

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:

25299-21-22

Child's Name:

T.W.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

06/05/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, T.W. (Student),¹ is a late teenaged student who previously attended the Lehigh Valley Regional Charter School (School). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² At the start of the 2019-20 school year, Student enrolled in an out of state residential private school program (Private School) and remained there for the 2020-21 and 2021-22 school years.

In late summer of 2021, the Parents filed a Due Process Complaint against the School under the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ challenging its program proposal for the 2019-20 school year and seeking reimbursement for the private school tuition and related expenses. The School disagreed, and the case proceeded to a due process hearing that included a ruling in favor of the Parents on a statute of limitations defense.⁴

Following review of the record and for all of the reasons set forth below, the claims of the Parents cannot be sustained and must be denied.

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

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 §§ 711.1 – 711.62.

³ 29 U.S.C. § 794.

⁴ Hearing Officer Exhibit (HO-) 1. Other 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 Exhibits (S-) followed by the exhibit number.

ISSUES

1. Whether the School's proposed program for Student for the 2019-20 school year was appropriate under the applicable law;
2. If the School's proposed program for Student for the 2019-20 school year was not appropriate, whether the private school is appropriate and the equities favor reimbursement for tuition and related expenses.

FINDINGS OF FACT

1. Student is a late teenaged child who was enrolled in the School during the 2018-19 school year. [redacted] (N.T. 30-31, 38, 209-11, 540-41; P-8.)
2. Student was diagnosed with a rare congenital genetic disorder at a very young age and exhibited global developmental delays along with a number of other conditions, including Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. Student also has a vision impairment that has worsened over time. Student has been identified as eligible for special education based on mild Intellectual Disability, Other Health Impairment, and a Speech/Language Impairment. Student's needs are complex. (N.T. 308-09; P-4; P-24.)
3. An Independent Educational Evaluation (IEE) was obtained in the fall of 2014. At that time, Student's cognitive ability (Wechsler Individual Achievement Test – Fourth Edition (WISC-IV)) was determined to be in the range for intellectual disability (Full Scale IQ score of 53, General Ability Index (GAI) score of 63). The evaluator recommended IDEA

identification based on Intellectual Disability, Other Health Impairment, and Speech/Language and Vision Impairments, with a life skills program proposed as appropriate for Student. (P-1.)

4. A second IEE was obtained in late summer 2018 by the same private evaluator. (N.T. 118; P-3.)
5. Cognitive assessment for the August 2018 IEE (WISC-IV) yielded a Full Scale IQ score of 55 and a GAI score of 64, with the latter indicated as the better representation of ability. Adaptive behavior was assessed through rating scales, with both the teacher and Parents endorsing weakness in those skills. (P-3 at 2, 15-16, 25-26.)
6. On assessment of achievement (Wechsler Individual Achievement Test - Third Edition (WIAT-III)) for the August 2018 IEE, Student earned scores that were variable among subtests, reflecting areas of strength and weakness. All Composite scores were in the Below Average (Oral Language) to Low (Reading, Mathematics, Written Expression, and Total Achievement) range. (P-3 at 3, 21-24.)
7. The August 2018 IEE also assessed receptive and expressive language skills to be in the average to below average range, with some identified weaknesses. Characteristics of Autism were also reported by both the teacher and Parents. (P-3 at 4, 5, 19-20, 27.)
8. Assessment of behavioral functioning for the August 2018 IEE reflected few concerns, with only at-risk indications for Withdrawal (teacher) and Functional Communication and Leadership (Parents). However, on another measure, both raters indicated elevated to very elevated concerns with inattention, hyperactivity, learning problems, defiance/aggression, and peer relations. (P-3 at 4, 6, 24-25, 27-28.)

9. The August 2018 IEE retained the eligibility categories of [the] previous IEE in 2014 but recommended a residential program for Student, specifically suggesting Private School for Student's post-secondary education. (P-3.)

2018-19 School Year

10. Student was in a life skills program at the School's middle school during the 2017-18 and 2018-19 school years. In that program, students focus on a functional curriculum addressing academic (functional reading, written expression, and mathematics) and activities of daily living; they also attend special classes and field trips. (N.T. 404-07.)
11. Students in the middle school life skills program also had vocational activities. Student's IEP provided for six community-based activities over the course of a year. (N.T. 410-11; S-7 at 33-36.)
12. The School sought and the Parents provided consent to a reevaluation in early September 2018. (S-3.)
13. A Reevaluation Report (RR) issued in early October 2018. Parent input into the RR reflected a number of strengths and needs for Student, with goals for supported independent living and employment. (P-4.)
14. Academic information in the RR summarized Student's present levels, with reading comprehension at a fifth grade level; a description of mathematics, written expression, and vocabulary skills; and Student's functional performance at school and in the community. Additional speech/language and occupational therapy input was also included. (P-4 at 9-13.)
15. The Woodcock-Johnson Test of Cognitive Ability – Fourth Edition was administered for the RR. Student attained a General Intellectual

Ability score in the very low range with a standard score of 44, below the first percentile. (P-4 at 15-17.)

16. The Woodcock-Johnson Tests of Achievement – Fourth Edition were also administered for the RR. Student’s scores were in the very low range across clusters and subtests, suggesting significant difficulty with age-appropriate academic tasks. (P-4 at 17-18.)
17. Speech/language assessment for the RR was somewhat variable, with receptive and expressive language skills slightly below the average range and appropriate vocal quality. Student did exhibit some weaknesses with articulation, fluency, and prosody. (P-4 at 18-21.)
18. Assessment of occupational therapy functioning for the RR revealed some areas of weakness but overall appropriate motor and self-help skills for the school setting. (P-4 at 20-21.)
19. The October 2018 RR determined that Student was eligible for special education on the bases of Intellectual Disability, Other Health Impairment, and Speech/Language Impairment. A number of strengths and proficiencies were reflected, with needs identified in the areas of reading comprehension, applied mathematics, written expression, behavioral regulation, social skills, and speech/language and occupational therapy, as well as post-secondary transition planning. (P-4 at 22.)
20. A meeting convened in October 2018 to develop an Individualized Education Program (IEP) for Student. A draft IEP was created for that meeting. (N.T. 415; P-5; S-4; S-5.)
21. Another meeting of Student’s IEP team convened in November 2018, at which time program and placement options for the 2019-20 school year were discussed. Student’s program at the time was provided in an Intermediate Unit (IU) middle school in a neighboring school

district. The Parents asked at that meeting that the School consider a private school placement (Private School) for the 2019-20 school year. (N.T. 38-39; P-8; S-7 at 11; S-8.)

22. The November 2018 IEP incorporated results of the recent RR and included extensive information on postsecondary transition strengths, interests, and needs. This IEP also identified a number of other strengths for Student (including working with others, interpersonal communication skills, following directions and routines, responsibility, and class participation) and specific needs related to reading, mathematics, written expression, fine motor, and speech/language skills. (S-7.)
23. Post-secondary transition services in the November 2018 IEP noted a variety of options for postsecondary education and training and goals for employment and supported independent living. Annual IEP goals and short term objectives were based on Student's then current performance, addressing reading comprehension at a fifth and sixth grade level, as well as vocabulary; functional mathematics (money/banking); functional written expression (use of technology for written communications); vocabulary and written expression; use of numerical operations to solve word problems and double digit multiplication; fine motor (keyboarding) skills; and articulation. One-on-one or small group instruction were noted for the reading and mathematics instruction. (S-7 at 41-59.)
24. Program modifications and items of specially designed instruction in the November 2018 IEP provided for clear directions; wait time; positive reinforcement; prompting, cuing, and redirection; modeling; manipulatives; opportunities for practice; social and coping skill instruction; organizational assistance; fine motor and speech/language skill supports; structure for tasks; time management; as well as

preferential seating, movement breaks, and test and assignment accommodations. (S-7 at 60-65.)

25. Related services in the November 2018 IEP were speech/language (group); occupational therapy, adaptive physical education, and transportation. The program was one of full time life skills and speech/language support in the same neighboring school district middle school, with Student participating in regular education for special classes, lunch, and various school activities. (S-7 at 66-69.)
26. The Parents approved the Notice of Recommended Educational Placement (NOREP) for implementation of the November 2018 IEP. (S-7.)
27. The Parents also provided consent in November 2018 for a vision evaluation, which was completed in February and March 2019. Orientation and mobility training was recommended. (S-9; S-10; S-12.)
28. The IEP team agreed to a series of visits to a local high school program for the 2019-20 school year to better evaluate the academic and vocational components. Team members did tour those locations, and the Parents remained open to local programming options. (N.T. 161-63, 491-94; S-21 at 41-42.)
29. Student's IEP was revised in April 2019, at which time vision information and the recommendation for orientation and mobility training was added. New annual goals addressed vision functioning and orientation/mobility, together with related support. (N.T. 416, 509-13; S-13.)
30. Another meeting convened in May 2019, attended by the Parents and IU representatives, for a discussion about Student's programming prior to a future IEP meeting and consideration of assistive technology. This

May meeting was not an IEP meeting, but was an opportunity for the team to “further identify and clarify the intended outcomes” in order to later plan for the 2019-20 school year (P-11 at 1). (N.T. 221-22, 518-19; P-10 at 1; P-11; S-16.)

31. After the May 2019 meeting, the School issued a NOREP for a full time program of life skills support at the high school in another neighboring school district; speech/language and vision support services were also specified as well as a one-on-one associate teacher for instructional, social, and emotional support.⁵ The Parents did not approve the NOREP and specified Student’s progress as a reason. At that time, they were still unclear on what was proposed since many facets of Student’s program remained undecided. (N.T. 228-3, 523-24; P-12; S-17; S-21 at 22-24.)
32. By the end of the 2018-19 school year, Student had made progress on, but not yet mastered, a majority of the IEP goals. Student did master one of the vocabulary goals as well as the articulation and keyboarding goals by that point in time. (S-14.)
33. Another IEP meeting convened in June 2019 to discuss programming for the 2019-20 school year, but the program at the high school was not described in sufficient detail for the Parents to understand it and specific decisions about its academic and vocational elements were deferred. Student’s IEP was revised following that meeting to reflect the discussion about the 2019-20 school year and a move to the high school in the different neighboring school district. (N.T. 229-30, 421-23, 523-24; P-22; S-15.)

⁵ The NOREP does not expressly provide for the one-on-one teacher support, but not having such support is listed as an option considered but rejected (S-17) and the IEP revisions made in June 2019 include the one-on-one support (P-22 at 4).

34. The Parents, through counsel, notified School counsel on June 19, 2019 of their intention to place Student at a private school and asked the School to consider funding placement at Private School. (P-13.)

Further Preparation for 2019-20 School Year

35. The Parents explored a number of possible programs for Student for the 2019-20 school year in the spring and summer of 2019. Student also attended the Private School summer program. (N.T. 52-53, 64, 231-32, 237, 277.)
36. The School issued an invitation to an IEP meeting scheduled for late August 2019 to discuss the Parents' concerns with the School's proposal for that school year. The Parents attended the meeting and the team discussed changes to the proposed program at the high school that would include vocational experiences at various local businesses, vocational instruction, and independent living skills. Academically, the program focused on functional reading, mathematics, science, and social studies. (N.T. 48-50, 233, 487-88, 491-96, 523-27; P-17; P-18; S-19.)
37. No new IEP was developed prior to the start of the 2019-20 school year. (N.T. 551-52.)
38. After the August 2019 meeting, the School issued a new NOREP proposing a supplemental program of life skills support and maintaining the speech/language and vision support. Of the other specified options considered, a private school placement was not listed. (P-19.)
39. The Parents did not approve the August 2019 NOREP, stating that "the proposed program/placement is not appropriate for" Student (P-21 at 3). (N.T. 51, 235-36; P-20; P-21.)

Private School

40. The Parents enrolled Student in the residential program at Private School because they concluded that it would be more beneficial for Student than the day program there. They did rely on recommendations of the developmental neuropsychologist and private evaluator in making that decision. (N.T. 238-39.)
41. Student has had daily check-ins at Private School as well as weekly individual and group counseling. (N.T. 282-83.)
42. The Parents believe that Student has made gains at Private School particularly with respect to social skills and relationships as well as behavior. (N.T. 241-42.)
43. Private School was fully online from March 2020 through the fall of 2020, and included residential activities and instruction in the evenings. Student did not return in person until February 2021. (N.T. 242-43, 280; P-24 at 3.)

Private Evaluation 2021

44. In the summer of 2021, the Parents had Student evaluated by a developmental neuropsychologist [redacted]. This evaluation included a broad array of assessments including intelligence, memory and learning, adaptive behavior, academic achievement, behavioral functioning, and executive functioning. The results were generally consistent with previous evaluations; notable exceptions were in the areas of cognitive ability where Student's scores were in the borderline (GAI SS 74) to extremely low (Full Scale IQ SS 65) range; and behavioral functioning, where a number of significant concerns not previously reported were endorsed by the Private School teachers. (N.T. 303; P-24.)

45. At the time of the neuropsychological evaluation, Student demonstrated weaknesses with academic (reading, written expression, and mathematics) and independent living skills. Student's teachers also reported very significant concerns with Student's behavioral and executive functioning. (N.T. 311, 318-19; P-24.)
46. The discrepancy between Student's 2021 cognitive score and earlier assessments may be due to one or more various factors, including differences in the instruments themselves and Student's behavioral presentation and engagement on the dates of administration. (N.T. 329-31.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, the burden of persuasion in this case rested with the Parents who filed for this administrative proceeding. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers assume the role of fact-finder and are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the

witnesses who testified to be credible as to the facts. In the relatively few instances that there were contradictions, those are attributed to variations in memory, or to differing perspectives, rather than any intention to deceive. The weight accorded the evidence, however, was not equally placed and is discussed further below as necessary. The documentary evidence was particularly important given the time lapse and the resulting understandable lack of current clarity of the relevant past events on the part of many of the witnesses.

The findings of fact were made only as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. For example, testimony that merely reiterated the content of documents was not necessary and is generally not referenced. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires each of the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and also complying with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student 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, of courses, central to the focus 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 that are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F., 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).

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is

such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); *see also T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

Residential placement is one option on the continuum, and is appropriate when “necessary to provide special education and related services to a child with a disability.” 34 C.F.R. § 300.104. The question of whether a residential placement must be provided at public expense requires an assessment of whether that full-time placement is “necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 243-44 (3d Cir. 2009, (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981)). In other words, if the medical, social, and emotional components of the residential program are “part and parcel of a specially designed instruction to meet the unique needs of a handicapped child,” the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694).

General IDEA Principles: Parental Placements

Parents who believe that an LEA has not offered 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., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.* However, where a private program fails to address a student's unique needs, it may be found to be inappropriate. See, e.g., *Lauren P. v. Wissahickon School District*, 310 Fed. App'x 552, 555 (3d Cir. 2009).

General IDEA Principles: LEA Obligation to Students Not Enrolled

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district evaluate or develop a special education program for him or her, it is incumbent upon the district to comply. *A. B. v. Abington School District*, 841 Fed. App'x. 392, 396 (3d Cir. 2021); see also *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district

and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent’s request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district’s motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018) (applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged). “[T]o trigger a public school district's responsibilities under IDEA, a parent who enrolls a child in a private school must request an evaluation or begin the public school enrollment process.” *A.B., supra*, 841 Fed. App’x at 395 (citations omitted). In other words, the trigger is that the “parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE.” *I.H., supra*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073).

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). 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 Parties’ Claims

The School first asks this hearing officer to reconsider her ruling on the statute of limitations. She declines to do so and, moreover, observes that the convincing testimony of one of the Parents that they remained open and willing to consider the School’s proposals (N.T. 54, 162-63) together with their participation in an IEP meeting in late August 2019 (Finding of Fact 35) support the conclusion reached in HO-1.

On the merits, the first issue is whether the School’s proposed program for the 2019-20 school year was appropriate for Student pursuant to the applicable standards. The answer to that question simply cannot be ascertained from this record but the Parents’ claims are not thereby defeated.

Initially, this hearing officer cannot agree with the Parents that the School was required to develop a new IEP for Student for the very start of the 2019-20 school year. Student had an existing IEP that was due to expire in October 2019 and, thus, the requirements for an IEP to be in place

at the start of each school year and undergo review on at least an annual basis have been met. See 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.323(a), 300.324(b).⁶ Nevertheless, they were entitled to an understanding of the program that was proposed in order to participate meaningfully in educational decision-making for Student. In this case, the Parents were not afforded that critical procedural element of the collaborative special education process.

The IEP team began discussion of preparing for the 2019-20 school year in the fall of 2018 with expansion of vocational and community-based activities. Options were considered and team members toured various locations that may have been part of Student's program. Even as late as May 2019, however, at least six months after such options were first considered, the IEP team had not convened for the specific purpose of a program proposal for the fall. They did meet again in June, but there still was an obvious lack of any clarity especially on what the vocational aspects of the program actually would be.

Indeed, and while it is the Parents' understanding at the time that controls, the testimony of the IU witnesses at the hearing confirmed the absence of certainty with multiple crucial decisions left undecided as of the eve of the 2019-20 school year (*see, e.g.*, N.T. 423, 523-24). The Parent who testified similarly provided a persuasive account of all that remained wholly unknown to them at the May, June, and August 2019 meetings (*see, e.g.*, N.T. 223-24, 229-30, 233-35). Moreover, while the School as the LEA was obligated to comply with LRE mandates, it is not at all apparent that the IEP team truly considered a private school as the Parents had long requested. For these reasons, this hearing officer concludes that there was a procedural deprivation that significantly impeded the Parents' ability to

⁶ Whether or not further revision to the IEP was necessary is dependent on what precisely was changing with Student's transition to high school.

participate meaningfully in program planning and development, and therefore constituted a denial of FAPE satisfying the first prong of the test.

Before turning to the second factor in considering the remedy of tuition reimbursement, it is necessary to define the scope for the remainder of this discussion. Assuming that a charter school as a public school has the same obligation to a student enrolled in a private school as do public schools, unlike the 2019-20 school year when a program was required to be and was proposed for Student, there was no evidence of any triggering event for the 2020-21 or 2021-22 school years that should have prompted the School to take some action. Accordingly, the analysis of the tuition reimbursement prongs must relate solely to the 2019-20 school year.

The next question is whether Private School is appropriate for Student. This issue similarly cannot be answered based on the evidentiary record presented and is fatal to the claim. There was no testimony presented by any individual from Private School, and there was limited persuasive evidence on what services are provided to Student there. Moreover, the Parents' two psychologists who claimed familiarity with Private School did not describe the extent of their knowledge about the facility or program, or when it was obtained, but clearly their current understanding was rather limited in scope (N.T. 135-37, 195, 323-26) and not specific to Student. The Parent who testified 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.

Furthermore, although there were documents provided by Private School, even if determined not to be hearsay, they simply do not provide a basis for any legal determination on its appropriateness for Student. In addition to what appear to be pages from its website (P-27 at 1-10), the Director of Special Services at Private School stated in writing that it has the "ability to address and meet" Student's array of needs (P-27 at 11), and

provided an overview of its program (P-27 at 11-12), but lacked any concrete description of how it is implementing Student's academic and vocational programming, or even what curricular materials or other resources have been utilized. There is also no indication on whether related services identified as needs for Student, other than counseling and social skills, are provided, nor is there adequate information on how Student's significant behavioral and executive functioning deficits (some of which were never previously reported) were and are addressed. This is particularly concerning after a review of Private School's progress reporting that frequently notes Student's presentation as not focused and attentive (P-26). For all of these reasons, the Parents have not established the second prong of the tuition reimbursement test, and they therefore cannot prevail.

Finally, it is nonetheless noteworthy that neither of the Parents' psychologists opined that Student needs a residential program in order to be provided with educational benefit (N.T. 358; P-3), but rather couched their recommendations based on what may be "best" (P-3 at 30) and provide opportunity for the "greatest gains" (N.T. 323). This is not consistent with the IDEA obligations imposed on LEAs.

CONCLUSIONS OF LAW

The School denied FAPE to Student on procedural grounds in proposing a program for the 2019-20 school year.

The Parents have not met their burden of establishing that Private School is appropriate for Student under the applicable law.

ORDER

AND NOW, this 5th day of June, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School denied FAPE to Student on procedural grounds in the program it proposed for the 2019-20 school year.
2. The Parents are not entitled to reimbursement for tuition or related expenses at Private School.
3. The School is not ordered to take any action.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 25299-21-22