

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:

25121-2021

Child's Name:

L.B.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Local Education Agency:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

December 7, 2021

Information and Procedural History

The Student ¹[redacted] resides within the District (District). The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) based on Autism and a secondary classification of speech and language impairment.² Pursuant to a settlement agreement with the District, the Student has attended a private school (Private School) since February 2020. At the end of the 2020-2021 school year, the District offered a special education program that proposed the Student's enrollment in one of its middle schools. The Parent disagreed with that recommendation and filed an Amended Due Process Complaint asserting that the District's proposal did not offer a free, appropriate public education (FAPE) under the IDEA and the federal and state regulations implementing that statute.

On the merits, the Parent sought reimbursement for tuition costs and expenses for Student's attendance at the Private School for the 2021-2022 school year and an independent education evaluation (IEE). In response, the District maintained that its offered program and placement were legally appropriate and that no relief is due.

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

² The Parent's IDEA claims arise under 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

For the reasons set forth below, the Parent's claims are granted in part and denied in part.

ISSUES

- 1) Did the District offer a free appropriate public education to the Student through its June 17, 2021, IEP?

- 2) If the District did not offer a FAPE, are the parents entitled to reimbursement for tuition, books, transportation, and one-to-one at the private school the Student attended for the 2021-2022 school year onward?

- 3) Was the District's May 5th, 2021, reevaluation report appropriate?

- 4) If the District's reevaluation was not appropriate, are the parents entitled to reimbursement for their privately obtained independent evaluation?

FINDINGS OF FACTS³

Kindergarten through fourth grades

1. The Student attended the school in the District from kindergarten through fourth grade and received special education and supports. (P-11; N.T. 552, 572)

2019-2020 [redacted]

³ Counsel entered into a stipulation that follows the Findings of Facts.

2. During the 2019-2020 school year, the Student attended [redacted] in the District. (p-6)
3. In October 2019, the IEP team met to develop programming for the Student. That IEP was amended in December 2019 and again in January 2020. (P-6)
4. As a student enrolled in the District, the Parent observed that Student experienced emotional dysregulation, frustration, and anxiety. (N.T. pp. 82, 132, 528, 548, 605-606)
5. In February 2020, the District agreed to fund Student's education at a Private School. The Student attended the Private school for the remainder of the 2019-2020 school year. In March 2020, because of the COVID-19 pandemic, the Student received remote instruction while enrolled in the Private School. (P-9; N.T. 60, 97)

2020-2021 School Year [redacted]

6. During the 2020-2021 school year, the Student attended the Private School, at District expense, [redacted]. In October 2020, the Student began to receive both in-person and remote instruction under a hybrid model. (N.T. pp. 64, 104)
7. The Private School is a private academic day school that educates children with learning differences. The Private School is licensed for elementary education, grades one through eight; secondary education, grades nine through twelve; and elementary and secondary learning disabled. (P-11, P-17, P-25, N.T. pp. 147, 188)

8. The Private School elementary provides one-to-one classroom instruction using a course curriculum prescribed by the Pennsylvania Department of Education. The Private School has a total enrollment of five students. The Private School provides reading instruction through the Wilson Reading program and Math through a multisensory program. At the Private School, the Student receives 30-40 minutes of speech and languages services, two times a week. (P-11, P-17, P-25, N.T. pp. 147-148, 188)

9. The Private School incorporates a cognitive-based training program (CBTP) into its regular academic course work. The CBTP focuses on nineteen brain areas and is based on the premise that learning difficulties can be addressed by identifying and strengthening cognitive functions that underlie learning. The goal is to strengthen learning capacities rather than teach compensation for specific learning difficulties. Through the CBTP, the Student receives 40-minute classes five days per week. (P-12, p. 10, P-24; N.T., pp. 151-153, 194, 231-234, 238)

10. Each student enrolled at the Private School is assessed at the end of each year to evaluate progress and revise programming, if needed. The Private school conducts beginning and end of year Comprehensive Mathematical Abilities Test (CMAT) and Woodcock-Johnson reading assessments of its students to determine progress. (P-12, p. 10, 12)

11. The Student has made progress at the Private School. (P-15, P-16, P-25; N.T. 156-157, 160, 163-168, 174-175, 216-218, 310-311, 370-371, 460-461, 594-595)

District Reevaluation

12. On May 6, 2021, the District completed a reevaluation (RR) of the Student. The reevaluation included a summary of previous private evaluations, Parent input, current and former aptitude and achievement testing, classroom based assessment information, Private School observations and input. The District's school psychologist responsible for the reevaluation is an experienced, certified school psychologist. (P-11; N.T. 521-527, 582)
13. Parent input for inclusion in the RR indicated that the Student becomes upset after making mistakes, is engaged when prompted, has an amazing memory, but needs continued growth in reading comprehension. (P-11, p. 3)
14. Student's 2020-2021 term two grades reported in the RR from the Private School were A in Astronomy, B in English Reading, A in Math, and A- in World Cultures. Term 2 CBTP grades for the 2020-2021 school year were of E (Exceeds) in motor symbol sequencing and M (Meets) in symbol relations-clocks. (P-11, pp. 7-8)
15. For inclusion in the RR, the District school psychologist conducted two online observations of the Student at the Private School. During math instruction, Student was an active, attentive and responsive participant and demonstrated a good foundational knowledge of basic addition and subtraction but struggled with multiplication. Student's classroom teacher reported Student was

working on a fourth grade level in Math. (P-11, pp. 10, 38; N.T. 534, 539)

16. During Language Arts virtual instruction, the Student wore headphones and alternated reading paragraphs with the teacher but had difficulty decoding some words. At times, the Student became frustrated and yelled. The Student appeared distracted; however, music was playing, and distractions occurred with a sibling. The teacher was able to re-direct the Student, and work continued. The classroom teacher reported Student performed on a third grade level in Language Arts (ELA). (P-11, pp. 10, 38; N.T. 534)
17. For inclusion in the RR, the Student's speech therapist at the Private School provided input regarding Student's progress. (P-11, pp. 10-12)
18. For input in the RR, Student's Private School teachers indicated Student needed to improve memory, oral expression, following written directions, written expression skills, basic reading, fluency, comprehension, homework completion, and working independence. Accommodations recommended by the Private School teachers included small group/individual instruction, extended time, check for understanding, highlighting points, drill and repetition, structured routines, flashcards, chunking, study guides, shortened assignments, and guided reading. (P-11, pp. 13-14)
19. The District administered aptitude testing with the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V). Student's scaled scores ranged from 2-10 and percentile rank from 1-45%.

Student demonstrated the greatest weakness on the verbal comprehension index and received a score indicative of functioning at the 1st percentile. The Student received visual-spatial index scores at the 18th percentile and a working memory index score at the 21st percentile. Student's FSIQ indicated general cognitive ability in the very low range of intellectual functioning (FSIQ 78). Because the Student demonstrated a significant discrepancy in verbal comprehension relative to the other assessed indices and a documented speech-language impairment, the school psychologist determined Student's nonverbal IQ to be 92, without verbally loaded tasks. (P-11, p. 16; N.T. 531)

20. Based on the WISC-V scores, the school psychologist concluded that the Student struggled with tasks associated with both receptive and expressive language. (P-11; N.T. 530)

21. On the WIAT-III, in overall reading, the Student received scores in the very low range in total reading, low in basic reading, and very low in reading comprehension and fluency. In written expression, the Student received a score in the low range. In math, the Student received a score of low, and in math fluency, a score of below average. During testing, the Student became upset, made vocalizations, and demonstrated frustration. The psychologist decided to end the testing because the Student did not have mastery of basic skills and did not want to push [Student] further. (P-11, p. 18; N.T. 529-530)

22. For inclusion in the RR, the District assessed Student's social, emotional, and adaptive functioning from rating scales completed by the Parent and Private School teachers. Based on the Autism Spectrum

Rating Scales (ASRS), the District determined that Student's social communication and unusual behaviors were consistent with a diagnosis of Autism Spectrum Disorder. (N.T. 535)

23. Behavior Rating Inventory of Executive Function (BRIEF-2) rating scales completed by the Parent and Private School teachers indicated concern regarding Student's ability to shift and emotional control. Using the global executive composite (GEC) that incorporated the BRIEF 2 clinical scales, the Student had average scores. (N.T. 537-538)
24. The Adaptive Behavior Assessment System, Third Edition (ABAS-3) rating scales determined that Student's conceptual domains were in the below-average range, social domains scores were extremely low, and practical skills were in the low range. (N.T. 538)
25. A District conducted speech-language evaluation determined Student's voice to be within normal parameters, no clinical dysfluency, speech articulation was highly intelligible and age-appropriate. Administration of the Comprehensive Assessment of Spoken Language, Second Edition (CASL-2), determined Student's overall skill in oral expression (receptive and expressive vocabulary, sentence expression, grammatical morphemes, inference) fell within the deficient range. The credentialed evaluator recommended that Student receive speech-language services to increase receptive, expressive, and pragmatic language skills. The evaluator could not determine whether the Student made progress toward speech goals while attending the Private School. (P-11, p. 26-27; N.T. pp. 600, 614)

26. To assess auditory comprehension, a licensed audiologist administered a central auditory processing evaluation. Based on results of the SCAN-3 C for Children, the Student demonstrated normal/borderline normal peripheral hearing sensitivity with very good speech discrimination skills in a quiet environment. The evaluator determined the Student exhibited auditory decoding difficulties that impacted the understanding of spoken language, phonics, and reading abilities. The Student's weaknesses in tolerance-fading memory resulted in difficulties repeating back two or more words. The detected deficits with binaural integration and binaural separation in conjunction with the Autism diagnosis resulted in difficulty with the Student simultaneously listening and looking, and fusing the meaning. The audiologist concluded that Student's weaknesses with speech and noise would result in distraction with noises present. Student's speech and language delay and cognitive deficits impacted the ability to complete many of the assessment tasks; the evaluator could not rule out a central auditory processing disorder. (P-11, pp. 28-30, 39; N.T. 665-678)

27. The audiologist recommended an FM system, preferential seating, chunking of lengthy instructions, repetition, and visual reinforcement. (P-12; N.T. 679-685)

28. For inclusion in the RR, a District Occupational Therapist observed the Student at the Private school, reviewed Parent input regarding sensory concerns, consulted with Student's math teacher, and administered assessments. On the Developmental Test of Visual Motor Integration, the Student received scores of below average for visual-motor integration, average for visual perception, and low for

motor coordination, but within the typical performance range on the School Companion Sensory Profile 2. The assessment determined that the Student demonstrated functional gross motor skills needed for the school environment but recommended fifteen minutes a month of consultative OT. Recommended SDI included a visual schedule, cueing, flexible seating options, a trial of pencils or erasable pens, typing practice. (P-11, pp. 30-37, 39; P-12, p. 25; N.T. 407)

29. For the RR, the District conducted an adaptive physical education evaluation. Because the Student was able to perform skills and activities at or above grade level, adapted physical education class was not recommended. (P-11, p. 37, P-12, p. 27)

30. The May 2021 RR determined Student eligible for special education services and SDI based on an educational classification of Autism and a secondary classification of speech and language impairment. The completed RR included numerous recommendations for IEP team consideration. (P-11, pp. 39-41)

June 2021 IEP/FAPE Offer

31. On June 3, 2021, the IEP team met to develop programming for the 2021-2022 school year. (N.T. pp. 73-76)

32. At the meeting, the team discussed the implementation of an FM system and potential SDI for use in the middle school. The Parent expressed concerns about isolating effects of an FM system; previous implemented SDI were ineffective, noise levels in a larger school,

transitions, and that Student progressed at the Private School (P-12; N.T. pp. 73-76, 593)

33. The June IEP indicated Student had communication needs. The IEP contained present levels of academic and functional performance with a summary of Student's former and current grades, input from the Private School CEO and teachers, an explanation of the CBTP, a summary of the District's RR. At the meeting, the Parent indicated concerns about Student's increased anxiety, the need for support with coping, struggles with transitions, grammar and punctuation, and potential stigmatization of headphones. The Parent requested that the District continue the Student's placement in the Private School for the 2021-2022 school year. (P-12, pp. 7-28).

34. The June IEP incorporated the RR determination that Student had needs in reading (basic reading skills/decoding; oral reading fluency and reading comprehension); Math (computation [multiplication] and problem-solving; Written expression (conventions, organization, and development). Behavioral needs included peer social skills (initiation of conversations and interactions, behavioral rigidity, leisure skills), executive functioning skills (shift, initiation and emotional control); Speech needs (expressive, receptive, pragmatic language); OT needs (sensory processing); and adaptive skill needs (community use). (P-11, p. 38, P-12, pp. 29-30; N.T. 540-541)

35. The June IEP offered measurable goals and short-term objectives designed to address reading, writing, math, social communication, and language, organization, and coping. All goals described how progress

would be measured and reported to the Parents. All goals indicated baseline data would be collected within the first 30 days of the 2021-2022 school year. (P-12, pp. 36-46; N.T. 582-583, 595)

36. The reading comprehension goal expected the Student to answer 4/5 comprehension questions correctly or 80% on three bi-weekly probes. The fluency goal expected an increase of WCPM to 100 words with 93% accuracy in four out of five trials. The writing goal expected the Student to write three sentences on topic with prompting, with proper punctuation conventions in 4 out of 5 trials for three consecutive weeks. (P-12, pp. 36-38)

37. The multiplication goal expected the Student to answer twenty single-digit multiplication problems with a minimum of 80% accuracy on three consecutive bi-weekly probes. The problem-solving goal expected the Student to increase the ability to select and apply correct math operations to 90% of problems on three consecutive weekly probes. (P-12)

38. The word understanding goal expected the Student, during structured therapy activities, to demonstrate understating of multiple meaning words in a minimum of two contexts with 80% accuracy on three out four consecutive sessions. (P-12)

39. When describing pictures or answering, the grammar goal expected the Student to formulate grammatically correct sentences using plural nouns and possessive nouns, and past tense verbs with 80% accuracy on three out of four sessions. (P-12, p. 42)

40. The social communication goal expected the Student, during structured activity, to increase skills by initiating interactions, responding appropriately, and maintaining interaction through questions and comments on four of five opportunities for three consecutive weeks. When provided with a scene, the social language goal expected the Student to complete a speech bubble to form a sentence that matched the picture for nine of ten opportunities on three out of four consecutive sessions. (P-12, pp. 43-44, 51)
41. The organizational goal expected the Student to independently follow a provided checklist for multiple step tasks and complete the task in four out of five trials for three consecutive weeks. (P-12, p. 45)
42. The coping skills goal expected the Student to improve coping when frustrated when a mistake is made by independently using a learned strategy four out of five opportunities for three consecutive weeks. (P-12, pp. 46, 51-52; N.T. 451, 785-786)
43. The June IEP offered program modifications and specially designed instruction (SDI) that included small group instruction for ELA, social skills instruction, social-emotional learning for regulation skills, instruction to increase processing efficiency, extended time, positive reinforcement, word banks, cues, and prompts to relieve anxiety, weekly email communication with the Parent, shortened assignments, modifications in science and social studies to classwork and homework, community-based instruction to assist with socialization and communication skills, multi-modality instruction – modeling, repetition, rephrasing, visual cues, graphic organizers, memory strategies, lengthy auditory instructions, a peer buddy, a

prompt hierarchy, visual aids, reading instruction to improve sound-letter associations, and phonological awareness. (P-12, pp. 47-52; N.T. 782)

44. Related services offered in the June 2021 IEP included fifteen minutes of consultative occupational therapy (OT), once a month, and thirty minutes of speech therapy, two times a week. (P-12, pp. 52-53)
45. Supports for school personnel included consultation between the regular education and special education and related services staff and between the OT and the IEP team. (P-12, p. 53)
46. The team deferred an ESY determination until February 2022. (P-12)
47. The June 2021 IEP offered supplemental learning support with access to emotional support and life skills, at the District middle school, with 52% of the day inside the regular classroom. If implemented, the Student would receive ELA, Math, Speech, executive functioning coping strategies, and computer-based reading in a learning support classroom. (P-12, pp. 51, 54, P-13; S-32; N.T. 440, 446, 777-779, 782-783)
48. Social skills instruction would occur two times a week through a social and emotional learning program provided in regular education as well as one time a week individualized instruction in emotional regulation. (P-12, pp. 51-52; N.T. pp. 451-453, 787)

49. The IEP presented at the June meeting did not contain a placement recommendation and was not finalized. (N.T. 576, 592, 803)
50. The June 14, 2021, Notice of Recommended Educational Placement (NOREP) accompanying the proposed IEP recommended supplemental learning support at a District middle school. Other options considered by the team included continued enrollment at the Private School or regular education classes with or without supplemental aides and services. (P-13, p. 2)
51. On June 22, 2021, the Parent rejected the IEP on the grounds that the District failed to offer FAPE. (P-13)
52. On August 17, 2021, the Parents filed an amended Complaint and requested a due process hearing.

2021-2022 School Year [redacted]

53. During the 2021-2022 School year, the Student attends the Private School [redacted] (N.T. pp. 81, 148)

Independent Evaluation

54. In September 2021, the Parent obtained the completed private evaluation of Student. For inclusion in the evaluation, a child psychiatrist observed the Student for sixty minutes at the Private School, spoke with school staff and current teachers, reviewed prior psychological, academic, speech and language, OT, academic information, and current and previous IEPs. The evaluator did not interview the Student. (P-25, P-26; N.T. 222, 234)

55. The private evaluation resulted in numerous recommendations for Student that included a small school and classroom environment with teachers that understood language processing delays and emotional/cognitive needs of children, continued speech therapy with participation in the CBTP, language exercises in an environment without the use of masks, and OT.
56. The evaluator determined that CBTP auditory exercises, particularly the motor symbol sequence and symbol relations, worked to build the formation to support the Student's language processing. (P-25; N.T. 216-218)
57. The private evaluator is qualified as an expert in psychiatry, child and adolescent psychiatry, learning disabilities, and (CBTP) the Private School's method for addressing learning disabilities. (P-25, P-26; N.T. 191)

Stipulation

- A. The January 13, 2020, IEP Revision, marked as Exhibit P-6 in the above-captioned matter, includes a Procedural Safeguards Notice signed by [Parent] on January 13, 2020.
- B. The May 6, 2021 Reevaluation Report, marked as Exhibit P-11 in the above-captioned matter, includes the signatures of the following Evaluation Team Participants: [Redacted], Parent; [Redacted], Psychologist; [Redacted], Speech/Language Therapist; [Redacted], Audiologist; [Redacted], Occupational Therapist; [Redacted], Adaptive Physical Education Teacher; [Redacted], LEA Representative; [Redacted], Special Education Teacher; and [Redacted], Director of Special Education.

- C. The June 3, 2021 IEP, marked as Exhibit P-12, in the above-captioned matter, includes the signatures of the following IEP Team Participants: [Redacted], Parent; [Redacted], Regular Education Teacher; [Redacted], Psychologist; [Redacted], Speech/Language Therapist; [Redacted], Educational Audiologist; [Redacted], Occupational Therapist; [Redacted], Other; [Redacted], Adaptive Physical Education Teacher; [Redacted], Attorney for the District; [Redacted], Attorney for the CIU20; [Redacted], Attorney for the District; [Redacted], Attorney for Parents and Student; [Redacted], LEA Representative; [Redacted], Special Education Teacher; and [Redacted], Director of Special Education.
- D. Counsel attest that they have authority to enter this Stipulation of Counsel on behalf of their respective clients.
- E. Parents' Amended Due Process Complaint is hereby included in the record as Exhibit P-30.
- F. This Stipulation may be executed in counterparts, each of which, separately and together form one singular stipulation.

DISCUSSION AND CONCLUSION 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). This hearing officer found most of the witnesses who testified to be credible as to the facts. The testimony was 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 12 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).

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).

Evaluation Criteria

The IDEA establishes requirements for evaluations. 20 U.S.C. § 1414. In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A). Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” 20 U.S.C. § 1414(b)(2)(B)-(C). In addition, the LEAs are obligated to ensure that: assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any

instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A). Finally, evaluations must assess “all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B).

Independent Educational Evaluation (IEE) at Public Expense

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)

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 calculated to provide the child with educational benefit. *Id.*

Least Restrictive Environment

One crucial component of the IDEA is the 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. FAPE and LRE are related but separate concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); see also *L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

Parents’ Claims

As a matter for which the Parent seeks tuition reimbursement, the threshold issue that must be resolved is whether the District offered this private school student a FAPE. In the Amended Complaint, due process hearing and closing argument, the Parent alleged numerous inadequacies that render the District’s June 2021 programming legally inadequate, some are addressed below.⁴ The Parent also seeks reimbursement for a privately obtained evaluation. Based on the totality of the evidence in this matter, the Parent has preponderantly established that the District’s offered program

⁴ The most disturbing allegation the Parent now asserts is that the Student may [self-harm] if attendance is required at the District middle school. Although this contention was not raised in the Amended Complaint and the Parent provided no corroborative evidence to support the testimony of, threats of self-harm, this allegation should not be disregarded by the responsible adults in this child’s life.

and placement for the 2021-2022 school year failed to offer FAPE and that tuition reimbursement is appropriate. However, the Parent has failed to establish that the District's RR was inadequate and that reimbursement for the privately obtained evaluation is appropriate.

The Parent's first contention was that the District offered a predetermined program and placement and did not earnestly consider Student's continued enrollment in a private school placement. As previously outlined, an IEP must be developed by a team that includes the parents. After creation of the IEP, the team should then discuss placement since the placement decision must be "based on" that IEP. 300 C.F.R. § 300.116 (b) (2). While the District was not required to accede to the Parent's preference for continued enrollment in the Private School attended, it was obligated to give consideration to concerns and input, which the evidence fully supports occurred in this matter. At the IEP team meeting, the Parent expressed concern and provided an explanation as to why proposed interventions were unsuitable, and expressed a preference for continued enrollment in the Private School. The Parent clearly participated in the IEP development meeting and provided input. There was no refusal to discuss or meaningfully consider the Parent's input and preferences during the decision-making process. The NOREP listed other options, including the private school placement suggested by the Parent. This Student's placement was not predetermined, and the District did not impede the Parent's ability to participate in special education program decision-making. *See, e.g., L.B. v. Gloucester Township School District (In re D.B.)*, 489 F. App'x 564, 567 (3d Cir. 2012); *C.H. v. Cape Henlopen School District*, 606 F.3d 59, 66 (3d Cir. 2010)

In the Spring of 2021, the District reevaluated the Student. The District utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. More particularly, the District summarized results of available information from previous evaluations, input from the Parent and Private School teachers; observations of Student; incorporated available classroom and curriculum-based assessment data; obtained and reported input and assessment results from teachers; conducted an assessment of Student's current cognitive and academic abilities; and included measures of Student's social, emotional, behavioral functioning and related services needs. All the District professionals responsible for preparing the RR were qualified for their roles.

On District conducted aptitude testing, the Student's scaled scores ranged from a percentile rank of 1-45%, with the greatest weakness demonstrated on the verbal comprehension index indicative of functioning at the 1st percentile. Student's FSIQ indicated general cognitive ability in the very low range of intellectual functioning. After achievement testing, the District determined the Student did not have mastery of basic academic skills. Audiological testing results served to underscore processing difficulties. The evaluator was unable to rule out a central auditory processing disorder because the Student's speech and cognitive deficits impacted the ability to complete many assessment tasks. The evaluator determined the Student exhibited auditory decoding difficulties that would affect educational performance, including spoken language, phonics, and reading.

The District's 2021 reevaluation process was fully compliant with the IDEA. The record does not support the conclusion that the District's

evaluation was legally deficient. It appropriately assessed Student's abilities, strengths, and needs. Accordingly, there is no basis to order that the Parent receive reimbursement for the privately obtained evaluation of the Student.

The June 2021 IEP offered goals and short-term objectives to address reading comprehension, fluency, writing, multiplication, math problem solving, word meaning, writing-grammar, social communication, social language, organization, and coping. All goals were responsive to needs identified by the District's RR and described how progress would be measured and reported to the Parents. However, none of the goals contained baseline data. In addition to measurable goals, the proffered IEP contained numerous SDI to support the Student's identified academic and functional needs.

Under the proposed IEP, the Student would receive supplemental learning support with access to emotional support and life skills, at the District middle school, with 52% of the day inside the regular classroom. Instruction in ELA, Math, Speech, executive functioning coping strategies, and computer-based reading would occur in special education. The Student would receive Social Studies and Science instruction with modified curricular materials in the regular education classroom.

The Parent contends that the lack of baseline data in each of the IEP goals renders the proffered program deficient and results in a FAPE denial. In support of this contention, the Parent cites *Methacton Sch. Dist. v. D.W. ex rel. G.W.*, No. 16-2582, 2017 WL 4518765 (E.D. Pa. Oct. 6, 2017), a memorandum opinion, which held a Pennsylvania district denied FAPE to a high schooler when it developed annual goals not based on appropriate baseline data. Conversely, the District clarifies that our Third Circuit has yet

to weigh in on this issue. The District has also indicated that other jurisdictions, as well as Pennsylvania Special Education Hearing Officers, have acknowledged that a lack of baseline data does not always equate to a FAPE denial (*See, e.g., Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010)(IDEA does not require inclusion of baseline data for provision of FAPE); *Nack ex rel. Nack v. Orange City School District*, 545 F.3d 604 (6th Cir. 2006)(lack of baseline data not a denial of FAPE); *Dudley v. Lower Merion School District*, 2011 WL 5942120 (E.D. Pa. 2011)(to-be-determined baselines do not render IEP inadequate); *Kathryn F. v. West Chester Area School District*, 2013 WL 6667773 (E.D. Pa. 2013); (H.O. Valentini, 12/26/2019)(baselines to be determined within ten days appropriate); *Council Rock School District*, 120 LRP 24265, 8, 9, 14 (H.O. Skidmore, 3/10/2020)(baseline to-be-determined for new goals constituted FAPE).

In this matter, although the goals did not contain baseline data, they were measurable. They provided a clear description of the skills this student needed to access, participate, and make progress in the curriculum. All the goals offered in the June 2021 IEP related directly to areas of need determined by analyzing multiple sources of information, including evaluations, classroom-based assessments, student observations, and input from the parent. Although the goals as drafted were technically legally compliant, I agree that this missing information complicated the ability to fully comprehend the educational proposal and the expectations upon Student's enrollment in the District. However, my determination that the June 2021 IEP failed to offer FAPE is based on the following.

First, this Student has profound verbal reasoning and auditory processing weaknesses that the proffered educational programming failed to adequately address. Both the District school psychologist and the audiologist provided credible testimony supporting their evaluations that verbally loaded tasks are a struggle for this Student. A classroom with other individuals and

a teacher constitutes a verbal load through which this Student would find it challenging to navigate. The weaknesses are profound. In a larger classroom environment with typical middle school background noise, this Student would have tremendous difficulty understanding verbal and audio content. Whether attributable to Autism or cognitive factors, this weakness could not be adequately assessed, but the impact is clear. Student's decoding, reading, and listening comprehension are significantly compromised. The District's plan to provide this Student with access to educational content across the middle school curriculum was inappropriate. The FM system trial is highly dependent on consistent microphone use by the speaker. It does not address daily peer interaction and communication, which all agree is necessary to develop and support this Student's social skills. The preferential seating, repeated directions, and other similar interventions, although not detrimental, did not appear to be sufficiently individualized to provide this Student with FAPE, particularly with most of the school day spent in regular education. Student has profound needs that permeate the entirety of the school day, including the regular education Science and Social Studies classes, where a high degree of focus, participation, and understanding would be needed. Although helpful, modified curricular materials are of limited use for a student who struggles to simultaneously decipher what is being said and the importance of the content.

Next, the District's June IEP did not contain a solid plan to assist Student with transitioning from the small Private School to the vastly different large middle school environment. The record has established that in addition to communication and auditory weaknesses, this Student has needs related to coping, frustration, and emotional dysregulation. In a larger school and classroom environment, where numerous students are present, and transitions are expected throughout the day, whether in hallways or the

cafeteria, the District has presented no plan outlining the supports this Student could expect.

The record establishes preponderantly that Student could not, with supplementary aids and services, be educated successfully within the regular classroom but continued to require specialized placement completely outside of that environment. This hearing officer concludes that the June 2021 IEP did not meet the standard of an appropriate program for Student. As such, the June 2021 IEP is not consistent with the legal standards above and did not constitute an 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.”).

The Private School

Having concluded that the District did not offer Student an appropriate program for the 2021-2022 school year, the next question in the tuition reimbursement analysis is a consideration of the private school program. As the above factual findings highlight, the Private School provides individualized instruction and supports with small class sizes, a navigable environment, instruction in core academics and related services geared toward Student’s unique needs. Student has demonstrated progress at the Private School that, based on Student’s unique presentation, is meaningful. For these reasons, the Private School meets the appropriateness prong of the *Burlington-Carter* test.

The third prong of the *Burlington* tuition reimbursement analysis requires consideration of the equities in this case and determination whether

they weigh in favor of reimbursement. The District contends that the Parent did not give due consideration to the proposed placement. Based on the totality of the evidence in this matter, that contention is unsupported by the hearing record. The Parents were responsive, supplied information when requested, and fully participated in developing Student's IEP. No equitable considerations exist to justify a reduction or denial of reimbursement.⁵

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 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 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. The Parent's request for a one-to-one is denied.

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, Esq.

⁵ The Parent's framing of issues for the hearing included a request for a one to one for Student. The Parent did not present any credible evidence in support of this demand. It is denied.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

December 7, 2021