whether Student should be identified as eligible under the IDEA;
2. Whether the District denied Student an appropriate program under the IDEA and Section 504 over the 2019-20 and 2020-21 school years;
3. Whether the District's proposed program for Student for the 2021-22 school year was appropriate;
4. If the District denied Student an appropriate program for any portion of the 2019-20 and 2020-21 school years, should Student be awarded compensatory education and should the Parents be reimbursed for certain expenses; and
5. If the District's proposed program for the 2021-22 school year was not appropriate, should the Parents be awarded reimbursement for tuition and related expenses?

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student residing in the District. Student attends a private school (Private School) for the 2021-22 school year. (N.T. 63-64, 71-72; S-34 at 1.)
2. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in the fall of 2016. Student's ADHD is primarily manifested

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the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

through inattention and lack of focus, as well as other executive functioning weaknesses. (N.T. 72, 134; S-34 at 68-74.)

3. The District has a policy that permits its students to re-take a test, resubmit an assignment, and demonstrate understanding through alternative means. (N.T. 358, 669.)
4. At the District's middle school, regular meetings convene with administrators, the school psychologist, and school counselors to discuss teachers' student concerns. (N.T. 565-66.)

### **Early Educational History**

5. The Parents requested an evaluation of Student in the fall of 2016 because of their concerns with Student's reading and mathematics skills, as well as handwriting, attention, social skills, impulse control, executive functioning, and understanding directions. The District conducted the evaluation. (N.T. 74-76, 79-80, 182; P-1; P-22.)
6. The District issued an Evaluation Report (ER) in December 2016. The ER included input from the Parents that included a number of strengths in addition to weaknesses. Teacher input reflected Student's need for improvement in mathematics skills; weaknesses regarding attention, task completion, and working independently; and a continued need for reading support. Recommendations of teachers included prompts for redirection, modeling, repetition of directions, and testing accommodations. (P-1.)
7. The District school psychologist observed Student in multiple classes and other settings for the 2016 ER, collecting time on task data. (P-1 at 3-6.)
8. Results of a cognitive assessment for the 2016 ER (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) were somewhat variable across Composites, with relative strengths on the

Visual Spatial and Working Memory Composites and a relative weakness on the Processing Speed Composite. The Full Scale IQ and General Ability Index scores were consistent and in the average range. (P-1 at 9-10.)

9. On the Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV-ACH) for the 2016 ER, Student earned average to high average range scores across clusters, and Student’s achievement was determined to be commensurate with cognitive ability. (P-1 at 11-12.)
10. Speech/language assessment for the 2016 ER revealed no areas of weakness in any area or overall, including articulation. Separate testing of Student’s auditory processing skills similarly yielded average range scores. (P-1 at 10-11, 15-17.)
11. Student’s social/emotional/behavioral functioning was assessed for the 2016 ER through rating scales completed by the Parents and teacher. The Parents’ scales endorsed clinically significant concerns with adaptability and activities of daily living; and at-risk concerns with hyperactivity, attention problems, and adaptive skills. By contrast, the teacher noted no clinically significant concerns, but attention problems and learning problems in the at-risk range. Both raters indicated that Student met criteria for ADHD. With respect to executive functioning, Student exhibited clinically significant executive functioning deficits in initiation, working memory, planning/organizing, and organization of materials (Parents); and inhibition, initiation, working memory, planning organizing, organization of materials, and self-monitoring (teacher). Both raters rated overall executive functioning in the clinically significant range. (P-1 at 17-20.)

12. A Functional Behavior Assessment (FBA) conducted for the 2016 ER targeted Student's needs for prompting and redirection to complete tasks. The FBA revealed that Student did not require more prompting than peers and no behavior plan was necessary, although some helpful strategies were noted. (P-1 at 14-15.)
13. The 2016 ER determined that Student was not eligible for special education. Recommendations included a Section 504 Plan to address attention and executive functioning weaknesses. The Parents approved a Notice of Recommended Educational Placement (NOREP) for continuation of regular education programming. (P-1; P-2.)
14. The Parents obtained an auditory processing evaluation in February 2017 due to concerns with Student's inconsistent responses to verbal questions and directions. That evaluation reported deficits with auditory decoding, output organization, and language processing. Recommendations were made for accommodations in the school environment such as preferential seating, visual supports for verbal information, repetition of directions, guided notes, pre-teaching of vocabulary, organizational support, and positive reinforcement. (P-6.)
15. The Parents obtained tutoring for Student in the summer of 2018 to prepare for middle school. Those services ended in March 2019. (N.T. 88-89, 206-07; S-23.)
16. Student had some difficulty completing homework at home during the [redacted] school years (2016-17 through 2018-19). The Parents and District communicated at times throughout those school years. (N.T. 75-76, 79-80, 84-85, 92; P-23; P-24; S-22 at 1-22.)
17. The District convened a meeting with the Parents in the fall of 2018 when the Parents reported some concerns. A Section 504 Plan was developed at that time, providing for preferential seating and

opportunities to stand and move; modeling and repetition of directions; test and assignment accommodations; support for executive functioning (including opportunities for reteaching and organizational assistance, management of tasks); and use of speech-to-text for writing assignments. The team also agreed to provide an additional reading class for Student with a reading specialist. The Parents approved the Section 504 Plan. (N.T. 562-64; P-5; S-3.)

## **2019-20 School Year**

18. Teams of [redacted] teachers met regularly during the 2019-20 school year to discuss students throughout the school year. For Student specifically, the teachers discussed concerns that the Parents presented. (N.T. 317-18, 323-25, 328-29, 346.)
19. A meeting convened in the fall of 2019 to review Student's Section 504 Plan. The Plan remained essentially the same as that from the fall of 2018. (N.T. 105, 322, 363; P-6; S-4.)
20. Student's [redacted] teachers had access to Student's Section 504 Plan and met with the guidance counselor at the start of the school year to review it. The Plan was implemented by Student's teachers and no teachers reported concerns with Student's programming that school year. (N.T. 318-20, 329-32, 600-02.)
21. The District provided asynchronous instruction after the March 2020 school closures due to the pandemic.<sup>5</sup> Teachers were available to meet with students daily. (N.T. 332-33, 667-68; S-5 at 1.)

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<sup>5</sup>The closures were announced on March 13, 2020 and continued through the end of the 2019-20 school year, and notice is taken of the orders of the Governor of the Commonwealth of Pennsylvania, see <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited March 31, 2022).

22. The District issued an Interim Individualized Flexible Accommodation Plan for Student due to the pandemic. Student's accommodations were modified by that interim plan, and provided for online check-ins, a schedule, and guidelines for organization and time management; clear directions; chunked assignments; copies of notes; visual resources; test and assignment accommodations; and a process for obtaining answers to questions while remote. (P-7; S-5.)
23. Student experienced difficulty with remote instruction. The Parents asked in late March about additional accommodations such as daily bulleted task lists, and provided support to Student at home through the end of the 2019-20 school year. (N.T. 106-07, 111-12, 162; P-25 at 13-14.)
24. Student's [redacted] teachers chunked the materials for the students during the school closures. No tests were administered. (N.T. 335-36.)
25. Student had difficulty completing homework at home during the [redacted] school year. The Parents and the District communicated at times throughout the school year about homework and other matters, especially after the school closures. (N.T. 98-99, 161; P-25; S-22 at 23-43.)
26. Student ended the 2019-20 school year with all grades in the A to B-range, with the exception of health and a special for which Student earned C-range grades. (S-2 at 4.)

### **2020-21 School Year**

27. Teams of [redacted] teachers met regularly during the 2020-21 school year to discuss students throughout the school year. (N.T. 375-76, 381-82.)



28. Student's [redacted] teachers had access to Student's Section 504 Plan and met with the guidance counselor at the start of the school year to review it. The Plan was implemented by Student's teachers and no teachers reported concerns with Student's programming that school year. (N.T. 377-78, 382-84, 438-41, 600-02.)
29. The District resumed in person instruction in October 2020 through a hybrid model. The Parents opted to have Student continue remote attendance due to health concerns of a family member. Classes were live and remote students accessed those as they were presented to students who were in person. Student continued to struggle with learning remotely and the Parents reported that Student was not comfortable keeping the web camera on. The Parents continued to provide support at home, but Student did not take advantage of opportunities to obtain assistance with assignments or for re-teaching that was offered. (N.T. 114-17, 121-22, 162-63, 373, 384-86, 409-10, 560.)
30. The Parents obtained an informal evaluation of Student's literacy skills in November 2020. At that time, the evaluator (whose credentials were not indicated) reported some academic deficits, and her recommendations focused on use of the company's resources. (S-6.)
31. A meeting convened on November 24, 2020 to review Student's Section 504 Plan. The previous accommodations from the fall 2019 Plan were retained, and the team added nonverbal prompting for attention, use of audio texts, and verbal directions provided in writing with checks for understanding. The teachers implemented this revised plan. (N.T. 119, 378-79, 382-84; P-9; S-7.)
32. Student returned to the District's school building in March 2021 when students were in person four days per week. (N.T. 134, 373, 560.)

33. Student had difficulty completing homework at home during the [redacted] school year. The Parents and District communicated at times over the school year about homework and other matters. (N.T. 121; P-26; S-22 at 44.)
34. The Parents began considering private schools for Student in the spring of the 2020-21 school year. (N.T. 132, 177-79, 181.)
35. Student ended the 2020-21 school year with all grades in the A to C range. (S-2 at 5.)
36. Student began treating with a private therapist at the end of the 2020-21 school year to learn to manage anxiety and develop self-advocacy and coping skills. That services continued into the spring of 2022 but gradually became less frequent over time. (N.T. 129, 145, 202-04; P-16; S-8.)
37. The Parents provided notice in late August 2021 of their intention to place Student in Private School at District expense. The District denied that remedy. (S-13; S-17.)

### **Summer 2021 Private Evaluation**

38. The Parents obtained a private evaluation of Student in the summer of 2021. The report of that evaluation was required by Private School but was not shared with the District until sometime in August. (N.T. 125-26, 132, 179-81; P-7; S-9.)<sup>6</sup>

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<sup>6</sup> As discussed more fully below, that report contains a number of scoring and other errors or omissions, including an incorrect overall cognitive score and inaccurate percentile and obviously missing scores on achievement testing; additional omitted results; and administration of a very outdated version of an instrument. (N.T. 529-30, 585, 598-99, 615-18.) The evaluating psychologist also expressed concerns to the District's school psychologist about Student's fatigue during the testing. (N.T. 612-14.) Based on all of this information taken together, the results of that evaluation are not reliable. Its findings are included herein for completeness because the Parents' claims heavily depend on that report.

39. The 2021 private evaluation was a psychoeducational assessment. At that time, the Parents' concerns were reading, writing, and mathematics skills especially in light of remote learning. Assessments for this evaluation were conducted on multiple occasions, with Student visibly anxious and distressed by the duration of the sessions and quite fatigued at times. (S-9.)
40. Student attained overall average range scores on the WISC-V for the 2021 private evaluation, with a deficit in processing speed. On a separate measure of memory and learning, Student scores were somewhat variable but in the extremely low to low average range on most subtests and all Indices. (S-9 at 6-11.)
41. Student's academic achievement assessed for the 2021 private evaluation yielded variable results with relative strengths (mathematics and writing) and weaknesses (reading, listening comprehension, and oral expression). An oral reading fluency score was not reported. On a Qualitative Reading Inventory, the evaluator determined that Student was instructional at a fourth grade reading level. (S-9 at 12-16.)
42. In assessment of attention and executive functioning skills, the 2021 private evaluation reported areas of strength and need. Behavior rating scales completed by the one of the Parents similarly endorsed attention difficulties. (S-9 at 17-19.)
43. The 2021 private evaluation made recommendations for support of organizational and study skills as well as attention; a number of strategies for reading, writing, and mathematics were also suggested that were consistent with the District's most recent Section 504 Plan. The private evaluator concluded a DSM-V-based language-based

learning disability was appropriate but did not recommend any specially designed instruction. (S-9 at 19-23.)

## **2021-22 School Year**

44. Private School offered an enrollment contract to Student on August 26, 2021. The Parents signed that agreement and made an initial payment to Private School on September 3, 2021. (N.T. 210; P-15; P-41; S-26.)
45. A meeting convened in early September 2021, at which the Parents' privately obtained evaluations were reviewed and discussed. On that same day, the District sought the permission of the Parents to conduct a new evaluation of Student, and the Parents provided their consent. (N.T. 136; P-17; S-16; S-17; S-18.)
46. Student's Section 504 Plan was also revised in early September 2021. All of the accommodations in the fall 2020 plan were maintained with several additions (movement breaks, direct instruction in reading executive functioning, counseling), such that all of the following were specified: preferential seating and opportunities to stand and move; nonverbal prompting for attention; modeling and repetition of directions with checks for understanding; visual resources; test and assignment accommodations including extra time; supports for executive functioning (including opportunities for reteaching and organizational assistance, management of tasks); use of speech-to-text for writing assignments; use of audio texts; movement breaks; direct instruction in reading (five days/week) by a reading specialist; direct instruction in executive functioning skills (two days/week); and weekly counseling. The Parents did not approve this plan. (S-18.)
47. Student attended the District high school for the first week of school of the 2021-22 school year. (N.T. 147, 163-64.)

## **2021 Evaluation Report**

48. The District completed its evaluation and issued a new ER on November 2, 2021. The District school psychologist observed Student at Private School for the evaluation. (N.T. 575, 582; S-34.)
49. The 2021 ER included input from the Parents reflecting some of Student's strengths and needs, with the latter relating to reading, writing, and organizational skills, as well as assistance with organization, chunking of assignments, reminders, and repetition of directions. Anxiety and ADHD were also noted. Results of the various previous evaluations were also incorporated. (S-34 at 1-8, 16-21.)
50. The 2021 ER summarized input from Student's District school counselor in middle school and Private School teachers. The teachers reported needs with respect to reading, writing, attention, distractibility, task initiation and completion, organizational skills, social skills in the new environment, and need for repeated directions. They recommended assignment accommodations, graphic organizers, support with note-taking, multi-sensory instruction and directions, and check-ins. One-on-one support was also suggested. (S-34 at 10-16.)
51. Cognitive assessment for the 2021 ER (Woodcock-Johnson Tests of Cognitive Abilities – Fourth Edition) yielded some variability, with a low average range General Intellectual Ability score and an average range score on a different Composite. The latter was determined to be a more accurate representation of Student's cognitive abilities. Separate assessment of memory and learning revealed average performance or better. (S-34 at 27, 29, 33-35, 38.)
52. Assessment of Student's academic achievement (WJ-IV-ACH and portions of the WIAT-4) for the 2021 ER yielded somewhat variable

scores but generally average performance. Relative weaknesses were indicated on some subtests, with low average or low range scores on measures of fluency and listening comprehension of longer passages. (S-34 at 28, 35-37.)

53. Student's phonological processing skills were also assessed for the 2021 ER. Student's performance reflected poor phonological memory skills and below average rapid naming ability. (S-34 at 28-29, 37-38.)
54. Social/emotional/behavioral functioning was assessed for the 2021 ER through a variety of rating scales. The Parents reported significant concerns with attention, hyperactivity, learning problems, and peer relations; one or both teachers noted concerns with attention, learning problems, and peer relations. On the BASC-3, the Parents indicated at-risk concerns in the additional areas of adaptability, leadership, and activities of daily living; and one teacher endorsed clinically significant concerns in the additional areas of learning problems, atypicality, social skills, and functional communication along with at-risk concerns for withdrawal, adaptability, leadership, and study skills. Student reported only a few minor concerns. (S-34 at 29-32, 46-51.)
55. Executive functioning assessed for the 2021 ER reflected clinically elevated concerns overall by the Parents and one of the teachers. Specific concerns at the clinically elevated level included working memory and organization of materials (Parents and both teachers), self-monitoring, shifting, initiation, planning/organizing, and task monitoring (one or both teachers), with potentially clinically elevated scores by other raters in the same areas. (S-34 at 31-32, 49-50.)

56. Assessment of speech/language skills for the 2021 ER was conducted for receptive and expressive language, including pragmatic language, as well as articulation and fluency. This portion of the evaluation did not reveal any impairment. (S-34 at 39-42.)
57. Occupational therapy skills were also assessed for the 2021 ER. With the exception of executive functioning weaknesses, no need for intervention in that area were identified. (S-34 at 42-45.)
58. An FBA was also conducted for the 2021 ER. The behaviors identified by Private School teachers were talking to peers or otherwise disrupting the class and being off-task. Only off-task behavior at a mild level was observed when the FBA was conducted. (S-34 at 51-62.)
59. A psychiatric evaluation was obtained for the 2021 ER. Student's ADHD diagnosis was confirmed through that assessment. (S-34 at 62-69.)
60. The 2021 ER determined that Student had a disability but was not in need of specially designed instruction. Recommendations were for specific supports for attention and task initiation/completion; processing speed and academic fluency; organization and time management; social skills and self-advocacy; and understanding inferences and abstract language. (S-34.)

### **November 2021 Section 504 Plan**

61. Another meeting convened in the fall of 2021 to review the ER and develop a new Section 504 Plan. That plan incorporated all of the prior accommodations from September 2021, such that all of the following were specified: preferential seating and opportunities to stand and move; nonverbal prompting for attention; modeling and repetition of directions with checks for understanding; visual

resources; test and assignment accommodations; supports for executive functioning (including opportunities for reteaching and organizational assistance, management of tasks); use of speech-to-text for writing assignments; use of audio texts; movement breaks; direct instruction in reading (five days/week) by a reading specialist, and executive functioning (two days/week) skills, with the latter in a specific center; weekly counseling; teacher check-ins; permission to make audio recordings of lessons; repetition and rephrasing to support comprehension; wait time for processing; choices rather than difficult open-ended questions; and support for inferences and abstract language. (N.T. 154, 569-70; S-35.)

62. Class sizes for core subjects for Student at the District high school would range from fourteen to twenty two students to two adults, with the exception of the center period staffed by one teacher to fifteen students. In the center, which is a regular education course, the teacher works individually with students in addition to providing instruction in and support for executive functioning skills. (N.T. 607-08, 659-61.)
63. The District provided a NOREP providing for regular education with the revised Section 504 Plan. The Parents did not approve the NOREP. (S-33; S-35 at 5-6.)

### **Private School**

64. The Parents visited and made application for Student to Private School on or about July 1, 2021. (N.T. 133:2-11, 269-70.)
65. Private School serves children with learning differences in first through twelfth grade. There are three levels, the lower school, middle school, and upper school. Student is in the upper school with



approximately 130 students and class sizes ranging from 6 to 8 students. (N.T. 230-31, 242-43; P-36.)

66. The upper school is college-preparatory, with classes in English, Mathematics, Social Studies, Science, and a separate Language Arts course. Students have block schedules with three classes each day on a seven-day rotation. All students have several advisory periods during which they meet with the advisor for any necessary support including planning and organization. (N.T. 232-33, 236-38, 284.)
67. Student is provided with modified and significantly modified instruction in most classes at Private School, including Algebra, Physics, English, Language Arts, and History. Modification means that the expectations are reduced to some degree. Student is also provided substantial support from teachers throughout the school day, including individualized monitoring of understanding and assignment completion. (N.T. 243-48; P-37; S-36.)
68. Student experienced difficulty transitioning to Private School and was not comfortable there until approximately January 2022. (N.T. 147-49, 152, 165-66.)
69. Student does not have an individualized learning profile at Private School. (N.T. 278-79.)
70. Private School requires that Student have outside counseling services because of Student's difficulty transitioning to that setting and the Parents' reported concerns with Student's anxiety and being withdrawn. (N.T. 201-04, 213, 290.)
71. Student is provided an Orton-Gillingham-based reading program at Private School. (N.T. 294-95, 298-99.)

72. Teachers at Private School reported that Student exhibits difficulty with focus and attention, often needing one-on-one support, ongoing monitoring, and prompts; and requiring modified instruction. (S-36.)

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed for 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.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible as to the facts. In the relatively few instances that there were contradictions, those are attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead; and in any event, credibility was not determinative on any issue.

The weight accorded the evidence, however, was not equally placed. The District’s school psychologist provided persuasive and compelling

testimony about its evaluation of Student for the 2021 ER, as well as flaws in the 2021 private evaluation. By contrast, the testimony of the Parents' expert, despite her obvious qualifications, was of limited probative value because it was based in part on a number of outdated assessment instruments (N.T. 533-36, 552-53, 619-20) and otherwise consisted of merely a record review including the 2021 private evaluation that she later agreed contained errors. This hearing officer has made her own independent review of the evidence as a whole, and reaches different conclusions as discussed herein. The documentary evidence was particularly persuasive, particularly where memories were not definitive, except as otherwise noted.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

### **General IDEA Principles: Substantive FAPE**

The IDEA requires states to provide a "free appropriate public education" (FAPE) to children who are eligible 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. Some time ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with procedural obligations in the Act.

## **Substantive FAPE: Child Find and Evaluation**

The IDEA and state and federal regulations further obligate local education 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. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability 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). More specifically, LEAs are required to consider evaluation 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” or to evaluate “every struggling student.” *Id.*

The IDEA further 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). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an eligible child [], the content, methodology or delivery of instruction.” 34 C.F.R. § 300.39(b)(3). The process of identifying children with disabilities is through evaluation.

## Evaluation Requirements

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child's individual needs are examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

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

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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

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

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance,

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

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

### **General IDEA Principles: Parental Placements**

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 2235, 242 (3d Cir. 2009). 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); *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.*<sup>7</sup>

### **General IDEA Principles: Compensatory Education**

It is well settled that compensatory education may be an appropriate remedy 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 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); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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<sup>7</sup> However, "it is unclear whether parents must additionally prove intentional discrimination to receive tuition reimbursement under Section 504 and the ADA. *Compare Lauren G. [v. West Chester Area School District]*, 906 F. Supp. 2d [375,] 390-91 *with Sch. Dist. of Phila. v. Kirsch*, 722 F. App'x 215, 228 (3d Cir. 2018)(not precedential)(holding parents must prove "deliberate indifference" to obtain tuition reimbursement under Section 504 and the ADA)." *Stephen O. v. School District of Philadelphia*, 2021 U.S. Dist. LEXIS 247164 at \*10, 2021 WL 6136217 (E.D. Pa. 2021).

## **General IDEA Principles: Procedural FAPE**

From a procedural standpoint, the family plays a meaningful role in special education. *Schaffer, supra*, 546 U.S. 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). Procedural deficiencies may warrant a remedy if they resulted in “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

## **General Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Significantly, however, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

## **Evaluations Under Section 504**

Section 104.35 of the applicable regulations implementing Section 504 requires that an evaluation “shall” be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of



educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.*

LEAs are also required to establish procedures for periodic reevaluation of students who qualify for services under Section 504. 34 C.F.R. § 104.35(d). One means of complying with this directive is to adhere to the IDEA requirements for reevaluations. *Id.*

### **The Parents' Claims**

The first issue is whether the District failed to comply with its child find obligation in declining to identify Student as eligible under the IDEA. The Parents have not met their burden of establishing this claim.

This issue requires a consideration of the District's most recent evaluation. The District's 2021 ER was remarkably thorough, utilizing a variety of assessment tools, strategies, and instruments to gather relevant academic, functional, and developmental information about Student, all relating to areas of suspected disability. Specifically, the District summarized available data; incorporated results of previous evaluations; included parental input; obtained and reported information from teachers; and involved a number of assessments. The District school psychologist also observed Student at Private School, where an FBA was also conducted.

Administrations of cognitive and achievement testing were part of the 2021 ER as well as psychiatric and phonological processing assessment. In addition to reporting those results, this ER summarized evaluation by related service providers (occupational and speech/language therapists) and utilized several rating scales to evaluate Student's social/emotional functioning and ADHD presentation. The District's 2021 ER thoroughly synthesized all of the data and available information gathered, and provided a solid foundation for determining Student's eligibility for special education and related needs.

The District had previously identified Student as having a disability and in need of a Section 504 Plan following a special education evaluation in 2016. Most recently, the District identified Student as having a specific learning disability in reading fluency in addition to ADHD. It did not, however, conclude that, by reason thereof, Student was in need of specially designed instruction. The ER nonetheless made a number of programming recommendations to address Student's identified needs through a Section 504 Plan. All of this evidence overwhelmingly supports the conclusion that the District's ER was sufficiently comprehensive to identify Student's educational needs in all areas related to suspected disability, and therefore met IDEA criteria and served the purpose of such an evaluation.

With further respect to eligibility, the testimony of the District school psychologist that specially designed instruction was not necessary due to Student's disabilities (N.T. 599-600) was cogent, logical, and quite persuasive. The contrary testimony of the Parents' expert that Student "could benefit" (N.T. 483:12-13) from specially designed instruction (N.T. 483-85), ignores the requisite "need" standard. Furthermore, that opinion was undermined by her concession that Student's processing speed deficits could not be addressed by specially designed instruction (N.T. 538), but rather needed development through more practice (P-40 at 13).<sup>8</sup> Moreover, the private evaluation obtained by the Parents in July 2021 (and on which they rely) cannot be considered reliable due to the glaring errors and omissions described by the District's school psychologist, some of which were acknowledged by the Parents' expert (N.T. 529-30, 585, 598-99, 615-18). These flaws as a whole can only be interpreted as rendering that report

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<sup>8</sup> It is also noteworthy that the Parents' expert would not recommend the Orton-Gillingham-based reading program that Private School implements given Student's specific reading skill deficits. (N.T. 548-49.)

lacking in validity,<sup>9</sup> particularly in light of its diagnoses that are not based on IDEA eligibility criteria. In sum, the Parents have failed to establish by a preponderance of the evidence that Student should have been identified as eligible under the IDEA.

The next issue is whether the District denied Student FAPE over the 2019-20 and 2020-21 school years. Based on the above conclusions, these issues shall be addressed under Section 504.

The Parents correctly observe that the District did not undertake a reevaluation of Student following the 2016 ER until 2021. Although the District could have followed the IDEA provisions for the timing of reevaluations, it was not required to do so. The District did convene a meeting with the Parents each school year to review Student's Section 504 Plans and revise them as needed. It could certainly be argued that, by the spring of 2020, it was time for Student to undergo a reevaluation. However, in light of the pandemic, it is unclear what purpose, if any, an evaluation during remote instruction would have served. It is also speculative at best to assume that Student, who was only attending school remotely through March 2021, would have been available for an evaluation during that time period. Even had an evaluation been initiated upon Student's return to school in person, the timing provisions in the regulations would not have required its completion until the 2020-21 school year was nearly ended.

Substantively, the Parents have failed to establish that the District's implementation of Student's Section 504 Plans over the 2019-20 and 2020-21 school years was inappropriate. The Section 504 Plans in question targeted Student's specific educational needs at the time each was

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<sup>9</sup> The parties also made arguments in support of and against an adverse inference due to that 2021 private evaluator's refusal to testify (HO-2). Because that evaluation is accorded no evidentiary value for purposes of deciding the issues, those arguments are moot and need not be further addressed.

developed, and the evidence is more than preponderant that the Plans were implemented to address all areas of weakness, including the provision of extra time for assignment completion. Student attained grades that reflected average or better performance both school years with the disability-related accommodations Student needed. This hearing officer also cannot accept the contention that the District's own policy to allow re-testing or alternative assessments of understanding is evidence of a denial of FAPE.

The Parents point to some instances where they communicated with teachers about Student's homework and assignments. These routine and far from significant occurrences do not, however, rise to the level of a denial of FAPE on a substantive basis. The Parents' related contention that Student turning in assignments late is somehow troubling despite the extra time accommodation is puzzling as well as meritless. As noted, there is no bright line rule on when FAPE has been provided under Section 504, but the evidence is overall preponderant that Student's programming over the 2019-20 and 2020-21 school years was substantively appropriate for Student.

Procedurally, the Parents aptly refer to the District's issuance of a revised Section 504 Plan in the spring of 2020 without their participation. While the District, like all other LEAs and, indeed, the general public, faced unprecedented challenges with the pandemic, including transitioning to remote learning under orders for closures and other restrictions, input from the Parents in this case on how Student's Section 504 Plan could be implemented remotely at home would clearly have been valuable. This is particularly so in this case when the Parents even suggested and asked about additional accommodations. This hearing officer concludes that the failure to include the Parents regarding revision of Student's Section 504 Plan when schools closed in this case amounted to a procedural violation that significantly impeded their right to participate meaningfully in that educational decision, and to contribute to a discussion on accommodations

based on their experience supporting Student at home. That procedural denial continued through the meeting that did convene in the fall of 2020, and shall be remedied through compensatory education.

With respect to the 2021-22 school year, however, the Parents have not met their burden either procedurally or substantively. The Section 504 Plan developed in September 2021 was based on Student's then-current presentation, and clearly and appropriately addressed Student's disability-related educational needs. Additionally, the Parents' concerns with the size of classes at the high school are belied by the actual student to teacher ratio. Following a District-initiated evaluation in the fall of 2021, by which time Student was already attending Private School, some additional accommodations were proposed, but those new supports did not materially alter the program or otherwise render the September 2021 Plan inadequate. Accordingly, there was no denial of FAPE for the 2021-22 school year, and the remaining prongs of the tuition reimbursement analysis need not be reached.<sup>10</sup>

## **Remedies**

As a result of the procedural violation over a portion of 2020 described above, Student is entitled to compensatory education. The record suggests that, had the Parents been given the opportunity to provide input into Student's accommodations during remote learning, approximately one hour per week of additional support is estimated to have been appropriate to enable Student to better access the curriculum. The District shall be provided a rectification period of thirty days following the school closures (April 13, 2020) such that compensatory education of one hour per week will

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<sup>10</sup> Regarding the equities prong, however, if it were reached, the best evidence of the Parents' cooperation and collaboration with the District in the fall of 2021 is Student's attendance at the District's high school and continued enrollment for the first week of the 2021-22 school year.

be awarded beginning on that date and continuing through the date of the November 2020 Section 504 Plan meeting.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs as determined by a qualified professional. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. 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 if Student re-enrolls. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

The Parents also seek reimbursement for expenditures that cannot be granted. The tutoring provided was for a limited time period and the evidence is not preponderant that it was necessary for Student's right to FAPE. The reasons for the costs associated with medical and therapeutic services have not been established as having a nexus to the District's programming. The Parents also cannot obtain reimbursement for the 2021 private evaluation that has been disregarded. Even if it were reliable, which it is not, providing a report long after it was available to parents does not

support a claim for reimbursement. See *L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 \*75, 2015 WL 1725091 (E.D. Pa. 2015)(citing *M.S. v. Mullica Township Board of Education*, 485 F. Supp. 2d 555, 575 (D.N.J. 2015), *affirmed*, 263 F. App'x 264 (3d Cir. 2008), and denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). For these reasons, while the Parents were free to and did obtain an IEE at their own expense, on this record they are not entitled to its funding by the District.

The final issue raised by the Parents regarding remedy is a request for reimbursement for the fees incurred by them for their expert witness to testify at the hearing. However, the basis for this requested remedy is Section 504, which provides in relevant part that, “*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs.” 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, \*6 (2d Cir. 2006)(concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). Moreover, this witness’ testimony as discussed *supra* was accorded only very limited evidentiary value. For these reasons, this hearing officer declines to order that remedy.

## **CONCLUSIONS OF LAW**

1. The District did not violate its Child Find obligation to Student.

2. The District did not deny Student FAPE on substantive grounds during the 2019-20 and 2020-21 school years.
3. The District did engage in a procedural violation for a portion of 2020 when it revised Student's Section 504 Plan without the Parents' input.
4. The District's proposed program for the 2021-22 school year was appropriate and the Parents are not entitled to reimbursement for tuition to Private School and related expenses.
5. Student is entitled to compensatory education.

## **ORDER**

AND NOW, this 4<sup>th</sup> day of April, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate its Child Find obligation to Student or deny Student FAPE on substantive grounds.
2. The District did deny Student FAPE on procedural grounds for a portion of 2020, and Student is entitled to compensatory education in the amount of one hour for each week that school was in session from April 13, 2020 through the end of the 2019-20 school year, and from the start of the 2020-21 school year through November 24, 2020.



The award is subject to the above conditions as though fully set forth herein at length.

3. The District's proposed program for the 2021-22 school year was appropriate for Student's needs.
4. The District is not ordered to provide any further relief.
5. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 25401-21-22