

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:

22225-18-19

Child's Name:

D. S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

11/27/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early teenaged student residing in the Downingtown Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Following Student's enrollment in a private school, Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes. The District denied all of the Parents' assertions.

The Parents sought to establish that the District failed to provide Student with FAPE between the 2016-17 school year and the program offered for the 2019-20 school year, and sought both compensatory education and tuition reimbursement. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no remedy was due. After an evidentiary hearing, the scope of the claims was limited to the two year period immediately preceding the date of filing of the Complaint (May 2017 through the start of the 2019-20 school year).⁵

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifying information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

⁵ Hearing Officer Exhibit (HO-) 3. On November 23, 2019, four days before this decision was due, the Parents sought reconsideration of the ruling on the scope of the claims, citing to the recent opinion in *Adams v. Zimmer US, Inc.*, ___ F.3d ___, 2019 U.S. App. LEXIS 34513, 2019 WL 6139673 (3d Cir. 2019). The District objected, and neither party sought to file a brief. This hearing officer finds nothing in the clearly distinguishable *Adams* decision (remanding an issue of the application of the discovery rule in a personal injury case to a

Following completion and review of the entire record,⁶ the claims of the Parents must be granted in part and denied in part.

ISSUES

1. Whether the District provided Student with appropriate educational programming at the end of the 2016-17 school year and over the 2017-18 school year;
2. Whether the District provided Student with appropriate educational programming during the 2018-19 school year through Student's enrollment at a private school;
3. Whether the educational programming proposed in the fall of 2018 was appropriate;
4. Whether the educational programming proposed for the 2019-20 school year was appropriate;
5. If the District's educational program was not appropriate as provided during the 2016-17, 2017-18, and/or 2018-19 school years, whether

jury) that suggests that HO-3 should be reconsidered. The Parents' Motion is hereby denied.

⁶ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. It should be noted that, after the final hearing session, the Parents sought to admit certain recent email communications that were newly discovered. The parties were provided directives for addressing that additional evidence proffered as P-32. P-32 and HO-4 related to that request are hereby admitted. Citations to duplicative evidence in the record will not necessarily be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

Student is entitled to compensatory education;
and

6. If the District's educational program was not appropriate as offered in the fall of 2018 and/or for the 2019-20 school year, whether the Parents are entitled to reimbursement for tuition and related expenses for the private school.

FINDINGS OF FACT

1. Student is an early teenaged resident of the District and is eligible for special education on the basis of a Specific Learning Disability in basic reading skills and reading fluency. There is no dispute that Student has dyslexia. (N.T. 18, 411-12; S-13.)
2. Student exhibits difficulty with reading, writing, and spelling skills. Student's working memory is impaired in certain ways but not in others; visual-spatial working memory is a strength. (N.T. 392, 445, 551-53.)
3. While in the District during the relevant time period, Student required additional time for assignments and assessments so that Student had sufficient processing time. (N.T. 265.)
4. The District provides a Multi-Tiered System of Support (MTSS) to all students in reading fluency and comprehension as its Response to Intervention process. MTSS is a regular education approach of providing targeted intervention based on need as reflected in grade-level benchmarks. (N.T. 188, 190, 192-94.)

5. The District further assesses reading comprehension of all students reflected in another set of benchmark scores. That instrument can also be used to assess reading accuracy. Intervention may be indicated by those scores if grade level expectations are not met. (N.T. 197, 204; S-25.)
6. Students who are struggling with reading benefit more from remediation and intervention in the early elementary grades (when they are still learning to read) than in later grades, but interventions can be effective beyond the early grades. (N.T. 288, 328-29, 433-34, 436-37.)

Early Educational History

7. Student attended a private parochial school through the end of the 2014-15 school year (second grade). In the summer of 2015, Student moved into the District and enrolled there, in part because Student had been exhibiting difficulty with reading and related skills at the private school. (N.T. 22, 26, 80; S-3.)
8. In the spring of 2015, Student was evaluated by the then-residential school district due to concerns with language arts (reading and writing) skills. At the time, Student was provided speech/language services to address articulation needs. An Evaluation Report (ER) was issued by that district in May 2015. (S-1.)
9. The 2015 ER concluded that Student was eligible for special education on the bases of Specific Learning Disability (basic reading, reading comprehension, reading fluency, and written expression) and a Speech/Language Impairment. (S-1 at 14-15, 17-19.)

10. The other school district developed an Individualized Education Program (IEP) for the start of the 2015-16 school year. (S-2.)

Early History in the District

11. The District developed a new IEP in October 2015 after Student enrolled. (S-4.)
12. The October 2015 IEP contained annual goals addressing articulation, reading comprehension, and written expression. Program modifications and items of specially designed instruction addressed deficits in reading fluency and comprehension, written expression, spelling, and articulation, as well as test and assignment accommodations. The IEP provided for learning support at a supplemental level, with Student outside of the regular education environment for language arts instruction and speech/language therapy. The Parents approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-4 at 13-20.)
13. Student's IEP was revised in May 2016. Annual goals targeted articulation, reading comprehension of grade level passages, reading fluency of grade level passages, and written expression (conventions) on grade level assignments. Program modifications and items of specially designed instruction were small group reading instruction as well as practice and modeling; prewriting activities and discussion with teacher monitoring; and test and assignment accommodations (assessments read aloud if not for reading ability, extended time). (S-9 at 12-15, 21-23, 25.)
14. The May 2016 IEP again proposed learning support at a supplemental level, with Student continuing to receive special education instruction outside of the regular classroom for language arts and

speech/language therapy. The Parents approved the accompanying NOREP. (S-9 at 27-29, 34-37.)

2016-17 School Year (Fourth Grade)

15. Student was in a ninety minute block class of small group language arts instruction outside of the regular classroom and a forty-five minute small group writing class in fourth grade. (N.T. 183-84.)
16. Student's learning support reading instruction during fourth grade was provided through a multisensory program targeting basic reading skills including decoding skills and reading comprehension. The programs for both reading and writing instruction were direct, systematic, and evidence-based. (N.T. 225-27, 253-55; S-11 at 11.)
17. Student was in Tier 3 MTSS during the 2016-17 school year. (N.T. 190, 192.)
18. A new IEP was developed in May 2017. At that time, Student reportedly continued to perform below grade-level benchmarks in reading fluency and overall was below the specified grade level in reading skills throughout the 2016-17 school year. Word identification/spelling skills were similarly well below expectations (between the 3rd and 8th percentile). Student's continued difficulty with written expression skills was also noted, as well as articulation. (S-11 at 11-12.)
19. Needs in the May 2017 IEP remained as reading fluency and comprehension, written expression, and articulation. Annual goals targeted each of these: articulation (producing age-appropriate sounds with quantified accuracy); reading comprehension (from a below benchmark level to a higher but still below benchmark level with

quantified accuracy); reading fluency (from a below benchmark level to a grade level benchmark level); and written expression (based on rubric scores for paragraph writing). Program modifications and SDI remained as in the prior IEP: small group reading instruction as well as practice and modeling; prewriting activities and discussion with teacher monitoring; and test and assignment accommodations (assessments read aloud if not measuring reading ability, extended time). (S-11 at 12-13, 19-21, 23.)

20. The May 2017 IEP continued to propose learning support at a supplemental level, with Student still receiving special education instruction outside of the regular classroom for language arts and speech/language therapy. (S-11 at 25-27.⁷)
21. Student's final report card for the 2016-17 school year included progress monitoring indicating significant progress toward the articulation goal; progress toward but not mastery of the reading fluency and comprehension goals; and progress toward but not mastery of the written expression goal. Student reportedly demonstrated better reading decoding, fluency, and comprehension skills by the end of the school year but continued to need small group special education reading and writing instruction. (P-4 at 7-12; S-12 at 1-11.)
22. Student did not manifest difficulties in regular education content-area classes during fourth grade. All classes included multisensory instruction. (N.T. 221-22, 262-63.)

⁷ There is not a signed NOREP in the record.

23. Student was not eligible for ESY services after fourth grade. (N.T. 260.)

2017-18 School Year (Fifth Grade)

24. At the start of the 2017-18 school year, the Parents were given notice that Student would be provided Tier 3 (intensive support) through MTSS in reading based on assessments of oral reading fluency, reading comprehension, and overall instructional reading level. Student was below benchmark expectations in all areas. (P-8 at 1-3.)
25. Student continued with a ninety minute block class of small group learning support language arts instruction outside of the regular classroom and a forty-five minute small group writing class in fifth grade. The language arts instruction addressed reading decoding, encoding, and reading comprehension. (N.T. 183-84; S-14 at 13-14.)
26. Student's reading and writing instruction during fifth grade was provided through evidence-based programs. (N.T. 254-55.)
27. During the 2017-18 school year, Student's scores on two administrations of the Word Identification and Spelling Test (WIST) in the fall of 2017 and the winter of 2018 reflected weaknesses in decoding and encoding but an increase in standard scores in the latter over the former. (N.T. 231; S-13 at 17.)
28. Student did not manifest difficulties in regular education content-area classes during Fifth Grade. (NT. 268-69.)
29. In February 2018, the Parents were given notice that Student would continue in Tier 3 MTSS support due to improved but not on benchmark scores on assessment of reading fluency, reading comprehension, and overall instructional reading level. (P-8 at 5-8.)

30. Progress on IEP goals during the 2017-18 school year through March 2018 revealed improved reading comprehension from the baseline benchmark (55% on beginning fourth grade level passages) to approaching mastery for end of fourth grade level passages; improvement in reading fluency (from a baseline of 94 words correct per minute at a fourth grade level) to an average of 92 words correct per minute on grade level passages; and improved scores in written expression (from a baseline of 70% in all areas) to 83% with some support). S-14 at 15; see S-25.)
31. Student was reevaluated in the spring of 2018 with a Reevaluation Report (RR) issued in May 2018. (S-13.)
32. Parent input into the May 2018 RR reflected strengths in mathematics and science, and concerns with completing written assignments but not with organizational skills, study skills, or homework. They also indicated a preference for regular education classes to the extent possible. (S-13 at 14-15.)
33. The May 2018 RR summarized results of the 2015 ER in addition to the most recent classroom-based and state assessments, current grades, and progress toward IEP goals. The speech/language goal had been mastered. Results of administrations of the WIST from the fall of 2017 and winter of 2018 were also included. However, Student was reportedly proficient at the fifth grade level on one measure of reading comprehension, a single reading inventory in April 2018 that was discrepant from prior administrations. (S-13 at 15-18.)
34. Input from teachers in the May 2018 RR revealed that extra time to complete assignments and assessments, redirection as needed, graphic organizers/outlines and prompts for writing assignments, and

small group reading instruction had been beneficial for Student. A summary of observations of Student by the special education teacher documented time on task and off task, with on task behavior somewhat less than a peer in a large group environment. Teacher recommendations were for repetition and practice in reading; prewriting and discussion for writing assignments with teacher monitoring; direct, explicit reading instruction (decoding and encoding); and test and assignment accommodations (extra time, tests read aloud unless measuring reading skills). (S-13 at 19-20.)

35. In an interview for the May 2018 RR, Student indicated that Student was not ready for sixth grade in the fall. Observations of Student during testing by the school psychologist suggested that its results were valid. (S-13 at 21-22.)
36. Cognitive assessment for the May 2018 (Wechsler Intelligence Scale for Children – Fifth Edition) yielded average range scores across composites with the exception of the Working Memory Index (low average range with wide discrepancy between the Digit Span and Picture Span subtests, reflecting that performance on visual tasks was a strength compared to that on language-based tasks). The Full Scale IQ, General Ability Index, and Cognitive Proficiency Index scores were all in the average range but indicated that working memory was a relative weakness. (S-13 at 22-24.)
37. On the Wechsler Individual Achievement Test – Third Edition (WIAT III) administered for the May 2018 RR, Student obtained scores in the below average range on the Reading Composite and all of its subtests except Reading Comprehension (low end of the average range). Scores on the Writing and Math Composites were in the average range. (S-13 at 24-25.)

38. A speech/language evaluation for the May 2018 RR identified a weakness only with respect to one subtest on sentence combining. There were no articulation needs noted and speech/language services were no longer recommended. (S-13 at 29.)
39. Social-emotional functioning for the May 2018 RR (Behavior Assessment System for Children – Third Edition) yielded clinically significant concern by the special education teacher for learning problems, and an at-risk concern for leadership skills. The Parents and regular education teacher did not indicate any concerns on any of those scales. (S-13 at 25-26.)
40. The May 2018 RR identified Student as eligible for special education on the basis of a Specific Learning Disability (basic reading skills and reading fluency). Recommendations included direct, explicit instruction in reading as well as monitoring of reading comprehension. (S-13.)
41. A new IEP was also developed in May 2018. This IEP incorporated assessment information from the May 2018 RR as well as progress on IEP goals. At that time, Student reportedly was performing below grade-level benchmarks in reading fluency, reading comprehension, and mathematics computation. Word identification/spelling skills similarly remained well below expectations (between the 7th and 19th percentile). Overall, Student was still attaining below grade level benchmarks in reading skills throughout the school year (S-14 at 12-16.)
42. There was a significant amount of input from the Parents into the May 2018 IEP. Their concerns focused on weak reading skills (particularly fluency and comprehension) and sought a Wilson Reading Program for

Student; more information about the reading programs provided; and additional IEP goals and items of specially designed instruction. (S-14 at 17-18.)

43. Needs in the May 2018 IEP were identified in basic reading skills and reading fluency. Annual goals targeted reading decoding (real and nonsense words from noted baselines) and reading fluency (increasing words read correct per minute from a noted baseline). (S-14 at 18, 24-25.)
44. Program modifications and items of specially designed instruction were: direct multisensory reading instruction for decoding and encoding; prewriting activities and discussion with teacher monitoring and graphic organizers; monitoring of reading comprehension and written expression; visual aids; ensuring Student's attention; clearly stated directions; study guides and outlines; check-ins for assignments; and test and assignment accommodations (assessments read aloud if not measuring reading ability, extended time, separate location). This IEP also specified that the SETT process was to begin at the start of the 2018-19 school year. (S-14 at 26-27.)
45. The May 2018 IEP proposed learning support at an itinerant level, with Student still receiving special education instruction outside of the regular classroom for basic reading skills and reading fluency. Student was eligible for ESY services in 2018, and the IEP for the school year would otherwise effectively be implemented in the fall. The Parents approved the accompanying NOREP. (S-14 at 29-32, 38-41.)
46. A transition meeting was held to prepare Student for entry into sixth grade. (N.T. 271, 273, 478. 561, 575-78; P-3 at 29.)

47. Student's ESY program in 2018 provided individual Wilson Reading instruction two days each week for one hour each day to address decoding and encoding needs; reading comprehension was also addressed. Student began at a level beyond the first sub-step (1.3) and progressed to sub-step 1.6 by the end of the program. (N.T. 350-56; S-16 at 9.)

August 2018 Independent Neuropsychological Evaluation

48. The Parents obtained an independent neuropsychological evaluation (INE) of Student in the summer of 2018, with a report issued in August 2018. The Parents shared that report with the District when they received it. (N.T. 523; P-1.)
49. Cognitive assessment for the August 2018 INE (Leiter International Performance Scale, Third Edition) yielded a Nonverbal IQ score in the high average range (87th percentile) with some relative strengths and weaknesses. (P-1 at 3-4.)
50. Academic achievement was also assessed for the August 2018 INE (Woodcock-Johnson Tests of Achievement, Fourth Edition and the Gray Oral Reading Test, Fifth Edition). Student attained variable standard scores reflecting weaknesses in many areas of reading as well as math facts; notably, Student earned a standard score below the average range in Passage Comprehension. (P-1 at 4.)
51. Student's attention, executive functioning skills, and social/emotional behavior were assessed for the August 2018 INE through various measures, with notable concerns related to working memory and inhibition. (P-1 at 4-5.)

52. The August 2018 INE concluded that Student presented with a Specific Learning Disability in Reading due to phonological dyslexia. Recommendations included direct multisensory literacy intervention, executive functioning coaching, individualized and small group instruction, small class sizes, project-based assignments, with various accommodations in the educational environment including assistive technology. (P-1.)

2018-19 School Year (Sixth Grade)

53. Student entered the sixth grade at the start of the 2018-19 school year at a different District building. (N.T. 461-62.)
54. Student was in a co-taught language arts class in sixth grade for literature and writing. That class had a regular education and special education teacher, with the latter providing support as needed for Student such as with note-taking. (N.T. 462-63, 515-17.)
55. Student was provided Wilson Reading instruction in sixth grade by a reading specialist, in a small group with one other student, as the IEP team had agreed. The reading specialist determined where Student needed to begin at the start of that school year based on an administration of the Wilson Assessment of Decoding and Encoding (WADE) and other assessments. She was able to effectively work with both students in the group despite their unequal levels in the program, allowing both to participate in instruction and practice. (N.T. 283-84, 296, 310, 320, 338-39, 570; S-26.)
56. The Wilson Reading Program provides direct, explicit, sequential, multisensory instruction in decoding and encoding daily. Students are expected to master the skills before moving on to the next step. The

Wilson Program does not directly address comprehension or fluency. (N.T. 296, 307-08, 327, 331-32.)

57. The Wilson Reading instruction was provided to Student during one of two encore or optional classes. Students had choices of encore classes that could include an intervention class for that period. (N.T. 464-65.)
58. Student's reading comprehension was monitored in the fall of 2018 only through the benchmark assessments provided to all students. (N.T. 529.)
59. The District initiated the SETT process for Student in September 2018. Identified barriers were basic reading and reading fluency skills. Suggested tools were an iPad with a text-to-speech application; access to audio books; and digital versions of textbooks when available. Not all materials were available in audio format, however. Student would also trial keyboards. (N.T. 519-20, 537-38, 595-96, 610; S-17.)
60. Student's IEP was revised in September 2018 following completion of the August 2018 private INE report that included a diagnosis of dyslexia. Information on the SETT process was added, and the present levels were updated to reflect benchmarks on the new goals for the start of that school year.⁸ Results of the administration of the WADE were also incorporated. New items of specially designed instruction incorporated recommendations from the SETT process, including speech-to-text and text-to-speech technology. The Parents did not return the NOREP. (S-18.)
61. Student checked in with the special education case manager during an end of day advisory period most days of the week in sixth grade.

⁸ Progress data that post-dated the September 2018 IEP meeting could not have been part of the document at the time of that meeting.

Student had the opportunity to review assignments and ask for clarification of expectations. On rare occasions, Student may have needed to also check with specific teachers about specific homework and assignments. The check-ins were effective for Student. (N.T. 462, 467-72, 515-16.)

62. In early November 2018, the reading specialist administered the Phonological Awareness Screening Test (PAST) to Student to gauge automaticity and guide instruction. Student was at the basic phoneme level without automaticity in recognizing syllables. (N.T. 321-24; S-19 at 11-13.)
63. In November 2018, the reading specialist administered the Test of Silent Word Reading Fluency (TOSWRF) to assess word recognition skills. Student scored at the sixth percentile (poor range). (N.T. 324; S-19 at 13.)
64. In late October, the Parents provided a ten day notice of their intention to enroll Student in the Private School and seek tuition and related expenses. (N.T. 595; P-21 at 44; S-19 at 5.)
65. The IEP team met again following the ten day notice and provision of the August 2018 private INE report. Student was reportedly making progress toward the reading goals in the Wilson Reading Program (from level 2.1 to level 3.1 in decoding and encoding) and improvement on reading fluency probes (approaching mastery). Results of the PAST and the TOSWRF were also added. The District proposed two additional goals, one in encoding skills (from a baseline of 50% to 80% accuracy) and one in reading comprehension (increasing correct responses on grade level cloze passages). However, the reading comprehension would be addressed through a

regular education class focused on higher-level reading skills. (N.T. 335-36; S-19.)

66. New items of specially designed instruction in the November 2018 IEP were for direct instruction in vocabulary and reading comprehension; a keyboard for assistive technology; and Student not being required to read aloud in front of peers. (S-19 at 35-38.)
67. Student was formally withdrawn from the District on November 19, 2018⁹ to attend the Private School. (P-21 at 49; S-20.)
68. The District offered to provide a reading comprehension class to Student in sixth grade. That class is a regular education remediation class. (N.T. 335-36.)

May 2019 Independent Neuropsychological Evaluation

69. Student was privately evaluated by a different neuropsychologist from the same practice where the summer 2018 INE was conducted for an update in the spring of 2019. (N.T. 375-76; P-2.)
70. The update resulted in an Addendum (AINE) report issued in May 2019. That document included an observation of Student at the Private School and results of a few assessments. (P-2)
71. The new assessments were of executive functioning and the Wide Range Assessment of Memory and Learning, Second Edition). Those instruments revealed deficits in attention/concentration and verbal memory as well as verbal inhibition, reflecting weaknesses with tasks involving words, numbers, and letters. (P-2.)

⁹ The record does not contain a signed NOREP for the November 2018 IEP.

72. The AINE maintained the diagnosis of the prior IEP and its recommendations, and made further suggestions including a structured educational setting with significant support. (P-2.)

2019-20 Proposed IEP

73. The IEP team met in June and July 2019 with a final IEP dated July 10, 2019. Little information had been provided by the Private School for that meeting, but the District did not seek to obtain more. The team considered the AINE at that time. (N.T. 501-02, 541-42; P-32 at 50; S-27.)
74. The July 2019 IEP included the limited information provided by the Private School: results of a Diagnostic Reading Assessment (reflecting scores that appear to be grade equivalencies), a student profile, and final grades. (S-27 at 6-7.)
75. The July 2019 IEP included present level information from the fall of 2018 in the District (first marking period grades, scores from a rubric for writing samples). The remainder of the present level information was from the previous IEP supplemented by progress monitoring data prior to Student's withdrawal. (S-27.)
76. Parent concerns at the time of the June and July 2019 IEP meetings were for intensive multisensory instruction throughout the school day and across environments, and uncertainty over how needs relating to working memory and dyslexia could be addressed in the District. (S-27 at 14-15.)
77. The goals and program modifications/items of specially designed instruction in the July 2019 IEP were virtually identical to those in the November 2018 IEP, except that two new items of specially designed

instruction addressed working memory support. The goals set forth the same baselines as in the previous fall. This IEP continued to propose the same level of itinerant learning support. (S-27.)

78. The Parents did not return the July 2019 NOREP accompanying the July IEP. (N.T. 531, 616; S-28.)

The Private School

79. The Parents began investigating private schools in the summer of 2018, and visited the Private School in the fall of 2018 before early October. Student visited in early October that year. (N.T. 592-93, 619-21.)
80. The Private School is a school for children with learning differences that provides multisensory instruction. It serves approximately 200 students in grades 3 through 12, with a lower school (grades 3-5), middle school (grades 6-8), and upper school (grades 9-12). (N.T. 117-18, 157, 176-77.)
81. Students must apply for enrollment the Private School and an admissions committee makes the determination of whether to accept a student. (N.T. 151.)
82. Student was accepted at the Private School in part because of the reading difficulties. (N.T. 156; P-11 at 1.)
83. Student demonstrates difficulty with reading at the Private School, including decoding and fluency. Student has made progress on reading skills while enrolled there. (N.T. 133-34, 146; P-12.)

84. Student participates and engages in classes at the Private School, completes assignments, and takes time for tasks that are more difficult. (N.T. 140-41.)
85. The class sizes at the Private School are small, with between three and twelve students in each class. (N.T. 117-18.)
86. The Private School provides an Orton-Gillingham-based language arts¹⁰ program and curriculum. That program is one of direct, structured, and sequential multisensory instruction that includes diagnostic and prescriptive assessments to inform teaching. A second structured writing program is also used. Students all have a general reading class for grade-level literature. (N.T. 128-30, 155, 157, 161, 166.)
87. The school day for students at the Private School at the middle school level is approximately six and one half hours consisting of seventy-five to eighty-five minute block classes, three advisory periods, a short meeting with announcements, a community session for participation in clubs, and a lunch period. Core classes include social studies, science, and mathematics, in addition to language arts classes. (N.T. 118-22; P-14.)
88. Teachers at the Private School at the middle school level communicate frequently about students including meetings held two days each week. (N.T. 125-26.)
89. Progress monitoring data is collected for students at the Private School in addition to curriculum based assessments. All of the data help

¹⁰ Language arts at the Private School is a combination of reading decoding, reading comprehension, reading fluency, and writing skills. (N.T. 135.)

guide instruction for the students. (N.T. 130-32, 135-38, 141-42, 172-73.)

90. A learning profile was developed for Student that identified strengths and needs, with the latter specifying executive functioning skills; memory; reading, writing, and expressive language skills; and mathematics fluency. Accommodations were also noted (extended time and dictation). (P-15.)
91. Student has benefitted from many aspects of the Private School, including small class sizes, the multisensory phonics-based instructional approach based on Orton-Gillingham principles, and individualized instruction, particularly with respect to reading and language skills. (N.T. 114-15; P-11)
92. Student attended the Private School summer program in 2019. That program was a combination of instruction and camp-type activities at an extra cost beyond the regular school year tuition. (N.T. 144, 601-02, 622-23.)
93. Student likes attending the Private School and demonstrates more independence with homework completion than when enrolled in the District, as well as more of an interest in reading. (N.T. 59-98, 600-02, 604.)
94. The Parents have made payments for tuition and related expenses at the Private School for the portion of the 2018-19 school year that Student attended there, and made a deposit for those expenses for the 2019-20 school year in February 2019. (P-20.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is commonly viewed as consisting of two elements: the burden of production, and the burden of persuasion.

Recognition must be given here that the burden of persuasion in this type of case 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 here must rest with the Parents who requested this administrative hearing. Nonetheless, application of this principle determines which party will prevail only in those rare cases where the evidence is evenly balanced, or is found to be 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 concludes that all of the witnesses testified in a credible manner without any intention to deceive, based on that individual’s recollection and particular perspective. The testimony of each witness was, however, not accorded equal weight. Some testimony was determined to be more relevant to the issues presented. More specifically, the testimony of the private neuropsychologist (who qualified as an expert in that field) was not wholly persuasive with respect to Student’s academic skill needs largely because it was focused on grade level equivalencies (*see, e.g.,*

N.T. 393-94) rather than on actual scores. Such figures are derived scores that, while useful, must be interpreted with caution; they do not mean that a student is performing at the grade level specified.¹¹ By contrast, however, his testimony regarding the neuropsychological implications of Student's disability and how it manifests itself was enlightening and was accorded significant weight to the extent it was probative on the issues. In addition, the testimony of the District professionals who worked with Student and had direct experience with what occurred in the school setting is credited over those who testified based on something other than first-hand knowledge; while all of those witnesses are deemed credible, the testimony of witnesses with first-hand knowledge had more persuasive value when compared to that of those who may have heard different accounts from others.

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

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

Local educational agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court considered again the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. * * *

A focus on the particular child is at the core of the IDEA. * *

* As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

As *Endrew*, *Rowley*, and the IDEA have consistently made clear, the IEP must be, first and foremost, responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Stated 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). Still, the IEP team is required to monitor the student’s response to the various programming 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, 324.

General IDEA Principles: Procedural FAPE

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

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

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

General Section 504 Principles

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley*

School District. v. M.R., 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. See, e.g., *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parents' Claims

The first primary issue is whether the District's program as provided at the very end of the 2016-17 school year, throughout the 2017-18 school year, and into the beginning of the 2018-19 school year was appropriate for Student under the above standards. The second primary issue is whether the programs proposed in November 2018 and July 2019 were reasonably calculated to provide FAPE. These two issues shall be addressed chronologically and in that order.

At the end of the 2016-17 school year into the start of the 2017-18 school year, Student's IEP addressed the identified needs in reading fluency and comprehension, written expression, and articulation. Student was in learning support for reading and writing instruction. In addition, Student was identified as needing Tier 3 MTSS, a regular education intervention that was a supplement to the special education program provided for language arts.

Progress monitoring of the IEP goals at the end of the 2016-17 school year noted better developed skills in reading decoding, fluency, and comprehension, but a continued need for special education. Similar

progress monitoring over the 2017-18 school year through March 2018 reflected consistent progress in reading fluency and comprehension skills and in written expression. This progress was steady even if Student did not reach grade-level standards in those areas, which is not fatal given Student's continued weaknesses related to those goals, as *Andrew* so aptly observed.

An RR in May 2018 that included academic achievement testing documented that Student still had deficits across all reading skills including reading comprehension. However, Student did attain an achievement test score in that skill in the average range; there was also a single reading inventory score in the spring of 2018 that placed Student within the proficient range in reading comprehension.

The goals in the May 2018 IEP that followed the RR addressed the academic needs identified at that time (reading decoding and fluency) and also provided for monitoring of reading comprehension and written expression. With Student demonstrating improved skills in those areas previously considered to be deficits, taken as a whole, the May 2018 IEP was appropriately responsive to the needs identified at that time based on information known. This hearing officer also concludes that the provision in the IEP for monitoring of skills that had previously been additional weaknesses was both necessary and educationally sound under all circumstances.

Implementation of that IEP is a different question. The Wilson Reading Program provided during ESY 2018 and the beginning of the 2018-19 school year permitted Student to make gains in the basic reading skills that it targeted: decoding and encoding, foundational skills that Student had not yet mastered. While acquisition of those early reading skills would ultimately lead to better reading comprehension skills, it is not evident

whether and when any monitoring of those occurred during the 2018-19 school year other than continuation of the benchmark assessments given to all students. It merits repeating that the omission of reading comprehension from the programming for the 2018-19 school year beyond mere monitoring was based on a single standard score on the WIAT III that was in the low end of the average range, and one reading inventory score that, unlike prior administrations, reflected proficiency. Student was not, however, meeting benchmark expectations in reading comprehension at any point during the relevant time period. Careful monitoring would and should have been conducted to ensure that Student did not exhibit further needs in that area. Unfortunately, this was not done.

The record compels a conclusion that, during the fall of the 2018-19 school year, the District was, or should have been, on notice that Student's reading comprehension skills still required individualized intervention. The August 2018 INE reported a Passage Comprehension score on a standardized instrument below the average range; true monitoring of that skill would almost certainly have confirmed that data. Student's assistive technology assessment process led to some tools that would also assist in reading comprehension skills, but not all materials were available in audio format. In addition, the team did recognize at the time of the November 2018 IEP revision that direct instruction in vocabulary and reading comprehension was necessary for Student. However, the latter was to be addressed through a regular education intervention, not special education. Even so, and allowing for a reasonable period of time for the District to recognize unmet needs and address them, the belated response in early November 2018 following the Parents' notice of their intention to place Student in the Private School was ultimately a fatal flaw. Clear deficiencies could and should have been recognized and addressed before that proposed IEP revision, which was

prompted by the Parents rather than the District's own monitoring of Student's program.

Moreover, the proposed revisions in the November 2018 IEP were minimal, adding an encoding goal when Student was already provided and making progress in the Wilson Reading Program that addressed those specific skills, and a regular education reading comprehension class that was not one of individualized intervention based on Student's unique abilities and needs. Critically, the program in the fall of 2018 failed to support Student's access to and comprehension of the general education curriculum at a grade level where understanding of written materials was demanded throughout the school day. This is particularly significant with Student having already made the transition from elementary school, and was at a developmental age when reading interventions would be less effective than in earlier years. This hearing officer concludes, therefore, that the program in the fall of 2018 as implemented was not appropriate for Student and denied Student FAPE, and a remedy is accordingly due.

The IEP offered in July 2019 was, in essence, the November 2018 IEP with a different date that did not meaningfully consider Student's experience at the Private School. The District did not attempt to obtain sufficient recent information about Student's present levels of academic achievement and functional performance, ascertain whether the goals from the November 2018 IEP were appropriate in July 2019, or provide baselines for those goals that were accurate as of the date of its development. This hearing officer cannot conclude that the July 2019 proposed IEP that did not reflect an accurate understanding of Student's then-current strengths, needs, and present levels of academic achievement and functional performance was reasonably calculated to permit Student to derive meaningful educational benefit. A major focus in *Endrew* centers on the child's unique

circumstances at the time the IEP is drafted. The July 2019 proposed IEP clearly lacked that essential component. Thus, the denial of FAPE continued with the July 2019 IEP proposed for the fall of the 2019-20 school year, and must be remedied.

Some of the Parents' contentions regarding the time period prior to the fall of 2018 merit specific consideration. First, while it is undisputed that Student has benefitted from a Wilson Reading program, such does not establish that the District failed to offer or implement an appropriate program in reading and related areas through the end of the 2017-18 school year. Educational interventions must be provided over some period of time in order to determine whether they are working or not working for a particular child, and the progress monitoring prior to the fall of 2018 indicate growth in Student's areas of need. Furthermore, while one might hope, and the Parents would understandably expect, that Student will be able to "close the gap" (Parents' Closing at 3), the law does not demand that of LEAs; rather, special education programming must aim to permit meaningful progress in light of the child's unique strengths and weaknesses. See *generally Dunn, supra*, 904 F.3d 248. An ideal or optimal program is not the standard.

Second, the suggestion of the Parents that the District overlooked and failed to provide social/emotional support to Student (Parents' Closing at 13) is, at best, speculative. Other than a clinically significant concern with learning problems by the special education teacher, the May 2018 RR revealed nothing, including input from the Parents, that might suggest that social/emotional functioning required such programming in the school environment.

Third, to the extent that the Parents claim the District was not forthcoming in provided sufficient detail about matters such as the particulars of specific

reading programs and approaches, this hearing officer cannot conclude on this record that the District denied them the opportunity to meaningfully participate in educational decisions and keep them apprised of Student's strengths, needs, programming, and progress. While some of the reports provided by the District may have confused the Parents because, for example, Student was provided both regular education supports and interventions and special education services, the evidence is not preponderant that the District should have involved them more in program development and implementation. The record simply does not support a conclusion that providing information about day-to-day instruction was necessary or even desirable, although the professionals who testified certainly indicated a willingness to answer questions or provide explanations if and when needed.

Lastly, the Parents' claims related to Section 504 and the ADA have been addressed within the context of the above discussion and need not be examined further.

Remedies

Compensatory Education

As a remedy for the claimed FAPE denial during the relevant time period while Student attended school in the District, the Parents seek compensatory education, an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably

required for a school district to correct the deficiency. *Id.* Compensatory education is not appropriate where, as here, there was no denial of FAPE while Student was enrolled in the District during the relevant time period.

Specifically, this hearing officer found no denial of FAPE to Student during the period of time between the spring of the 2016-17 school year through the start of the 2018-19 school year. Certainly within six weeks into that later school year the District had reason to take, and should have taken, steps to ascertain whether Student's reading comprehension and related weaknesses were appropriately supported. Those steps would have included convening an IEP meeting and revising the IEP that would be implemented within ten school days of its finalization, or by early November 2018. See 22 Pa. Code § 14.131(a)(6). Although the District did not do so until the Parents took their own steps by providing notice of their intention to place Student in the Private School, there is no period of time in this case that warrants an award of compensatory education.

Tuition Reimbursement

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

U.S. at 13. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

As discussed above, the November 2018 proposed IEP was not individualized for Student and instead included only modest revisions that were not meaningfully responsive to clearly identified needs. Thus, that program was not appropriate. The July 2019 proposed IEP was essentially the same document and was likewise inappropriate for Student. As such, the first prong of the tuition reimbursement test has been met. This conclusion does not, however, extend to the summer program at the Private School in 2019, which was not established to be necessary for Student.

The Private School, on the other hand, serves children like Student in a smaller environment that does not include large class sizes. Student receives individualized Orton-Gillingham-based language arts instruction as well as multisensory instruction throughout the day, approaches that are individualized and have been beneficial to Student. Student has demonstrated progress at the Private School including increased independence, participation and engagement in classes, and an improved interest in reading. Despite the District's argument that the Private School is not ensuring that Student make better progress nor assessing Student with sufficient frequency, the Private School is not required to comply with the IDEA standards; in addition, Student's reading program there includes an ongoing diagnostic and prescriptive approach that guides instruction. In short, there is more than preponderant evidence that the Private School is appropriate for Student, thereby satisfying the second prong of the test.

Lastly, the equities in this case do not favor the District over the Parents. They indicated a willingness throughout the relevant time period to engage in collaborative decision-making with an interest in having Student remain in the District. Contrary to the District's contentions (District Closing at 11-

12), the evidence establishes that the Parents provided the INE when it was received in the fall of 2018, rather than withholding it from the District, and did not act in anything other than good faith. There is nothing in the record in this case that would warrant reducing or denying reimbursement to the Parents of the tuition for the Private School and related expenses. Accordingly, the Parents have met their burden of establishing the requisite prongs of the test for reimbursement for tuition and related expenses.

ORDER

AND NOW, this 27th day of November 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate the provisions of the IDEA including the provision of FAPE prior to November 2018 when Student was in the process of withdrawing from the District. No compensatory education is warranted or due.

2. The District's proposed programs in November 2018 and July 2019 were not appropriate for Student under the applicable law and amounted to a denial of FAPE.
3. The Parents are entitled to reimbursement for tuition and related expenses at the Private School incurred for the 2018-19 and 2019-20 school years. Reimbursement shall be made within ten business days of proof of payment by the Parents to the District.
4. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D., C.H.O.
HEARING OFFICER
ODR File No. 22225-1819KE