

*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**

26193-21-22

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

J.C.

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

#### **Counsel for Parent**

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

08/16/2022

## Introduction

This special education due process hearing concerns the educational rights of J.C. ("student"), a student who resides in the Upper Merion Area School District ("District").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> although there is a disagreement between the parties as to the exact nature of the student's qualifying disabilities. The parties dispute whether or not the District proposed, in September 2021, educational programming for the student which provided a free appropriate public education ("FAPE").

In the summer of 2021, the student's parents moved into the District from a neighboring state. Over the course of July and August 2021, the District evaluated the student and, in September 2021, issued an individualized education program ("IEP") to outline the educational programming for the student. Shortly before the issuance of the IEP, the parents had undertaken a unilateral private placement for the student.

Parents seek tuition reimbursement for the private placement, alleging that the District's proposed IEP was not calculated to provide FAPE to the student. The parents also seek reimbursement for a private neuropsychological evaluation performed in the fall of 2021. The District counters that its evaluation process was appropriate and that the IEP, as proposed, met its FAPE obligations to the student.

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14"). Analogously, the parents assert a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"). See 34 C.F.R. §§104.1-104.61; 22 PA Code §§15.1-15.11 ("Chapter 15").

For reasons set forth below, I find in favor of the parents on the tuition reimbursement issue and in favor of the District on the issue of reimbursement for the private neuropsychological evaluation.

### **Issues**

1. Was the District's evaluation of the student appropriate?
2. If not, are parents entitled to reimbursement for the November 2021 private evaluation?
3. Did the IEP issued in September 2021 constitute an offer of appropriate programming for the student?
4. If not, are parents entitled to tuition reimbursement?

### **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

#### ***Educational History Prior to Summer 2021***

1. Prior to the summer of 2021, the student resided in a neighboring state and received education there.
2. In the fall of 2014, while the student was in [redacted] grade, a private neuropsychological evaluation diagnosed the student with a specific learning disability in reading, particularly decoding and fluency, and attention deficit hyperactivity disorder ("ADHD"). The

student had also received speech and language services while in early intervention. (Parents' Exhibit ["P"]-1).

3. In the April 2016, when the student was in [redacted] grade, a private neuropsychological evaluation confirmed the diagnoses of ADHD and a specific learning disability in reading and the historic need for support in spoken language (language disorder). The evaluator also diagnosed the student with a specific learning disability in writing and with a generalized anxiety disorder. (P-2).
4. As of March 2018, when the student was in [redacted] grade, the student had been receiving special education services at a private school, a placement arranged by the out-of-state school district where the student then resided. (P-3).
5. In June 2019, when the student was in [redacted] grade, an evaluation of the student as part of a research study confirmed the diagnoses of ADHD and specific learning disabilities in reading and writing. The evaluator identified potential deficits in language and recommended a formal speech and language ("S&L") evaluation. (P-4).
6. In August 2019, a S&L evaluation diagnosed the student with a language disorder in expressive and receptive language. (P-5).
7. As of April 2021, the student's IEP team met to draft the IEP to be implemented in the 2021-2022 school year, the student's [redacted] grade year, at the private placement which the student had attended since [redacted] grade. (P-8).
8. The April 2021 IEP showed that the student's performance in English and language arts was independent or instructional at the 6<sup>th</sup> grade level, and in mathematics was independent or instructional at the 7<sup>th</sup> or 8<sup>th</sup> grade levels. (P-8 at page 1).

9. In the April 2021 IEP, the student had proposed goals in reading fluency, reading comprehension, written expression, mathematics problem-solving, S&L (both expressive and receptive), emotional self-regulation and response to others. (P-8 at page 6-15).
10. The April 2021 IEP included counseling and S&L therapy as related services, as well as assistive technology for reading and writing tasks. (P-8 at page 16).
11. In June 2021, the student's out-of-state school district recommended the continuation of the student at the private placement which the student had been attending. (P-9).

### ***Summer 2021***

12. At a point prior to July 1, 2021, the parents had been investigating private schools prior to their relocation from the neighboring state into the District. Once they had made formal real estate arrangements and prior to enrolling the student in the District, parents retained counsel (an different attorney than the attorney who represented parents at the hearing). Parents' attorney emailed counsel for the District, requesting that the District issue a notice of recommended educational placement ("NOREP") for a private school placement. The first time that District special education administration were informed of the student's need for special education was when counsel for the District informed them of parents' request through counsel. (Notes of Testimony ["NT"] at 79-81, 114-117, 344-345).
13. The student formally enrolled in the District on July 1, 2021. (P-10).

14. Parents provided documentation to the District, including the June 2019 evaluation, the August 2019 S&L evaluation, the April 2021 proposed IEP, and the June 2021 prior written notice outlining the proposed placement. Parents also provided the student's final 2020-2021 report card from the out-of-state private placement. (P-4, P-5, P-8, P-9, P-11; School District Exhibit ["S"]-2).
15. On July 7, 2021, a District school psychologist, who was tasked with being in charge of any evaluation process, asked a District S&L if she had been asked to review the August 2019 S&L evaluation. She replied that she had not been asked. (S-3 at page 1).
16. On or about July 8, 2021, the student's mother and the District's director of special education spoke about the student and potential programming at a private school and at the District. Because parents had requested the issuance of a NOREP, on July 8<sup>th</sup> the District issued a NOREP, indicating that a review of the documentation provided by the parents led the District to a preliminary conclusion that it could offer appropriate programming for the student. Because the student had come into the District from another state, the NOREP indicated that the District wished to evaluate the student. The NOREP further indicated that "alternative educational placements may be considered if the current proposed special education evaluation and subsequent IEP development indicate such". (P-11, generally and at page 3; NT at 358-359).
17. Over mid-July, the student's mother and the District school psychologist corresponded by email regarding the prior reports and sharing of documentation, especially since both parties felt that there might be a delay in obtaining reports and information from the out-of-state school district where the student resided. (P-26 at pages 1-6; S-3 at pages 2-9).

18. Over the latter half of July, the District arranged the schedules of staff for the student to complete a reading assessment and an assessment of the student's executive functioning skills. (P-26 at pages 7-12; S-3 at pages 9-22).
19. On July 29, 2021, the District completed the reading assessment. (P-26 at page 13; S-3 at page 23).
20. In early August, the District school psychologist had gathered parental input. (P-26 at page 14; S-3 at page 24-27).
21. On August 12, 2021, the District finalized its evaluation report ("ER") and, given the student's needs, discussed internal placement options at the District [redacted] school. On August 13, 2021, the District school psychologist emailed the ER to the parents. (P-26 at pages 15-18; S-3 at page 29).
22. The August 12<sup>th</sup> ER contained a summary of the April 2016 evaluation, the June 2019 evaluation, and the August 2019 S&L evaluation, and teacher input and observations gleaned from the April 2021 IEP, as well as the parent input gathered by the District school psychologist. (P-14 at pages 2-11).
23. The August 12<sup>th</sup> ER contained the results of the reading assessment performed by the District. Based on those results, the student was found to be instructional in reading at the 6<sup>th</sup> grade level, in line with the present levels of academic performance in the April 2021 IEP. (P-8 at page 1; P-14 at pages 11-12).
24. The August 12<sup>th</sup> ER contained the results of the executive functioning assessment performed by the District. The student's mother and the student completed rating scales for the assessment. (P-14 at pages 12-14, 23-24).
25. On the executive functioning assessment, the scores of the student's mother were clinically significant across all three indices

(behavior regulation, emotion regulation, cognitive regulation) as well as the overall global executive composite. The ratings of the student's mother on most sub-scales were largely in the 'marked difficulty', 'marked concern', or 'substantial difficulty'. (P-14 at pages 12-13, 23-24).

26. On the executive functioning assessment, the student's self-rating scores were dramatically different. The student's ratings on the behavior regulation index were potentially elevated, on the emotion regulation index were average, and on the cognitive regulation index were mildly elevated. The student's self-rating on the overall global executive composite was average. The student's self-ratings were elevated on three sub-scales, two as 'some difficulty' and one as 'substantial difficulty' (the inhibition sub-scale, related to executive function impacted by the student's ADHD). (P-14 at pages 12-14, 23-24).

27. The August 12<sup>th</sup> ER identified academic needs in decoding/fluency, reading comprehension, and written expression. The ER identified functional and behavioral needs in attention to task, assignment completion, and potential support for academics-related anxiety. (P-14 at pages 15-17).

28. The August 12<sup>th</sup> ER recommended that the student be identified as a student specific learning disabilities in reading and written expression and as a student with a health impairment (ADHD). The District evaluator left to the IEP team the question of whether the student required explicit S&L therapy or whether the student's language needs could be supported in other ways in the special education environment. (P-14 at pages 18-19).

29. When the District school psychologist provided the August 12<sup>th</sup> ER to the parents, he indicated that the student's IEP meeting would

likely take place in near the end of August: "Most likely, [the IEP] will be proposed for the week that staff return for school (August 23-25)". (P-15, P-26 at page 17, bracketed material edited for clarity, parenthetical in the original).

30. On August 23, 2021, the District special education teacher who would be the student's reading teacher and administrative case manager, as proposed by the District, reached out to District special education administration, inquiring about an IEP meeting: "Do we have an IEP meeting scheduled for (the student)?" (P-26 at page 19, parenthetical edited for stylistic consistency).
31. The District special education administrator scheduled the IEP meeting for the next day, August 24, 2021, via videoconference. (P-17).
32. On August 24, 2021, the student's IEP team met. The District did not have a draft IEP available for the team to review. The student's educational programming and placement, as the District envisioned it, was described to the IEP team members. (NT at 92-95, 163-167, 282-283, 364).
33. The District S&L therapist was not made part of the IEP team at the August 24<sup>th</sup> meeting. (NT at 239, 247).
34. At the August 24<sup>th</sup> IEP meeting, the parents informed the District that they did not agree with the programming that was described at the meeting and that they would be seeking a private placement at District expense. This was reiterated through communication from parents' counsel. (P-18, P-26 at pages 20-21; NT at 93-95, 163-167).
35. On Friday, August 27, 2021, at 11:38 PM, the District special education teacher emailed a draft of the student's IEP to special education administration. The first day of school for students was Monday, August 30<sup>th</sup>. (P-16, P-26 at page 22).

36. On Monday, August 30, 2021, parents signed the contract for enrollment of the student at the private placement. (P-20).
37. By Friday, September 3, 2021, the District S&L therapist had been provided with documentation of the student's S&L needs, through the August 2019 S&L evaluation and April 2021 IEP. The S&L therapist opined that, given its age, the S&L evaluation needed to be updated and that the S&L goals in the IEP were not well-written and the measure of S&L progress was vague. Lacking S&L evaluation results, she recommended as a default that the student receive support in education settings with abstract concepts as specially designed instruction while an updated S&L evaluation of the student was pursued. This content was made part of the proposed IEP. (P-19 at page 26, P-26 at pages 22-23; NT at 243-246, 248-251, 261).
38. On Thursday, September 9, 2021, the District proposed the draft IEP for parents' consideration, accompanied by a NOREP.<sup>3</sup> The documents were sent as attachments to an email. (P-19).
39. The August 2021 IEP included three goals, one each in reading comprehension, written expression, and focus/task-completion. (P-19 at pages 24-25).
40. The August 2021 IEP included the specially-designed instruction recommended by the S&L therapist, as well as the recommendation for a S&L evaluation. (P-19 at page 25).
41. The August 2021 IEP included a weekly counseling session of 45 minutes per session. (P-19 at page 27).
42. The student's special education placement would be in a smaller English class with special education instruction and support, with a

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<sup>3</sup> The IEP was dated for implementation on August 30, 2021, so it will be referred to as an August 2021 IEP.

double period to allow for modified material, extra time on instruction, deepened instruction, and extended time on assessments. (P-26 at page 13; NT at 278-281, 382-384).

43. Given the student's special education class for English and weekly counseling, the student's approximate placement would be in regular education for 67% of the day. (P-19 at page 31).
44. Parents rejected the NOREP, through which the District proposed that its IEP be implemented at the District high school. (P-19 at pages 33-37).
45. Approximately 11 work days passed from Tuesday, August 24<sup>th</sup> to Thursday, September 9<sup>th</sup>. Somewhere in the midst of this period, but after school commenced on August 30<sup>th</sup>, weather events dramatically impacted some residents of the District and necessarily took up the attention of the District's senior administration, including the director of special education. (P-16; NT at 401-403).

### ***2021-2022 School Year***

46. The student attended the private placement selected by the parents, and contracted-for on August 30, 2022, for the entire 2021-2022 school year. (P-22, P-24; NT at 532).
47. The private placement specializes in the instruction of students with reading disabilities. (NT at 526-532).
48. Early in the school year, the student experienced difficulty in adjusting to the private placement. Through efforts to assist with socialization and executive functioning, the student adjusted more readily to the private placement. (NT at 532-541, 553-556).

49. The student experienced progress in reading through the intensive reading instruction and additional supports provided at the private placement. (P-22, P-23; NT at 541-550, 556-565, 573-580).
50. The student received S&L support twice per week, services which the private placement would recommend continuing in the student's program. (P-24; NT at 565-569).
51. The exact amount of reimbursement that might be owed to parents—accounting for any financial aid provided by the private placement— is not provided on this record. The administrator from the private placement who testified at the hearing did not know those details related to arrangements with the parents. (NT at 583-586).
52. In the fall of 2021, the student underwent a private neuropsychological evaluation. In November 2021, the evaluator issued a report ("neuropsych evaluation"). (P-21, P-25).
53. The November 2021 neuropsych evaluation was undertaken to provide updated information about the student's cognitive, achievement, learning, and behavioral profiles for programming at, and recommendations for, the private placement. (P-21 at page 1; NT at 444-445, 480).
54. The November 2021 neuropsych evaluation included a comprehensive battery of assessments and screenings, including cognitive assessment, academic achievement, executive functioning, learning and memory, language, and fine motor/visual motor skills. (P-21, generally, and at pages 6-10, 14-16; NT, generally, at 444-518).
55. The November 2021 neuropsych evaluation included diagnoses identical to the diagnoses in the June 2019 evaluation (in material part, specific learning disabilities in reading and written expression, ADHD, and language disorder). (P-21 at page 11).

56. The November 2021 neuropsych evaluation contains instructional and support recommendations. The first, and most extensive, of these recommendations specifically references the private placement. (P-21 at page 11-13; NT at 463-472).

### **Witness Credibility**

All witnesses testified credibly and an equal degree of weight was accorded to each witness's testimony. No one witness's testimony was accorded markedly more or less weight in relation to the testimony of other witnesses.

### **Legal Framework**

*FAPE.* The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

*Procedural Violations.* Any denial-of-FAPE must be based on substantive programming considerations, and not procedural violations of IDEIA, unless a procedural violation (1) impeded the child's right to FAPE, (2) significantly impeded a parent's opportunity to participate in the

decision-making process regarding the provision of FAPE to the parent's child, or (3) caused a deprivation of educational benefit to the child. (34 C.F.R. §300.513(a)(2)(i-iii); 22 PA Code §14.102(a)(2)(xxx)).

*Evaluation.* A comprehensive evaluation of the student is a necessary first step to understand a student's strengths and needs, including potentially highly specialized needs, from a variety of perspectives (parents, teachers, specialized providers and/or evaluators) and data-gathering/formal assessments, and observations. (34 C.F.R. §§300.305-300.311; 22 PA Code §§14.123-14.125). This is explicitly the case where a student with an IEP comes into a school district from another state and the receiving school district determines that it needs to perform its own evaluation. (34 C.F.R. §§300.323(f)(1); 22 PA Code §§14.102(a)(2)(xxvii)).

*Remedy.* Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim under the three-step Burlington-Carter analysis is undertaken below. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)). This framework can also be applied to gauge a parent's claim for reimbursement (although not monetary damages) in other regards where the parent claims unilateral obligations needed to be undertaken for a school district's alleged denial of FAPE. Thus, the Burlington-Carter analysis will also be utilized to examine parents' claim for reimbursement for the private evaluation.

In the Burlington-Carter analysis, a three-step process is undertaken to see if a parent's claim for reimbursement is warranted. Step one of the Burlington-Carter analysis is an examination of the school district's proposed

program, or last-operative program, and whether it is reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private unilateral placement or services selected by the parents. Step three of the Burlington-Carter analysis involves a balancing of the equities between the parties to see if those equities impact the remedy in any way.

## **Discussion**

### ***IDEIA/Denial-of-FAPE***

*Evaluation.* The District's August 12<sup>th</sup> evaluation of the student was largely appropriate but not wholly appropriate. The District's decision to adopt the prior private comprehensive evaluations, the most recent of which was completed only two years prior, was entirely defensible, especially as both parties recognized that receiving school-based information from the out-of-state school district where the student resided was going to take too long. So the District did not deny the student FAPE in relying on this information. Ultimately, the conclusions of the August 12<sup>th</sup> ER, identifying the student as a student with disabilities in the form of specific learning disabilities in reading and written expression and the health impairment of ADHD, were appropriate.

The prejudicial flaw in the August 12<sup>th</sup> ER was the lack of any evaluation for eligibility as a student with S&L impairment, or at least an evaluation that might inform more expertly the student's needs for support in S&L. This is especially the case where the District S&L therapist specifically asked if she would be part of the evaluation process but was not brought into that process. (Finding of Fact 15).

Given this, step one of the Burlington-Carter analysis supports a finding that the District's August 12<sup>th</sup> ER was inappropriate. At step two of

the Burlington-Carter analysis, the November 2021 neuropsychological evaluation is appropriate as an evaluation process and artifact. It is at step three of the Burlington-Carter analysis that parents' claim for reimbursement for the November 2021 neuropsychological evaluation fails. The report itself explicitly indicates, and the evaluator testified, that the evaluation was undertaken, and the report, generated for the express purpose of informing the student's performance and programming at the private placement. The recommendations, too, are geared to the programming at the private placement. (Findings of Fact 52, 55).

One could argue that any educator might adopt the results of the evaluation assessments in the November 2021 neuropsychological evaluation report to inform an educational understanding of the student; indeed, this might even be the case at the District if it chose to do so. This assertion is true. But the report was not generated to help any educator. The exact opposite is true—the report was produced as a result of an explicit collaboration between the parents and the private placement. In that regard, at step three of the Burlington-Carter analysis, it would be inequitable to award reimbursement to parents, at the expense of the District, for the November 2021 neuropsychological evaluation/report and the testimony of the evaluator at the hearing.

Accordingly, the District need not reimburse parents for the November 2021 neuropsychological evaluation/report or any fee for the evaluator's testimony at the hearing.

*IEP.* Similarly, the August 2021 IEP was largely appropriate but not wholly appropriate. The prejudicial flaws in the substance of the IEP include the lack of goals in decoding or fluency where the student's June 2019 private evaluation indicated significant needs in word reading, pseudoword decoding, total word reading efficiency, sight word efficiency, and phonemic

decoding efficiency (P-4 at page 19) and where the April 2021 IEP included goals and programming in those areas (P-8 at page 7).

And, as indicated above, the lack of any S&L evaluation must be viewed as a prejudicial flaw for the IEP. First, it is explicitly recommended in the August 2021 IEP, finalized (although not presented to the parents) nearly seven weeks after the S&L therapist inquired as to whether she would be performing such an evaluation. (Findings of Fact 15, 35). Second, while one does not know the results of such an evaluation might be, the evaluator herself did not feel she had enough information and relied on default programming recommendations in the IEP. (Finding of Fact 37). This lack of an updated S&L evaluation will be addressed in the order below.

Too, there is a denial of FAPE because the District did not have a proposed IEP for the IEP team's review at the August 24<sup>th</sup> IEP meeting. This is a procedural violation which amounts to a denial of FAPE because it significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student, or (3) caused a deprivation of educational benefit to the child. (34 C.F.R. §300.513(a)(2)(ii); 22 PA Code §14.102(a)(2)(xxx)). A school district must have an IEP in place for a student at the outset of a school year. (34 C.F.R. §300.323(a); 22 PA Code §14.102(a)(2)(xxvii)). Critically, an IEP must be "a **written** statement for each child with a disability that is developed, reviewed, and revised in (an IEP) meeting." (34 C.F.R. §300.320(a); 22 PA Code §14.102(a)(2)(xxvii), emphasis added). The lack of an IEP draft to be considered by the IEP team where eight working days passed between completion of the August 12<sup>th</sup> ER and the August 24<sup>th</sup> meeting, ostensibly because staff would not have returned until August 23<sup>rd</sup> in preparation for the school year, is procedurally prejudicial. (Findings of Fact 29, 32). Ultimately, the IEP was not reduced to writing for an additional three working days after the IEP meeting, late at night on Friday, August 27<sup>th</sup>.

(Finding of Fact 35). Quite simply, parents were not placed in a position to understand, concretely, what the District was proposing for the student before the school year began on Monday, August 30<sup>th</sup>.<sup>4</sup>

On that very day, the parents contracted for the unilateral private placement. (Finding of Fact 36). The private placement provided the student with significant learning, primarily in reading but in other areas (socialization, executive functioning, and S&L). (Findings of Fact 46-50).

Given the foregoing discussion in this sub-section, step one of the Burlington-Carter analysis supports a finding that the August 2021 IEP was inappropriate. It was not reasonably calculated to yield meaningful education benefit to the student in light of the student's unique programming needs in reading and S&L. Additionally, procedural violations given the lack of any written IEP for the IEP team's consideration (and particularly the parents' consideration) prior to the start of the school year amounts to a procedural denial of FAPE.

At step two of the Burlington-Carter analysis, the unilateral private placement undertaken by the parents is appropriate. The student benefited from significant learning as the result of that programming provided by the private placement.

At step three of the Burlington-Carter analysis, the equities do not weigh in favor, or against, either party. The District argues in its closing that the parents did not authentically engage in the process of considering the District's offer of programming and that they had predetermined their decision to enroll the student in the private placement. Notwithstanding the fact that parents were not placed in any position to understand through a written IEP document what that offer of programming would look like, the record in its entirety shows that over the period of July and August 2021,

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<sup>4</sup> Even here, the District did not provide the IEP to the parents for an additional eight working days, on Thursday, September 9<sup>th</sup>.

the parents communicated with educators, shared documents and viewpoints, and participated in assessments (and made the student available for the reading assessment in a timely way). When summoned quite suddenly to the August 24<sup>th</sup> IEP meeting, they made arrangements to participate. And, most importantly, it was not until the first day of school at the District on August 30<sup>th</sup>, without any IEP in hand to consider, that they made the contractual commitment for the student's enrollment at the private placement. The record supports a finding that the parents had a deep interest, even a preference, from the beginning in a private placement.<sup>5</sup> But they engaged in good faith with the evaluation and IEP processes.

Accordingly, the District will be ordered to reimburse parents for the student's enrollment at the private placement, where need for that reimbursement is documented.

### ***Section 504/Denial-of-FAPE***

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).<sup>6</sup> The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be

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<sup>5</sup> And, certainly, the fact that parents began their relationship with the District through counsel, making demands for a private placement is not—as the kids say—a 'good look'. But that rocky start does not undermine the parents' authentic engagement in the months thereafter.

<sup>6</sup> Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

considered to be identical for claims of denial-of-FAPE. (See *generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the above analysis applies here. The District denied the student FAPE as outlined above.

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## **ORDER**

In accord with the findings of fact and discussion set forth above, the Upper Merion Area School District shall reimburse the parents for their unilateral placement of the student at the private placement which the student attended in the 2021-2022 school year. On or before August 30, 2022, the parents shall provide, through their counsel, to the school district, through its counsel, (1) a written statement from a private placement administrator with knowledge of any financial aid, scholarship, or other credit to the parents' tuition for the student for the 2021-2022 school year and (2) documentation of identifiable payment for tuition/private-placement services. To the extent that any balance for the 2021-2022 school year is owed, the educator identified in #1 in the preceding sentence shall verify in the written statement the amount of any such balance. Upon being furnished with this information, the school district shall promptly undertake the internal processes for approval and issuance of any reimbursement owed to the parents.

In accord with the findings of fact and discussion set forth above, the Upper Merion Area School District does not owe reimbursement to the parents for any costs or fees associated with the production or issuance of the November 2021 neuropsychological report, or with any costs or fees associated with the testimony of the evaluator at the hearing.

In accord with the findings of fact and discussion set forth above, the student needs to undergo a comprehensive speech and language (“S&L”) evaluation to inform potential S&L programming at the school district. Therefore, the terms of this order shall serve as explicit permission for the school district to evaluate the student for potential needs in S&L. The record review, input, observations, assessments, testing, consultation, scope, details, findings, recommendations, and/or any other content in the S&L evaluation report, shall be determined solely by the school district’s S&L evaluator. Parents are urged to coordinate with the school district and its S&L evaluator to make the student available for this evaluation.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

08/16/2022