

*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:**

25443-21-22

#### **Child's Name:**

J.A.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### *Counsel for Parents:*

Nicole Reimann, Esquire  
7 Bala Avenue, Suite 202  
Bala Cynwyd, PA 19004

#### **Local Education Agency:**

Owen J. Roberts School District  
901 Ridge Road  
Pottstown, PA 19465

#### *Counsel for LEA:*

Jason D. Fortenberry, Esquire  
331 East Butler Avenue  
New Britain, PA 18901

#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

01/14/2022

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, J.A. (Student),<sup>1</sup> is a late preteenaged student who resides in the Owens J. Roberts School District (District). Student has previously been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup>

Student and the family moved to Pennsylvania from another state and into the District during the summer of 2021. Following Student's enrollment, the District convened a meeting to propose comparable services for the fall. The Parents did not agree with its recommendation, and enrolled Student in a private school. They then filed a Due Process Complaint demanding reimbursement for tuition and related expenses by the District under the IDEA and Section 504, and the case proceeded to an efficient due process hearing.<sup>4</sup>

The Parents sought to establish that the District's proposed program would not provide Student with a free, appropriate public education (FAPE) and that the relief sought was warranted. The District maintained that it

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

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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 Joint Exhibits (J-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

fully complied with its IDEA obligations in recommending its proposed program, and that no remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parents must be granted for the 2021-22 school year.

## **ISSUES**

1. Whether the District complied with its obligations to Student both procedurally and substantively in its proposed program for the start of the 2021-22 school year; and
2. If the District did not comply with its obligations, are the Parents entitled to reimbursement for tuition and related expenses for the Private School?

## **FINDINGS OF FACT**

1. Student is a late preteenaged resident of the District, and attends a private school (Private School) for the 2021-22 school year. (N.T. 28.)

### **Educational History**

2. Student and Student's family resided in a different state prior to the summer of 2021. Student attended a private school in a program of full time special education in that state beginning in kindergarten. (N.T. 317, 334-35; J-1 at 1-2.)
3. A private neuropsychological evaluation was conducted of Student in the summer of 2020 in the other state. (J-1.)

4. Cognitive assessment for the summer 2020 neuropsychological evaluation revealed a high average range full scale IQ score, with some variability among Index scores. Student's performance in the areas of Fluid Reasoning and Processing Speed were relative strengths, with average range Verbal Comprehension skills; whereas performance in the areas of Visual Spatial and Working Memory skills could not be adequately assessed. The neuropsychologist determined that Student's visual and auditory working memory skills were in the average range. (J-1 at 3, 12-13.)
5. Assessment of academic achievement for the summer 2020 neuropsychological evaluation yielded variable scores across the range of reading skills, average range mathematics scores, and well below average range scores on writing tasks. (J-1 at 5-7, 13.)
6. Social/emotional/behavioral functioning for the summer 2020 neuropsychological evaluation reflected no concerns by the Parents; but Student concerns included self-esteem, anxiety, and social skills. The neuropsychologist also noted Student's difficulty with maintaining attention to task and focus as well as distractibility. (J-1.)
7. The neuropsychologist noted Student's diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD) as well as fine motor skill dysfunction. That professional made a number of educational recommendations for Student, including a small, structured full-time special education program, accommodations in the school environment, counseling, and assistive technology. (J-1.)
8. An Individualized Education Program (IEP) from the other state dated February 22, 2021 summarized Student's present levels of academic achievement and functional performance, and set forth Student's

learning characteristics that included difficulty with focus and attention, distractibility, poor impulse control, low self-esteem, and difficulty managing emotions. At the time, Student was provided small group instruction in the areas of reading/language arts and mathematics, and a high level of teacher and therapist support throughout the school day. Student's disability was identified as a speech/language impairment which was significant and impacted Student's entire school day. (J-2.)

9. The February 2021 IEP contained annual goals for reading decoding, reading comprehension, mathematics computation, mathematics problem solving, spelling, written expression, coping skills, speech/language skills, occupational therapy skills, self-regulation, and executive functioning skills. Student's program was one of full time special education (with a specified ratio of eight students to two adults) with counseling, occupational therapy, and speech/language therapy as related services. Assistive technology was identified as a necessary program modification/accommodation. (J-2.)
10. The other state issued a prior written notice to the Parents in April 2021, proposing a full time nonpublic school placement; the IEP specifically rejected special education in the community school as inappropriate for Student's need for more specialized instruction. (J-2; P-2.)
11. Before moving to Pennsylvania, the Parents investigated private schools within the Commonwealth in the area to which they were relocating. Student applied to and was accepted at two of those, including Private School. (N.T. 320-21.)

## **Enrollment in District**

12. Student's Parents enrolled Student in the District in June 2021, just prior to the end of its 2020-21 school year. At that time, they provided to the District the 2020 neuropsychological evaluation report and the February 2021 IEP from the other state. (N.T. 40-41,<sup>5</sup> 316-17, 337; J-1; J-2; J-9; P-14 at 1-3.)
13. Student attended the summer program at Private School in 2021. (N.T. 337-38.)
14. On July 16, 2021, the Parents, through counsel, notified the District of their intention to place Student in Private School for the 2021-22 school year pursuant to the applicable regulation permitting that placement at public expense. (J-4.)
15. The District did not convene a meeting with the Parents until after the Parents' July 16, 2021 notice. The Parents attended that meeting held on July 28, 2021. (N.T. 45, 322-23; P-5; J-5.)
16. The District provided the Parents with a sample schedule for Student at the July 2021 meeting, and the participants discussed the schedule that included research-based reading and mathematics, an additional reading comprehension period in small group, and content area classes. The Parents also toured the proposed elementary school. (N.T. 49, 71-72, 93, 99, 266-67, 324-27, 331-32; P-13.)
17. The District did not develop or provide a draft IEP for the meeting. (N.T. 50.)

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<sup>5</sup> Although the District witness was not totally sure of the last day of the 2020-21 school year, his testimony is consistent with the District calendar available at <https://www.ojrsd.com/Page/2#calendar1/20210604/month> (last visited January 4, 2022).

18. The District's proposal was for learning support for reading and mathematics, most likely outside of the regular education classroom. Student's other classes, and lunch and recess, would have been in the regular education environment. (N.T. 54, 58-61, 64, 278-79, 289, 294-95, 305-06; P-13.)
19. The District's Notice of Recommended Educational Placement (NOREP) was provided to the Parents at the end of the July meeting and specified learning support for English/language arts and mathematics in addition to counseling, occupational therapy, and speech/language therapy. This NOREP was intended to offer comparable services based on those in the IEP from the other state and recommended learning support at a supplemental level. (N.T. 83, 86, 328; J-6 at 1-2.)
20. The District additionally sought and obtained the Parents' permission to conduct an evaluation of Student in early August 2021. They also gave consent for communication between the District and Private School. The District confirmed later that month that the evaluation would begin sometime in September. (J-7; J-8; P-6.)
21. The Parents disapproved the NOREP on August 5, 2021. (J-6.)
22. The District communicated with the Parents on August 23, 2021 to confirm whether Student would be attending its proposed elementary school. The District did not attempt to communicate with the Parents again after the return of the NOREP prior to that date. (N.T. 65-66, 89, 329-30; J-8.)
23. The proposed District elementary school has three [redacted] classrooms with approximately thirty students in each. Those classrooms are in the same building wing, but students go to different

parts of the building for special classes, lunch, and recess. (N.T. 33, 35-39, 303.)

### **Independent Educational Evaluation**

24. The Parents obtained an Independent Educational Evaluation (IEE) of Student in October 2021 by a neuropsychologist. (N.T. 133.)
25. Assessment of cognitive ability for the IEE (Differential Ability Scales) yielded a high average range General Conceptual Ability score, with average to above average scores on the four Clusters. Scores on additional assessment of memory reflected relative strengths and weaknesses. (P-9 at 7-9, 21-22.)
26. Results of academic achievement assessment for the IEE (Kaufman Test of Educational Achievement) were in the average range on the Reading and Mathematics Composites, and in the low average range on the Written Language Composite. Areas of relative strength and weakness were noted in all of these. (P-9 at 9-11, 22.)
27. An administration of select subtests of the Neurological Developmental Assessment – Second Edition for the IEE reflected some variability in results, with low to below average range scores with respect to auditory attention, measures of executive functioning, and some areas of visual-motor skills. (P-9 at 6-7, 21.)
28. With respect to social/emotional/behavioral functioning, rating scales completed for the IEE reflected more parental concerns than those of teachers at Private School. In the educational setting, only an at-risk concern was reported for Withdrawal; in contrast, the Parents reported significant concerns across executive functioning domains, and at-risk



concerns with somatization, attention problems, leadership skills, and functional communication. (P-9 at 11-13, 23.)

29. The private neuropsychologist observed Student at Private School.<sup>6</sup> (N.T. 146-49; P-9 at 13.)
30. The private neuropsychologist concluded that diagnoses of ADHD, Specific Learning Disorder (written expression) and an Anxiety Disorder were appropriate for Student. She made a number of recommendations, including small classroom instruction, structure throughout the school day, and multisensory instruction. (P-9 at 18-20.)
31. The District completed an Evaluation Report (ER) of Student in late October 2021, and issued it to the Parents. (P-11; P-12.)

### **Fall of 2021**

32. The District's ER included input from the Parents and a summary of the private neuropsychological evaluation. Input from teachers at Private School was also provided as were prior educational records. (P-11 at 1-5, 7-10.)
33. Cognitive assessment for the ER (Wechsler Intelligence Scale for Children – Fifth Edition) yielded a Full Scale IQ at the upper end of the average range. Composite scores were in the average to high average range. (P-11 at 11-13.)
34. Assessment of academic achievement for the ER reflected relative weaknesses in reading decoding skills, phonological awareness, spelling, and written expression. Student's performance on

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<sup>6</sup> The private neuropsychologist also noted that the environment and student population at Private School likely factored into the teacher rating scales. (P-9 at 11-13.)

mathematics fluency assessments was relatively strong (average to high average range scores) with an overall average range score on the Mathematics Composite. (P-11 at 14-18.)

35. Social/emotional/behavioral functioning was conducted for the ER through a variety of rating scales completed by the Parents, a Private School teacher, and Student. Similar to relevant results of the private neurological evaluation, the Parents reported a number of concerns in many aspects of Student's functioning, whereas the teachers reported none. Student reported weaknesses with areas of executive functioning and some concern with anxiety. (P-11 at 18-24.)
36. Speech/language functioning assessed for the ER revealed average to above average performance and no concerns with this domain. (P-11 at 24-29.)
37. An occupational therapy evaluation for the ER revealed some weaknesses with visual perception and visual motor skills, as well as with sensory, self-regulation, and handwriting skills in the school environment. (P-11 at 29-31.)
38. The District school psychologist on two different dates observed Student at Private School for the ER. She also collected data on Student's time on task. (P-11 at 5-7.)
39. The District concluded that Student was eligible for special education based on the ER, on the bases of an Other Health Impairment and a Specific Learning Disability (basic reading skills and written expression). (P-11 at 36-37.)
40. The private neuropsychologist considers the results of the District ER to be comparable with her own. (N.T. 172-73.)

## **Private School**

41. The majority of Private School students have some type of disability, although not all have a formal diagnosis. (N.T. 240)
42. Student attends the middle school at Private School, [redacted]. There is currently a total of seven [redacted] students, and Student's content area classes are with approximately eight [redacted] students. (N.T. 196, 202-04, 209-10.)
43. All teachers and other staff at Private School hold least a bachelor's degree in their fields. (N.T. 198-99, 203, 204, 207, 218.)
44. Student's class schedule at Private School includes an advisory meeting period; mathematics; reading; writing; science and social studies; a block period focused on literacy/communication and foundational mathematics skills; and a period of academic support on most days where students can begin homework, complete tests, and seek teacher help when needed. All students have a social-emotional learning session with a counselor once every six-day cycle that includes social skills instruction and practice. Student also has lunch, special classes, and break time with the entire middle school student population (forty eight students) each day. (N.T. 202-03, 205-11, 225-26, 230-34, 248.)
45. A learning specialist is assigned to each grade at Private School. That specialist completes a learning profile for each student, and pushes into classrooms to ensure that accommodations are implemented. He or she also is available for students as needed and serves as a resource for families. (N.T. 213-14, 217-18, 242-43, 257-28.)

46. Private School provides a structured environment with specific support for developing executive functioning skills. Project-based and interactive learning are components of the school day. (N.T. 20-02, 205-06, 219-21, 255, 257-58.)
47. Private School offers a homework assistance program after school at no cost, for any student who need assistance or want to complete assignments at school. (N.T. 224.)
48. A number of extra-curricular activities are available at Private School, including athletics and clubs. (N.T. 226-27.)

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

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

Special education hearing officers assume the role of fact-finders, and accordingly bear the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256,

266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them; indeed, the testimony overall was essentially quite consistent rather than contradictory, and the facts themselves are largely not in dispute.

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

### **General IDEA Principles: Substantive FAPE**

The IDEA requires 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). An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School*

*District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

In special education programming, 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). 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. 34 C.F.R. § 300.301(c); 22 Pa. Code §§ 14.123(b), 14.124(b).

## **General IDEA Principles: LEA Obligation for Students**

### **Transferring from Out of State**

The interstate transfer provision of the IDEA is found at 20 U.S.C. § 1414(d)(2)(C)(i)(II):

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if

determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C. § 1414(d)(2)(C)(i)(II). The Third Circuit Court of Appeals has interpreted such language to mean that an LEA is not required to implement an individualized education program (IEP) from another state, particularly where the parents of the child unilaterally remove him or her to a new placement. *Michael C. v. Radnor Township School District*, 202 F.3d 642, 650-51 (3d Cir. 2000); *see also J.F. v. Byram Township Board of Education*, 629 F. App'x 235 (3d Cir. 2015). Thus, comparable services do not necessarily mean maintenance of a private or other particular placement.

The language above explicitly applies to transfers "within the same academic year." Importantly, the law also demands that LEAs have an IEP in place at the start of the school year for each child within its jurisdiction. 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

### **General IDEA Principles: Procedural FAPE**

From a procedural standpoint, the family including 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).

### **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.*

### **The Parents' Claims**

The first issue is whether the District complied with its IDEA obligations to Student for the start of the 2021-22 school year. The parties' positions on this question are widely divergent. The Parents contend that the District was required to develop an IEP for Student prior to the first day of the 2021-22 school year, but it did not. The District, by contrast, posits that it was required to provide comparable services until it had the opportunity to evaluate Student for eligibility in Pennsylvania, based on its timelines, and that its offered services constituted compliance with the IDEA.

The District correctly observes that, pursuant to Pennsylvania law, an evaluation of Student over the summer of 2021 was not required by the state regulations. Nonetheless, the Parents also aptly point to comments by the U.S. Department of Education (DOE) when the federal regulations



implementing the IDEA were adopted and it was asked to clarify language regarding interstate transfers during the summer. At that time, the agency opined that, "public agencies need to have a means for determining whether children who move into the State during the summer are children with disabilities and for ensuring that an IEP is in effect at the beginning of the school year." 71 Fed. Reg. 156 at 46682 (August 14, 2006).

The facts of this case are quite similar to those in *Mr. A. v. Greenwich Board of Education*, 2016 U.S. Dist. LEXIS 94431, 2016 WL 3951052 (D. Conn. 2016). There, the Court reversed the hearing officer's conclusion that the family's move into the District over the summer permitted it to provide comparable services rather than develop an IEP. Relying on the language above that applies only when a student transfers "during" an academic year, the Court explained the import of those provisions:

The IDEA's intrastate transfer provision neither requires or allows for an initial disability evaluation because an intrastate transfer student has already been determined to be disabled under *that state's* standards. In other words, "the child's educational placement has already been determined in accordance with state procedures . . . and his or her IEP bears the imprimatur of that state." *Michael C. ex rel. Stephen C. v. Radnor Tp. School Dist.*, 202 F.3d 642, 651 n.7 (3d Cir. 2000). Therefore, for an intrastate transferor, when an IEP for the forthcoming year has already been put in place, there is no distinction for the school board evaluators between the summer months and the school year. In both situations, neither an initial evaluation or a reevaluation—for purposes of determining disability—need (or may) be conducted.

However, for an *interstate* transferor, the previous IEP carries no imprimatur of correctness in the new state and therefore an

initial evaluation must be conducted, even if, as here, the previous IEP was created for a forthcoming school year. In this situation, the distinction between the school year and the summer has significance. During the school year, the receiving school requires the leeway offered pursuant to § 1414(d)(2)(C)(i)(II) because there is little to no gap in time between the operation of the old and the new IEP (if one is determined to be necessary). During the summer months, however, where, as here, the receiving school has months to assess the transfer student prior to the beginning of the school year, no leeway is required and the general IEP obligations operate as usual.

2016 U.S. Dist. LEXIS 94431 at \*34-35. The *Greenwich* Court did find significant one fact that does not exist in the present case: there, the new school district determined that the student was eligible under its own state law, so an evaluation was not a prerequisite to development of an IEP. This hearing officer cannot conclude that the absence of this factor renders the conclusions in that decision inapposite based on the explicit language quoted above. Moreover, other federal district courts have held similarly without this additional finding, in reliance on the language of the IDEA. See, e.g., *Maynard v. District of Columbia*, 701 F. Supp. 2d 116 (D.D.C. 2010).

This case law persuasively supports the Parents' position on the District's obligations to Student prior to the start of the 2021-22 school year. The Parents enrolled Student in the first half of June 2021, before the 2020-21 school year ended. They provided the most recent IEP and evaluation report. The District did not contact them or otherwise take steps to undergo preparation for an evaluation or development of any form of program for Student. It was not until after the Parents provided notice of their intention to place Student in Private School at public expense that a meeting

convened. Even then, the Parents were provided little information about what Student's program in the District might include, and the only action taken at that time was seeking the Parents' consent for an evaluation that the District confirmed would occur in the fall. *Compare C. v. Cape Henlopen School District*, 606 F.3d 59, 69 (3d Cir. 2010)(finding failure to have IEP in place at start of school year was not material where evaluation was underway a month prior to the start of the school year and an IEP meeting convened before classes started, even where that IEP was not finalized prior to the first day of school). This hearing officer concludes in this case that the District's failure to at least begin to develop an IEP for Student by the start of the 2021-22, under all circumstances amounted to a denial of FAPE.

The District also asserts that the Parents did not specifically request an offer of FAPE, which does trigger an obligation to develop a proposed program even if a child is not enrolled. *See, e.g., A.B. v. Abington School District*, 841 F. App'x 392 (3d Cir. 2021). But here, the Parents actually enrolled Student in the District and provided a copy of the prior IEP and a previous evaluation. The duty was on the District to comply with the IDEA, which again requires an IEP for each child in its jurisdiction at the start of the school year. It is the District as the LEA that bears the obligation to offer FAPE, a responsibility that cannot be placed on parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)(explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]").

Even if one were to accept the District's argument that it was not required to evaluate or offer an IEP to Student prior to the start of the 2021-22 school year, it was nonetheless mandated to provide comparable services following the interstate transfer. The term "comparable services" is not defined by the IDEA, but it is instructive to turn once again to the DOE's commentary to the federal regulations implementing that statute, cited by

both parties. There, the agency notes that it interprets the term “comparable” to have “the plain meaning of the word, which is ‘similar’ or equivalent’.” 71 Fed. Reg. 156 at 46681 (August 14, 2006).<sup>7</sup>

The IDEA transfer language “requires the new school district to provide comparable services ‘in consultation with parents[.]’” *Y.B. v. Howell Township Board of Education*, 4 F.4<sup>th</sup> 196, 203 (3d Cir. 2021). A key element of this procedure is notice to parents of the substance of the comparable services. Although *Y.B.* involved the intrastate transfer provision of the IDEA, the concept of comparable services is the same as in the interstate transfer provision. In either case, the IDEA does not require any particular form of notifying parents what the comparable services would be. However, in *Y.B.*, where the new LEA determined it could implement the child’s program in its own schools, the Court found “[a]mple evidence” that the transferee school district offered services comparable to those by the prior LEA when it issued a memorandum listing the services that “matched” those in the prior IEP and included related services such as transportation. *Id.* at 200-01. *Y.B.* also noted that the transfer provision is not designed “to give the parents a veto power. [Rather], it is ultimately the school district that makes a placement decision.” *Id.* at 203. Nevertheless, parents are entitled to know what services and placement are proposed.

In this case, the District here provided a possible schedule for Student that did not specify what portions of the day were comprised of special and regular education; and, even at the hearing, such decisions had not yet been made. The District then provided a NOREP for supplemental learning support with a majority of the related services identified in the other state’s recent IEP. Although this hearing officer concludes that a private school or

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<sup>7</sup> This guidance has been accepted by at least one federal district court. *Sterling A. v. Washoe County School District*, 2008 U.S. Dist. LEXIS 94222 at \*13, 2008 WL 4865570 (D. Nev. 2008)

other small setting with a particular staff to student ratio was not necessarily required to find that the proposed services were comparable, there is a significant difference between supplemental and full-time special education support. Even accepting the premise that the District could provide an appropriate level of special education support across all settings, including in Student's regular education classrooms with approximately thirty students, a general understanding of how the identified support would be made available to Student was critical for the Parents to make an informed decision on whether to accept the District's NOREP. Based on this record, there simply was insufficient specification for the Parents to consider whether the proposal was comparable, or even to draw any specific conclusion about its appropriateness. This amounts to a procedural violation that significantly impeded the Parents' ability to meaningfully participate in decision-making about Student's programming in the District, warranting a remedy.

The District points to certain language in the *Y.B.* decision suggesting that parents of a child who undergoes an interstate transfer should nonetheless enroll the child in the new LEA and, if necessary, thereafter challenge the program through due process. *Y.B., supra*, 4 Fed.4th at 200-01 (stating that the parents "prevented [the LEA] from implementing its services at all, so there is no evidence the services offered were not 'comparable.'" ) But in that case, again, the Court found that the services offered were comparable, a conclusion that cannot be reached here. Moreover, there is no reason that parents of children who transfer interstate should not be afforded the same opportunity as parents of children who ask for an offer of FAPE from a resident LEA where the child is not enrolled, in order to consider its program. *See, e.g., A.B., supra*, 841 F. App'x 392; *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district's motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the

district where the parent had requested that it propose a special education program for her to consider for the student). The basis for this line of case law is to provide parents with sufficient information to make a knowledgeable decision on where to enroll their child.

### **The Private School**

Private School focuses on individualized instruction and supports in a structured environment with small class sizes, similar to the program in the other state's February 2021 IEP. Student had relevant classes as well as counseling, with a program that included interactive learning, social skills, learning specialist support, and development of executive functioning skills. Student spent less structured time with a number of same-age peers on a daily basis and had opportunities for extra-curricular activities. Student could reasonably be expected to demonstrate progress in areas of identified need in this unilateral placement. For these reasons, the Private School satisfies the second prong of the tuition reimbursement test in this case.

### **Equitable Considerations**

The District contends that the equities do not weigh in the Parents' favor because they failed to establish that they were willing to consider District programming rather than a private school. This hearing officer cannot agree. The record established that the Parents contacted the District for enrollment purposes and provided appropriate documentation of Student's educational needs. They attended the meeting that the District convened, and gave consent to an evaluation. Their decision to enroll Student in Private School when no evaluation was begun for purposes of developing a program does not equate to a predetermination or unwillingness to consider something other than a private school placement. For these reasons, the equities do not suggest a need for a reduction or denial of reimbursement.

The Parents having satisfied the prongs of the tuition reimbursement test, that remedy is appropriate for the 2021-22 school year due to the District's failure to comply with the IDEA in offering a program for Student at its start based on the facts of this particular case. Nonetheless, the District, having completed an evaluation, is now in a position to begin the development of a program, with the Parents, for the 2022-23 school year. The attached order will direct initiation of that process long before that school year ends.

### **CONCLUSIONS OF LAW**

1. The District failed to comply with its obligations to Student as an interstate transfer student for the 2021-22 school year.
2. The Parents are entitled to reimbursement for tuition and related expenses for Private School for the 2021-22 school year.

### **ORDER**

AND NOW, this 14<sup>th</sup> day of January, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The program proposed by the District for the 2021-22 school year was not substantively appropriate under the applicable law.
2. The Parents are entitled to reimbursement for actual tuition and related expenses that they incurred for Private School for the 2021 school year.

3. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all current invoices and receipts for tuition and related expenses for Student at Private School for the 2021-22 school year.
4. Within thirty calendar days of receipt of the documentation, the District shall reimburse the Parents for the full amount of the invoices and receipts provided by them pursuant to this order.
5. Within thirty calendar days of the date of this order, the District shall convene an IEP meeting to include the Parents to begin development of a program for the 2022-23 school year. All procedural safeguards with respect to any resulting NOREP shall apply.
6. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 25443-21-22