

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:

25268-21-22

Child's Name:

A.T.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Kathleen M. Metcalfe, Esquire
1230 County Line Road
Bryn Mawr, PA 19010

Local Education Agency:

East Penn School District
800 Pine Street
Emmaus, PA 18049

Counsel for LEA:

Marc Fisher, Esquire
2610 Walbert Avenue
Allentown, PA 18104

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

02/15/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.T. (Student),¹ is a middle elementary school-aged student residing in the East Penn School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³ Student currently attends a private school at the option of the Parents.

In the fall of 2021, the Parents filed a Due Process Complaint against the District challenging its programming for Student under the IDEA and Section 504. As remedies, the Parents demanded compensatory education and reimbursement for private school tuition, a private evaluation, and other expenses. The case proceeded to an efficient due process hearing,⁴ during which the Parents sought to establish that the District did not comply with its obligations to Student for the 2019-20, 2020-21, and 2021-22 school years. The District maintained that its educational programming, as implemented for and offered to Student, was appropriate under the applicable law, and that no remedy was due.

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

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

³ 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).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

Following review of the record and for all of the reasons set forth below, the Parents' claims must be granted in significant part.

ISSUES

1. Whether the District failed to comply with its obligation to timely identify Student as a child with a disability;
2. Whether the District's educational program for Student was appropriate during the 2019-20 school year;
3. Whether the District's program proposed for the 2020-21 school year was appropriate;
4. If the District's program as implemented or proposed over the 2019-20 school year was not appropriate for Student, should Student be awarded compensatory education;
5. If the District's program as proposed for the 2020-21 school year was not appropriate for Student, should the Parents be reimbursed for private school tuition and related expenses; and
6. Whether the Parents should be reimbursed for a privately obtained evaluation and for expenses they incurred for private tutoring?⁵

⁵ The Parents also sought reimbursement for expert witness fees. (N.T. 18.) However, the basis for this requested remedy is Section 504, which provides in relevant part that, "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006

FINDINGS OF FACT

1. Student is a mid-elementary school-aged student residing in the District. Student has been identified as eligible for special education under the IDEA based on Specific Learning Disability. (N.T. 26-27; P-17.)
2. The District utilizes a multi-tiered system of support for all of its students during a specific intervention period of approximately thirty minutes, four days each week. All students are provided with Tier I support, and may be referred for more intensive (Tier II or Tier III) level support based on a lack of adequate rate of improvement. If Tier III support is not successful, then the team may consider an evaluation for special education. (N.T. 78-80, 105-06, 469-70, 472-74.)
3. Student enrolled in the District in January 2019 after attending a non-public school for [redacted] and the first semester of [the next grade], where Student reportedly had difficulty with mathematics skills but was making progress with reading. The Parents did not report any specific concerns at the time of enrollment, but noted the change in environment and routine. Student was provided Tier II intervention in the District in a small group for reading (phonics, sight words, and spelling) that spring. Student made some small gains in reading, but inattention and lack of focus were noted as impacting progress. (N.T. 106-08, 129, 316, 475-76; S-1; S-2; S-3; P-1; P-2; P-6; P-17 at 1-2; S-2.)

U.S. App. LEXIS 27014, *6 (2d Cir. 2006)(concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), providing that forum with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). The issue has nonetheless been preserved.

4. The Parents also arranged for private tutoring for Student shortly after moving into the District because they were concerned with Student's reading skills. The tutor worked with Student for two hours each week throughout the calendar year. (N.T. 318-21, 324-25; P-4; P-6.)

2019-20 School Year

5. In the fall of 2019, Student was referred to a child study team due to concerns with Student's academic performance (basic reading skills) and attention difficulties. On a screening measure at the start of that school year, Student attained a reading score at a middle kindergarten level. (N.T. 35-40, 43, 84-85; P-9.)
6. Student's [redacted] teacher provided a number of strategies for all students to help them maintain focus throughout the school day, such as movement breaks, fidget items, and opportunities for activities such as drawing. Student was able to use all of these but sometimes more frequently than peers. (N.T. 542-44, 559-60.)
7. The child study team including one of the Parents met in October 2019. The District staff at the fall 2019 meeting were aware that the Parents were providing outside tutoring for Student. (N.T. 53, 67-68, 318-20, 379, 481-82, 517-18.)
8. The District school psychologist conducted a time-on-task observation of Student in early November 2019 at the request of Student's pediatrician. Student's teacher also completed rating scales for the physician.⁶ Together, the results suggested that Student engaged in movement more than peers, and required redirection in order to complete tasks. (N.T. 43, 48-49, 326-27; P-10; P-11; P-13; P-14.)

⁶ The completed rating scale by the teacher and admitted at the hearing is extremely light and difficult, but not impossible, to read when enlarged. (P-14 at 3-4.)

9. The pediatrician diagnosed Student with Attention-Deficit/Hyperactivity Disorder (ADHD) in the fall of 2019. Student began taking medication for ADHD at that time, and Student's teacher noticed that Student was less inattentive and distracted, and more engaged, at school. (N.T. 330, 332, 534-35.)
10. Student was provided with Tier III support beginning in October 2019 in a very small group with two other students. When the team met again in early December 2019, the District proposed a special education evaluation because Student's progress was not satisfactory. A request for permission to evaluate was sent on December 6, 2019. (N.T. 83-85, 115-16, 119-21, 127, 131, 382-83, 478-79, 483-84, 487-88, 539-40.)
11. Student also had guided reading instruction in a small group in the regular education classroom during the 2019-20 school year. (N.T. 480, 525-27.)
12. Student was provided some individualized mathematics support during the 2019-20 school year. (N.T. 555-57.)
13. The District conducted the evaluation with the Parents' consent and issued an Evaluation Report (ER) in February 2020. (P-15; P-16; P-17.)
14. Parent input into the February 2020 ER reflected Student's current medication and continuation of the ongoing tutoring. They also noted some behaviors that Student exhibited at home including hyperactivity and difficulty with task completion. (P-15 6-13.)
15. Information from the prior school was included in the February 2020 ER. Student reportedly exhibited difficulty with mathematics skills there but was progressing with reading skills; and attention and assignment completion were areas of need. (P-17 at 2-3.)

16. Teacher input into the February 2020 identified areas of strength (early academic skill acquisition, homework completion) and weakness (reading, writing, and mathematics skills; attention to and completion of tasks). Results of curriculum-based assessments revealed that Student was not meeting expectations in the areas of reading, writing, and mathematics. (P-17 at 1-6.)
17. Assessment of cognitive functioning (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) for the 2020 ER yielded a below average range full-scale IQ score, with some variability among Indices. More specifically, relative weaknesses were noted on the Visual Spatial and Fluid Reasoning Indices, with average range performance on the other composites. (P-117 at 9-10.)
18. Student’s academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) was assessed for the 2020 ER. Student’s Composite scores were in the average range (Oral Language), below average range (Basic Reading, Written Expression, Mathematics, and Total Achievement), and low range (Total Reading, Reading Comprehension and Fluency, and Math Fluency), with some variability among subtests within those Composites. (P-17 at 7-9).
19. The 2020 ER determined that Student was eligible for special education based on Specific Learning Disability in the areas of basic reading skills, oral reading fluency, reading comprehension, and written expression, following an ability-achievement discrepancy analysis. The ER included recommendations for programming for all of those, as well as for mathematics weaknesses and attentional difficulties. (P-17.)

20. The District school psychologist did not conclude that Student needed support beyond Tier I interventions to address any executive functioning deficits. (N.T. 73-75.)
21. A meeting convened in early March 2020 to develop an Individualized Education Program (IEP) for Student. (N.T. 137; P-18.)
22. The March 2020 IEP identified needs in reading, writing, and mathematics skills. Annual goals addressed reading decoding and fluency (together in the same goal from a baseline of 13-16 words per minute to a goal of 23-25); written expression (writing a complete sentence based on an unattached checklist); mathematics computation (scoring 15-20 on an probe from a baseline of 4); and mathematics concepts/applications (scoring 7-9 on a probe from a baseline of 4). Program modifications/items of specially designed instruction included multi-sensory instruction, strategies for understanding directions, organizational check-ins, and test and assignment accommodations. (P-18.)
23. Student's program in the March 2020 IEP provided for learning support at a supplemental level, with English/Language Arts and Mathematics instruction outside of the regular education environment (ninety minutes each). Student was not determined to be eligible for extended school year (ESY) services. (P-18.)
24. Student's IEP was implemented on March 11 and 12, 2020 after the Parents approved the Notice of Recommended Educational Placement (NOREP). March 13, 2020 was an in-service day for staff, and was also the day that the Governor announced closure of all schools due to the pandemic.⁷ (N.T. 168-69, 343.)

⁷ The closures continued through the end of the 2019-20 school year, and notice is taken of the orders of the Governor of the Commonwealth of Pennsylvania, see

25. The District would have provided with a replacement curriculum for English/Language Arts. Student's mathematics program would have been in a special education classroom but using the general education curriculum. (N.T. 162, 164-65.)
26. After schools were closed, the District provided regular check-ins with teachers and added asynchronous instruction for students on April 6, 2020. The learning support teacher worked with the Parents to provide accommodations and resources for Student to help with access remote instruction. Beginning in late April 2020, Student was provided weekly live small group instruction for thirty minutes. (N.T. 169-72, 186-87, 189-94, 196, 198, 346-47, 565-66; P-24; P-26; P-27; P-28; P-29; S-11 at 1; S-12; S-13; S-14.)
27. Student experienced significant difficulty accessing remote learning and required continuous monitoring. The Parents hired a second tutor to work with Student daily when instruction was remote and over the summer of 2020. (N.T. 344-45, 349, 351-52, 394.)
28. The District did not conduct progress monitoring of IEP goals after schools closed in March 2020 through the end of that school year. Staff planned to conduct assessments in the fall when schools were open to make determinations on compensatory services. Students in the District also did not receive final trimester grades at the end of the 2019-20 school year. No further determination of ESY eligibility was made for Student. (N.T. 175-76, 203, 231, 234, 571; P-24; P-30; P-32; P-33.)

<https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited February 11, 2022).

29. The Parents explored private school options in the summer of 2020. (N.T. 358, 395-96.)

Preparation for 2020-21 School Year

30. A meeting convened with the Parents in early August 2020 to discuss the District's options for its students for the fall of 2020. At that time, the District planned on hybrid instruction for most students, who would attend in person and remotely, each for five days every two weeks. The District proposed that Student attend school five days a week, with the days when Student would have been remote on a hybrid schedule to be in the learning support classroom. All of Student's small group special education instruction in Mathematics and English/Language Arts would have been in person. (N.T. 217-20, 236-38, 354-56, 579; P-36.)
31. An IEP meeting was scheduled to convene on August 27, 2020 at the request of the Parents. The District cancelled the meeting that morning, after its receipt from Private School of a notice of enrollment at Private School. The District notified the Parents that a meeting could be scheduled if they re-enrolled Student in the District and signed a NOREP proposing the program discussed at the beginning of August. (N.T. 223; P-37; S-15; S-16.)
32. Student was not enrolled at Private School as of the morning of August 27, 2020. Private School notified the District of the erroneous notice later that morning, and the District advised the Parents and again asked that they approve the August 2020 NOREP so that an IEP meeting could be scheduled. (N.T. 357-58; P-38; P-39; P-40.)
33. The Parents did not re-enroll Student in the District because they did not yet understand the program that it was proposing for the 2020-21

school year. They enrolled Student in Private School after the August 27, 2021 meeting was cancelled. (N.T. 359, 404; P-40; P-41.)

34. The Parents requested, and the District denied, reimbursement for tuition to Private School. (P-40; P-41.)

2020-21 School Year

35. Student enrolled in Private School for the 2020-21 school year. Student was retained [redacted] that year on the recommendation of Private School. (N.T. 360-61.)

Private School

36. Private School services students from kindergarten through grade twelve. (N.T. 421.)
37. Student's teachers at the private school for the 2020-21 and 2021-22 school year are not certified special education teachers but all have undergraduate degrees in elementary or special education. (N.T. 440-41.)
38. Private School considered and determined that Student should repeat [that] grade due to gaps in academic skills and particularly reading. (N.T. 422-23, 442-43.)
39. Private School developed a Student Service Plan for Student in December 2020. The Plan at that time provided for sessions with reading specialist from the local Intermediate Unit; additional individual reading and writing instruction using an Orton-Gillingham (phonics-based) program; and assessment accommodations. (N.T. 422, 425-26; P-51 at 4-5.)
40. Student's grades at Private School for the 2020-21 school year were generally in the A- to B range, with satisfactory or outstanding performance in social studies, science, and special classes. (P-43.)

Private Evaluation

41. The Parents obtained a private neuropsychological evaluation of Student in late spring 2021. That evaluation included an observation of Student at Private School. In that observation and during formal assessment, Student exhibited a high level of movement and distractibility. Student was not taking medication at that time, a factor that impacted Student's performance compared to the February 2020 ER by the District. (N.T. 269-70, 272-73, 278, 363; P-42.)
42. The private neuropsychologist did not speak with anyone from the District. (N.T. 296.)
43. Assessment of cognitive function for the 2021 private neuropsychological evaluation (WISC-V) yielded a Full Scale IQ score of 79, in the very low range. Other Index scores were similarly in the very low or low average range. All of these scores were to be interpreted with caution due to significant variability. (P-42 at 13-14.)
44. In separate assessments of memory and learning, Student's scores were somewhat variable, revealing a relative strength in immediate memory but overall relative weaknesses in that area. (P-42 at 17-20.)
45. On an administration of the Fourth Edition of the WIAT for the private neuropsychological evaluation, Student performed below expectations with respect to many writing skills. Other instruments assessing reading and mathematics skills revealed some weaknesses in mathematics skills, whereas Student performed below to well below expectations. Listening comprehension skills, however, were developed as expected. (P-42 at 26-34.)
46. On measures of phonological processing and related skills for the 2021 private neuropsychological evaluation, Student performed well below expectations overall. (P-42 at 16-17, 27-30.)

47. Social/emotional functioning was assessed in the 2021 neuropsychological evaluation through rating scales completed by one of the Parents and two teachers (Behavior Assessment System for Children – Third Edition). One or more raters indicated clinically significant concerns with hyperactivity and attention problems, and additional at risk concerns were noted with aggression, conduct problems, attention problems, and learning problems, as well as some adaptive skills (social skills, leadership, and functional communication). (P-42 at 35-39.)
48. With respect to executive functioning in the 2021 private neuropsychological evaluation, rating scales completed by one of the Parents and teachers identified several potentially clinically elevated areas by the Parents (inhibiting, initiating, planning/organizing, and working memory), and a number of mildly elevated areas of concern for one or more raters (inhibiting, self-monitoring, and working memory). A different measure of working memory confirmed weaknesses in that area. (P-42 at 20-24.)
49. Assessments of other domains for the private neuropsychological evaluation revealed relative strengths in visual-motor integration skills; and relative weaknesses in some visuospatial skills, perspective-taking, and with automaticity. (P-42.)
50. The 2021 neuropsychological evaluation identified various areas of strength (including verbal reasoning, some areas of memory, emotional control at school) and weakness (including basic reading skills, written expression skills, attention and impulsivity, cognitive proficiency). The evaluator concluded that Student exhibited Specific Learning Disability in reading decoding, fluency, and comprehension, as well as written expression. A number of recommendations were

also provided, including an Orton-Gillingham-based reading program. (P-42.)

2021-22 School Year

51. Student remained in Private School for the 2021-22 school year. (P-42.)
52. The Student Service Plan in effect for the 2021-22 school year maintained the Orton-Gillingham reading instruction; provided for accommodations and modifications to assessments and homework assignments; interventions as needed to address academic struggles including small group instruction; and educational program elements that would be found in the program modifications/items of specially designed instruction section of an IEP: preferential seating, notice of changes to schedule, checks for understanding and completion of assignments for accuracy, multisensory presentation of directions, and self-advocacy/self-esteem development. (N.T. 435; P-51 at 1-3.)
53. Private Orton-Gillingham-based tutoring during the 2021-22 school year at some point was arranged by the Parents at the end of the school day. This decision was made to avoid Student missing regular class time. (N.T. 435, 454-55.)
54. Student's grades at the end of the first term of the 2021-22 school year were fairly consistent with those over the 2020-21 school year, but with A grades in social studies and science and a C+ in English/Language Arts. However, Student's benchmark scores on assessments of reading and mathematics at the start of that school year were well below and below expectations, respectively. (P-44; P-51 at 6, 11-13.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them. The testimony was overall consistent, and the minor differences are attributed to lapse in memory, or to differing perspectives, rather than intention to mislead the fact-finder. The persuasive value and weight of the evidence is discussed further below as necessary.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties’ closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires 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 also complying with the procedural obligations in the Act.

States, through 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.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard

must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Substantive FAPE: Child Find and Evaluation Requirements

The IDEA and state and federal regulations further obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an

eligible child [], the content methodology or delivery of instruction.” 34 C.F.R. § 300.39(a)(2).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) 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—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) 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

(C) 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); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and

emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see *also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see *also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). If parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a

school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

General IDEA Principles: Reimbursement for Tuition

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). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. 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 of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the

parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parent’s Claims

The first issue is whether the District complied with its child find obligation in a timely manner. The Parents contend that the District should have acted during the spring of 2019 or, at the very latest, at the start of

the 2019-20 school year, to initiate a special education evaluation. The District posits that it complied with these mandates in all respects.

The Parents correctly observe that the District was not required, nor even permitted, to defer an evaluation merely because its response to intervention program was in process for Student. *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011)(confirming that, “the use of [Response to Intervention] strategies cannot be used to delay or deny the provision of a full and individual evaluation” and citing 34 C.F.R. §§ 300.304 – 300.311). Nevertheless, the District was not mandated to immediately pursue an evaluation “at the earliest possible moment.” *D.K., supra*, 696 F.3d at 249. Student entered the District in January 2019 having never attended public school, and needed to adjust to a change in environment, new peers and adults, and an unfamiliar routine. The District quickly implemented Tier II reading interventions based on identified gaps in skills as Student became acclimated. Although Student’s progress in that reading program was not determined to be adequate, a more intensive intervention was instituted in the fall of the 2019-20 school year, and additional mathematics support was also provided.

The question therefore turns on whether the delay until December 2019 to seek an evaluation was inappropriate. That fall, Student continued presenting with significant reading skill deficits that were impacted to some degree by inattention and distractibility. The Tier III intervention was not intensive enough to remediate those weaknesses, even with the private tutoring. This hearing officer concludes that no later than the end of the first trimester of the 2019-20 school year (60 school days in a normal 180-day school year), the District should have sought to conduct a special education evaluation. Sixty school days would have ended sometime near the end of November; thus, the District’s December 6, 2019 request for consent to

evaluate was timely. Accordingly, the Parents have not established a child find violation.

The next issue is whether the District's program developed after its ER was appropriate for Student's needs. Because the IEP must be based on the ER, it is necessary to discuss the evaluation.

The District's February 2020 ER utilized several assessment tools to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Here, the District incorporated information from the non-public school Student attended; included parental input; and obtained and reported information from teachers. The District school psychologist conducted a classroom observation of Student that, in addition to the testing observations, provided useful information about how Student responded when presented with directives and task demands. The ER included cognitive and achievement testing, and rating scales to evaluate Student's social/emotional functioning. The District's ER summarized and reviewed the available information and determined Student's eligibility for special education, making programming recommendations to address Student's identified needs.

The Parents contend that the failure to specifically assess Student's executive functioning weaknesses is a significant and fatal flaw. They aptly note that "ameliorative effects of mitigating measures," including medication, are not to be considerations in identifying a disability. 42 U.S.C. § 12102(4)(E). Nonetheless, as the Office for Civil Rights has also explained, "[o]nce a school district determines that a student has a disability, [] that student's use of mitigating measures could still be relevant in determining his or her need for special education or related services." *Dear Colleague Letter*, 58 IDELR 79 (OCR 2012). The testimony of the District school psychologist on Student's lack of need for interventions beyond regular education support to address attention and other executive

functioning at the time was persuasive, and operates to defeat this contention of the Parents. The private neuropsychologist's testimony that she would have conducted such assessments does not establish that the District erred in declining to do so, particularly given her concession that Student's presentation at the time of the District ER differed from that when she conducted her evaluation. After all, any evaluation could likely include additional measures or tools.

Taken together, the record supports the conclusion that the District's ER was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability for purposes of informing the IEP team in development of programming. Accordingly, its evaluation served its IDEA purpose.⁸

The next issue is whether the District's program developed after the February 2020 ER was appropriate under the applicable standards. The IEP itself did not detail the special education programming, although there was testimony on the approaches the District intended to use for implementation. These omissions from the IEP itself can amount to both procedural and substantive violations. *See, e.g., Montgomery County Intermediate Unit v. A.F.*, 506 F.Supp.3d 293 (E.D. Pa. 2020). However, here, schools were closed immediately after the NOREP was approved by the Parents, and there was virtually no opportunity for the District to provide the services specified in that IEP and NOREP regardless of how it might have done so. Student was to receive special education programming for both English/Language Arts (using a replacement curriculum) and Mathematics, for a total of three hours per school day.

⁸ The private evaluation will be briefly discussed further below.

It is, of course, true that the District was unable to implement Student's IEP as intended during the period of school closures. That circumstance could not be foreseen. However, at no time were an LEA's obligations under the IDEA suspended as a result. Student was entitled to FAPE from time of the Parents' approval of the District's NOREP. Whether Student might have qualified for ESY services absent the closures, and whether Student might have benefitted from remote programming in the summer of 2020, is unknown. In any event, the remedies discussed below are intended to provide full relief for the FAPE denials.

The next issue is whether the District violated its obligations to Student with the program it proposed for the 2020-21 school year. It is unfortunate that the District cancelled the August 27, 2020 IEP meeting when it was inaccurately notified that Student was enrolled in Private School. When advised of the error, the District required the Parents to re-enroll Student so that the meeting could be rescheduled. This demand was not consistent with the law.

Even if an eligible child is not currently enrolled in the school district of residence, when the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *A. B. v. Abington School District*, 440 F. Supp. 3d 428, 435 (E.D. Pa. 2020); *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). Here, there is no question that the Parents asked for another meeting in late August 2020, and planned to attend it in order to better understand what the District was actually proposing for the fall in light of the continued pandemic. They were not given the opportunity to convene that meeting and make an informed decision, and this hearing officer concludes that the District thereby failed in its IDEA mandates for Student for the 2020-21 school year.

As noted above, for the start of the 2021-22 school year, the District had no obligation to develop and propose a program with Student enrolled in Private School. The Parents also did not ask that it develop one. Nonetheless, the Parents were advised by District representatives in August 2020 that they needed to re-enroll Student in order for an IEP meeting to convene. Under the circumstances presented by this particular case, this hearing officer concludes that the District's obligations carried forward into the 2021-22 school year because of its demand for re-enrollment before proceeding further.

Having determined that the District did not meet its FAPE obligations to Student for the 2020-21 and 2021-22 school years, it is necessary to next undergo analysis of the second prong of the *Burlington-Carter* test for tuition reimbursement. Private School serves school-age children who are taught by teachers with relevant education. Student repeated second grade due to skill deficits; has been provided with specific reading instruction that targeted Student's individual deficits; has had other interventions for academic difficulties; and has had other supports that would be considered program modifications or items of specially designed instruction in a public school. Private School need not meet IDEA standards, and the evidence is preponderant that it is appropriate for Student pursuant to this test.

The equities here also favor the Parents, who intended to cooperate with the District as late as August 27, 2020 to keep Student in its schools. They requested reimbursement for tuition at the earliest possible time they could after learning that the District would not convene another meeting unless they approved a NOREP and re-enrolled Student. For all of these reasons, the Parents have established entitlement to reimbursement for tuition and related expenses for Private School.⁹

With respect to compensatory education, Student was entitled to three hours each school day of special education pursuant to the District's March 2020 IEP. The IEP was not implemented after March 12, 2020 and, as of April 6, 2020, Student's special education services can only be described as minimal. This hearing officer concludes that Student must therefore be awarded three hours of compensatory education for each day that school was in session from March 13, 2020 through the end of the 2019-20 school year. That award is intended to remedy the FAPE denial in full through the start of the 2020-21 school year. As such, with respect to ESY services, which are intended for maintenance of skills rather than acquisition of new skills,¹⁰ and reimbursement for tutoring, no further remedy is owed.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs as determined by a

⁹ The District's final argument on the equities has been rejected by at least one Pennsylvania federal district court, and this hearing officer likewise finds it without merit. *Christian G. v. Lower Merion School District*, 919 F.Supp.3d 793 (E.D. Pa. 1996).

¹⁰ See *Extended School Year Services in Pennsylvania*, Pennsylvania Department of Education (2020)(available at <https://www.pattan.net/Publications/Extended-School-Year-Services-in-Pennsylvania> (last visited February 14, 2022)).

qualified professional. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress if Student re-enrolls. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age fourteen (14). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

Finally, the Parents seek reimbursement for the private neuropsychological evaluation. This hearing officer concluded above that the District's evaluation was appropriate under IDEA criteria, so the Parents are not entitled to this remedy. Moreover, this evaluation was undertaken in the late spring of 2021, after Student attended Private School for an entire school year, and has not been shared with the District for consideration by the IEP team. Although the private neuropsychologist's testimony, report, and recommendations were persuasive, there simply is no basis for the District to fund her evaluation in this case.

CONCLUSIONS OF LAW

1. The District failed to comply with its obligations to Student for a portion of the 2019-20 school year.

2. The District failed to comply with its obligations to Student for the 2020-21 and 2021-22 school years.
3. Student is entitled to compensatory education for a portion of the 2019-20 school year.
4. The Parents are entitled to reimbursement for tuition and related expenses for Private School for the 2020-21 and 2021-22 school years.
5. The Parents are not entitled to reimbursement for the private neuropsychological evaluation.

ORDER

AND NOW, this 15th day of February, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District denied Student FAPE during a portion of the 2019-20 school year from March 13, 2020 through the end of the school year.
2. Student is awarded three (3) hours of compensatory education for each day that school was in session as identified in ¶ 1 hereof in order to remedy the denial of FAPE. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
3. The District denied Student FAPE in its failure to comply with its IDEA obligations for the 2020-21 and 2021-22 school years.

4. The Parents are entitled to reimbursement for tuition and related expenses for the 2020-21 and 2021-22 school years.
5. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all current invoices and receipts for tuition and related expenses for Student at Private School for the 2020-21 and 2021-22 school years.
6. Within thirty calendar days of receipt of the documentation, the District shall reimburse the Parents for the full amount of the invoices and receipts provided by them pursuant to this order. The District may, at its own option, elect to begin to offer and provide transportation for Student to Private School, rather than reimbursement for those particular expenses, at any time.
7. All other demands for relief are DENIED.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
Hearing Officer
ODR File No. 25268-21-22