

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:

25872-21-22

Child's Name:

H.D.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

April 30, 2022

INFORMATION AND PROCEDURAL HISTORY

The Student¹ (hereafter Student) is a [redacted] District resident parentally placed in a 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 a Specific Learning Disability (SLD), Other Health Impairment (OHI) and Speech and Language impaired.²

The student attended a private school funded by the District from first through third grades. The Student returned to the District for fourth and a portion of sixth grade. Early in sixth grade, through an agreement with the District, the Parents enrolled the Student in an intensive, private reading program at District expense for a year spanning a portion of sixth and seventh grades. The Student returned to the District and finished the seventh grade. The Parents³, dissatisfied with the Student's progress, unilaterally placed the Student in the Private School for the eighth (2020-2021) and ninth grades (2021-2022). They now seek reimbursement for tuition and related services expenses on the basis of a denial of FAPE. ⁴ The District asserts that the programming offered was appropriate and that no remedy is due. For the following reasons, the Parents' claims are granted.

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 due process Complaint. References to "Parent" should not imply they were not acting in concert.

⁴ This Private School was new for the Student and different from the private program and intensive reading program previously attended.

ISSUES

- 1) Did the District fail to offer the Student a free appropriate public education, FAPE, for the 2020-2021 school year?
- 2) If the District failed to offer the Student a FAPE, are the Parents entitled to tuition reimbursement and payments made for related services during the 2020-2021 school year?
- 3) Did the District fail to offer the Student a FAPE for the 2021-2022 school year?
- 4) If the District failed to offer the Student a FAPE, are the Parents entitled to the tuition reimbursement and payments made for related services during the 2021-2022 school year?

FINDINGS OF FACTS⁵

Early Elementary Years

1. The Student attended kindergarten through third grades at private placements funded by the District. (J-38, J-90, Stipulation)
2. Although the District offered to fund fourth grade at the private school attended for the last three years, the Parents enrolled the Student in the District for the 2016-2017 school year. The Student entered the District with academic, behavioral and related service needs. (J-3, J-5, J-38, J-90; N.T. 56-57)

⁵ In addition to Stipulations of Fact, Counsel prepared and submitted Joint exhibits. J-1 through J-90 were admitted into the hearing record.

3. During the 2017-2018 school year, the Student attended fifth grade in the District. The IEP team met in October to address Parents' concerns [and] twice in March 2018 to plan for the Student's transition to middle school. (Stipulation; N.T. 63)
4. An October 2017 QRI-5 administered to assess the reading skills determined the Student's instructional level at third grade and frustration level at fourth grade.⁶ (J-42, p. 6; N.T. 184)

2018-2019 School Year – Sixth Grade

5. During the 2018-2019 school year, the Student was enrolled in the sixth grade in the District. (J-39)
6. Through the IEP implemented by the District, the Student received programming through a Read 180 program and then moved to the System 44 classroom to help develop phonics skills. (J-39)
7. An October 2018 QRI-5 administered to assess the Student's reading skills determined the Student's instructional level at the primer level and frustration level at first grade. (J-42, p. 6)
8. In November 2018, the District agreed to fund the Student's placement at an intensive private reading program, [redacted], for the remainder of the school year, including ESY. While attending the [private reading] program, the Student received speech therapy services from the District and participated in extracurricular activities. (J-42, J-90; N.T. 64)

⁶ Student never scored that high again on the QRI or any measure of reading comprehension and Parents purport that a scoring error occurred. However, the District conceded that the apparent regression should have been addressed in the RR but was not. No satisfactory explanation of the discrepancy was supplied. (J-44, p. 5; N.T. 185, 190)

9. In April 2019, the District completed a reevaluation (RR) of the Student. On a March 2019 ORI-5 administered to assess reading skills, the Student's scores determined an instructional level of second grade and a frustration level of third grade. (J-39, J-42, p.6)
10. The team met on May 14, 2019, and a draft IEP was offered to the family. The Parents requested continued District funding of [the private reading program] to allow more time for the Student to make progress; they expressed concern that the 2017 QRI scores were erroneous and that prescriptive, intensive, 1:1 reading instruction was necessary. The District agreed to fund the [private reading] program for ESY 2019 and through the end of December 2019. The Student was to return to the District for the 2019-2020 school year, midway through seventh grade. (J-71, J-90; N.T. 65-67; Stipulation)

2019-2020 School Year-Seventh Grade

11. During the 2019-2020 school year, the Student started the seventh grade at the [private reading] program, funded by the District. (J-71, J-90; N.T. 65-67; Stipulation)
12. On November 26, 2019, the IEP team met to discuss Student's December transition back to the District. During the meeting, the May 2019 IEP was updated, Parent concerns were discussed, and a reevaluation of the Student was proposed. (J-17; N.T. 66)
13. On December 2, 2019, the Student transitioned from the [private reading program] to a District middle school. On December 6, 2019, the Parents consented to a reevaluation of the Student. (J-72)

14. On December 12, 2019, through a NOREP, the team proposed that the Student receive special education instruction that included intensive language arts, math, a researched-based reading intervention program, social skills instruction and speech and language therapy. (J-73)
15. The District purchased the [private reading program] and trained a reading specialist in its administration. On January 13, 2020, the IEP team met to discuss Student's progress in math and reading. At the meeting, the team discussed the introduction of the [private reading] program. (J-18, p.15; N.T. 290)
16. February 3, 2020, progress reporting indicated Student was not proficient in reading comprehension, fluency, and writing. The District reported partial proficiency in reading, social skills, following directions, math computation, and auditory memory. (J-35)
17. On February 7, 2020, the District completed its reevaluation report. On the Weschler Intelligence Scale for Children, Fifth Edition (WISC-V), the Student's scores had great variability. They ranged from extremely low in the 1st percentile (processing speed) to average (verbal comprehension) in the 30th percentile. Student's full-scale IQ was determined to be 73. On the Stanford-Binet, Fifth Edition (SB5), the Student received a Nonverbal IQ score of 81 in the 10th percentile, and a Verbal IQ score of 73 in the 4th percentile, resulting in a full-scale IQ score of 76. On subtests of the SB5 to assess verbal ability, fluid reasoning and memory, the Student received scores in the 59th percentile in nonverbal reasoning, 63rd percentile in verbal fluid reasoning and the 50th percentile in nonverbal working memory. Because of the great variability in Student's performance, the

evaluator suggested caution when considering overall score composites. (J-42; N.T. 212)

18. For inclusion in the RR, the District conducted a Critical Reading Inventory (CRI) through which the Student's highest instructional level was primer. A January 2020 QRI-5 determined the Student's instructional level at second grade and frustration level at third grade. (J-42, p. 6; N.T. 188)
19. On the Kauffman Test of Phonological Processing -Third Edition (KTEA 3), incorporated into the RR, the Student received subtest scores of 0.2 percentile in letter & word recognition, 1st percentile in reading comprehension, 2nd percentile in nonsense word decoding, and 3rd percentile for phonological processing. Student's composite scores were in the 0.2 percentile for reading, the 1st percentile for decoding and the 1st percentile for sound-symbol. Student's written expression and orthographic processing composite scores were in the 0.1 percentile. (J-42, p. 16-17, J-44, p. 3)
20. Student's math composite score fell in the 1st percentile, with a quantitative reasoning score in the 3rd percentile. (J-42, p. 16)
21. In behavioral and emotional functioning assessments, difficulties with attention were noted but determined not to rise to a level of significance. Still, qualitative information indicated that the Student required support for inattention in classes requiring more reading and writing expectations. (J-42, p. 17)
22. A speech assessment recommended speech and language support for two thirty-minute sessions each week. An OT evaluation recommended that Student receive direct services to address typing and motor skills. (J-42, p. 19)

23. The team determined Student to have needs in written expression, basic reading and comprehension, math computation and reasoning, articulation, memory, attention, social interaction, emotional regulation and typing and visual motor skills. The RR offered numerous recommendations, including that Student receive an intensive level of instruction in reading, language arts and math with a smaller class size with opportunities for modified pacing, guided practice and repetition. (J-42, p. 19)
24. The RR concluded that Student continued to require specially designed instruction on the grounds of a specific learning disability, OHI and a Speech or Language Impairment. (J-42, p. 19)
25. On February 26, 2020, the team met to discuss Parents' concerns about the Student's programming. (J-17; N.T. 66)
26. On March 6, 2020, the Student's annual IEP meeting occurred. The March 2020 IEP, slated for implementation until March 2021, provided measurable annual goals in reading, written expression, math, speech and OT. Related services proposed included speech for 60 minutes per week (30 minutes individual and 30 minutes group) and OT for 30 minutes every other week. The team determined the Student was eligible for ESY. (J-18, J-19)
27. SDI offered in the March IEP included replacement reading instruction using the [private reading program] to focus on phonemic awareness, testing accommodations, direct instruction in math and language arts, modified assessments and assignments, typing for written work, teacher notes, access to a paraprofessional for core classes, reading with an adult in Language Arts, strategies to support attention and executive functioning, behavior praise, pass/fail grading for social

- studies and science classes, and a writing program. (J-18, p. 40-42, J-19)
28. Through the March 2020 IEP, the team proposed that Student receive supplemental learning support with 63% of the school day spent in the regular classroom. (J-18, p. 47-48, J-19; N.T. 231, 265, 304)
 29. The Parents did not return the NOREP accompanying the March 6, 2020, IEP. (J-77)
 30. Through the March IEP, the Student received direct instruction in research-based programs taught by a certified special education teacher, in a small group, in reading, writing and math. The Student's social studies and science classes occurred in regular education. The Student received related services in speech for 60 minutes per week (30 minutes individual and 30 minutes group) and OT for 30 minutes every other week. (J-18, J-42 p. 5; N.T. 233, 235-236, 241, 248)
 31. In March 2020, the District closed because of the COVID-19 pandemic. Following the mandated closure, the District provided the Parents with a "Covid plan" informing how Student's special education programming would be implemented with synchronous and asynchronous instruction and live/virtual related services. (J-21)
 32. Although the District offered both in-person and virtual ESY during the summer of 2020, the Student did not participate. (J-22, N.T. 69)
 33. In June 2020, a private speech-language pathologist completed a language and literacy reevaluation of the Student. The evaluator obtained Parents input, reviewed records, conducted an informal observation and administered assessments. The evaluator administered the Listening Comprehension Test: Adolescent (LCT-A), Word Test Adolescent (WT-A), subtests of the Clinical Evaluation of

Language Fundamentals -5 (CELF-5:M), Test of Problem Solving-2 Adolescent (TOPS-2), Clinical Assessment of Pragmatics (CAPs), subtests of the Test of Integrated Language and Literacy (TILLS), Test of Reading Comprehension-Fourth Edition (TORC-4) and the Spelling Performance Evaluation for Language and Literacy-Second Edition (SPELL-2). (J-58, J-59)

34. The private evaluator diagnosed the Student with a mixed receptive-expressive disorder, a social pragmatic communication disorder, a specific reading disorder and a disorder of written expression. (J-58, J-59)
35. The private evaluator recommended that the Student receive education in an alternate out of District setting with small classrooms, teaching through a structured literacy approach with synthetic phonics, speech language therapy, and small social groups. (J-58, J-59)
36. On July 23, 2020, the Private School accepted the Student into its program. (J-45; N.T. 29)
37. On July 29, 2020, the Parents sent the District a "ten-day" letter that advised of their decision to place the Student at the Private School for the 2020-2021 school year and their request for reimbursement. In response, the District offered IEP meeting to address the Parents concerns. The Parents did not reply. (J-46, J-85; N.T.31)

2020-2021 School Year – Eighth Grade

38. During the 2020-2021 school year, the Student was enrolled in the eighth grade in the Private School. The Student received virtual instruction, Monday-Thursday, with Friday as an optional in-person day. On March 22, 2021, the Private School resumed full-time in-person instruction. (J-86; N.T 98)

39. The Student received thirty minutes of weekly, individual speech services through the IU while attending the Private School, as well as private therapy coordinated by the Parents. (J-60 B, J-60 C; N.T. 43-44)
40. While attending the Private School, the Student received intensive private OT services coordinated by the Parent. (J-62, J-62A; N.T. 46)
41. The Private School is independent, licensed by the Pennsylvania Department of Education and offers co-educational programming for sixth through twelfth grades. (N.T. 96)
42. The Private's School mission is to provide a place where unique minds that learn in unique ways can be educated. The Private school specializes in educating students who have not been successful in another setting. The Private School has one teacher in a classroom to four students. The curriculum is individually tailored to the needs of the Student. (N.T. 95-98)
43. The Private School offers an array of core academic classes as well as electives with an average of four to five students per class. (J-52, J-53; N.T. 98)
44. The Private School does not use a specific behavior system or program but offers the Student breaks and chunking and supports to address any attentional issues. (N.T. 99)
45. At the Private school, a reading specialist trained in the Wilson reading system provided Student with instruction in a one-to-one format three or four times per week, with each session lasting fifty minutes. Wilson reading strategies are utilized when other subjects are taught. The Private School uses AIMSweb for progress monitoring. (N.T. 94- 100, 102, 158; Stipulation)

46. On April 30, 2021, the Parents, through counsel, contacted the District about available programming for the summer 2021 ESY and the 2021-22 school year. After confirmation that the Parents sought an offer of FAPE and were still residents, the District issued a permission to reevaluate the Student. A Parent signed and returned the consent. (J-79, J-87, Stipulation)
47. On May 26, 2021, the IEP team met, and the District offered an ESY plan to the family. Through a June 3, 2021, NOREP, the District offered instruction in ELA and math, a social skills camp two days a week, two hours of additional reading support per week, 60 minutes of speech and language per week, and two additional transitional "booster" weeks, extending the programming from June 28 until August 12, 2021. (J-24, J-28; N.T. 73)
48. The Student earned a final grade of "A" in math, English Language Arts, Art, Earth Science, Ancient Civ I and Photo Composition. (J-52)
49. The Student did not attend the District's ESY program during the summer of 2021. (N.T. 72-73)
50. Before the 2021-2022 school year commenced, the District offered an interim IEP to the family while completion of the RR was pending. (N.T. 74)

2021-2022 School Year

51. During the 2021-2022 school year, the Student was enrolled in the ninth grade in the Private School. (J-53)
52. The Private School has two-four, other students in each class. Student is enrolled in Basic Math II, Language Arts, Life Sciences, American Studies, Photo Editing, Bees and Garden, Transitions, Physical

- Education and Health. Student receives individual reading instruction. The Student earned grades of "A" for all classes during the second marking period. (J-53; N.T. 47, 206)
53. Student receives weekly, individual Speech services for thirty minutes from the IU. Student receives private OT and Speech services. (J-60 C, J-62 A, J-60B; N.T. 48)
 54. While the RR was pending, the District invited the Parents to a meeting to discuss an interim IEP. (J-25)
 55. On September 10, 2021, the District completed its reevaluation of Student. The RR included a classroom observation of the Student at the Private School, academic assessments, background information, social and emotional behavior rating scales, Parent input, a summary of evaluative information and speech and language and OT evaluations. (J-44; Stipulation)
 56. For inclusion in the RR, the school psychologist administered the WIAT-4. Student received reading scores that ranged from a .1 percentile in phonemic proficiency to a .5 in pseudoword decoding and oral reading fluency. In written expression, the Student's scores ranged from the 1st percentile in essay composing to the 2nd percentile in spelling and sentence building. In math, the Student's scores ranged from the 92nd percentile in receptive vocabulary to the 1st percentile in problem-solving. (J-44, p. 16; N.T. 196-197)
 57. The QRI-5 administered in June of 2021 for inclusion in the RR determined the Student's instructional level as third grade and frustration level at the fourth-grade level. The District's reading specialist recommended that the IEP team consider the Student's

instructional reading level to be third grade and working toward the fourth grade. (J-44, p. 18-19; N.T. 418)

58. A speech-language evaluation performed for inclusion in the RR concluded that the Student demonstrated skills consistent with a speech and language disability with needs in articulation, written expression, reading and listening comprehension. The evaluator recommended that Student receive sixty minutes of weekly speech and language therapy. (J-44, p. 27; N.T. 199)
59. An OT evaluation for the RR concluded that Student's visual-motor integration and visual perception skills were below average and motor coordination was within the average range. The evaluator recommended quarterly consultative OT to ensure maintenance of skills. (J-44, p. 27; N.T. 200)
60. At the observation at the Private School, the evaluator determined the teacher had to work very hard to keep Student 's attention, but the Art teacher expressed pairing with responsible students resulted in a positive effect. (N.T. 206)
61. The RR determined Student to have needs in written expression, basic reading and comprehension, math computation and reasoning, articulation, attention, social skills, and executive functioning. The RR offered numerous recommendations including that Student receive an intensive level of instruction in reading, written expression and math with smaller class size with opportunities for modified pacing, guided practice and repetition, teacher check-ins, movement breaks, manipulatives, memory aiding devices, extended time and direction instruction in social skills. (J-44, p. 28-29)

62. On September 27, 2021, the IEP team met to review the RR and draft an IEP for the 2021-2022 school year. (J-26)
63. The September 2021 IEP offered the Student measurable goals to address written expression, basic reading and comprehension, math computation and reasoning, social skills and speech. (J-26, p. 44-48)
64. The IEP offered specially designed instruction, including two periods a day of replacement/remedial reading/writing instruction to work on phonics, comprehension, fluency and vocabulary, assessment accommodations, direct instruction in math, modified homework, adult support within science and social studies, classroom/guided notes for social studies and science, social skills instruction, speech to text and text to speech technology, and executive functioning class. The District proposed intensive reading instruction using the Read 180 and System 44 as a hybrid (J-26, p. 49-50; N.T. 284)
65. Related services offered included speech therapy (60 minutes per week) and an OT quarterly consult with teachers. (J-26).
66. To assist with the transition to the high school, the IEP offered an opportunity to meet with the guidance counselor, a "shadow day" before the start of school, and a "New Student Group." (J-26)
67. The September 2021 IEP proposed the Student receive supplemental learning support with 63% of the day in the regular classroom. (J-26, p. 54; N.T. 202)
68. The team determined the Student eligible for ESY. (J-26, p. 51)
69. On October 19, 2021, the Parents advised the District through a "ten-day" letter of their decision to retain the Student at the Private School for the 2021-2022 school year. (J-50; N.T. 32, 75)

70. The District's expert witness is credentialed as a Wilson dyslexia therapist and Wilson trainer, with certifications in Pennsylvania for elementary education and as a reading specialist. The expert reviewed reports, did not observe Student in a classroom, collect input or talk to any of Student's teachers or service providers, and could not offer an opinion about whether a particular placement or the Wilson instruction provided at the Private School was appropriate. The reading expert opined that Wilson was an appropriate program for Student. (N.T. 332-335, 400)
71. The Student has made progress in reading and math since attending the Private School. The December 2021 progress report indicated a targeted instructional range around the 5th-6th grade level, an increase from the previous year where it was between 4th and 5th grade. The Private School concluded that the Student responded favorably to the personalized teaching style and small classes at the Private School as evidenced by progress on the QRI and in the Wilson Reading System. (J-57)
72. On December 17, 2021, the Parents filed a Complaint seeking a due process hearing. (J-1)

DISCUSSION AND CONCLUSIONS OF LAW

WITNESS CREDIBILITY

Hearing officers, as factfinders, are 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). All testimony was reviewed and weighed in light of the witnesses' participation in the hearing during their testimony and in light of the documentary evidence specifically reviewed by them and, where applicable, in general. Considering the testimony in light of the documentary evidence, I find that most of the witnesses, including Parent, were credible and reliable witnesses. In most cases, the witnesses' testimony was consistent with the documentary evidence and other testimony.

The Parents objected to the District's proffer of a specific witness as an expert in the field of reading specialty. Based on the witnesses' knowledge, skill, experience, training, and education as evinced through a resume and testimony, this witness is qualified to testify and render an opinion as an expert. For reasons outlined in the findings below, this witness's testimony was not especially probative.

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 their 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 case, the Parents, as the party seeking relief, bore the burden of persuasion.

IDEA FAPE PRINCIPLES

Parents who believe that a local education agency (LEA) has failed to comply with its obligations under the IDEA may “present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.515; 22 Pa. Code § 14.162. In reviewing the record, every witness's testimony and each exhibit's content was thoroughly considered in issuing this decision, as were the parties' comprehensive closing arguments.

The IDEA requires states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In 1982, our U.S. Supreme Court addressed these statutory requirements, concluding that FAPE mandates are met by providing personalized instruction and support services designed to permit the child to benefit educationally from the program and comply with the procedural obligations in the Act. *Board of Education of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)

Local education agencies (LEA), including school districts, meet the obligation of providing a FAPE to eligible students through the development and implementation of an IEP, which must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” *Mary Courtney T. v. School District of*

Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. In 2017, the U.S. Supreme Court determined that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). "A focus on the particular child is at the core of the IDEA." *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206-09) (other citations omitted).

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). Instead, the law demands an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Endrew F.*; see also, *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) A program's appropriateness must be based on the evidence known to the school district at the time at which the offer was made and not in hindsight. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010). *Endrew F.*, makes clear that the "IDEA... requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000.

The IEP is the center of the statute's education delivery system for disabled children. *Endrew F.* (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents. An

IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE, as the IDEA defines it, includes both "special education" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities, special education, and related services "in conformity with the [child's] individualized education program" or "IEP." *Id.* § 1401(9)(D). Further, the law does not demand that an LEA provide a goal for, or particularized data on, "every single recognized need of a disabled student. "FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education." *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff'd*, 581 Fed. App'x 141 (2014).

A school district could violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 176. "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *J. W. v. Fresno Unified School District*, 626 F.3d 431 (9th Cir. 2010) (citing *Rowley*, 458 U.S. at 206-207). A procedural violation occurs when a district fails to abide by the IDEA's procedural requirements. Procedural violations

do not necessarily amount to a denial of a FAPE. See, e.g., *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* 137 S.Ct. 1001.

Least Restrictive Environment

Moreover, also very crucial is the IDEA obligation for eligible students to be educated in the "least restrictive environment" (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *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). All LEAs are required to make available a "continuum of alternative placements" to meet the educational and related service needs of children with disabilities. 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.

Tuition Reimbursement

The Individuals with Disabilities Education Act ("IDEA") permits, under certain circumstances, the parents of an eligible child with disabilities to seek reimbursement for the costs associated with a private school placement

unilaterally made by the parents. More specifically, federal regulations to the IDEA state:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. 34 C.F.R. § 300.148 (c).

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test. The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

SECTION 504 PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on 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). In Pennsylvania, Parents may request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA’s identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8. The obligation to provide FAPE is substantively the same under Section 504 as under the IDEA. *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

Further, the standards for evaluating claims under Section 504 and the ADA are essentially identical. See, e.g., *Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

To establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that:

1. [Student] is “disabled” as defined by the Act;
2. [Student] is “otherwise qualified” to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. [Student] was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

By contrast, intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met only by establishing “both (1) knowledge that a federally protected right is substantially likely to

be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

Parents’ Claims

In their Complaint the Parents contend that the District denied Student a FAPE because the District’s overall programming offered for the 2020-2021 and 2021-2022 school years did not adequately address identified needs. This Student has an extensive history of academic, primarily reading needs. The Student was educated outside of the District in private placements at public expense for first through third grade. The Student returned to the District for fourth, fifth and a portion of sixth grade. From October of fifth grade to October of sixth grade, the Student’s reading instructional level decreased from a third grade level to a primer level. Student’s frustration level decreased from a fourth to a first grade level. While educated in the District, the Student received reading instruction, from Read 180, System 44 and other research based programming.

From November of sixth grade until mid-seventh grade, through an agreement with the District, the Student attended a [private reading] program intended to provide intensive reading support. After completion of the program, it appears minimal reading progress was made, with Student’s instructional reading level determined to be between primer and second grade, depending on the assessment utilized. The Student returned to the District in December 2019, an RR completed in February 2020, and because of the COVID 19 pandemic, remote instruction occurred from March 2020 until the end of the school year. In July 2020, the Parents notified the District of

Student's placement in the Private School where the Student remained for the 2021-2022 school year.

As a matter involving tuition reimbursement, the first issue is whether the District's offered programming was reasonably calculated to provide FAPE to Student. Based on the evidence presented, the Parents have preponderantly established that the programming offered for the 2020-2021 and 2021-2022 school years failed to offer a FAPE.

The District's offered programming for the 2020-2021 school year emanated from an IEP developed in March 2020 which was based upon a February 2020 reevaluation of the Student. In the February 2020 RR, the District utilized two different norm-referenced, standardized assessments of intellectual functioning to examine patterns in Student's reasoning skills. The RR concluded that Student had average verbal reasoning skills but difficulty with visual-spatial reasoning, fluid reasoning, working memory and processing speed. Overall, Student's cognitive needs were complex, with the evaluator suggesting caution when considering overall score composites. Despite the myriad of interventions introduced over the years, both in and out of the District, the Student's assessed academic skills in reading, math and writing remained significantly lower than expected in light of cognitive reasoning abilities. The RR concluded that Student had needs in every academic area and suggested the IEP team consider an intensive level of interventional instruction in reading, language arts and math with smaller class sizes.

Despite the District's thorough RR, the resulting educational programming offered to the Student for the 2020-2021 school year was inadequate because it failed to provide workable interventions across the school day. The March 2020 IEP contained the requisite measurable annual

goals in reading, written expression, math, speech and OT with accompanying SDI that provided direct instruction using research-based programming.

Through the proposed programming, math and language arts would occur in a learning support classroom, but the Student would spend most of the school day in regular education. However, reading ability was significantly lower than expected, given average verbal cognitive reasoning skills. Although similar deficits existed in math, this Student's un-remediated literacy deficits would detrimentally affect access to the educational environment. As a middle school student unable to independently read and understand most written information, this Student's access to education would be severely compromised. In regular education classes like science or social studies, the expectation to interpret information written on a whiteboard, take notes, or read from a tablet or textbook, would create an untenable academic situation even with promised supports (typing, teachers' notes) in place. As the numerous evaluations and assessments have reiterated and academic performance has established, this Student needed consistent small group instruction with intensive reading supports and grade-appropriate program modifications. Over the years, the District tried various approaches and even purchased the intensive reading program the Student last received when out of the District. Although these efforts were positive, as a Student approaching high school, time was running short on providing this child with fundamental literacy skills. Accordingly, this hearing officer concludes that the March 2020 IEP was not sufficiently individualized for the student's needs.

In April 2021, the Parents contacted the District about available programming for the 2021-2022 school year. The District promptly responded and proposed a reevaluation of the Student to obtain updated information. The resulting September 2021 reevaluation determined that

since the 2020 RR, Student's listening comprehension abilities remained a strength, and both reading and math skills improved; however, no measurable gains occurred in written expression.

The programming proposed for implementation during the 2021-2022 school year through the September 2021 IEP was also inadequate. Although a double period of reading instruction was added, Student was still expected to receive education for the majority of the school day in regular education. Through testimony, the District advanced the assertion that Student's good listening comprehension abilities coupled with various supports would be enough to provide adequate access to the curriculum. I disagree. Now a high schooler, the Student must have reliable, grade-appropriate access to educational content across the school day, which permits the ability to take notes, access textbook content competently, and interpret information from a tablet or whiteboard. This must occur in every class. Listening comprehension is a strength, and although high school can be very discussion-based, the Student's acquisition of literacy skills is paramount to gain a necessary level of functional skills commensurate with established ability. The District's 2021-2022 programming offered in response to the needs identified was not "reasonably calculated" for this child to receive "meaningful educational benefit" in light of the student's "intellectual potential" and, therefore, was not substantively appropriate. *Endrew, supra*, 137 S. Ct. at 999, 197 L.Ed.2d at 350.

Throughout the hearing, the Parents urged the Hearing Officer to determine the District violated its FAPE obligations toward the Student because the reading programming proposed for the school years at issue proved ineffective in the past. Based on the evidence adduced during the hearing, I am unwilling to conclude that the reading programs previously implemented by the District and proposed for implementation during the

school years at issue are wholly responsible for Student's stagnant and sometimes stalled progress. All evaluations have concluded that this Student's cognitive profile is complex, resulting in a constellation of academic needs, still not fully understood. Although deference is to be accorded to the IEP developed by an educational professional, and Parents cannot insist upon a specific methodology or program for the education of their child, the selected instructional approach must be compatible with the problem it intends to rectify. *A.B. ex rel. D.B. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004); *T.L. v. Lower Merion School District*, 2016 WL 34053; *Kathryn F. v. West Chester Area School District*, 2013 WL 666777. It is now time to change the method and methodology through which this Student will receive an education. Although the District could not be expected to guarantee any particular results or progress in its programming for Student, the lack of discernable improvement coupled with offers of programming that were inconsistent with the level of intervention required amounted to a denial of FAPE for which a remedy shall be ordered.

The District wanted to explore inclusion fully, and this was appropriate. *Oberti, Id.* However, the time has occurred for a more aggressive educational intervention. Time is running out for this Student to become a functional reader. Student's placement in regular education for most of the school day, with an array of supplementary services, was tried and did not work.

Having concluded that the District did not offer Student an appropriate program for the 2020-2021 and 2021-2022 school years, the next question in the tuition reimbursement analysis is a consideration of the private school program. The Parents have proven by a preponderance of the evidence that the Private School was an appropriate placement. As outlined in the findings above, the Private School is independent, licensed by the Pennsylvania Department of Education and offers co-educational programming for sixth

through twelfth grades. The Private School has a small teacher-to-student ratio and provides a curriculum of core academic and elective classes with instruction individually tailored to the needs of the Student. At the Private School, a reading specialist trained in the Wilson reading system provides Student with fifty minutes of individual instruction three or four times per week. Wilson reading strategies are also utilized when other subjects are taught.

The final prong of the *Burlington* tuition reimbursement analysis requires this Hearing Officer to consider the equities in this case and determine whether they weigh in favor of reimbursement. As such, a Hearing Officer *may* reduce or deny tuition reimbursement in one of three circumstances: (1) where the parents failed to provide the District with written notice of their intent to withdraw their child from the public schools and seek reimbursement for private placement; (2) where the public school expressed its intent to evaluate the student at the time of withdraw (through the issuance of a permission to evaluate), and the parents failed to cooperate in the evaluation; and (3) where the parents acted unreasonably. 34 C.F.R. § 300.148(d). The equities of this case do not favor a reduction in tuition reimbursement.

With respect to the claim of discrimination, the Parents have failed to present any evidence that the District deliberately excluded Student from participation in or denied access to any of the benefits available at the school or its programming. On the contrary, the District offered the Student a wide array of educational supports during the years in question. The Parents have not sustained their burden of proof regarding this claim.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District did not offer Student a free appropriate public education for the 2020-2021 and 2021-2022 school year.
2. The Parents are entitled to reimbursement for tuition, transportation, and related expenses for Student's attendance at the private school for the 2020-2021 and 2021-2022 school year, less any scholarship, financial assistance, or other fee reduction that the Student or Parent received or would be eligible to receive in the absence of this order.
3. Upon presentation to the District by the Parents of proof(s) of payment, or outstanding balance due, reimbursement shall be made to Parents within 45 calendar days documentation is presented to the District.
4. If the District did not provide transportation to and from the private school, the District shall reimburse Parents for transportation expenses, either by a receipt showing the Parents' out-of-pocket transportation costs and/or by using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates. The District will reimburse Parents for mileage expenses for every day the student attended the private school during the 2020-

2021 and 2021-2022 school year. The reimbursement for transportation shall be only for the days the student attended the private school.

5. Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree in writing.

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

Joy Waters Fleming, Esquire

Joy Waters Fleming, Esquire
Special Education Hearing Officer

April 30, 2022