

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:

24360-20-21

Child's Name:

G.K.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Michael J. Connolly, Esquire
McAndrews, Mehalick, Connolly, Hulse and Ryan P.C.
30 Cassatt Avenue
Berwyn, PA 19312

Local Education Agency:

Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335

Counsel for LEA:

Christina M. Stephanos, Esquire
Sweet, Stevens, Katz & Williams LLP
331 Butler Avenue
New Britain, PA 18601

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

04/21/2021

INTRODUCTION AND PROCEDURAL HISTORY

The student, G.K. (hereafter Student),¹ is an early-teenaged student residing in the Downingtown Area School District (District) who 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 election of the Parents.

This decision follows the Parents' filing of a Due Process Complaint against the District wherein they assert a denial of a free, appropriate public education (FAPE) to Student under the IDEA and Section 504 in the District's program offer for the 2020-21 school year. As a remedy, the Parents demand reimbursement for tuition and related expenses associated with that private school placement. The District denies all of the allegations and disputes that any relief is due. The case proceeded to an efficient due process hearing⁴ at which the parties presented evidence in support of their respective positions. Following careful review of the record, and for the

¹ In the interest of confidentiality and protection of Student's privacy, Student's name, gender, and other potentially identifiable information are not used beyond the cover page of this decision to the extent possible. All personally identifiable information 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 The hearing convened remotely due to the COVID-19 pandemic. 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 generally are not to all.

reasons set forth below, the claims of the Parents cannot be sustained and must be denied.

ISSUES

1. Whether the District's proposed program for Student for the 2020-21 was appropriate under the applicable law;
2. If the District's proposed program for Student for the 2020-21 was not appropriate, whether the private school placement is appropriate; and
3. If the District's proposed program for Student for the 2020-21 was not appropriate, and the private school placement is appropriate, whether the Parents are entitled to some or all of the claimed tuition reimbursement and related expenses following a balance of the equities?

FINDINGS OF FACT

1. Student is an early teenaged resident of the District and is eligible for special education services under the IDEA. Student is enrolled in and attending a private school (Private School) for the 2020-21 school year. (N.T. 39-40.)

Relevant Prior Educational History

2. Student attended school in the District from kindergarten through second grade. Student was identified as eligible for special education

in early fall of first grade as a student with a specific learning disability (reading, writing, and mathematics) and also in need of occupational therapy services. Student has been enrolled at Private School since third grade, the 2016-17 school year. (N.T. 53; S-1; S-2; S-3; S-12.)

3. Student was evaluated by a private psychologist from Children's Hospital of Philadelphia in November 2017. At that time, the private psychologist reported DSM⁵ diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD) and Specific Learning Disorder (reading, written expression, and mathematics), as well as subclinical anxiety and obsessive compulsive behaviors. (S-12 at 145-58.)
4. The private psychologist administered several assessments of Student including the Wechsler Individual Achievement Test – Third Edition (WIAT-III). Student's scores on that instrument were not commensurate with Student's cognitive profile (average ability) in reading, written expression, and mathematics. (S-12 at 145-58.)
5. The Parents did not seek tuition from the District for any time period prior to the 2020-21 school year. (N.T. 120.)

Spring 2020

6. The Parents signed an enrollment contract for the 2020-21 school year with Private School in March 2020, and began making tuition payments in July 2020. (N.T. 59, 138; S-16.)
7. As of the end of the second trimester of the 2019-20 school year, Student continued to exhibit significant needs in the areas of reading, writing, mathematics, social studies, and science, requiring a number of accommodations and a high level of support. (P-13 at 22-28.)

⁵ Diagnostic and Statistical Manual of Mental Disorders, currently in its fifth edition.

8. Private School developed a flexible learning approach in the spring of 2020 following the school closures due to the COVID-19 pandemic. Student reportedly participated in virtual instruction with individualized support during the closure. (S-12 at 97.)
9. The District also closed its schools as of March 16, 2020 due to the COVID-19 pandemic, with March 13, 2020 the last day of in-person instruction.⁶ The District provided virtual instruction through its last school day on May 29, 2020. (N.T. 521-22.)
10. On May 19, 2020, the Parents contacted the District to ask about an evaluation of Student. The District responded that, due to COVID-19 restrictions, direct assessments could not be completed; but, the District noted that it would complete the evaluation to the extent it could do so, and issue a report within the sixty day timeline, to be followed in the future by any outstanding assessments. (N.T. 57-58; S-5 at 1-2.)
11. At the time of the Parents' May contact, the District was not conducting in person assessments of children due to the COVID-19 pandemic and the absence of guidance on how to perform such evaluations safely. Test publishers had also not provided procedures for maintaining standardization and validity of instruments with remote assessments. (N.T. 285-86; S-5 at 3-4.)
12. In early June 2020, the District sought records from Private School. (S-11 at 1-4.)
13. On June 11, 2020, the District issued a Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) refusing to conduct an evaluation of Student as a result of the COVID-19 closures,

⁶ The school closures were consistent with an order of Pennsylvania Governor Wolf that same date.

stating that, “the completion of evaluation activities is prevented at this time.” (S-6 at 3.) The District school psychologist explained to the Parents that standardized assessments could not then be completed while complying with health and safety guidance. The District also notified the Parents that it would issue a Permission to Evaluate form after it had guidance on how to administer individual assessments in light of ongoing restrictions. Additionally, a record review was determined to be insufficient to serve the purposes of a special education evaluation, although the District did ask for any records from Private School in the Parents’ possession. (N.T. 287-88, 291; S-5; S-6.)

14. The District also indicated in June 2020 that it could provide regular education interventions while an evaluation was completed if Student was enrolled for the fall of the 2020-21 school year. (S-5 at 5-7.)
15. The Parents did not approve the June 11, 2020 NOREP. (P-3 at 18-21.)
16. On August 18, 2020, the Parents notified the District that they sought public funding for Private School for the 2020-21 school year. (S-5 at 9.)

August 2020 IEP

17. An Individualized Education Program (IEP) meeting convened in late August 2020 attended by the Parents. By that time, the District had requested the opportunity to meet with Student to determine present levels of performance, but the family was not immediately available. (N.T. 67, 153, 294-95; S-5 at 17-18.)
18. At that same August 2020 meeting, the team also discussed proceeding with an evaluation of Student. By that point in time, the District had

guidance on conducting assessments within health and safety protocols. (N.T. 285.)

19. As of the District's August 2020 IEP meeting, the District had received some records from Private School, but many of those came directly from the Parents two days before the IEP meeting rather than from Private School. Private School sent records the day before the meeting. (N.T. 298, 301-02, 344-45, 508-16; S-5 at 12; S-11.)
20. The August 2020 proposed IEP summarized available information and identified Student's needs as improvement of reading, writing, mathematics, and executive functioning skills. (S-7.)
21. Input from teachers at Private School for the August 2020 reflected its flexible learning plan model for online instruction. Beneficial accommodations for Student included one on one communication with teachers to understand directions and assignments, and opportunities for small group and individual instruction in mathematics. (S-7 at 6-12.)
22. Annual goals in the August 2020 IEP were based on information made available to the District, targeting oral reading fluency at a fifth grade instructional level with no baseline available; reading comprehension at a fifth grade instructional level with no baseline available; decoding with no baseline available; math computation at a sixth grade level with no baseline available; math concepts and applications with no baseline available; written expression with no baseline available; and organizational and self-monitoring skills with no baselines available. (N.T. 524-32; S-7 at 23-31.)⁷

⁷ The absence of baselines is written two different ways in the goals, but the testimony clarified that both phrasings meant that no baseline was yet available. (N.T. 578-79.) Some of the information on which the District relied was from an outside source other than Private School, but the District was not aware of that. (N.T. 525, 606.)

23. Program modifications and items of specially designed instruction in the August 2020 IEP provided for direct, explicit instruction in decoding/encoding, reading comprehension, mathematics, executive functioning, and written expression, in addition to a check-in period. (S-7 at 32-33.)
24. Student's August 2020 IEP provided for learning support at a supplemental level, with Student participating outside of the regular education classroom for decoding/encoding, reading comprehension, writing, mathematics, and executive functioning instruction, as well as the check-in period. (S-7.)
25. The Parents did not approve the NOREP accompanying the August 2020 IEP. (S-7 at 39-43.)

Fall 2020

26. Two days after the August 2020 meeting, the District issued a Permission to Evaluate form to the Parents along with a request for input from them and Private School. (S-5 at 30.)
27. The District scheduled sessions with Student for testing to determine present levels in early September 2020 when the family was available. (N.T. 520-21, 580-82; S-5 at 27.)
28. The first day of school for students in the 2020-21 school year was August 31, 2020. (N.T. 522.)
29. For the first quarter of the 2020-21 school year, the District provided virtual instruction in a mix of synchronous and asynchronous teaching. However, the sessions were synchronous for all special education classes and some regular education interventions including reading classes. By the start of the second quarter, all students were offered in-person instruction two days each week with special education

students having the opportunity to attend four days each week in person. In March 2021, all students were able to attend in person four days each week. (N.T. 185-86, 388, 546-48.)

Evaluation Report

30. The District issued an Evaluation Report (ER) on October 26, 2020. The ER noted that health and safety guidance was followed during administration of assessments for this ER. (S-8.)
31. Parent concerns in the October 2020 ER were for articulation and comprehension in addition to ADHD, deficits in processing speed and working memory, and reading. They also expressed Student's need for teacher attention, cuing for focus/attention, and organizational skills. (S-8 at 2-5.)
32. The October 2020 ER summarized available information including that from Private School and the private psychologist. The District school psychologist was not given permission to observe Student at Private School due to COVID-19 restrictions. (S-8; S-11 at 16.)
33. Teacher input from Private School for the October 2020 ER included concerns with assignment completion, need for prompting and reminders to focus, and reading decoding/encoding skills. Student reportedly worked at a slow pace compared to peers. (S-8 at 10-11.)
34. Cognitive assessment for the October 2020 ER (Wechsler Intelligence Scale for Children – Fifth Edition) yielded scores in the average range on the Verbal Comprehension and Fluid Reasoning Composites, and the General Ability Index, although the Full Scale IQ was in the low average range. This instrument reflected weak working memory and processing speed consistent with the ADHD diagnosis. (S-8 at 13-15.)

35. Assessment of academic skills for the October 2020 ER revealed significant weaknesses with phonological awareness and processing. Student's scores were well below grade expectations in basic reading skills including fluency and comprehension; mathematics concepts and applications; and written expression skills. On specific assessment of literacy skills, Student scored at or below the first percentile on word identification, spelling, and fundamental literacy composites. (S-8 at 15-20.)
36. Assessment of social/emotional/behavioral functioning for the October 2020 was conducted through rating scales completed by the Parents, a Private School teacher, and Student. Those instruments indicated concerns with anxiety and learning problems at a clinically significant level and with withdrawal and attention problems at an at-risk level (teacher); concern with withdrawal at an at-risk level (Parents); and a concern with sensation-seeking at an at-risk level (Student). In executive functioning, the teacher and Parents noted concerns with working memory, with the Parents also indicating concern with planning/organizing. Student's self-report did not note any concerns with executive functioning skills. (S-8 at 20-24.)
37. Speech/language assessment for the October 2020 ER did not reveal any weaknesses suggesting an impairment or a need for direct services. (S-8 at 24-28.)
38. Occupational therapy assessment for the October 2020 ER did not reflect a need for services. (S-8 at 28-30.)
39. The October 2020 ER concluded that Student was eligible for special education on the bases of specific learning disability (reading, writing, and mathematics) and other health impairment (ADHD and related executive functioning weaknesses). (S-8 at 33-34.)

40. Recommendations in the October 2020 ER included direct instruction in reading, writing, mathematics, and executive functioning skills; and a number of accommodations. (S-8 at 34-35.)

November 2020 IEP

41. Another IEP meeting convened in November 2020 attended by the Parents. The November 2020 IEP was a revision based on Student's present levels of performance including results of the October 2020 evaluation. (N.T. 81, 484, 550-54; S-9.)
42. Parent concerns in the November 2020 IEP were Student performing below grade level and having small class sizes at Private School, as well as how programming would be implemented during virtual or hybrid instruction. (S-9 at 25.)
43. Input from Private School teachers for the November 2020 IEP indicated that Student demonstrated needs with completing tasks and assignments, reading and writing skills, maintaining focus, and self-confidence and self-advocacy. Student required many supportive services and accommodations in order to be successful. (S-9 at 6-8.)
44. Identified needs in the November 2020 IEP, in addition to reading, written expression, and mathematic skills, were for cognitive efficiency, orthographic and phonological processing, and executive functioning skills. (S-9 at 26.)
45. Annual goals in the November 2020 IEP addressed oral reading fluency (forty five words correct per minute at a second grade level from a baseline of thirty three words correct per minute at a first grade level); reading comprehension (answering twelve comprehension questions on fifth grade level passages correctly from a baseline of five correct answers); decoding words with 90% accuracy (from no baseline available); encoding words with 85% accuracy (from no baseline

available); mathematics computation (earning twelve points on consecutive probes at a seventh grade level from a baseline of no points); mathematics concepts and applications (earning six points on consecutive probes at a fifth grade level from a score of ten on a fourth grade probe and a score of one on a fifth grade probe); written expression (providing thirty five correct writing sequences from a baseline of twenty two); maintaining organizational binders in four of five checks (from a baseline of none); and self-monitoring (planning and completing assignments through nine cycles from a baseline of none). (S-9 at 34-42.)

46. The November 2020 IEP maintained the program modifications and items of specially designed instruction from the August 2020 IEP, and added access to audiobooks, graphic organizers, questions for comprehension, pre-teaching vocabulary, and additional support for reading comprehension in content areas; supports for assignment completion, writing tasks, mathematics work, study skills, and organization; checks for understanding of directions, preferential seating, movement breaks, and assessment accommodations; and a plan for transition to the District (to include a meeting with the school counselor, a building tour, and a peer mentor). (S-9 at 43-49.)
47. Student's program in the November 2020 IEP remained learning support at a supplemental level. (S-9 at 53-54.)
48. The Parents did not approve the NOREP accompanying the November 2020 IEP. (S-10.)
49. After the November 2020 IEP meeting, the District issued another Permission to Evaluate form to conduct additional assessment of academic achievement. (S-5 at 59.)

District Middle School Programming

50. The District middle school that Student would have attended serves seventh and eighth graders in the same building. The school groups its students into four units that are each located in a specific section of the building. Each unit has separate “teams” for the two different grade levels, and each team has assigned regular and special education teachers. Most classrooms, including special education classes, are in the same location in the building for each team. (N.T. 171-72, 451, 465-66, 475, 486-88, 556-57.)
51. The District middle school that Student would have attended provided opportunities for students to engage in activities to meet staff and prepare to begin attending that building. Those activities were available in the summer of 2020 with some COVID-19 precautions and restrictions. A guidance counselor met with the students and reviews schedules with them. Tours were also available for the families. (N.T. 476-77, 479-81.)
52. All students in the middle school have a period at the end of the day for various activities including seeking support from teachers and completing assignments. Social activities also occur during that period at times. (N.T. 161-62, 174-75, 538-39.)
53. Regular education classes at the middle school that Student would have attended average approximately twenty four students. Many of those classes are co-taught. (N.T. 163-64.)
54. It was unknown prior to creation of a schedule for Student whether any of the regular education classes would be co-taught. However, the District recommended co-taught classes for mathematics and writing regular education classes. (N.T. 164, 528, 535, 539-40.)

55. All special education instruction outside of the regular classroom at the middle school that Student would have attended is part of the student's schedule rather than subject to "pull-out" from another class. (N.T. 178-79, 454-55.)
56. Special education classes at the middle school that Student would have attended average approximately six students. (N.T. 163.)
57. At the District middle school that Student would have attended, the IEP team determines what classes are replaced by programming such as a special education reading class that not all students have. (N.T. 496-97.)
58. The District proposed an Orton-Gillingham-based reading program that is individualized and sequential, requiring mastery of skills before moving onto the next step. This program addresses decoding/phonics, encoding, and reading comprehension. This program was discussed at the November 2020 IEP meeting. Student's scores on literacy-based assessments and reading probes were consistent with use of the recommended program. (N.T. 427-28, 432-33, 436-39, 444-45, 528-31.)
59. The District proposed a mathematics support class for Student using a research-based program. (N.T. 532.)
60. The District proposed an executive functioning support class for Student using a research-based program two times per cycle. (N.T. 532-33.)
61. Student's multisensory instruction in decoding and encoding would have been a research-based program taught by a reading specialist and provided in place of a literature class. (N.T. 165, 180, 460-61.)
62. Student's reading comprehension instruction (a regular education class) would have been a research-based program taught by a reading

specialist and provided in place of history class. (N.T. 160-61, 166-67, 180, 445-48, 450.)

63. Student's curriculum support classes for addressing writing support/instruction, executive functioning support, and mathematics support/instruction would have provided research-based programs in place of one of the three encore classes (student-selected electives, health, and physical education). (N.T. 167-68, 173-74, 180-82.)

Spring 2021

64. The District issued a Reevaluation Report (RR) in January 2021 following consent of the Parents. (P-9; S-13.)
65. The District administered the WIAT-III for the January 2021 RR. Student's composite scores on that measure were all in the low to below average range. (S-13 at 32-34.)
66. The January 2021 RR determined that Student was eligible for special education based on Specific Learning Disability and Other Health Impairment. (S-13 at 34.)
67. Recommendations in the January 2021 RR remained the same as in the October 2020 ER. (S-8; S-13.)
68. Another IEP meeting convened in early February 2021. (N.T. 342-43.)
69. The February 2021 proposed IEP contained updated information from teachers at Private School, reflecting that Student continued to struggle with reading and written expression, but that mathematics skills were a relative strength. Student reportedly used a number of accommodations at Private School particularly with reading tasks. (S-17 at 9-15.)
70. The February 2021 IEP added post-secondary transition services due to Student's age. Student would explore post-secondary and career

options with a goal toward competitive employment following graduation. (S-17 at 37-38.)

71. The February 2021 IEP was otherwise the same as the one from November 2020. The Parents did not approve the NOREP accompanying the February 2021 IEP. (S-17.)

Private School

72. Private School serves children with learning differences in grades one through eight, and has an emphasis on development of executive functioning skills. (N.T. 215-16, 224.)
73. Students at Private School undergo an admission process that includes review by an admissions committee. (N.T. 218.)
74. Private School has a lower school and a middle school, located on different levels of the same building. During the 2020-21 school year, Student has been in the middle school (sixth through eighth grades). (N.T. 215-16, 248.)
75. Approximately 175 students attend Private School for the 2020-21 school year. The student to teacher ratio is approximately three students for each teacher in classrooms of seven to thirteen children. (N.T. 217.)
76. Private School uses a variety of instructional programs and materials across its classes based in part on teacher recommendations. Instruction is not individualized, although the accommodations students actually use generally are. (N.T. 250-55, 266.)
77. Private School does not develop or implement IEPs, but does create a learning plan for its students. (N.T. 121, 220.)
78. Student experienced less anxiety at Private School than in the District. (N.T. 78-79, 83-84, 90.)

79. Student's classes at Private School for the 2020-21 school year have been: three periods of language arts (reading and writing skills), two periods of mathematics, a period for social studies and science, and a period for specials. Student also has three check-in periods throughout the school day for additional support. (N.T. 220-22.)
80. Student has a Private School-provided computer for use at school and at home. That device has applications that provide recorded books and other speech-to-text software. (N.T. 225.)
81. Student demonstrates more success in language arts than in content area classes. Language arts classes provide significant coaching and cues and Student needs those in that subject area. Student is additionally provided with a scribe who also coaches. (N.T. 226, 240, 242-43, 261, 265.)
82. Student's language arts program is focused on reading novels and writing assignments. Student's fluency needs are not directly addressed at the middle school level, except to the extent that continuing to build reading fluency is part of language arts. (N.T. 251, 266-67.)
83. Private School reports a student's instructional reading levels based on his or her designated grade level, not based on standardized assessments. (N.T. 263-64.)
84. Private School conducted benchmark assessments of Student's reading and mathematics skills between the 2016-17 and 2019-20 school years. Student generally performed well below expectations, revealing numerous skills deficits, although scores overall incrementally improved slightly over time. Private School did not use that instrument in 2020-21. (N.T. 256-57; S-8 at 9; S-12.)

85. Student does not perform well on reading assessments that do not permit accommodations such as having text read to Student. (N.T. 238-39.)
86. Private School provided in-person instruction since the start of the 2020-21 school year, with some break in that offering. There was also an option for virtual participation, and Student attended through that format for some brief period of time. (N.T. 86-87, 101, 225.)
87. As of the end of the second trimester of the 2020-21 school year, Student continued to exhibit needs in the areas of reading, writing, mathematics, social studies, and science, requiring significant accommodations and a high level of support. (P-14.)
88. Private School expects its students to develop an approach to learning that does not require a high level of support by the time of entry into eighth grade. By the end of the second trimester of the 2020-21 school year, Student was not in a position to begin decreasing supports. (N.T. 264.)
89. During the 2020-21 school year, Student exhibited a poor understanding of executive functioning strengths and weaknesses, particularly Student's areas of need. (N.T. 338; S-8; S-13.)
90. Student's scores decreased significantly on subtests in a standardized basic reading composite between 2014 and 2021, based on a comparison of assessments of academic achievement, indicating regression in basic reading skills rather than growth. (N.T. 325-27; S-1 at 8-10; S-13 at 32-34.)

DISCUSSION AND ANALYSIS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. The latter, the burden of persuasion, lies with the party seeking relief in this type of administrative hearing. *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. 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 responsible for 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. Their testimony was essentially quite consistent for purposes of the issues to be decided. The weight accorded the evidence, however, was not equally placed as discussed further below where necessary.

The findings of fact were made only 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' comprehensive closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, 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 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.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court again observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted); see *also* 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). And, a proper assessment of whether a proposed IEP meets the above standards

must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). LEAs are required to have an IEP in place for its eligible students at the beginning of the school year. 20 U.S.C. § 1414(D)(2); 34 C.F.R. § 300.323.

General IDEA Principles: LEA Obligation for Students Not Enrolled

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, the district is required 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). “Because the IDEA imposes no obligation on school districts to *sua sponte* evaluate and develop IEPs for students unilaterally placed in private schools,” they must do so when a parent has made a request under the IDEA. *A.B., supra*, 440 F. Supp. 3d at 435 (citations omitted). In other words, the trigger is that the “parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE.” *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762, 772 (E.D. Pa. 2012)(quoting *Moorestown*, 811 F.Supp.2d at 1073).

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.*

Substantive FAPE: IDEA Evaluation Requirements

Substantively, an IEP follows and is based on an evaluation. The IDEA sets forth two purposes of a special education 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).

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). Reports of evaluations and reevaluations must be provided within sixty calendar days of consent (excluding summers) that must be sought promptly. 22 Pa. Code §§ 14.123(b), 14.124(b).

The Parents’ Claims

The first issue is whether the program proposed by the District for the 2020-21 school year was appropriate under the applicable law. The Parents requested an evaluation and program offer from the District, triggering its obligation to Student in a private school. The August 2020 IEP should have followed, and been based on, an evaluation to determine Student’s strengths, weaknesses, IDEA eligibility, and need for special education and related services. Unfortunately, it was not.

The District was no doubt presented with some uncertainty in the midst of the global pandemic in the spring of 2020 when the Parents sought an evaluation. The District initially proposed a record review to be followed by appropriate assessments when health and safety permitted it to do so. This was an eminently reasonable approach considering all circumstances, and adhered to the existing guidance by federal and state educational agencies.

More specifically, at the time, the U.S. Department of Education noted that, “[i]f an evaluation of a student with a disability requires a face-to-face assessment or observation, the evaluation would need to be delayed until school reopens. Evaluations and re-evaluations that do not require face-to-

face assessments or observations may take place while schools are closed, so long as a student’s parent or legal guardian consents.”⁸ The Pennsylvania Department of Education similarly explained that an LEA may not “abandon a 60-day timeline” for conducting an evaluation, but did note that the evaluation should be delayed until the re-opening of schools, or until “the school deems it safe for staff and students for in-person testing.”⁹ Subsequent U.S. Department of Education guidance for LEA compliance with the IDEA during the period of COVID-19 closures contained the following: “As a general principle, during this unprecedented national emergency, public agencies are encouraged to work with parents to reach mutually agreeable extensions of time, as appropriate.”¹⁰ None of the guidance, or other governmental actions or directives, suspended an LEA’s IDEA obligations, however.

The District did not proceed to conduct a record review and seek the cooperation of the Parents to delay formal assessments until health and safety permitted. Nor did it provide the rating scales it used for the October 2020 ER that did not require in person interaction. Rather, the District issued a NOREP/PWN refusing to conduct an evaluation of Student and suggested that a program of regular education interventions could be considered for the start of the 2020-21 school year. A program for Student limited to regular education unquestionably would not have been appropriate for a child who previously received special education services in the District

⁸ March 16, 2020 Fact Sheet: *Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*, U.S. Department of Education, available at <https://www.ed.gov/coronavirus/program-information> (last visited April 20, 2021).

⁹ Pennsylvania Department of Education Bureau of Special Education Guidance on Evaluations & Reevaluations, available at <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/Guidance-on-Evaluations-and-Reevaluations.aspx> (last visited April 20, 2021).

¹⁰ March 21, 2020 Fact Sheet, *Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, see *supra* n. 8.

and who continued to exhibit significant needs even before a complete understanding of Student's educational profile could be gleaned.

The District contends, accurately, that the evaluation timeline if initiated in May or June 2020 would not have expired until October in any event since the Pennsylvania regulations exclude the summer break. Nonetheless, the Parents sought an evaluation for a program proposal for the 2020-21 school year, and the law required the District to comply with that request and have an IEP ready to be implemented at the start of the 2020-21 school year, early enough in time that the Parents could consider it before deciding whether to return Student to Private School. The District's decision to decline to proceed with obtaining any evaluation data amounts on this record to a procedural violation that ultimately resulted in an inappropriate program offer.

To its credit, the District did convene the IEP team in late August in order to propose a program for the fall of 2020 that was not simply a plan of regular education interventions pending an evaluation. Unfortunately, that IEP was largely based on inaccurate and incomplete information and cannot be considered substantively appropriate. For example, the August 2020 IEP proposed an annual goal for oral reading fluency at a fifth grade level. As part of the evaluation process, the District discovered that Student's oral reading fluency deficits were far greater than understood as of August, and that goal was revised to aim for second grade level accuracy. The section of the IEP providing program modifications and specially designed instruction is quite limited and lacked many of the strategies successfully used by Student at Private School. It is true that the District attempted to test Student for accurate baselines just prior to the start of the 2020-21 school year but Student was not available. The fatal flaw here in this hearing officer's view is that, had the District proceeded with the planned review of existing data in June 2020 and obtained records from Private School, it almost certainly

would have followed up with requests for further available information on Student's actual performance. The failure to seek all available data and additional input ultimately led to development of a proposed IEP in August 2020 that was not reasonably calculated to provide Student with educational benefit based on Student's needs.

The Parents raised few challenges to the District's ER and RR during the 2020-21 school year. This hearing officer unhesitatingly concludes that each of those evaluations satisfied IDEA criteria and, thus, provided the team with the requisite understanding of Student in order to determine eligibility and Student's areas of need for specially designed instruction. The addition of an observation by the District school psychologist would have added to its breadth, but under the circumstances cannot be considered a critical omission and especially not one attributable to the District (or Private School, for that matter).

The November 2020 IEP, developed after completion of the October ER, was a vast improvement over the prior IEP. Indeed, had this IEP been proposed in August 2020, analysis of its appropriateness would, in this hearing officer's estimation, lead to a different result on the first prong of the tuition reimbursement test. That IEP, and the one that followed in February 2021, contained annual goals targeting Student's identified areas of need based on Student's then-current present levels; direct, explicit instruction in those same areas of need; and a robust constellation of program modifications and items of specially designed instruction based on Student's strengths and weaknesses. The recommended reading program is research-based, individualized, and designed to address Student's significant reading deficits in a sequential approach requiring mastery of skills. All other explicit special education instruction was similarly research-based. The supplemental level of support proposed would permit the special

education support Student needed while also providing Student with significant opportunities to participate with typical peers.

The Parents contend, among other things, that the District's proposed IEPs fail to account for Student's benefit from small class sizes or their concern that Student would understand that some of Student's classes in the District were special education. The testimony about how class size would impact Student was far from preponderant¹¹ and, as discussed more fully below, Student struggles even with the relatively low student to teacher ratio at Private School. The District also provided persuasive evidence that the physical layout of the middle school that Student would attend would minimize any recognition of what classes were more supportive than others. These concerns, while likely genuine from a parent's perspective, do not preponderantly establish that the District's November 2020 and February 2021 proposed IEPs are inappropriate for Student. Again, an LEA need not offer an ideal program.

The next prong of the tuition reimbursement test is the appropriateness of Private School. On this element of the analysis, the Parents' claims fail.

Student has attended Private School for nearly four full school years. Although Student undoubtedly feels more successful in those classes where Student is provided ongoing coaching and cuing compared to those without those supports, Student has not yet begun to develop an understanding of Student's own approach to learning such that the currently high level of support can be gradually diminished as is expected by Private School by the end of the seventh grade year.

¹¹ The Private School witness who opined on this matter over District objection (N.T. 240-45) did not observe Student in any setting other than its small classrooms, and her testimony lacked a foundation for, and persuasive value on, what the District could provide in its own classrooms.

Student is also not provided any instruction or other targeted intervention at Private School to address reading fluency and decoding, areas of significant weakness and a critical foundation for all learning. Student's performance on assessments by the District in the fall of 2020 speaks volumes on Student's lack of growth in basic reading skills. Moreover, the record reveals that Private School uses a variety of programs for instruction that, together, can best be described as eclectic approach rather than targeted and explicit based on individual needs. In addition, Private School reports grade levels not based on individual student performance but rather on the particular grade a student is considered to be attending, greatly diminishing the value of its records in gauging Student's unique strengths and weaknesses. Reports of Student's "progress" while at Private School are anecdotal and simply unsupported by data.

The testimony of the District witnesses on the necessity for evidence-based interventions for Student was compelling and accorded significant weight, as were their concerns with Student's deficits in and need for developing independence in light of Student's reliance on extensive supports (N.T. 334-37, 403-04, 558-61). This is particularly important given Student's stated interest in post-secondary education. This ongoing absence of an awareness of Student's unique strengths and weaknesses to further independent learning at Student's age and grade level is quite evident in Student's lack of understanding of Student's executive functioning weaknesses. Although the Parents posit that the District's lengthy list of program modifications and items of specially designed instruction in the November 2020 and February 2021 IEPs reflect its own recognition of Student's dependence on a high level of support, the District could not be expected to withdraw all of the accommodations and other support that Student was receiving at Private School upon Student's return to its middle school. The District's express acknowledgement of the need to gradually

decrease support and foster independence for Student is a positive element of its November 2020 and February 2021 IEPs, not a basis for rejecting its proposals.

All of these details amount to a clear absence of preponderant evidence that Private School is appropriate for Student or that Student's needs may reasonably be expected to be met there during the 2020-21 school year. Because the Parents have not met their burden of persuasion on this prong, they cannot prevail on their requested remedy.

Based on the foregoing, there is no need to turn to the equitable considerations step of the tuition reimbursement test. The Parents' Complaint must accordingly be dismissed.

CONCLUSIONS OF LAW

1. The District's proposed program in August 2020 was not appropriate for Student.
2. Private School is not appropriate for Student for the 2020-21 school year and reimbursement for its tuition and related expenses is not warranted.

ORDER

AND NOW, this 21st day of April, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claims are **DENIED** and their Complaint is **DISMISSED**.

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. 24360-20-21