

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:

23866-1920

Child's Name:

Y.A.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

2/19/21

The student (Student) ¹ is a District resident and enrolled in the [redacted] grade in [an out of state] private school. Student is eligible for special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA) as a child with a specific learning disability and as other health impaired (OHI).² The Parents³ filed a due process complaint alleging the District failed to offer a free, appropriate public education (FAPE) to Student for the 2019-2020 school year under the IDEA and Section 504 of the Rehabilitation Act of 1973 as well as the federal and state regulations implementing those statutes⁴. The Parents seek tuition reimbursement for Student's attendance at the [out of state] private school for the 2019-2020 school year and until such time the District offers an appropriate program, as well as reimbursement for the cost of a privately obtained evaluation. The District maintains that its special education program, as offered, was appropriate for Student and that no relief is warranted. The case proceeded to a due process hearing which convened virtually due to the COVID-19 pandemic.

For the reasons set forth below, the claims of the Parents will be denied.

ISSUES

- 1) Was the District's proposed program for the 2019-2020 year appropriate for Student?
- 2) If the District's proposed program was not appropriate, are Student and the Parents entitled to reimbursement for tuition and related expenses for the private school placement Student attended during the 2019-2020 school year; and until the District offers an appropriate program and placement?
- 3) Are the Parents entitled to reimbursement for an Independent Educational Evaluation?

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 before its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ Parents refers to the Student's mother and grandmother who acted on this child's behalf.

⁴ 29 U.S.C. § 794. The federal regulations 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 §§ 15.1 – 15.11 (Chapter 15).

FINDINGS OF FACT

2013-2014-[Redacted] Grade

1. Student enrolled in the District as a [redacted] grader. (N.T. 38)⁵

2014-2015-[Redacted] Grade

2. During the 2014-2015 school year, a private evaluation determined Student eligible for special education under the primary disability category of a specific learning disability (SLD) as well as secondary categories of speech and language impairment (SLI) and other health impairment (OHI) and attention deficit hyperactivity disorder (ADHD). (S-2, p.2)

2015-2016-[Redacted] Grade

3. Although Student began the school year attending classes at the District elementary school, anxiety interfered with school performance, then worsened, resulting in the District providing homebound instruction. (N.T. 43)

2016-2017-[Redacted] Grade

4. During the 2016-2017 school year, Student attended a Pennsylvania private school funded by the District. (S-2)

2017-2018 –[Redacted] Grade

5. During the 2017 -2018 school year, Student attended a Pennsylvania private school funded by the District.
6. On April 30, 2018, the District conducted a reevaluation (RER) of Student. The RER concluded that Student remained eligible for special education as a child with a specific learning disability and as other health impaired (OHI). (S-2)
7. The RER was difficult to complete because Student experienced anxiety, did not want to enter the school building, and the District utilized videotaping or audiotaping of Student, which distressed the Student. (N.T. 111)
8. On May 24, 2018, the IEP team met to develop programming for the 2018-2019 school year. (S-8).

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number.

9. The Parent disagreed with the District's evaluation, and the District agreed to fund an independent educational evaluation (IEE) of Student. (S-6; N.T. 72-74; 126)
10. The IEE commenced in June 2018, and the District received the final report in September 2018. For the compilation of the IEE, the psychologist administered the WISC-V, KTEA-3, BRIEF-2, Parent and Student interviews, test observations and a review of academic records. The WISC-V determined Student's FSIQ to be in the ninth percentile with a score of 80. Achievement testing indicated that Student functioned with serious academic deficits in word decoding, reading comprehension, spelling, math reasoning, math computation, and listening comprehension. The IEE concluded that Student had a severe specific learning disability with a secondary and related disability in speech and language as well as the need for accommodations due to symptoms of ADHD. (S-6); N.T. 73-74, 125-126)
11. The IEE recommended that Student receive specially designed instruction with small group and one on one instruction in the areas of literacy and math, as well as a phonics based instructional program for reading. (S-6)

2018-2019-[Redacted] Grade

12. During the 2018-2019 school year, the Student attended a Pennsylvania private school for [redacted] grade. The private school provided a full scholarship to Student. (P-4)
13. On October 12, 2018, the IEP team met to discuss educational programming for Student. The District presented a revised IEP to the Parent in a NOREP dated October 24, 2018. The Parents did not sign or return the NOREP. (S-8, S-9)
14. At some point during the school year, the Parent decided that Student would change schools, and a decision was made to enroll Student in an [out of state] private school for the 2019-2020 school year. (N.T. 77-78)
15. On June 28, 2019, the Parent retained a psychologist to conduct an educational evaluation of Student. (P-4)
16. During the summer of 2019, Student attended the [redacted] Program at the [out of state] private school. (P-16)

2019-2020-[Redacted] Grade

17. On August 19, 2019, the Parent in writing advised the District that it had not offered an appropriate program and placement for the upcoming school year, leaving no option but to continue Student's enrollment in a private school for the 2019-2020 school year. In the

letter, the Parent requested tuition reimbursement for Student's attendance at the [out of state] private school attended during the summer. (P-5, S-10; N.T. 80)

18. On September 11, 2019, the District invited the Parents to an IEP meeting scheduled for September 26, 2019. (P-6)
19. On September 11, 2019, the District contacted the Parent to request that Student be brought to the school for updated testing, baselines, and transition survey for completion of an IEP. The Parent asked to call back from her other number. The District provided the Parent with the school number and extension to call back. (S-16, S-19)
20. On September 12, 2019, the District spoke with the Parent (Grandparent) to set up a time to conduct testing of Student. The Parent (Grandparent) indicated that her daughter (Parent) wanted the request for testing to be sent in a letter to their home. (S-16, S-19)
21. On September 13, 2019, the District contacted the Parent in writing, referenced a conversation a week before, attempting to arrange a date and time to obtain updated Student assessments for development of an IEP. The letter also requested Parent's signature on a previously provided release for Student's educational records from the private school attended from 2016-2019. (S-22; N.T. 130-131)
22. On September 16, 2019, the District sent a letter to the Parents that requested Student be made available for updated testing for development of an IEP. (S-16, S-19)
23. On September 17, 2019, the Parents provided to the District a privately conducted evaluation of Student. (P-4, S-11; N.T. 133, 349, 351)
24. On September 19, 2019, the District left a message for the Parents requesting a time to arrange updated testing of Student. (S-16, S-19)
25. On September 20, 2019, the District left a message requesting a time to conduct updated testing of Student. (S-16, S-19)
26. On September 26, 2019, the IEP team met to develop programming for the 2019-2020 school year. Although the meeting lasted two-hours and forty-five minutes, Student's IEP was not finalized. At the meeting, the Parent advised that the District generated release for records from the Pennsylvania private school was damaged. The District did not generate a second records release for the Parent. (P-6, P-17, S-16; N.T. 24 166, 132-135, 139, 142, 169-170)
27. On October 7, 2019, the District contacted the Parent and offered October 8, 9 or 15 as dates to continue the IEP meeting. The Parent advised that October 8 and 9 were too soon and that they preferred to wait until the team could review the PA private school records.

The District advised that baseline assessments were still needed, and the Parent suggested the District go to Student's [out of state] private school. The District sent an invitation to the Parent for a meeting scheduled for October 15, 2019. (P-9, S-13, S-16; N.T. 145)

28. On October 8, 2019, the Parent contacted the District and requested to meet the week of October 21st, either on October 22 or October 28. The Parent also indicated that the Pennsylvania private school would send Student's records and baselines to the District. (P-9, S-21; N.T. 58)
29. On October 10, 2019, the District emailed the Parents indicating the Pennsylvania private school records were not received, that baseline testing was still needed to update IEP goals, and that several hours were unavailable to drive [out of state] and do the probes. The District requested that Student be brought to the District for the testing and suggested October 14, 2019. (S-21)
30. On October 24, the Parent received an invitation for an IEP meeting scheduled for October 25. The Parent did not attend the October 25 IEP meeting. (P-9, S-14, S-21; N.T. 144-146, 188)
31. On November 15, 2019, the District contacted the Parent, referenced the attempted October 25 IEP meeting, and offered November 20 or November 25, 2019, as dates to finish the IEP. The email also indicated that Student's records from the Pennsylvania private school were not received. The District sent IEP meeting invitations to the Parents for November 20 and November 25. (S-4, S-15, S-21; N.T. 149)
32. On November 25, 2019, the District sent a reminder email to the Parent about the IEP meeting scheduled for that day. The Parent did not attend the meeting. (S-21, p. 2; N.T. 150)
33. On December 10, 2019, the Parent sent an invitation to the District proposing December 20 or January 3 as dates to finish the IEP meeting. The District accepted January 3, 2020, as the date to complete the IEP meeting. (S-21, p. 2; N.T. 150)
34. On December 17, 2019, the District sent a release of information and records to Parent for Student information from the [out of state] private school. On December 23, 2019, the Parent signed the release. (S-18; N.T. 110)
35. On January 3, 2020, the IEP team met and offered a final IEP to the Parent. The Parents actively participated in the IEP meeting. (N.T. 152, 171)

January 2019 IEP

36. The January IEP indicated that Student exhibited ADHD inattentive behaviors that interfered with learning. The team determined since Student was not in a setting where a FBA could be conducted, the District would issue a permission to evaluate if behaviors developed that could not be explained by ADHD. (S-19, p. 9)
37. The present levels of academic achievement and performance in the January IEP consisted of educational background information, the District's unsuccessful attempts to obtain updated Student baseline information, a reference to 2018 teacher input from the PA private school, a summary from the 2018 IEE, a summary from the 2019 private evaluation, 2018 functional performance comments, and Parent concerns.⁶ (S-19; N.T. 167-169)
38. The IEP identified Student's academic, developmental, and functional needs as improve reading, writing, and math skills; increase independent task completion, homework completion, redirection and prompts for attention; improve areas of adaptive skills including communication and self-directed behaviors, frequent drill and repetition of skills, expressive and receptive language. (S-19, p. 10)
39. The January 2020 IEP offered goals designed to address needs in self-advocacy, independence, functional math, functional reading, reading, writing, and speech and language. All goals indicated a baseline would be determined. (S-19, pp. 21-22)
40. The self-advocacy goal expected Student to request assistance or self-advocate appropriately on at least seven out of ten occasions. The independence goal expected Student to increase task completion rate to 75%. when given prompts, fading to independence. (S-19, p. 21)
41. The functional math goal expected Student when presented with direct instruction in functional math skills to improve skills from early second grade to early third grade level or better. The functional reading goal expected Student, when provided with direct instruction in a research-based reading program at the current instructional level (second grade), Student will improve reading skills from early second grade to early third-grade level. The reading goal would provide direct instruction in a research-based reading program at an instructional level of (second grade) and expected Student to improve reading decoding, fluency, and accuracy from current levels. The writing goal expected Student when provided with a writing topic and explicit instruction in writing, Student will write a five-sentence paragraph, with a topic sentence, a supporting sentence, and a conclusion sentence, with fewer than 10% of words misspelled, on three consecutive samples, with 80% accuracy. (S-19, pp. 21-22)

⁶ The IEP indicated Parent concerns were not provided in advance although at the January meeting, concerns were for Student to improve in all academic areas.

42. The first speech and language goal expected Student, by the end of the IEP term, to orally answer factual questions (e.g., what, where, who, when) about a paragraph read out loud, providing all required information with 80% accuracy measured over three consecutive probes. The second speech and language goal expected Student, following receipt of therapy, to state the meaning of unknown words using context clues and use in a sentence that demonstrates meaning with 80% accuracy measured over three consecutive probes. (S-19, p.22)
43. Progress on goals included measurement using teacher observation, data collection, curriculum-based assessments, writing samples, and therapist observation. (S-19, pp. 21-22)
44. Short term objectives/benchmarks in the IEP indicated that multiple attempts were made to obtain new information and that upon enrollment or Student availability, additional assessments would occur to provide the IEP team with information to update goals, instructional levels, baselines, and short-term objectives, if needed. (S-19, p. 22)
45. The January 2020 IEP contained modifications and SDI to address Student's math, reading decoding, fluency, written expression, comprehension, and executive functioning, and speech/language needs. (S-19)
46. To address math needs, the January IEP proposed SDI that included 45 minutes of daily direct instruction using a research-based math intervention program, mental math exercises, and guided practice to increase math fact automaticity. (S-19)
47. To address literacy needs, the January IEP proposed SDI that included up to 90 minutes of daily, direct instruction with a research-based multi-sensory, sequential reading intervention program (small group) to address reading decoding, fluency, written expression, and comprehension skills. (S-29, p. 23)
48. To address speech and language needs, the January IEP proposed SDI with 60 minutes of weekly, direct instruction in vocabulary development and syllable by syllable pronunciation focus with opportunities for Student to use and practice. (S-19, p. 23-24)
49. To address executive functioning needs, the January IEP proposed SDI that included direct instruction and prompts to use executive function skills to improve attention to task and working memory, extra time and prompting, modified homework, multiple repetitions, agenda book/homework log, graphic organizers, cueing, chunking, alternative assessment location, and movement breaks. (S-19, p. 23)
50. To address Student's emotional needs, the January SDI proposed that Student receive 30 minutes of counseling four times a month. (S-19, p. 28)

51. To address technology needs, the District proposed the daily use of audiobooks and online access to reference material, typing or access to a scribe, and weekly keyboarding instruction. (S-19, pp. 24-25)
52. The January IEP proposed small group instruction for all core academic subjects, according to the current length of each period, using a significantly modified or alternative curriculum, depending on the subject for a minimum of 45 minutes per day. (S-19)
53. To assist with the transition back to a public-school setting and to address school day anxiety, the District proposed a reentry plan to permit Student to meet the school psychologist and guidance counselor, before the first day of school, introduce Student to teachers and provide a building tour, assign a designated staff for comfort, assign a peer buddy, and a modified attendance schedule expanding over a two-to-four-week period. (S-19, p. 27; N.T. 160-161, 332-333)
54. Related services in the proposed IEP included counseling four times a month for thirty minutes, speech/language therapy eight times per month for thirty minutes per session, and a personal care assistant, five days a week. (S-19, p. 27-28; N.T. 157, 160)
55. The personal care assistant, supporting Student, would be trained, and supervised by a board-certified behavior analyst and would accompany Student five days a week. (S-19, pp. 25, 28)
56. Supports for school personnel included monthly speech-language therapist consult with teachers. (S-19, p. 28)
57. The IEP team determined Student eligible for extended school year (ESY). Proposed ESY services included speech/language support and learning support and implementation of functional math and reading goals. (S-19, pp. 21-22)
58. The January IEP proposed full time emotional, learning, life skills, and speech and language support. If the IEP had been accepted, Student would receive four core subjects with a special education teacher for the full period; science and social studies, reading/English, and math would have all been in a special education placement. For learning support and life skills classes, Student would change classes. Student would transition for specials, lunch, assemblies with the regular education student body, accompanied by a personal care assistant. (S-19; N.T. 156, 176, 179)
59. The District's learning support and life skills classes have an average of ten to twelve students. (N.T. 179)

60. On January 8, 2020, the District issued a NOREP proposing to provide Student with special education through a full-time program with learning support, life skills support, emotional support, and speech and language therapy. The evaluation and assessment data relied upon referenced the District's reevaluation, records review and cited the unsuccessful attempts to obtain updated baseline data.
61. On January 17, 2020, through a NOREP, the Parents rejected the January IEP. In a separate email communication, the Parent asked whether the District would evaluate and observe Student, obtain records from the previously attended private school, advised of the status of the records release for the current private school, requested a final IEP as the January document indicated it was a "draft," and requested a time to see the program and classroom offered to Student. The Parent did not receive a response from the District. (N.T. 66; P-15, S-20)
62. On June 25, 2020, the Parents filed a due process Complaint. (S-1)

September 2019 -Private Evaluation

63. In September 2019, a private evaluator retained by the Parents completed an evaluation of Student. The three-hour private evaluation included a record review, parent input, test session observations, cognitive and achievement testing, and assessment of verbal and nonverbal reasoning, working memory, processing speed, attention, and executive functioning, learning and memory, visual memory, visual-motor integration, adaptive behavior, and social-emotional and behavioral functioning. The evaluator did not observe Student at the private school. (P-4; N.T. 301-316, 339-340, 351)
64. The private evaluator did not ask why the Parents changed Student from the Pennsylvania private school attended for three years to a different private school located [out of state]. The Parent did not provide nor did the evaluator request information from the private school Student attended during the 2016-2017, 2017-2018, and 2018-2019 school years. The private evaluator did not receive or review the 2018 District-funded IEE. (P-4; N.T. 344-346, 348, 350)
65. On the Comprehensive Executive Functioning Inventory (CEFI) completed by the Parent, Student's executive functioning was determined to be average. Based on the Parent report of the BASC, Student received a moderately elevated rating for anxiety. (P-4; N.T. 322)
66. The private evaluator recommended Student receive access to on-site psychological services based on elevated BASC indicating anxiety coupled with Parent reported perfectionist and compulsive behaviors and transition to a new school warranted safeguards to monitor emotional status. (P-4; N.T. 323)

67. On the Woodcock-Johnson IV, Student received scores of low in broad reading, reading comprehension, reading fluency, broad written language, written language, and written expression. Student received exceptionally low scores for skills related to reading, basic reading, broad math, math, math calculation and, math problem solving. (P-4)
68. The private evaluation identified Student with a primary disability of specific learning disability and a secondary disability of OHI based on a prior diagnosis of ADHD and executive functioning weaknesses. The private evaluator determined that Student performed below age level in basic reading skills, reading comprehension, reading fluency, mathematics calculations, and written expression. (P-4; N.T. 354)
69. Based on the interpretation of the BASC-III, Parent input, the private evaluator concluded that Student's anxiety was moderately elevated, displaying more anxiety-related behaviors than peers, that intervention would likely be beneficial, not absolutely necessary but should be monitored. (P-4; N.T. 313)
70. The private evaluator recommended that Student receive full-time learning support with small group or individualized instruction in core academic areas of basic reading skills, reading comprehension, reading fluency, math calculation, math problem solving, and written expression, including spelling. The evaluator recommended supports for Student's levels of anxiety, as well as executive functioning skill coaching and intervention to promote development of executive functioning skills and intervention to develop skills that will permit monitoring and regulation of attention. (P-4, p. 41; N.T. 337, 353)
71. The evaluation recommended IEP goals in basic reading skills, reading comprehension, reading fluency, math calculation, math problem solving, written expression (including spelling), and executive functioning skills (working memory, attention). Executive functioning should be taught within an intervention model in which Student is taught a skill to promote working memory through individual or small group coaching with educator feedback. (P-4)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. It is important to recognize that 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, must rest with the Parents. Application of this principle, however, 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. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of factfinders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *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 most of the witnesses who testified to be credible as to the facts. The testimony was essentially quite consistent overall, and there was no indication of any intent to deceive.

Substantive FAPE

The IDEA requires that states provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” “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) “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). Individualization is the central consideration for purposes of the IDEA. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. 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). A proper assessment of whether a proposed IEP meets the above standards 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).

At a minimum, an IEP must include, in part, a statement of the child’s present levels of academic and functional performance, a statement of measurable annual goals designed to meet the child’s needs to enable him or her to be involved in and make progress in the general education curriculum, a statement of how progress on the goals will be measured, and a statement of the special education and related services and supplementary aids and services, based upon peer reviewed research, to be provided to the child. 34 C.F.R. §300.320.

Procedural FAPE

From a procedural standpoint, the 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).

Tuition Reimbursement

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private

placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *see also*, *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all 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.*

LEA Obligation for 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 to develop a special education program, it is incumbent upon the district to comply. *A. B. v. Abington School District*, No. 20-1619, 2021 WL 71699, at *3 (3d Cir. Jan. 8, 2021)⁷; *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). “Because the IDEA imposes no obligation on school districts to *sua sponte* evaluate and develop IEPs for students unilaterally placed in private schools, ‘the first question’ a court must answer in determining whether a district violated

⁷ Unpublished decision

its FAPE obligations by failing to propose a special education program for such a student is whether the parent made a ‘request’ pursuant to the IDEA.” *A.B.*, *supra*, 440 F. Supp. 3d at 435 (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). Nevertheless, “it is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school.” *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 at *41 (M.D. Pa. Sep. 28, 2017) (emphasis added).

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). Intentional discrimination, however, requires a showing of deliberate indifference, which may be met 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). Importantly, “deliberate choice, rather than negligence or bureaucratic inaction,” is necessary to establish such a claim. *Id.* at 263. 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).

PARENTS’ CLAIMS

Student has not attended school in the District since the 2015-2016 school year as a [redacted] grader. Pursuant to a settlement, the District funded Student’s attendance at a

Pennsylvania private school for the 2016-2017 and 2017-2018 school years. In preparation for the 2018-2019 school year, the District reevaluated the Student to develop programming. In April 2018, the IEP team met, the Parents expressed disagreement with the District's evaluation and the District agreed to fund an independent education evaluation (IEE) of Student. After receipt of the IEE, the District revised the IEP and issued a NOREP, offering an educational program to Student. The Parents did not return the NOREP. Student received a scholarship for attendance at the Pennsylvania private school for [redacted] grade during the 2018-2019 school year.

On August 19, 2019, the Parents, citing the failure to offer an appropriate program and placement, notified the District of their intention to place Student in [an out of state] private school for the 2019-2020 school year. The letter sought tuition reimbursement from the District. On September 11, 2019, the District invited the Parents to an IEP meeting scheduled for September 26, 2019. From September 11, 2019 through September 20, 2019, to prepare for development of an IEP, the District contacted the Parent at least five times to arrange for updated testing, baselines, and a transition survey of Student. Those attempts to complete the probes necessary to update Student's academic information were unsuccessful, with Parent at one point suggesting that the District conduct the testing at Student's [out of state] private school. Less than two weeks before the meeting, the Parent provided the District with a privately obtained evaluation of Student, for which reimbursement is now sought. On September 26, 2019, the IEP team met. The Parents participated in the meeting, asking questions, and expressing concerns. Although the meeting lasted nearly three hours, it was not concluded, and no firm date was established for the parties to reconvene and finish the IEP discussion. After the September meeting, throughout October, November and December, this Student was without a FAPE offer, with numerous dates offered between the parties to complete the IEP meeting. The parties were able to reconvene in January 2020, four months after the first IEP meeting. The IEP, completed in January 2020, is now the subject of this due process hearing.

The Parents allege that the District's failure to offer FAPE before the first day of the 2019-2020 school year resulted in a denial of FAPE, thus satisfying the first prong of the

Burlington-Carter test for tuition reimbursement.⁸ I disagree. When the Parents contacted the District, at the end of the summer of 2019, Student was already enrolled in the [out of state] private school and had not been enrolled in the District for nearly three school years. The Parents' letter did not request FAPE for the upcoming school year and instead made a demand for tuition reimbursement. The Parents never expressed an interest in having the District evaluate Student or develop an IEP for the 2019-2020 school year. Their notice in mid-August 2019 explicitly stated an intent to retain Student at the [out of state] private school, and the evidence supported that predetermination.⁹ Whether the District had a legal obligation to offer a FAPE, without a request, to an unenrolled, private school student has been the subject of recent judicial inquiry. Nevertheless, the District efficiently responded with efforts to meet with Student to collect updated information to develop educational programming. Once the District undertook that obligation to offer an IEP, in my view, it had the responsibility to complete the process until the program was either accepted or rejected by the Parents. The Parents' late August notification and the District's interpretation of that communication left only days to piece together information before the first day of school to develop a program for a student that had not attended school in the District for many years. The Parents have presented no preponderant evidence that the failure to have an IEP in place the first day of the 2019-2020 school year resulted in a loss of educational opportunity or denied Student FAPE.

Next, the Parents contend that the IEP offered in January 2020 failed to offer Student individualized programming and was not designed to confer meaningful educational benefit. Specifically, the Parents contend that the proffered IEP contained inappropriate goals and specially designed instruction, insufficient supports for Student's ADHD and anxiety, inadequate related services, deficient personnel supports and psychological services, and lacked ESY. Based on the totality of the record, the Parents have failed to meet their burden of proof. As such, they have failed to establish entitlement to tuition reimbursement under the first prong of the *Burlington-Carter* analysis.

⁸ At the beginning of each school year, each local educational agency...shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized educational program, as defined in paragraph (1)(A). 20 U.S.C. 1414 (d)(2)(A)

⁹ During the summer of 2019, the Parents enrolled Student in a summer program at the [out of state] private school.

The January IEP referenced and relied upon information from a District-funded September 2018 IEE as well as the Parents' privately obtained 2019 evaluation to offer both functional and academic goals designed to address Student's identified needs. The September 2018 IEE was completed during the summer of 2018, after Student's two years at a Pennsylvania private school, funded by the District. The IEE concluded that Student had serious academic deficits in word decoding, reading comprehension, spelling, math reasoning, math computation, and listening comprehension. The IEE determined that Student had a specific learning disability, a related disability in speech and language, and the need for accommodations due to symptoms of ADHD. The IEE recommended that Student receive specially designed instruction with small group or one on one instruction in the areas of literacy and math and a phonics-based instructional program for reading.

Although the Parents did not provide their private evaluator with the 2018 IEE for review and inclusion in his report, the conclusions he reached were consistent. The 2019 private evaluation also identified Student with a specific learning disability and OHI based on ADHD and executive functioning weaknesses. After testing, the 2019 evaluation determined that Student performed below age level in basic reading skills, reading comprehension, reading fluency, mathematics calculations, and written expression. Like the 2018 IEE, the private evaluation recommended that Student receive full-time learning support in an educational program with small group or individualized instruction in core academic skill areas.

The January 2020 IEP gleaned information from the 2018 IEE as well as the 2019 private evaluation and identified Student's academic, developmental, and functional needs as requiring improvement in reading, writing and math skills, independent task completion, homework completion, redirection, and prompts for attention, improve areas of adaptive skills including communication and self-directed behaviors, frequent drill and repetition of skills, expressive and receptive language. The January 2020 IEP offered eight goals targeted to address self-advocacy, independence, functional math, functional reading, reading, writing, and speech and language (vocabulary, pronunciation). All goals indicated a baseline would be determined. If the IEP had been accepted, Student would have received daily, direct small group instruction using a research-based intervention to address math, reading decoding, fluency, written expression, and

comprehension. Student would have also received weekly speech/language therapy with goals to address vocabulary and pronunciation, and ESY. The IEP team determined Student eligible for extended school year (ESY) with speech/language support and implementation of the functional math, reading goals during the summer. All goals were tied to Student's needs as outlined in the IEE and Parents' privately obtained evaluation and were supported by detailed SDI to support the identified academic and functional needs.

The Parents' contentions that the IEP lacked sufficient supports to address Student's executive function and anxiety needs are unsupported by the record. The Parents' private evaluator recommended that Student receive direct, sequential instruction in executive functioning skills, with flexible scheduling for instructional breaks, supports for Student's elevated levels of anxiety, and coaching and intervention to develop skills to monitor and regulate attention. The January IEP proposed strategies and programming to address both anxiety and executive functioning needs. In addition to separate goals for independence and self-advocacy, the proffered IEP would have provided daily, direct instruction in skills to improve attention to task and working memory. Immediate staff feedback would be provided to Student throughout the day. Student would have spent most of the school day receiving small group instruction with nine to eleven other students.

With respect to concerns related to emotional regulation, particularly the crippling anxiety attested to, the District proposed the assignment of a personal care assistant, trained, and supervised by a board-certified behavior analyst, to support Student for the full school day. Other supports for Student's anxiety included weekly access to the child guidance resource center or a mental health clinician, introduction to a friendship group with the guidance counselor, and the ability through the use of a pass so Student could see an identified adult if feeling anxious. To further address Student's anxiety, the District proposed a plan to transition Student back to a public-school setting. The transition plan included a visit and tour prior to enrollment, assignment of a peer buddy, and a modified schedule for the first two weeks of school that gradually increased over four weeks. The Parent relied on the testimony of the private evaluator that evinced concern that each transition event would only occur once (e.g., meet with a psychologist and counselor once, tour the building once, a peer buddy will be identified and

introduced once, etc.). Although the private evaluator found fault with the plan, his testimony revealed his unfamiliarity with the District's proposal to provide a school day aide to alleviate Student's anxiety and provide needed executive functioning support. In addition to access to weekly counseling and the assigned aide, other SDI designed to address Student's attention and anxiety needs included extra time and prompting, modified homework, multiple repetitions, agenda book/homework log, graphic organizers, cueing, chunking, alternative assessment location, monitoring for subtle signs, and movement breaks.

The SDI supporting the academic goals were also responsive. If the FAPE offer were accepted, Student would have received direct instruction through research-based programming in math, reading decoding, fluency, written expression, and comprehension. The proposed SDI were designed to support the specific academic goals as well as Student's executive functioning, anxiety, and speech/language needs. Based on the information available to the District, the overall goals and SDI offered through the January IEP were appropriate and responsive to Student's needs as identified through the IEE as well the Parents' private evaluation

The missing baseline information from the goals would typically render this IEP inappropriate. However, based on the facts established during the hearing, that conclusion is unwarranted. The lack of updated baseline data is directly attributable to the Parent's failure to respond to District attempts to obtain this information. Multiple attempts to schedule access to the Student were unsuccessful; at one point, the Parent suggested the District go to the [out of state] private school to obtain baseline data. Additionally, the Parents did not provide the private evaluator with information from the Pennsylvania private school Student attended during the fifth through seventh grades or with the District funded 2018 IEE. During the hearing, the Parents did not offer evidence regarding Student's functional or academic needs or performance while attending the Pennsylvania private school and the District did not have access to this information for development of the January 2020 IEP. The absence of this information from the evidentiary record of Student's academic experiences for the preceding three school years weighed heavily toward the conclusion that the lack of baseline data would not be held against the District. A procedural deficiency such as the lack of baselines alone does not justify a denial of FAPE. *Coleman*, 983 F. Supp.2d at 564; *Rodrigues v. Fort Lee Bd. of Educ.*, 458 Fed. Appx.

124, 127 (3d Cir.2011) (not precedential) (finding that a lack of measurable goals in an IEP was a procedural error but did not affect a student's substantive rights or deny a FAPE); *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed.Appx. 920, 923 (3d Cir.2010) (not precedential) (finding that IEP lacking annual goals relating to some of a student's needs stemming from his disability was not a procedural flaw rising to a substantive harm because the IEP still provided a FAPE). In this case, the evidence has fully established the District's efforts to offer an IEP to the family with updated academic information. Those efforts were not met with cooperation from the Parents. The lack of baseline data in the January IEP cannot be held against the District.

The Parent contends that the IEP contains inadequate related services, insufficient school personnel supports, and inappropriate ESY services. The Parents have presented no preponderant evidence to support these allegations. The January IEP contained two speech/language goals. One goal was specific to vocabulary development the other speech goal was designed to address syllable pronunciation. Implementation was slated for weekly thirty-minute sessions. Updated information on additional speech needs could not be obtained. Based on the information available to the District, the speech goals were appropriate. Supports for school personnel were specifically outlined in the proffered IEP. Those supports included at least monthly consultation between the regular education and special staff. Similarly, the offered mental health and ESY plan were fully outlined and, as offered, were appropriate.

The IEE and private evaluation supplied a strong starting point for the development of educational programming for this Student. Although the District did not have updated information for the development of baselines, it did have sufficient information to determine Student's needs and develop a program that was reasonably calculated to enable Student to receive educational benefits considering intellectual potential and individual abilities. As such, the offer was consistent with the legal standards above and amounts to an appropriate offer of FAPE. *See Andrew F., supra*, 137 S. Ct. at 1001, 197 L.Ed.2d 352 (holding that, "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

After the January IEP meeting, the Parents' signed a NOREP and declined the offered program. That same day, after refusing the IEP, the Parents emailed the District and asked a series of questions (when the District would observe Student at the [out of state] private school, when the Parents could see classrooms in the District, etc.) related to the rejected programming. That communication did not request an evaluation or suggest that Student would be enrolled in the District. The Parents received no response from the District. Although the Parents had just made clear their dissatisfaction with the offered educational programming, the District's lack of response to their inquiries was discourteous but without a request for an evaluation or evincing an intent to re-enroll Student in the District, did not constitute a denial of FAPE.

Reimbursement for Private Evaluation

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii). "If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

In 2018, the District conducted a reevaluation of Student. The Parent disagreed with that evaluation, and the District agreed to fund an independent educational evaluation (IEE) of Student. That reimbursement occurred. No further District conducted evaluation has occurred; therefore, no disagreement could be made. The Parents obtained the 2019 private evaluation unilaterally, without consultation or knowledge of the District. In this case, the Parents have

presented no evidence that suggests reimbursement of the costs associated with the private evaluation are legally appropriate.

CONCLUSION

It is apparent based on the history of this case that since early elementary school, Parents have advocated strenuously for Student. Their efforts to secure in their view the best educational services to address what are now significant academic deficits are laudable and no doubt driven by love for this child and a desire to see the attainment of full potential. Consistent with the principles enunciated in *Andrew F.*, the January 2019 IEP offered to the Student was reasonably calculated to enable Student to receive meaningful educational benefit considering Student's intellectual potential. The IEP offered social, emotional, and academic programming necessary to move Student toward independence and self-sufficiency. The Parents have presented no evidence that the District discriminated against Student or violated Section 504. Accordingly, that claim is also denied.

ORDER

AND NOW, this 19th day of February 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are DENIED in their entirety.

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

Joy Waters Fleming
Joy Waters Fleming, Esquire
Special Education Hearing Officer
February 19, 2021