

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:

25036-20-21

Child's Name:

N.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Local Education Agency:

Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335-2643

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

October 30, 2021

Information and Procedural History

Student ¹is currently [a mid-teenaged student] enrolled in a private school (Private School) in the [redacted] grade for the 2021-2022 school year. At the beginning of the 2020-2021 school year, the Parents unilaterally placed Student in the [redacted] grade in a private school (Private School).² Student is eligible for special education according to the Individuals with Disabilities Education Act (IDEA) as a child with other health impairment and hearing impairment, including deafness.³ The Parents filed a due process complaint alleging that the District failed to offer the Student a free appropriate public education (FAPE), in violation of the IDEA and the federal and state regulations implementing that statute. ⁴

In their Complaint, the Parents seek reimbursement for Student's tuition, books, transportation, 1:1, extended school year (ESY), at the Private School during the 2021-2022 school year and ongoing, per pendency. Pursuant to Section 504 of the Rehabilitation Act, the Parents further seek reimbursement for the cost of their privately obtained neuropsychological evaluation of the Student and expert testimony during

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 Through a settlement agreement, the District partially funded Student's enrollment in the Private School.

³ 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).

the due process hearing. ⁵ In response, the District maintained that its offered program and placement were appropriate. For the reasons that follow, the Parents' claims are granted in part and denied in part.⁶

ISSUES

- 1) Whether the Hearing Officer should order the District to reimburse Parents for Student's tuition, transportation, etc., at the Private School for the 2021-2022 school year?

- 2) Whether the Hearing Officer should order the District to fund an IEE, which is an Independent Educational Evaluation, for Student? ⁷

FINDINGS OF FACTS⁸

⁵ Through the settlement agreement, the District reimbursed the cost of the March 2020 private neuropsychological evaluation, The issues framed for this due process hearing now request funding for a second IEE with the same evaluator. The neuropsychologist did not testify at the due process hearing pursuant to Parents' election to offer the report, without testimony, pursuant to the ODR February 2020 Prehearing Directives.

⁶ During the hearing, the District objected to the Parents' introduction of emails with the District, P-23, pp. 3-8, on grounds they were not disclosed pursuant 34 C.F.R. 500.12(b)(1). P-23 is admitted.

⁷ In the written issues provided before the due process hearing and in their written closing argument, the Parents cited to 34 C.F.R. §300.154(d)(2) (Methods of ensuring services) but argued the merits of 34 C.F.R. §300.304 (Evaluation Procedures) to support their entitlement to an IEE. Because the Parents offered no argument or rationale in support of the application of §300.154(d)(2), to this proceeding, their request for an IEE was reviewed applying the principles of §300.304.

⁸ All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' extensive written closing statements was considered. Only the findings of fact are cited as needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student attended school in the District from kindergarten through seventh grade. (S-2)

2. The Student is eligible for special education as a child with a mild to moderate sensorineural hearing loss and OHI. (S-2)

Preschool-Kindergarten

3. In 2009, as a preschooler, the Intermediate Unit (IU) provided the Student with birth to three speech and language in-home services. (P-4)

4. In January 2011, after a reevaluation, the IU determined the Student demonstrated age-appropriate speech and language skill; however, delays in fine motor and visual-motor skills were present, necessitating services. In January 2012, the IU determined the Student was no longer eligible for services. After a June 2012 evaluation in preparation for the Student's transition from early intervention to kindergarten, the Student was exited from special education. (P-4, S-2 pp. 2-5)

5. In 2013, while in kindergarten, a District evaluation determined the Student qualified as a student with a speech and language impairment due to articulation and language needs. In addition to speech therapy, the Student received hearing support and occupational therapy. (S-2 pp. 3-6)

First through Third Grade

6. From first through third grades, the Student received special education programming in the District. (P-4)

7. As a first-grader, a private evaluation determined the Student met the criteria for ADHD and had reading and math disorders. A District reevaluation determined Student met the criteria with a hearing impairment, specific learning disability, and speech and language impairment. In addition to hearing support, speech and occupational therapy, the Student received learning support services. (P-4)

Fourth through Seventh Grade

8. From fourth through seventh grades, the Student was enrolled in the District and received special education programming. (P-4, P-13)

9. In January 2017, a District reevaluation determined that Student no longer displayed a severe discrepancy between cognitive skills and achievement in basic reading, math, and writing. The reevaluation concluded that the Student no longer met the criteria as a child with a specific learning disability. (S-2 p.3-8)

2019-2020 School Year- [Redacted] Grade

10. During the 2019-2020 school year, the Student attended the [redacted] grade in the District.

11. In December 2019, the District conducted a reevaluation of the Student. For inclusion in the report, a speech evaluation occurred with administration of assessments to determine Student's articulation, expressive/receptive, and pragmatic language needs. Based on standardized testing, observations, teacher input, progress data, and clinical judgment of overall linguistic performance, a dismissal from speech-therapy services was recommended. (P-4, pp. 22-23)

12. Other evaluative measures in the December 2019 RR determined the Student met criteria as a student with an other health impairment (OHI) and a hearing impairment. (P-4, p. 23)
13. In January 2020, an annual IEP was developed that included goals for self-advocacy, executive functioning skills, and hearing support. In February 2020, the Student's IEP was revised to provide more support for executive functioning needs. (P-6, P-9)

Independent Educational Evaluation -March 2020

14. In March of 2020, a neuropsychologist retained by the Parents completed an evaluation of the Student. The issued report included a records review, cognitive, academic, and behavioral assessments, input from the Parents, and a classroom observation. Tests administered included the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Peabody Picture Vocabulary Test-Fifth Edition (PPVT-5) Expressive Vocabulary Test-Third Edition (EVT-3), Delis-Kaplan Executive Function System (D-KEFS, Wechsler Individual Achievement Test – 3rd Edition (WIAT-III), Self/Parent Report Behavioral Assessment System for Children-3rd Edition (BASC-3), Self/Parent/Teacher Rating Scales Conners 3, Self/Parent/Teacher Rating Scales. (P-11)
15. On the WISC-V, the Student demonstrated substantial variability across domains. Performance was in the low average to average range across the three core problem-solving domains, including verbal comprehension (23rd percentile), visual-spatial skills (34th percentile), and fluid reasoning (27th percentile). Student's

functioning was in the extremely low range on working memory tasks (1st percentile). Process speed was low average (13th percentile). (P-11)

16. On tests of auditory/linguistic processing, Student's performance was in the low average range on tasks of receptive (19th percentile) and expressive vocabulary (10th percentile). The Student struggled significantly on timed tasks of verbal fluency. The evaluator determined that working memory weaknesses likely affected performance. When the task involved comprehension of auditory information, the Student struggled substantially when the input was auditory-only (2nd percentile), but performance improved with a visual component and the task was more concrete (25th percentile). (P-11, p. 9)
17. On the Conners-3 rating scale of symptoms of ADHD and related difficulties, the Parent ratings produced the most elevated scores compared to teacher and self-reports. (P-11, p. 11)
18. On performance-based tasks to assess executive functioning, the Student initially understood but midway through seemed to forget the rules, begin making errors, and needed cueing. The Student also struggled on a task of inhibitory control and had trouble with planning and organization when faced with more complex tasks. (P-11, p. 12)
19. On the WIAT-III, the Student received composite scores in the 47th percentile for basic reading, 16th percentile in reading comprehension & fluency, and 27th percentile in math. (P-11, p. 24)

20. The private evaluation concluded that the Student met the criteria as a student with a language disorder, expressive and receptive difficulties, a specific learning disorder with impairment in reading, and ADHD-combined presentation. (P-11, pp. 15-16)
21. The private evaluation offered that the Student was at significant risk for experiencing increasing difficulty meeting academic demands across content areas due to combined language, attentional, and executive functioning weaknesses, and concerns about the formation of solid social connections, as well as evidence of anxiety. (P-11, p. 17)
22. After concluding that Student's cognitively based difficulties were the primary source of the difficulties experienced, the evaluation offered numerous recommendations for accommodations (note cards to expand vocabulary, chunking of information, visual, written language support, preteaching, calculator for math, word banks, prompting, executive function instruction, and alternate testing), to assist Student with language-based support and executive functioning needs. (P-11, pp. 17-20)
23. On May 19, 2020, the independent evaluator provided a summary of the March report to the Parents. (P-11, P-13, P-27)
24. On June 29, 2020, the Parents provided the private evaluation to the District. (P-15, p.8)
25. In July 2020, the Parents requested placement of the Student in a Private School at District expense. In September 2020, The parties entered into a settlement agreement that waived all prior claims; the

Parents received District funding of partial tuition at the Private School for the 2020-2021 school year, reimbursement for the private neuropsychological evaluation, and attorney fees. (P-15 p.24, S-6 p.3)

2020-2021 School Year – [Redacted] Grade

26. During the 2020-2021 school year, the Student attended the Private School, enrolled in the [redacted] grade. (S-6)
27. The Private School is [religious] affiliated with three divisions and serves students with learning differences with a mission to educate students with learning difficulties such as ADD, ADHD, dyslexia, dysgraphia, and difficulties with working memory, processing speed, and executive function. Instruction occurs with small classes with an average of four to one staff ratio. Student's [redacted] class had twenty students (N.T. pp. 163-164, 168, 176)
28. The Private School integrated support in reading, writing, and executive function in small class environments throughout the middle school program. (N.T. pp. 166- 167)
29. Language arts programming uses an Orton Gillingham-based approach to provide decoding, fluency, comprehension and writing instruction. Every summer, the Private School conducts an eight-day Orton-Gillingham training for its teachers. (N.T. pp. 165-167)
30. Writing instruction occurs through a diagnostic and prescriptive approach that utilizes direct and explicit instruction by teaching

students at the sentence level in the middle school, and at the paragraph level, and then the multi-paragraph level. (N.T. 169)

31. Math instruction is delivered through multisensory learning to move students from concrete to abstract understanding. Multisensory instruction could include auditory, visual, and tactile movement. (N.T. pp. 169-170, 206)
32. For executive functioning support, students are assigned a master binder to file all of their work, quizzes, reference sheets, worksheets, and homework. Each class period has time built in for organization. Students also have an advisory period three times a day. During the advisory period, a check-in occurs with the Student to assess if work needs to be done or a teacher consulted. (N.T. pp. 170-171, 207-209)
33. Progress monitoring at the Private School occurs through the Measures of Academic Progress (MAP) assessments in language usage, reading, and math. (N.T. pp. 182-183)
34. The Student has made academic and social-emotional progress at the Private School. (N.T. pp. 178-180, 186-187)

District's April 2021 Reevaluation Report (RR)

35. On February 15, 2021, the Parents consented to the reevaluation of the Student. (S-1)
36. On April 16, 2021, the District issued its reevaluation report (RR). A qualified, experienced school psychologist conducted the

evaluation of the Student. The RR included aptitude and achievement testing, a review of past educational records, progress reporting, a summary of privately obtained evaluations, measures of social, emotional, and behavioral functioning, Parent and teacher input, and observations of the Student (P-18, S-2; N.T. 219, 223-225, 231-232)

37. On the WISC-V, the Student received scores that indicated skills of low average (18th percentile) in verbal comprehension, low average (23rd percentile) in visual-spatial skills, borderline (8th percentile) in fluid reasoning, borderline (6th percentile) in processing speed, and extremely low (0.3 percentile) for working memory abilities. The evaluator determined the Student's general cognitive abilities to be within the borderline range (FSIQ 77); however, due to significant discrepancies between the Student's cognitive processing index and general ability index (GAI), the evaluator determined the GAI a better predictor of academic performance. Student's GAI fell in the low average range. (S-2, S-3, pp. 10-11)
38. The District administered the KTEA-3 to assess Student's reading, writing, and math abilities. (S-2, p. 23; N.T. 247)
39. On the reading composite of the KTEA-3, the Student received scores of low average for both letter-word recognition and reading comprehension. On the sound-symbol composite, the Student received borderline scores for phonological processing and average for nonsense word decoding. On the reading fluency composite, the Student received average scores for both silent reading fluency and decoding fluency. On the reading understanding composite, the Student received low average scores for both reading comprehension and reading vocabulary. On the orthographic processing composite

letter-naming facility test, the Student received a score of low average. (S-2, pp. 21-25, S-3, p. 13)

40. A District reading specialist conducted reading assessments of the Student. On the AIMSweb plus fluency benchmark assessment administered at the eighth-grade level, the Student received a score of 159 cwpm, which fell at the 52nd percentile. (S-2, p. 25, S-3, p. 14; N.T. 472)
41. On the TOSWRF-2, administered to assess silent word fluency, the Student received a grade equivalent score of 7.8, in the 45th percentile. (S-2, S-3, p. 15)
42. On the WIST word identification subtest, the Student received scores in the average range with a percentile rank of 63% and a grade equivalent of 10.9. On the spelling subtest of the WIST, the Student received scores in the below-average range, with a percentile rank of 25% and a grade equivalent of 6.0. (S-2, S-3, p. 16)
43. The Informal Reading Inventory (IRI) was administered to estimate Student's instructional level. On an eighth-grade level, the Student read at a rate of 152 correct words per minute. After reading aloud, the Student answered ten comprehension questions with 60% accuracy. This score was without look-backs to the passage. When provided the opportunity to look back at the passage, the Student answered the remaining questions with 80% accuracy. (S-2, S-3, p. 17; N.T. 482)
44. On the KTEA-3, Student's math concept and application and math calculation skills were in the borderline range. (S-2, S-3, p. 18)

45. Based on AIMSweb Math Concepts and Applications (MCAP) probes, the Student had math concepts and applications skills and math computation skills within the seventh-grade level. (S-2, p. 29, S-3, p. 20)
46. On the KTEA-3 writing assessment, the Student received scores in the low average range for written expression and spelling in the average range. (S-2, S-3, p. 20)
47. On the oral language and oral listening composite of the KTEA-3, the Student received borderline scores in listening comprehension and associational fluency. The Student received a score of average on the object naming facility subtest. (S-2, S-3, p. 20-21)
48. The Wide Range Assessment of Memory and Learning –Second Edition (WRAML-2) was administered to assess Student’s ability to learn and memorize information actively. On the working memory subtest, Student’s verbal working memory was low; visual working memory fell in the low range. (S-2, S-3, p. 22)
49. On selected subtests of the Delis-Kaplan Executive Function System (D-KEFS) to assess components of executive functions believed to be mediated primarily by the frontal lobe, the Student’s scores for visual scanning and letter and number sequencing fell in the average range. (S-2, p. 31)
50. To assess executive functioning skills, three teachers from the Private School and the Parent completed the Behavior Rating Inventory of Executive Function (BRIEF-2). On the BRIEF-2, all raters

identified inhibit and working memory as areas of concern for the Student. (S-2 p.34; N.T. 242-243)

51. The Behavior Assessment System for Children, Third Edition (BASC-3) was administered to three teachers, the Parent, and the Student, to assess emotional and behavioral concerns. The Parent reported concerns with hyperactivity, conduct problems and attention problems, adaptability, social skills, leadership, and functional communication. Teachers noted an elevated level of anxiety, with one reporting adaptability and functional communication concerns. (S-2, pp. 34-36, S-3, p. 27)

52. For inclusion in the RR, a certified, licensed speech-language pathologist conducted a speech and language evaluation of the Student. The assessment involved informal observation, assessment, a language sample, the administration of the Oral and Written Language Scales 2 (OWLS II), Test of Narrative Language 2 (TNL-2), The Word Test 2, the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) (Understanding Spoken Paragraphs subtest), and language sampling. (S-2, pp. 38-41; N.T. 385)

53. A language sample was completed to provide in-depth information about Student's use of language in real-world situations. The Student was able to tell a narrative, initiate communication, respond to greetings, was polite, and obtained attention in an appropriate manner. Eye contact, vocal loudness, and prosody were appropriate. No concerns regarding articulation, fluency, and voice were observed at this time. (S-2, p. 39)

54. The OWLS II, a standardized assessment, was administered to the Student to evaluate language skills in both receptive and expressive formats. On the OWLS II, Student's listening comprehension and oral expression scores were in the average range. The TNL-2 was administered to measure Student's narrative language abilities and to diagnose a language-based learning disability. On the TNL-2, Student received a comprehension score of average and production scores of above average. (S-2, pp. 39-40; N.T. 372-375)
55. On the Word Test-2, the Student received a total test score of 93, within the average range. This test measured the Student's facility with language and word meaning using common and unique contexts. The test is comprised of six subtests with average scores on this falling between 85-115. On this assessment, the Student received scores ranging from 102 to 83. The below-average score occurred on the semantic absurdities subtest. (S-2)
56. The Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) was administered to identify and diagnose language and communication disorders. On the (CELF-5) understanding spoken paragraphs subtest, the Student received a scaled score of 8, within the average range. About two-thirds of all students with typical language development earn scaled scores between 7 and 13. (S-2, p. 40, S-3, p. 31; N.T. 378)
57. Based on the results of the speech and language evaluation and observations, the evaluator concluded that the Student had age-appropriate skills in expressive language, receptive language, and

articulation (sound production) and did not qualify for speech and language services. (S-2, p. 41; N.T. 379)

58. A District teacher of the deaf/hard of hearing administered various assessments. On the Test of Auditory Processing, Fourth Edition (TAPS-4) administered to assess Student's ability to process, comprehend, and remember auditory information; the Student scored in the average range in phonological processing index, and low average range in the auditory memory and listening comprehension indexes. (S-2, S-3, p. 32)
59. On the Peabody Picture Vocabulary Test, Fifth Edition, (PPVT-5), which tests the student's receptive vocabulary ability compared to a cross-section of peers without a hearing loss, the Student obtained a raw score of 187, a standard score of 88, in the 21st percentile. Student's standard score fell within the expected range (average standard scores are between 85 and 115). (S-2, S-3, p. 33)
60. A Functional Listening Evaluation (FLE) was administered to assess the Student's ability to listen and correctly repeat back five-word random sentences with and without background noise added and from varying distances. With the use of hearing aids, the Student demonstrated average ability in phonological processing, vocabulary, and low average in auditory comprehension. Student was able to listen in close and far distances with and without background noise.
61. The evaluator concluded that Student presented with a mild to moderate sensorineural hearing loss and utilized

hearing aids. The evaluator recommended that Student receive hearing support for auditory memory, specifically word, number, and sentence memory. (S-3, p. 34)

62. Recommended classroom accommodations included the use of hearing aids during all instructional activities, preferential seating, facing the teacher, away from sound sources, in the front of the room, reinforcement of advocacy skills, and extra time to process information. (S-2, p. 44)
63. For inclusion in the RR, the District completed a classroom observation of the Student at the Private School. During the observation, the Student completed assignments, asked and answered questions, and read aloud when asked. (S-3, p. 34)
64. The RR concluded that Student had a disability and continued to need specially designed instruction. The primary disability category was (OHI), and the secondary was hearing impairment, including deafness. (S-2, p. 44)
65. The RR summarized that Student's math and reading scores declined since previous evaluations because curricular demands increased and required more reliance on executive functioning skills combined with academic skills. The RR attributed the decrease in scores to working memory deficits rather than a specific learning disability. (S-2, p. 45)
66. The RR noted Student as having needs in hearing support, executive functioning, reading, math, and writing. The RR offered recommendations to the IEP team that included the use of hearing

aids during all instructional activities, preferential seating, extra time to process information when participating in group discussions, direct instruction in executive functioning, written directions that accompany oral directions, audio text for reading, math lab, writing support lab, graphic organizers, chunking of information, and guided notes (S-2, p. 46)

May 2021 IEP

67. On May 12, 2021, the IEP team met to discuss Student's programming and placement for the 2021-2022 school year. (S-3)
68. The May 21, 2021, IEP listed special considerations that Student was deaf or hard of hearing and needed assistive technology. (S-3, p. 7)
69. The May 2021 IEP contained present levels of academic achievement and functional performance that summarized the 2021 evaluative data, results of formative and curriculum-based assessments, Student's grades, current classroom accommodations teacher, and Parent input. (S-3)
70. The Private School reported that the Student received accommodations that included chunking of information, audio text for reading, preferential seating, differing modalities, guided notes, near point reference sheets, graphic organizers, and multisensory instruction. (S-3, p. 8)
71. Concerns from the Private school teachers about the Student included slow processing, attention, reading comprehension,

impulsivity, focus, work pace, completing homework, following directions due to hearing issues. (S-3, p. 10)

72. Parent input provided to the IEP team included Student's great progress, happiness, and comfort at the Private School, the Private School's understanding, the District's lack of evaluation of expressive and receptive language, an IEE, and funding for continued enrollment. (S-3)

73. The Student's needs identified by the team included ongoing hearing support, executive functioning supports, reading, math, and writing. (P-19, p. 37, S-3)

74. The May IEP offered goals in executive functioning, hearing support, writing, assignment planning, self-monitoring, and organization. (S-3)

75. The executive functioning goal expected Student, when given a task to complete in group instruction, to begin the task within thirty seconds and remain on task for a minimum of ten minutes independently with no more than two prompts on eight out of ten independent tasks, as measured by staff data. The goal contained preliminary baseline data with additional data to be taken after Student's enrollment. (S-3)

76. The hearing goal expected the Student to repeat groups of five words, five numbers, and sentences with nine to eleven words per sentence when presented orally with 80% accuracy over three consecutive sessions. (Baseline: four words-65%, five numbers - 65%, nine-word sentences -80%) (S-3)

77. The writing goal expected the Student when provided a prompt to successfully produce a writing piece demonstrating a minimum score of three out of four on the Keystone Writing Rubric on each of the writing domains. The Student was expected to complete the task using four out of five academic trials for an overall accuracy rate of 80%. (S-3)
78. The assignment planning goal expected the Student to organize a task on paper, including the materials needed, the steps to accomplish the task, and a time frame to complete the assignment 80 % of the time on four out of five opportunities. (S-3)
79. The self-monitoring goal expected the Student when provided with post-observation review activities or in response to instruction to self-evaluate executive functioning skills, using a checklist with 80% accuracy when compared to observer's ratings using the same checklist on four out of five observations. (S-3)
80. The organization goal expected the Student when given structured support in a special education classroom, faded to independence, prompts to stay on task, and a teacher created self-monitoring checklist to maintain a preferred organization system by keeping papers in appropriate binders/sections on four out of five checks. (S-3)
81. All proffered goals described how the Student's progress would be measured and reporting to the Parents would occur every marking period. The executive functioning and hearing goals contained baseline

data. The District proposed collecting baseline data for the writing, assignment planning, self-monitoring, and organizations goals within two weeks of Student's receipt of instruction in the District. (S-3, pp. 47-55)

82. The May IEP offered numerous program modifications and specially designed instruction that included direct, explicit, and systematic instruction in executive functioning, organizational strategies, preteaching and reteaching of math, and writing; utilization of hearing aids, preferential seating, wait time, repeated directions, encouragement for self-advocacy, skeletal notes, chunking of assignments, study guides, separate test location, extended time, homework reduction, graphic organizers, audiobook tool, extra time to process information, an advance visit to the high school to meet with the teachers and school counselor, and alternate assessments instead of paper and pencil. (S-3, p. 56)

83. Related services offered included direct hearing support for sixty minutes per month and audiological services. Supports for school personnel included consultation between regular and special education staff and the hearing support teacher. (S-3, pp. 64, 67)

84. The team indicated that an extended school year (ESY) determination could not be made because Student attended a private school during the 2020-2021 school year, and progress monitoring information was lacking. (S-3, p. 65)

85. Through the May IEP, the Student would receive supplemental learning support and deaf or hearing-impaired support with 77% of the day spent in the regular classroom. (S-3, pp. 66-68)
86. The team concluded that the Student demonstrated readiness for instruction in an inclusive environment using supplementary aids and supports. The team determined that participation in the general education classroom would provide the Student with increased social initiations, relationships, and networks. (S-3, p. 66)
87. Through the May IEP, the Student would receive English, Algebra I, Eastern Civ, Biology, and encores of choosing in regular education. Student's special education programming would consist of up to 48 minutes per day, three days per six-day cycle of direct, explicit, systematic instruction in math, writing, executive functioning, generalization of study skills, and organizational strategies. (S-3, pp. 67; N.T. pp. 310, 510-511)
88. The Parents refused the offered program and requested a due process hearing. (P-21)

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. *Endrew 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 in order 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 reasonably 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

The Parents’ claim the April 2021 reevaluation conducted by the District was insufficient, and the ensuing IEP developed for implementation during the 2021-2022 school year did not offer FAPE. They seek public funding for an IEE by the same evaluator that conducted a neuropsychological evaluation of the Student and reimbursement for tuition at the Private School attended during the 2021-2022 school year.

The initial issue that must be addressed is the Parents’ assertion that the District’s reevaluation, completed in April 2021, was legally insufficient. In support of this contention, the Parents allege several deficiencies that render the RR inadequate. Much of the Parents’ disagreement centers on the

District's conclusion that Student was not determined eligible for special education based on a speech and language impairment and a specific learning disability, although suggested by their privately obtained evaluation. Based on the hearing evidence presented, the Parents have failed to sustain their burden of proof concerning this contention.

The District's April 2021 RR 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, including the privately obtained neuropsychological, input from the Parents 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. All of the District professionals responsible for preparing the RR were qualified for their roles.

The Parents' suggestion that the District had an obligation to use specific speech-language assessments instead of the measures selected by the certified speech-language pathologist is unpersuasive. It is, of course, always true that any evaluation could include more testing instruments. However, in this matter, the speech and language testing included numerous assessments, including standardized measures as well as informally obtained information from observation. The testing measures were comprehensive, valid, and reliable, and the speech pathologist that administered the testing explained each assessment, its purpose, and why it was chosen. She provided credible testimony. Likewise, the reading assessments

administered were thorough, adequately and credibly explained, and comprehensive.

The District's RR determined Student's eligibility for special education under the IDEA categories of OHI and hearing impairment and made recommendations to the IEP team. As indicated, the District administered numerous assessment measures that exhaustively examined this Student's needs. The District simply reached a different conclusion through its testing than that determined through the private evaluation. The Parents have not preponderantly established that the District's conclusions were contrary to law. Although I find credible the conclusion reached, by the school psychologist, of the impact of the Student's working memory deficits on academic performance, as discussed below, I do not dismiss the significance of those findings for purposes of special education programming.

In sum, the record evidence preponderantly supports the conclusion that the District's RR met IDEA criteria as it was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to the suspected disability.

As a matter through which the Parents seek tuition reimbursement for Student's attendance at the Private School, the next consideration is whether the proposed program offered by the District was reasonably calculated to provide meaningful educational benefit given Student's unique circumstances. In support of the contention that FAPE was not offered, the Parents contend that the May 2021 offered programming that in the past proved unsuccessful, the IEP failed to address Student's needs, and goals

were deficient.⁹ Many of these assertions are supported by the hearing record. Although there are many aspects of the District's program which must be viewed as appropriate and responsive to Student's needs, there are aspects of the proposed program that ultimately compel the conclusion that it was not a legally sufficient offer of FAPE.

After the District evaluation, the IEP team determined Student demonstrated hearing, executive functioning, reading, math, and writing needs for which special education programming was necessary. In response, the May 12, 2021, IEP, slated for implementation during the 2021-2022 school year, contained goals to address hearing, executive functioning, task initiation, writing, assignment completion, self-monitoring, and organization. The team proposed addressing Student's reading and math needs through specially designed instruction, delivered through supplemental learning support. Although the District's efforts to educate this Student in regular education with supplementary aids and services and modifications in the regular curriculum were necessary, the offered programming contains shortcomings that render the final offer of FAPE legally insufficient.

The most evident element of the program that falls short is the absence of sufficiently intensive and individualized interventions to address Student's significant academic difficulties that existed when Student last attended school in the District and were thoroughly explored in the IEE and the District RR. First, although the District conducted a comprehensive reevaluation, the resultant programming was not commensurate with Student's identified needs. The May IEP offered numerous proposed program

⁹ The Parents waived all prior claims against the District so a review and determination as to whether previously implemented programming was successful and denied Student a FAPE is outside the scope of this hearing. The Complaint and hearing in this matter encompassed claims pertaining to the May 2021 IEP.

modifications and specially designed instruction for implementation in the special education classroom that included direct instruction to address Student's deficits in executive functioning, organization, math concepts, and writing. However, the Student's reading and math performance on both the District conducted testing, and the private evaluation were indicative of the need for robust intervention in those areas, yet no academic goals were developed.

Although the District's testing did not result in a finding of a specific learning disability, Student's performance on various assessments yielded concern, meriting notice by the team and the recommendation for responsive measures. The specially designed instruction contemplated to address these areas was not sufficiently responsive given the nature of Student's deficits. Although an IEP need not specifically match every identified need with a goal, the offered programming overall must be calculated to offer meaningful educational progress. In this matter, multiple recent data points, as well as this Student's past academic struggles as documented through numerous evaluations, underscored the need for intensive academic intervention for this now high school student. Despite this information, the District's offered IEP lacked fundamental goals designed to meet the student's math and reading needs and enable progress in the general education curriculum.

Next, the writing, assignment planning, self-monitoring, and organization goals lacked baseline data. IEP teams need to gather quantifiable baseline data in order to develop robust, detailed, and measurable goals for a student's expected performance of each skill after a year. Although goals lacking baseline data may not render an IEP legally inadequate in all cases, this omission, in tandem with the unique factual

circumstances and needs of this child and other deficiencies, contributes to the conclusion that the District failed to offer FAPE. The absence of baseline data or other objective indicia of Student's functioning in the writing, assignment planning, self-monitoring, and organization goals further compounds the inability to properly understand the goals and evaluate whether they address the educational needs of this Student. The District's explanation that baseline data would be collected once the Student enrolled and attended classes was not satisfactory. The Parents made the Student available for the reevaluation assessments needed to complete the RR from which useful academic and functional information resulted. Some of that collected data could have been used to inform the crafting of the offered goals. However, that did not occur. Despite the District's reasons for the inadequacies, the May 2021 IEP was not reasonably calculated to enable this child to make progress appropriate in light of this Student's circumstances.

Singularly, the lack of goals in all identified areas of need and lacking baseline data in other may not necessarily equate to a denial of FAPE. However, given the individual and unique factual circumstances of this case and profile of this Student, both deficiencies lead to the inescapable conclusion that the proffered IEP failed to offer the Student FAPE consistent with *Endrew* principles.

The Private School is Appropriate

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. The private school is religious-affiliated and serves students with learning differences. The private school provides literacy instruction using a

structured, multisensory, diagnostic method consistent with an Orton-Gillingham program. Math is taught using a multisensory approach. While attending the Private School, the Student received accommodations that consisted of chunking of information, audio text for reading, preferential seating, differing modalities of delivery of information, repeated directions, guided notes, learning broken down into smaller units, near-point reference sheets, and graphic organizers. Based on a review of progress reports and the testimony presented, Student experienced academic and social gains. The record contains reliable evidence of the programming, specialized instruction, and services Student received at the private school. As such, the private school meets the appropriateness prong of the *Burlington-Carter* test.

The third prong of the *Burlington* tuition reimbursement analysis requires this Hearing Officer to consider the equities in this case and determine whether they weigh in favor of reimbursement. The District contends that the Parents went through the motions of attending the meetings but failed to fully participate in the IEP development process, having predetermined that the Student would remain at the Private School. 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 the development of Student's IEP. No equitable considerations exist to justify a reduction or denial of reimbursement.

Section 504- Reimbursement

The final issue is the Parents' request for reimbursement for the fees incurred by their private psychologist, who did not testify at the hearing. However, the basis for this requested remedy in 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 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), which provides district courts 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”). Accordingly, this hearing officer declines to order that remedy.

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.
3. The Parents are not entitled to reimbursement for fees or costs associated with a 1:1 or extended school year services.

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.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

October 30, 2021