

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:

25942-21-22

Child's Name:

P.G.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

Jacqueline Lembeck, Esq.
McAndrews, Mehalick, Connolly, Hulse & Ryan
30 Cassatt Ave.
Berwyn, PA 19312

Local Education Agency:

Derry Township School District
30 East Granada Ave.
PO Box 898
Hershey, PA 17033-0898

Counsel for LEA

Christopher J. Conrad
Marshall Dennehey
100 Corporate Center Circle Drive – Suite 201
Camp Hill, PA 17011

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

October 12, 2022

INFORMATION AND PROCEDURAL HISTORY

The Student¹ (hereafter Student) is currently in the [redacted] grade parentally placed in a private school (Private School). Student is eligible for special education under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act as a child with an other health impairment (OHI) and a Specific Learning Disability (SLD).²

The Parents³ filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973, as well as the federal and state regulations implementing those statutes⁴. As remedies, the Parents sought compensatory education, reimbursement for private school tuition and a privately obtained evaluation. The case proceeded to an efficient due process hearing, during which the Parents sought to establish that the District did not comply with its obligations to Student for the 2019-2020 and 2020-2021 school years. The District maintained that its

¹ In the interest of confidentiality and privacy Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14). The federal regulation 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 et seq. (Chapter 15).

³ Both Parents filed the Complaint and participated in the due process sessions. One Parent testified and frequently but not exclusively interacted with the District on behalf of the Student. Any citation to one Parent is for ease of reference.

⁴ 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 implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14). The federal regulation 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 et seq. (Chapter 15).

educational programming, as implemented and offered to Student, was appropriate under the applicable law, and that no remedy was due.

Throughout nine hearing sessions, counsel presented testimony from multiple witnesses that included, a Parent, [redacted] and [redacted] grade Language Arts teachers, a reading intervention teacher, the guidance counselor, the Assistant and building Principals, the school psychologist an independent evaluator, and a middle school special education teacher. No one from the Private School offered testimony. The parties stipulated to the admission of District exhibits S-1 through S-26 and Parent exhibits P-1 through P-9 and P-11 through P-15. The District objected to the admission of P-10. P-10 is admitted.

On March 21, 2022, the Hearing Officer, following a hearing, determined that all claims brought by the Parent in this matter were limited to those to have occurred from January 10, 2020, through the end of the 2021-2022 school year.

Following review of the record and for the reasons set forth below, the Parents' claims are denied.

ISSUES

- 1) Are any of Parents' claims barred by the statute of limitations?
- 2) Did the District meet its child find obligations regarding this Student?
- 3) Did the District's evaluations fail to appropriately and comprehensively evaluate the Student?
- 4) Did the District deny Student a FAPE during the 2019-2020 school year?
- 5) Did the District deny Student a FAPE during the 2020-2021 school year?

6) Did the District fail to offer the Student a FAPE for the 2021-2022 school year?

7) If the District denied Student a FAPE, what if any remedy is appropriate?

8) If the District failed to offer the Student a FAPE, are the Parents entitled to tuition reimbursement and payments made during the 2021-2022 school year?

9) Did the District discriminate against the Student for failing to address bullying concerns regarding the Student?

10) Are the Parents entitled to reimbursement for the independently obtained evaluation of the Student?

FINDINGS OF FACT

1. The Student is eligible for special education as a child with an other health impairment (OHI) (ADHD-combined type) and a specific learning disability (SLD). The Student has medical diagnoses of ADHD, [redacted], and [redacted], which can affect a portion of the brain related to memory and emotional regulation. (P-8, p. 2, S-17)
2. The Student has attended school in the District since the first grade. (P-8)
3. Since the [2016-2017 school year], the District has provided a Section 504 service agreement (504) to the Student because of [multiple medical diagnoses.] (S-1, S-2, S-12, p. 4)
4. Beginning in [the 2017-2018 school year], the District provided Tier 2 support in reading to the Student. In [the 2017-218 school year] on the

PSSA, the Student received scores of basic in ELA, Math and Science. (P-3, p. 2; S-12; N.T. 335, 380)

5. During the [2018-2019 school year], the Student received scores of basic on the PSSA in ELA and Math. (S-12)
6. During the summer of 2019, [redacted] the Parents hired the District's middle school reading specialist to provide private tutoring services to the Student. (N.T. 314)

2019-2020 School Year [redacted]

7. During the 2019-2020 school year, the Student was enrolled [redacted] in the District. (S-10)
8. On September 19, 2019, the Parent agreed to the implementation of a 504 service agreement for the Student. The 504 provided visual checklists, seating close to instruction, repeating back directions, keyboarding, dictation and transcription and small group testing with extended time. Additional service notes in the plan explained how to identify [medical concerns] of the Student. (S-10)
9. During [the 2019-2020 school year], in addition to English Language Arts (ELA) instruction, the Student received small group tiered reading intervention through the District's response to instruction and intervention program (RTII) for four out of six cycle days with the middle school reading specialist. In ELA, grammar and punctuation were the focus of instruction in reading intervention; the focus was on meeting the Pennsylvania reading standards and text-dependent analysis. (N.T. 281-282, 315, 353-355)

10. In ELA, during the first marking period, the Student received a failing grade, had difficulty completing work, required one-on-one assistance, and struggled with task completion and initiation. During lunch supervision, the teacher had concerns about Student's social interactions. In class, the Student did well socially, had friends, was pleasant and had a good attitude, but some behaviors interfered with learning. (N.T. 227-228, 233, 245, 256, 263)
11. To assist with task initiation and organization, the District provided the Student with accommodations that included a tab folder to write down assignments posted daily in homeroom; every Monday, the Student was directed to write down grades in all classes, for Parents to review and initial; during Flex time, Student was directed to work on incomplete assignments, provided with direction on organizing and use of CANVAS to check grades. A Google document was created with a list of missed assignments and provided to the Parents for review. Student was also provided with access to a therapy dog. (N.T. 268-277, 288-290)
12. During reading intervention instruction, the Student was comfortable, enjoyed the class and worked well peers. (N.T. 355, 360)
13. Although the Student struggled with written expression and handwriting, the intervention teacher supplied a graphic organizer and focused on modeling and guided practice. For additional assistance, the Student received an iPad with a built-in keyboard to facilitate writing. (N.T. 362-364)
14. Student's first marking period grades were "C" in Math, "F" in ELA, "A" in Science, "PA" (passing) in Reading, "B" in Health, "A" in Art, "A" in Computer, and "A" in Band. (S-21, p. 29)

15. The Student's medication taken to control [redacted] sometimes caused drowsiness. In the classroom, different techniques were utilized to promote alertness. They included bouncy bands, chair balls, a desk pedaling device, and allowing standing in class. The teacher did not force the Student to stand in class as a punishment. (N.T. 366-370)
16. In November 2019, the Parents requested an evaluation to determine if the Student had a specific learning disability and needed special education. (S-11)
17. In December 2019, a student in the District reported the Student made [inappropriate] comments creating an unsafe environment. The middle school Principal spoke briefly to the Student and emailed the Parents. No discipline was imposed. (S-26, p. 28-35; N.T. 529-530)
18. Although the Parents did not provide the District with medical documentation concerning Student's brain abnormality and its impact on Student's functioning, before the evaluation, the school psychologist read information about [the medical diagnosis] and its impact on memory and emotional regulation. (S-13; N.T. 99, 397, 443-445, 468-469)

January 2020 ER

19. On January 10, 2020, the District issued its evaluation report (ER) and emailed a copy to the Parents. The January 2020 evaluation report ER included Parent and teacher input, achievement testing, and assessments of executive functioning. (S-12)

20. Parent input in the ER noted that the Student struggled with basic skills in reading, math and writing and that [redacted] was well-controlled with medication. (S-12, p. 1-2)
21. For input in the ER, Student's ELA teacher advised that during class, Student asked for a lot of help, was not a self-starter, relied on one-on-one assistance, shut down and took a long time to complete the assessments. Student's first marking period grade was 59%. In Math, Science and Social Studies, the Student had average grades and struggled with work completion and attention. (S-12, p. 2)
22. For inclusion in the ER, Student's reading intervention teacher conducted assessments to measure comprehension and fluency. On the Aimsweb MAZE assessments, the Student received a Fall score of 11, with the benchmark being 22. Student's Winter score was 17 with a benchmark of 29. On the READ 180, Student's Lexile score from September to January increased from 527 to 652, showing improvement but still below basic. A proficient Lexile was considered 925-1070. (P-3, S-12, S-23, p. 8; N.T. 227, 251-252, 318-320, 375-376)
23. On Fastbridge Reading Assessments, to determine broad reading skills, the Student scored in the 39th percentile. On the CMBR, a measure of automaticity and oral reading, the Student scored in the 10th percentile. On the Comp Efficiency Test, to assess comprehension, the Student received a score of 56, above the Winter benchmark of 50. On the EasyCBM, to measure grade-level comprehension, the Student scored in the 1st percentile in October and in December in the 5th percentile. (S-12, S-23; N.T. 322, 339, 358)
24. In the ER, the Math teacher noted concerns with Student's follow through with homework assignments, difficulty following the lesson

- and taking notes, avoidance of group work, problems with multi-step processes, losing focus, and disorganization. (S-12, p. 3)
25. Student's Social Studies teacher provided input for the ER that Student struggled to complete assignments, get started on tasks, needed constant reminders, appeared tired and unmotivated and struggled to connect with peers. (S-12, p. 3)
 26. For the ER, the Science teacher noted that Student occasionally participated, struggled to transition, interacted well, and appeared distracted. (S-12, p.
 27. To assess Student's Reading, Writing and Math achievement, the school psychologist administered portions of the Woodcock-Johnson Test of Achievement, IV Form A (WCJ). (S-12)
 28. In Reading, the Student's letter-word identification was in the average range (66th percentile); on the passage comprehension subtest, the Student scored in the low average range (22nd percentile). In Math, on the calculation and applied problems subtests, the Student performed in the average range (53rd percentile). In writing, the Student performed in the average range (40th percentile). (S-12, p. 4)
 29. To assess executive functioning, a Parent and three teachers completed a questionnaire from the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF 2). (S-12, p. 5-8)
 30. On the BRIEF-2, the Student received scores that suggested intact inhibitory control, emotional modulation, and the ability to self-regulate behavior. The scores also suggested Student had difficulty with initiating, planning, organizing and monitoring output, holding information in working memory over time, and organizing belongings. (S-12, p. 7; N.T. 443)

31. The District did not perform cognitive testing because intellectual disability nor giftedness was suspected. (N.T. 402-407, 411, 417, 422)
32. The District is approved to use the Response to Instruction and Intervention (RTII) approach to determine whether a student has a specific learning disability.⁵ (N.T. 439-440)
33. Based on the evaluation results, the District concluded that the Student did not meet the criteria for a specific learning disability because the Student consistently met grade-level standards and demonstrated adequate achievement, as measured by repeated assessments. The Student's performance was average and ranged from the 22nd to the 66th percentile. The Student did not perform below the 10th percentile. The ER further concluded that Student did have a disability ([redacted]) but did not require specially designed instruction and did not meet the criteria for a child with OHI. (P-15, p.32, S-12; N.T. 441-442)
34. The ER determined Student as having needs related to communication, perseverance, task initiation, follow-through and focus, advocacy and handwriting. (S-12, p. 9)
35. Due to difficulties with work completion, the team recommended a revision to Student's 504 to include support for task initiation, persistence and work completion to address the executive function concerns. (S-12; N.T. 443)

⁵ Response to Intervention (RTI) refers to the methodology that is used to determine how slow is slow (rate of growth) and how low is low (student's level of performance), as an alternative to ability-achievement discrepancy within a comprehensive Specific Learning Disability (SLD) Determination process. <https://www.pattan.net/Multi-Tiered-System-of-Support/Response-to-Intervention-RTI>

36. On January 20, 2020, through a NOREP, the Parent disapproved of the District's recommendation citing the ER did address Student's structural brain abnormality and the impact on learning, memory and executive functioning. Although the Parent checked the box on the NOREP that requested mediation, they did not make the required request to ODR. No mediation occurred. (S-12, S-13; N.T. 54-56, 94-95)
37. The Student's 504 plan was not revised to include the recommendations from the ER. The Parents advised the District they preferred to meet after a mediation occurred. (P-15, p. 40, S-12, p. 9; N.T. 142, 234)
38. During [redacted] lunch, the Student and peers teased each other resulting in hurt feelings. The guidance counselor offered her office for Student to have lunch with more socially compatible peers, but the Student chose not to. (N.T. 198)
39. Student's second marking period grades were "D" in Math, "C" in ELA, "B" in Social Studies, "F" in Science, "PA" in Reading, "B" in Health, "A" in PE, "A" in Computer, and "A" in Band.
40. At the end of January 2020, the Parent contacted the middle-school Principal that Student received a threat of [violence] from a fellow student. After an investigation and referral to the school resource officer, the District could not verify whether the incident occurred. (S-26, p. 23; N.T. 558)
41. On March 13, 2020, the District closed due to the order of the Governor of Pennsylvania relating to the COVID-19 pandemic. (N.T. 39. 235-236)

42. During the COVID closure, the Student received online academic instruction. At the end of the final marking period, the ELA teacher made a list of all assignments; the Student needed to complete and emailed it to the Student and Parents. Once completed, the Student's grade improved to an "A". (N.T. 237-240, 365-366)
43. At the end of the 2019-2020 school year, the Student was diagnosed with ADHD. The Student received final grades of "D" in Math, "C" in ELA, "B" in Social Studies, "D" in Science, "PA" in Reading, "B" in Health, "A" in PE, "A" in Art, "B" in Computer, "B" in Music and "B" in Band. The Student's overall grade point average was 2.91. (S-21, p. 29; N.T. 35)

2020-2021 School Year [redacted]

44. During the 2020-2021 school year, the Student attended the [redacted] District. Because of the COVID-19 pandemic, the Student received hybrid programming, with two days of in-person and two days of remote instruction. The fifth day was considered a workday for Students and a planning day for teachers. (N.T. 38-39, 163, 145, 341, 459-460)
45. On August 24, 2020, the District contacted the Parent about revisions and adjustments to the Student's 504 plan to reflect implementation differences during virtual and in-person instruction. The 504 from [the previous school year] was attached to the email, and the District advised it would be implemented if no response was received by August 28. The Parents were invited to schedule a meeting if desired. (P-15, p. 48-49)

46. On August 25, 2020, The Parents requested that Student's ADHD diagnosis be added to the 504 and that Student return to in-person instruction.
47. On August 26, 2020, the District agreed to add the Student's ADHD diagnosis to the 504, asked Parent about specific accommodations to consider. The District denied the Parents request for non-hybrid programming on the basis that full-time, in-person instruction was reserved for students with special education plans and of great need. (P-15, p. 48)
48. On August 27, 2020, the building principal advised the Parents that hybrid instruction was the only option for students with 504 plans. The Parent requested an exception to the hybrid option because Student was "at risk" and they were waiting for mediation, but everything was backlogged. (P-15, p. 50; N.T. 149)
49. Because the Parent's did not sign the offered 504 agreement, the District implemented the plan from [the previous school year]. (S-15; N.T. 170-172, 199)
50. During [the 2020-2021 school year], the Student continued to receive Tier 2 reading instruction for four out of six cycle days from the middle school reading specialist in a class with six to seven students. (S-17, p. 4; N.T. 315, 355, 370)
51. In mid-September 2020, the Student received a profanity-laced email message from another student. In response, the District spoke with the Parent and the students involved. No discipline was imposed. (N.T. 497-498)

52. From Fall to Winter of [the 2020-2021 school year], the Student's benchmark scores on a Fastbridge assessment to gauge comprehension declined from the 16th to the 2nd percentile. On the CMBR to assess fluency, Student's scores increased from the 2nd percentile to the 4th percentile. On the Comprehension Efficiency Test, the Student's performance exceeded the benchmark. (S-17, p. 5, N.T. 343-345, 364, 373-374)
53. In March 2021, the Parent requested an evaluation of the Student to determine the presence of a specific learning disability and whether specially designed instruction was needed. Under factors relevant to the proposed evaluation, the District listed [multiple medical diagnoses.] The Parent added that the 504 should have reflected an ADHD diagnosis and the date "8/25/20". (P-15, p. 75; S-16)
54. On March 17, 2021, the Assistant Middle School teacher contacted the guidance counselor, indicated Student was failing all core classes and asked whether four in-person days of instruction could occur. On March 22, 2021, the Student returned to in-person instruction in the District. (P-15, p. 77)

May 2021 ER

55. The May 2021 ER included Parent and teacher input, a behavioral observation, a summary of the previous ER, local assessments, achievement testing, and assessments of social-emotional and executive functioning. (S-17; N.T. 418-419, 420-421)
56. For inclusion in the ER, the Parent indicated Student was diagnosed with ADHD, but stimulant medication options were limited because of

co-existing [redacted] diagnosis and the risk of increased [medical concerns]. (S-17, p.1)

57. The ER included the Behavioral Observation of Student in Schools (BOSS) tool that measured Student's active and passive engagement and off-task behaviors in Math, ELA and Geography classes. In Math class, the Student exhibited passive off-task behaviors 12.50% of the intervals compared to peers that exhibited off-task behaviors 25% of the time. In ELA, the Student appeared actively engaged 37.50% of the observed intervals with peers engaged in a higher level of passive off-task behavior. In Geography class, the Student exhibited off-task behaviors 12.5% of the time, similar to peers who exhibited off-task behaviors during 16.67% of the observation. (S-17, p. 2-3)
58. For input in the ER, Student's Math teacher offered that during the third marking period, Student had a "D" or an "F." The Student and a peer engaged in distracting behaviors stopped engaging in-class activities and completing assignments. In Science, Student was regarded as bright, curious, performed well when engaged but struggled socially and occasionally with behavior. Student was often tired, not engaging in-class activities, affected by difficulties with social situations, had difficulty making friends. Marking period grades ranged from a strong "B" to "F." (S-17, p. 3)
59. In Geography, Student was regarded as capable but academic performance worsened during the school year. Student needed peers, pushed other students' buttons in class, focused on other things and was distracted. In ELA, the Student was outgoing but demonstrated work completion and attention struggles. In class, Student could be argumentative and sought peer attention by calling out and talking to classmates. (S-17, p. 4)

60. The ER determined that Student's behaviors were not significant or concerning enough to warrant an FBA or behavior plan because they did not interrupt learning and could be managed through classroom accommodations. (N.T. 454)
61. On reading assessments reported in the ER, the Student's Lexile score decreased from September 2020 (595) to February 2021 (373). On the Fastbridge, a measure of broad reading, the Student's score declined from the 16th percentile in the Fall to the 2nd percentile in the Winter. On the CBMR, a measure of automaticity and oral reading rate, the Student scored at the 2nd percentile in the Fall and the 4th percentile in the Winter. Although the Student's oral fluency improved, the scores were significantly below benchmark. On a timed measure of reading comprehension (Comprehension Efficiency), the Student's score improved from Fall to the 73rd percentile in Winter. (S-17, p. 4-5, 7; N.T. 325, 328-329, 344)
62. On the WCJ, the Student exhibited limited proficiency in reading comprehension, performing at the 1st percentile. The Student exhibited limited proficiency in basic calculation skills and performed in the low average range. The Student's written expression was determined to be within the average range. (S-17, p. 8)
63. The District did not have an explanation for the significant decline in Student's reading comprehension performance over a year's time but offered it could be pandemic related and the change in learning environment, motivation or fatigue (N.T. 423-427)
64. Based on the completion of the Behavioral Assessment System of Children, 3rd Edition (BASC-3) by teachers and the Parents, Student exhibited behaviors that impacted focus in the classroom, high levels of hyperactivity and inattention both at school and at home.

65. Based on the completion of the Behavior Rating Inventory of Executive Functioning, 2nd Edition (BRIEF-2), by teachers and the Parents, the Student exhibited significant deficits in the ability to independently initiate tasks, monitor work, and effectively plan time for assignment completion. Overall, deficits in executive functioning impacted Student's success in the classroom. (S-17, p. 14)
66. The May ER determined Student needed direct instruction to address reading fluency and reading comprehension. Additional needs included increased task initiation work completion, attention to the task at hand, the ability to hold new information in immediate awareness, such as directions when given orally (working memory), and redirection when distracted. (S-17, p. 15)
67. Behavioral needs of the Student in the May ER included Student seeking attention from peers and adults, even if negative and argumentativeness. (S-17, p. 15)
68. The District's May 6, 2021, ER concluded the Student met the criteria for Other Health Impairment (OHI) on the basis of ADHD-combined type. The ER determined that ADHD adversely affected Student's educational performance and cited the conclusions from the BRIEF- 2 and BASC- 3. (S-17, p. 15-16; N.T.471)
69. The District ruled out an SLD related to Reading and attributed Student's decrease in scores from [the 2019-2020 to the 2020-2021 school years] on a WCJ subtest as inconsistent with a child with an SLD but related to difficulty in maintaining attention, initiating and completing assignments and planning/organizing time. (S-17, p. 19; N.T. 429-430)
70. The ER recommended that Student receive direct learning support in reading to increase comprehension skills, specialized instruction in

executive functioning, and seating in the front of the classroom in general education. The Parent did not request an IEE. (S-17, p. 16; N.T. 120)

71. On May 17, 2021, the IEP team met to develop educational programming. The May 2021 IEP contained goals to address executive functioning and reading comprehension. Specially designed instruction (SDI) included preferential seating, check ins, a repeat of directions, prompting, organizational skills, and question rephrasing. Special education supports included direct instruction in executive functioning for one class period, four of six cycle days. (P-5, S-19; N.T. 466-467)
72. The executive functioning (task initiation) goal expected the Student, when provided with a task (20-30 minutes), to set a timer, initiate a task, maintain focus, and complete the task by earning 6/8 points over 8/10 trials using a rubric. Through this goal, the Student would receive direct instruction in executive functioning for four days per six-day cycle to develop and practice skills needed to improve focus and on-task behavior, task initiation, organization, and impulse control. (S-19, p. 24, 27; N.T. 485)
73. The reading comprehension goal expected the Student, when given a computer-based measure at the [redacted] grade level, to score a 60 across five consecutive bi-weekly probes. Direct instruction in reading comprehension was intended to supplement the tiered reading interventions in place and was proposed for 100 minutes per six-cycle day with access to small group supports. (S-19, p. 25; N.T. 455, 465, 474-475, 480)
74. Specially designed instruction included regular education supports of preferential seating, typing, check-ins, repeated directions, organizational skills and prompting. Special education supports

- proposed included direct instruction in executive functioning and reading comprehension and small group supports. (S-19, p. 26-27)
75. The May 2021 IEP proposed that Student receive educational programming with itinerant learning support. (S-19, p. 31)
 76. On June 2, 2021, the Assistant Principal (AP) notified middle school staff that Student was threatened [redacted]. The AP spoke with the Student and the school resource officer, but the other student was not in school. The AP asked all to be extra kind and vigilant, and that local police were involved. No discipline was imposed. (P-17, p. 87, S-26, p. 40-41; N.T. 502-504, 514)
 77. On June 4, 2021, a Parent approved the NOREP recommending the Student receive itinerant learning support at the District middle school. (S-20; N.T. 468-469)
 78. At the end of the 2020-2021 school year, the Student received final grades "PA" pass in Reading, a "D" in Art, Computer, Tech Ed, ELA and Math, and a "F" in Geography and Science. (S-21, p. 30; N.T. 325)
 79. On July 12, 2021, the Parent contacted the District about the Student's retention [redacted]. (P-15, p. 89)
 80. On August 10, 2021, the Parents provided written notice of their intention to place Student in the Private School. The Parents sought funding from the District for the placement. (P-15, p. 90)

2021-2022 School Year [redacted]

81. During the 2021-2022 school year, the Student attended the Private School. In September 2021, the Parents reported to the District that Student received threatening messages from middle school students while attending an evening football game. The Parents advised the

District they would make a police report. Because the Student was no longer enrolled in the District, the District did not reply to the Parents. (P-10, S-26, p. 46; N.T. 533-525, 540)

82. The Parent selected the Private School because it offered smaller class sizes, research-based instruction and embedded social skills instruction. Student's grades have improved since enrollment in the Private School. (N.T. 75-76)

Private Evaluation

83. In October 2021, the Student received a private evaluation at parental expense. The evaluation concluded that Student met the eligibility requirements due to Other Health Impairment (OHI) and referenced the [redacted] and co-existing diagnoses of [redacted] and ADHD. The report noted medication options for Student's ADHD management were severely limited because of the co-existing [redacted] diagnosis. The report further stated that Student experienced executive function issues that included concerns with working memory, processing speed, social interactions with peers, impulsivity, distractibility, initiation, and emotional dysregulation. (P-8)
84. The private evaluation determined that Student met the eligibility requirements for a specific learning disability (SLD) because of assessed difficulties in reading comprehension, phonological processing, and mathematics. Further observations included that Student's poor comprehension combined with executive functioning issues impeded the ability to get going, stay on task and complete assignments. (P-8)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Legal Principles

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). Although much of the testimony is referenced in factual findings, few facts were disputed. As an explicit credibility determination is necessary, I find that all witnesses testified credibly despite strong differences in opinion and memory.

General IDEA Principles: Substantive FAPE

The IDEA requires that states 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. 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 complying with the procedural obligations in the Act. States, through 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.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). As the U.S. Supreme Court has confirmed, 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). Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an 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). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same).

Child Find and Evaluation Requirements

The IDEA and state and federal regulations further obligate school districts 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 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." *Id.* (citation omitted). 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(a)(2). 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

service 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). If parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b).

Reimbursement for Tuition

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 235, 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)(explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); see also *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was calculated to provide the child with educational benefit. *Id.*

General IDEA Principles: Procedural FAPE From a procedural standpoint, the family has “a significant role in the IEP process.” *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 such “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). Thus, in this case, the coextensive Section 504

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 issue is whether the District violated its child find obligations or denied the Student a FAPE during the 2019-2020 school year.⁶ For the reasons outlined below, the Parents have failed to preponderantly establish that the District failed to comply with its child find obligations or denied Student a FAPE.

In early childhood, the Student was diagnosed with [redacted] and an [redacted]. With this information, the District introduced a 504 service plan in second grade. That plan remained in place during the 2019-2020 school year as the Student transitioned [to the next grade]. The 504 was implemented and provided accommodations that included preferential seating, visual checklists, and a small group testing environment. Additional service notes in the plan provided information to alert school staff of symptoms of [redacted].

August 2019-January 2020

The Parents contend that the 504 plan in place [for that school year] was inadequate and that in January 2020, the District failed to comprehensively evaluate the Student, which resulted in an inaccurate determination of ineligibility for special education. Specifically, the Parents contend that the District ignored "red flags" that included Student's failure to meet benchmarks through the Tier II reading program, years of 504

⁶ After a hearing on the District's Motion to Limit Claims as time-barred, the Hearing Officer granted the Motion. As such, the claim period at issue began on January 10, 2020, the date the District issued its first ER.

accommodations but failing grades, and teacher concerns about Student's in-class functioning.

During the first marking period, although the Student demonstrated signs of struggle in ELA, a known area of weakness, Tier II reading interventions continued, with instruction occurring four out of six cycle days. Additionally, the Student was supported by a 504 Plan that included accommodations to address attention and focus, including preferential seating near the closest point of instruction, visual checklists and small group instruction. The record has established that the Student also received supplemental supports and interventions to promote independence and organization. Overall, the 504 plan and supports in place were appropriate.

Concerning the child find claim, although reading progress was not meteoric, it did occur as documented through the assessments administered by the reading intervention teacher. On the MAZE, READ 180, Comprehension Efficiency, and EasyCBM, the Student's scores increased from Fall 2019 to Winter 2020. The first marking period of middle school is undoubtedly a time of adjustment and acclimation. During this time, the Student received a poor grade in ELA; however, other grades were good and ranged from an "A" in Science to a "C" in Math. By the second marking period, some of Student's grades declined, but the ELA grade improved. The record, in this case, did not establish that the Student's performance should have created a "reasonable suspicion" that the child was otherwise IDEA eligible. The Student did not have seriously declining grades, preponderant evidence was not introduced that the implemented 504 plan was ineffective, nor were there multiple disciplinary referrals involving this child. The District did not violate its child find responsibilities toward this Student. In November 2019, the Parent requested an evaluation of the Student citing concerns about a specific learning disability. The District completed the evaluation in January 2020. Its adequacy is discussed below.

January 2020 ER

The next issue is whether the District's evaluation conducted in January 2020 was appropriate. The ER utilized various assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. The January ER summarized available data from the reading intervention teacher and other academic information. Additionally, parental input and information from the ELA, Science, Math, Reading and Social Studies teachers were obtained and summarized for the ER. During testimony, the school psychologist indicated an observation of the Student occurred and that no concerns were evident. However, that information was not reduced to writing and placed in the ER. Although not critical, that information would have been helpful. The District's ER summarized and reviewed the data and information gathered and determined that although Student had a qualifying disability ([redacted]), Student was ineligible for special education because specially designed instruction was not needed based on Student's existing current needs.

The Parents present multiple criticisms of the 2020 evaluation. First, they contend that the District failed to administer a cognitive assessment intimating that a connection was missed between Student's [redacted] and working memory weaknesses. Although provided with an opportunity to provide input, the Parents presented no medical evidence to the school psychologist before the evaluation or during the hearing to suggest that a connection existed or the adverse impact of the [redacted] on educational programming. The chief purpose of the evaluation was to determine whether a suspected learning disability was present. The District's analysis of reading comprehension and fluency data collected through RTII in conjunction with other evaluative measures was an appropriate strategy to determine this child's (in)eligibility for special education. No compelling evidence was

introduced that the District's implementation of RTII was used to delay or deny a complete and individual evaluation of this Student.⁷ Furthermore, that data was appropriately used as a part of the January 2020 evaluation within the SLD determination process. Overall, the District's 2020 evaluation was legally compliant with IDEA requirements and sufficiently comprehensive to identify Student's educational needs.

It bears mentioning that the January 2020 ER resulted in recommended revisions to Student's 504 agreement which did not occur. The evidence has established that the Parents mistakenly believed their request for mediation to dispute the findings of the 2020 ER was pending and opted not to meet with the District until their concerns were addressed. However, they did not follow the necessary steps and submit the mediation request to ODR. The District attempted to schedule a meeting to discuss the incorporation of the revisions to the 504 but Parents response of wanting to wait until the mediation occurred stalled and stopped this from occurring. Weeks later, the COVID-19 pandemic occurred, and the District ceased operations. When school resumed virtually, the Student received academic instruction, including the reading interventions previously in place. The 2019-2020 school year ended with academic progress made by the Student; No FAPE denial occurred.

2020-2021 School Year

The next issue is whether the 504 plan implemented by the District during the 2020-2021 school year denied Student a FAPE. At the beginning of the 2020-2021 school year [redacted], the Parents advised the District that Student was diagnosed with ADHD and requested that it be added to the 504 plan. The evidence has established that the District contacted the

⁷ U.S. Dept. of Edu., Office of Special Education Programs, Memo 11-07 (January 21, 2011); U.S. Dept. of Edu., Office of Special Education and Rehabilitative Services, Dear Colleague (October 23, 2015)

Parents, attached the plan from [the 2019-2020 school year], invited revisions for implementation, and advised that without a response, the previous plan would be implemented. Although invited to do so, the Parents did not supply the District with information regarding the nature of the ADHD diagnosis or proposed compatible accommodations for classroom implementation. Instead, the Parents' email communication focused on increasing the amount of time the Student could receive in person instead of virtual instruction. Apparently, through no fault of the District, the Parents remained under the mistaken impression that mediation would occur and opted to defer a meeting. The Student's [redacted] 504 plan, which was previously determined to be appropriate, remained in place for the balance of Student's [2020-2021 school] year. During virtual instruction, the Student struggled with difficulty completing assignments and depended on teachers' and Parents' support to access the education offered. However, the Parents have not established the District denied Student FAPE during this period.

May 2021 Evaluation

Next, the Parents contend that the evaluation requested by the Parent and conducted in May 2021 was inappropriate because the Student was not identified as having a SLD; however, five months later, a private evaluator reached an opposite conclusion. The Parents have not sustained their burden of proof concerning this contention.

The District's May 2021 evaluation utilized several assessment tools to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. The 2021 ER summarized the reading intervention teacher's available comprehension and fluency data and other academic information. Additionally, parental input and information from the ELA, Science, Math, Reading and Geography

teachers were summarized for inclusion in the ER. Like the 2020 ER, achievement testing and rating scales were incorporated to evaluate Student's social/emotional and executive functioning. This time, in addition to testing observations, a psychology intern conducted multiple classroom observations to gather data on Student's on-task behaviors, attention and engagement for compilation of the BOSS. Again, the Parents allege the ER was flawed because it lacked a cognitive assessment. The Parents point to the private evaluation conducted months later that determined the Student needed special education based on an SLD, although the District did not reach that conclusion. The District utilized an acceptable assessment methodology to evaluate for a SLD. The District's reliance on and analysis of RTII data as a component of determining whether Student's eligibility on the basis of an SLD was appropriate. From the evidence presented, I am unable to determine why different conclusions were reached but based on the information available to the District at the time the evaluation occurred, its processes and procedures were compliant with IDEA requirements; however,

The second point of contention advanced by the Parents was that the evaluation lacked an FBA. Although teacher input before the ER reported some distracted and disorganized behaviors, the measures that assessed Students executive and social/emotional functioning supported the conclusion that Student's infrequent negative behavior and in-class functioning resulted from the ADHD diagnosis and did not warrant a recommendation for an FBA. The Parents have presented no preponderant evidence that Student's behavior was an impediment to accessing education and that an FBA was necessary. The District's ER summarized and reviewed the available information. This time, it determined Student's eligibility for special education based on OHI because of ADHD and made programming recommendations to address Student's identified needs. Based on the

information available when the evaluation occurred, it was comprehensive and appropriate.

May 2021 IEP

Having determined the District's evaluation from May 2021 was appropriate, the next question is whether the May 2021 IEP was reasonably calculated to provide meaningful educational benefit for Student. The evidence is more than preponderant that it was not. Although the May 2021 IEP incorporated the recommendations from the preceding ER with needs appropriately identified in the areas of reading, task initiation, work completion, attention, working memory, and redirection, the proposed programming lacked the intensity and rigor needed to remediate the identified deficits.

The ER appropriately outlined Student's reading performance and revealed that despite supplied intensive reading interventions since the [the 2017-2018 school year], Student's reading progress had been inconsistent, with some progress. Although needs were identified in reading fluency and comprehension, social needs, along with significant issues related to executive functioning, only two annual goals were proposed, devoid of baseline data. To address Reading needs, a single goal was proposed with a focus on comprehension by providing an average of one hundred minutes of instruction spread over a six-day cycle. Curiously, the goal was based on an assessment on which the Student traditionally received higher scores. Progress monitoring would have occurred using that same assessment, possibly skewing the ability to determine whether Student made meaningful reading gains. Additionally, despite the ER's acknowledgment of reading needs related to fluency, a separate goal nor an appropriate special education programming strategy was proposed.

With respect to executive functioning and the litany of needs identified by reason of Student's identification as a child with OHI, the proposed IEP was also deficient. Because of [redacted], this Student cannot tolerate traditional stimulant medications to assist with focus and attention. As a result, for this Student to access education, school-based interventions to address ADHD must be comprehensive and envelope the entirety of the school day. Teacher comments about the Student's compromised ability to attend, focus and participate, as well as attendant social challenges, further underscored the need for a robust approach to support identified executive functioning needs. The District's plan was deficient in this regard. Although program modifications and items of specially designed instruction were proposed to address Student's executive functioning and reading needs, it was unclear if a research-based approach would be implemented and whether a set schedule for instruction would occur. Additionally, no specific social skills direct instruction was proposed despite the input from classroom teachers of the Student's struggle to interact with peers.

The IEP recommended an educational placement of itinerant learning support, which the IEP team determined was the Student's LRE. Nonetheless, the IEP, and the offer of FAPE therein, must be considered as of the time it was made and presented to the Parents. In this case, the IEP was never implemented. The Parents agreed to the proposed IEP but then opted to unilaterally place the Student in the Private School, as was their right to do so. However, the proposed May 2021 IEP did not offer Student a FAPE.

Having determined that the District did not offer FAPE for the 2021-2022 school year, it is necessary to undergo an analysis of the second prong of the *Burlington-Carter* test for tuition reimbursement. The next question is whether Private School is appropriate for Student. A private placement need not satisfy all the procedural and substantive requirements of the IDEA. *Id.*

The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.* This issue cannot be answered based on the evidentiary record presented and is fatal to Parents' claim. See, *T.W. v. Lehigh Valley Academy Reg'l Charter School*, ODR File No. 25299-21-22; *A.B. v. Colonial Sch. Dist.*, ODR File No. 22632-19-20. In the absence of direct testimony from the Private School, Parents instead offered (over the District's hearsay objection) an October 2021 report of proposed programming and first-trimester grades from the 2021-2022 school year. The Parents offered testimony from the private evaluator who spent a few hours at the Private School assessing the Student and a Parent. The Parents did not offer testimony from anyone affiliated with the Private School, with direct information about the educational programming and services provided during the school year at issue. As in *T.W.*, the Parent who testified in this matter. "provided what is certainly a heartfelt and sincere subjective belief that Student has made gains at Private School, but that perception is not adequate evidence of its legal appropriateness for Student." Thus, at step two of the *Burlington-Carter* analysis, parents have failed to carry their burden of proof. As cited by *A.B.*, "there [was] no evidence that allows this hearing officer to gauge how the individual learning needs of the student have been understood by the private placement or how the private placement addresses those needs with programming, specialized instruction, or services." For all these reasons, the Parents have not established that the Private School is appropriate for Student, and they, therefore, cannot prevail.

Discrimination

The next issue for resolution is whether the District engaged in disability-based discrimination or denied a FAPE for a failure to address episodic bullying experienced by the Student. Bullying is defined as aggression within a relationship where the aggressor has more real or

perceived power than the target, and the aggression is repeated over time. *Dear Colleague Letter, 61 IDELR 263 (OSERS 2013)* Some of the reported concerns occurred in the community, one incident occurred after the Student was no longer enrolled in the District, and a few did occur during the school day. However, after each incident, while the Student was enrolled in the District, school staff investigated the incident, replied to the Parent, met with the Student or met with the alleged offender. Overall, the District's actions were reasonable and without deliberate indifference. Furthermore, the Parent presented no compelling evidence that the negative conduct of other students toward the Student and the District's response resulted in a denial of a FAPE. The Parents have failed to establish that the District engaged in disability-based discrimination or denied a FAPE for a failure to address bullying concerns.

Reimbursement for Private Evaluation

Finally, the Parents seek reimbursement for the October 2021 private evaluation. Having concluded that the District's evaluations were appropriate under IDEA criteria, the Parents are not entitled to this remedy. Moreover, this evaluation occurred in the Fall of 2021, after Student withdrew from the District and enrolled in the Private School. Although the private evaluator's testimony, report, and recommendations were informative but not persuasive, there simply is no basis for the District to fund the evaluation in this case

ORDER

AND NOW, this 12th day of October 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

In accord with the findings of fact and conclusions of law as set forth above, the parents have failed to carry their burden of proof on their claim for tuition reimbursement.

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

October 12, 2022