

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

23897-2021KE

Child's Name:

N.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

1/6/21

INTRODUCTION

Student ¹ is currently [redacted], a District resident, and placed by the Parents, in [redacted], at [an out of state] boarding school. Student is [redacted] eligible for special education and related services with a primary disability of other health impairment (OHI) and secondary classification of Autism. The Parents requested a due process hearing alleging the District failed to offer Student with a free appropriate public education (FAPE), as required under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504), as well as the federal and state regulations implementing those statutes. ²

The case proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting closures.³ The Parents sought to establish that the District's reevaluation and proposed programs were not appropriate for Student, and that they were entitled to reimbursement and related expenses for the private school attended during the 2018- 2019, 2019-2020 and 2020-2021 school years. The District maintained that its evaluation of Student and resulting special education programs, as offered, were appropriate for Student, and that no remedy was due.

For reasons that follow, the claims of the Parents must be denied.

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

² The Parents IDEA claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101- 14.163 (Chapter 14). The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq.

³ This hearing required four separate video-conference sessions. Because of schedule conflicts, availability of witnesses, including the necessity for additional sessions, the decision due date was extended for a good cause, upon written motion of the parties.

ISSUES

- 1) Did the District offer Student a free appropriate public education for the 2018-2019 school year?
- 2) If the District failed to offer a free appropriate public education to Student, are the Parents entitled to reimbursement for tuition and all out-of-pocket expenses incurred during the 2018-2019 school year?
- 3) Did the District offer Student a free appropriate public education for the 2019-2020 school year?
- 4) If the District failed to offer a free appropriate public education to Student, are the Parents entitled to reimbursement for tuition and all out-of-pocket expenses incurred during the 2019-2020 school year?
- 5) Did the District offer Student a free appropriate public education for the 2020-2021 school year?
- 6) If the District failed to offer a free appropriate public education to the Student, are the Parents entitled to reimbursement for tuition and all out-of-pocket expenses occurred incurred during the 2020-2021 school year?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact.⁴

1. Student and Parents are residents of the District. (N.T. 11)
2. The District is the recipient of federal funding sufficient for jurisdiction in this IDEA matter. (N.T. 12)

⁴ Exhibits shall hereafter be referred to as “P-1” for the parents’ exhibits; “S-1,” for the school district’s exhibits; references to page numbers of the transcript of testimony taken at the hearing is designated as “N.T. ____”.

3. At the age of four, Student received a psychological evaluation because of concerns with social skills and classroom behavior. Student was diagnosed with an anxiety disorder. (S-25, p. 5-7)
4. Upon transition to kindergarten in a neighboring school district, a May 2011 evaluation determined that Student was eligible for special education as a Student with an Other Health Impairment (OHI). (S-25, p.7)
5. In December 2012, through a privately obtained evaluation, Student was diagnosed with an autism spectrum disorder. (S-25, p.7)
6. During the 2014-2015 school year, as a third-grader Student was determined eligible for special education and services under the eligibility category of Autism. (S-25, p.10)
7. Student transferred into the District at the onset of the 2015-2016 school year. (S-25, p. 10)
8. [redacted] (S-25, p.10)
9. Student is currently enrolled in the ninth grade at [an out of state] private boarding school. (S-25)
10. Student [redacted] is also eligible for special education as a student with an Other Health Impairment (OHI) and Autism. (S-25, p. 39)

2016-2017-Fifth Grade

11. During the 2016-2017 school year, Student attended a District elementary school, enrolled in the fifth grade. (S-3)
12. As a fifth-grader, the Student engaged in behavior, which resulted in physical restraint, necessitating revisions to a behavior support plan. (P-2, S-6, S-7; N.T. pp. 297-298, 623-624)
13. On March 24, 2017, the District held an IEP meeting to discuss revisions to Student's programming to address recess behavior, sensory opportunities, and social skills. That same day, a permission to reevaluate (PTE) was provided to the Parents. The Parents did not return the PTE to the District. (S-2, S-3)
14. On April 18, 2017, the Parents advised the District that Student would attend a Pennsylvania private school for the 2017-2018 school year. (S-3, p. 4)

15. On May 15, 2017, the District held a meeting with the Parents to discuss IEP revisions to address Student's behaviors. (S-5, p. 2, S-6, S-7)
16. The Parents did not sign or return the May 22, 2017 NOREP issued at the conclusion of the meeting and accompanying the May IEP. (S-5, p.2, S-6, S-7)
17. On July 7, 2017, the District sent a second PTE to the Parents. In response, the Parent advised that Student would not be returning to the District. The District requested that Parents indicate they do not consent to the proposed reevaluation and return the form to the office. (P-4, p.5; S-3)

2017-2018 School Year (Sixth Grade) – PA Private School/[Out of State] Boarding School

18. On August 24, 2017, the Parents again advised the District that Student would attend a private school in Pennsylvania. (S-3, p. 9, S-9)
19. Parents enrolled Student into a private school in Pennsylvania. (S-3, p.4)
20. On October 26, 2017, the Parents advised the District that the private school was not a good fit for Student and of their intention to reenroll Student into District. (P-5, p. 2; S-11, p.1)
21. Throughout the end of October, the Supervisor of Special Education and school counselor communicated about Student's previous IEP, the need for a meeting with the Parents to discuss current educational needs and offered a school tour to the Student. (P-5; S-11, p.3)
22. Parents did not enroll Student into the District. Upon the advice of a therapist, the Parents enrolled Student into an [out of state] private therapeutic boarding school [School 1] to complete sixth grade. (P-27; N.T. 633-634)
23. Student attended [School 1] for the remainder of the 2017-2018 school year. (P-27)
24. [School 1] served forty-two boys ages ten to sixteen with ADHD, Autism, anxiety, and depression. (N.T. 472, 454)

2018-2019 School Year – Seventh Grade

25. During the 2018-2019 school year, Student attended [School 1], enrolled in the seventh grade. (P-27)

26. In March 2019, the Parents, through counsel, requested an offer of FAPE from the District for the 2019-2020 school year. (S-13; N.T. 303, 636).
27. On April 9, 2019, the District issued prior written notice for a reevaluation of Student and requested Student's availability for testing in Pennsylvania. (S-14; N.T. 340-342)
28. On April 29, 2019, the District received the signed consent for reevaluation from the Parents. (S-13)
29. For the reevaluation, the District proposed conducting individual psychoeducational tests, perceptual-motor, academic and social/emotional functioning, speech/language, physical therapy and/or occupational therapy assessments, a psychiatric consultation, if deemed necessary, review of exiting academic and school records and classroom observation. (S-14, p.2)
30. During May and for most of June 2019, the District and the Parents had no contact. (N.T. 638)
31. On June 21, 2019, the District' Director of Specialized Programs & Services called the Parents and left a voicemail requesting Student's availability for testing. (S-16, p.1; N.T. 343, 345)
32. On July 16, 2019, the Director of Specialized Programs & Services emailed the Parent, referencing the previous voicemail requesting a time to discuss Student's evaluation. That same day, the Parents indicated that Student was at school in [another state] and would return at the end of August. (S-16, p. 1)
33. On July 26, 2019, the Parent emailed the Director of Specialized Programs & Services referenced missed two phone calls and indicated a follow up would occur. (S-16, p.2)
34. In July 2019, Student returned to Pennsylvania for two days before spending eight days in New Orleans for a family vacation. Parent did not advise the District of Student's return to Pennsylvania and possible availability. (N.T. 692-694)
35. On July 29, 2019, the Parents provided the District with a privately obtained educational evaluation of Student completed on March 21, 2019. (S-16, p. 3; S-17; N.T. 644)
36. The March 2019 private evaluation summarized aptitude and achievement testing, behavior rating scales that assessed executive functioning, and measures of psychological, emotional, and behavioral functioning. (S-17)
37. The March 2019 private evaluation recommended that Student step down to a lower level of care to either a boarding school or a structured setting with access to therapeutic supports, predictability, smaller class size, extended time, regular psychiatric services, physical activity, and ongoing individual therapy. (S-17, p. 15)

38. On August 1, 2019, the Parents requested District funding for Student's placement at [a different out of state] private boarding school [School 2] for the 2019-2020 school year. Parents advised that Student would be in Pennsylvania after August 19, 2019 until September 3, 2019. (S-16, p. 4; N.T. 646)
39. On August 19, 2019, Student graduated from [School 1]. (S-16, p.4; N.T. 694)
40. On August 21, 2019, the Parents advised the District that Student was at home until September 3, 2019. (S-16, p.4)

2019-2020 School Year – Eighth Grade

41. On August 23, 2019, the District proposed testing Student on August 27, 28, and 29, 2019. (S-16, p.5; N.T. 35)
42. The District's 2019-2020 school year began on August 26, 2019. (P-23, p.2)
43. On August 27, 2019, the Parent signed a records release for the District to obtain Student's records from [School 1] attended during the 2018-2019 school year. (S-22)
44. On August 28, 2019, the District held a meeting with Parent to discuss additional testing needs and the implementation of an "interim IEP". (S-16, pp. 7-8, S-20; N.T. 76-77, 80, 427)
45. The IEP dated August 28, 2019, indicated it was developed "in the interim of reevaluation and that the IEP team will convene to develop a new IEP after completion of the reevaluation", (interim IEP). The anticipated duration of service for the IEP was until November 26, 2019. (S-20, p.1)
46. The interim IEP summarized the March 21, 2019 evaluation from the private provider, Student's behavioral history, intellectual achievement, executive, psychological and emotional functioning. (S-17, S-20, p. 8)
47. Based on WISC-V cognitive testing, Student functioned overall in the superior range, with verbal comprehension and fluid reasoning index scores in the superior range, visual spatial and working memory index scores in the high average range and processing speed index scores in the average range. (S-17, p. 6, S-20, p. 8)
48. Based on WIAT-III achievement testing, Student performed in the very superior range in overall reading and written language skills and in the high average range in overall math skills. (S-17, p.8, S-20, p. 9)
49. On tests of executive functioning, Student did not demonstrate any difficulties with sustained attention, concentration, impulse control, or self-monitoring. Student continues

to struggle with impulse control, emotional regulation, cognitive flexibility, and inattention/distractibility. (S-17, S-20, p. 9)

50. On the BRIEF, Student denied significant difficulties with executive functioning; however, the Parents rated Student as having clinically significant difficulties with inhibit, shift, emotional control, working memory, and plan/organize. (S-17, S-20, p.9)
51. On the Connors Rating Scale, Student indicated no clinically significant symptoms of ADHD. The Parents reported Student displayed clinically significant difficulties with hyperactivity/impulsivity and peer relations. (S-17, S-20, p. 11)
52. On the Beck Depression Inventory, Student obtained a score indicative of a minimal level of impairment. (S-17, S-20, p.11)
53. On the TeenAge Sentence Completion test, Student's responses reflected emotional difficulties, social difficulties, oppositional behaviors, issues related to being bullied, and family. (S-20, p. 10)
54. Student and Parents reported a long history of anxiety with previous but no current diagnoses of a formal anxiety disorder. (S-17, S-20)
55. Parents reported that Student is still prone to anxiety when plans change or when peers do not follow the rules, but since attending [School 1], coping skills have been internalized and Student has made "huge progress" in managing frustration and is much more cognitively flexible and adaptable. (S-20, p.6)
56. The interim IEP summarized past behavioral incidents, a prior functional behavior assessment (FBA) and behavior plan. The interim IEP indicated a new FBA and PBSP would be developed with current data. (S-20, pp.13-17)
57. Parent concerns included the ability to view the lunchroom, classroom, and autistic support setting and completion time for evaluation. (S-20, p.19)
58. Student's needs included increased perspective-taking abilities within social situations, ability to identify antecedent to anxiety and apply coping strategies, executive functioning strategies, and application of coping skills. (S-20, p. 20)
59. The August interim IEP offered supplemental autistic support [redacted] and services with goals designed to address Student's [redacted] executive functioning, social skills, and behavior needs. (S-20)
60. Program modifications and specially designed instruction (SDI) included a highly structured classroom, a checklist with expectations, school day 1:1 aide to provide behavior and social support, testing accommodations, preferential seating, sensory suggestions, development of a FBA and PBSP, [redacted], scheduled breaks, direct social skills instruction, lunch period selection, and a transition plan. Related services included

social skills training/behavior specialist, transportation, one to one aide, [redacted] and mental health services. (S-20, pp. 33-38)

61. The IEP team determined Student eligible for extended school year (ESY) services. (S-20, p. 39)
62. After three days of testing, the Director emailed Parents and indicated the need for additional testing. On September 4, 2019, and September 9, 2019, Parents emailed the District inquiring about the additional assessments. (P-13)
63. On September 6, 2019, the District received Student's academic discharge report from [School 1]. (S-22, pp. 5-8)
64. The [School 1] discharge summary recommended a structured environment, individual counseling, family therapy, regular family meetings, compliance with parents, therapist, and school personnel, and participation in extracurricular activities. (P-27, pp. 15-16)
65. On September 10, 2019, the District advised the Parents that speech and language, occupational therapy, physical therapy, and additional academic assessments were needed. Parents advised that Student would be available for testing the week of October 14, 2019. (S-16, pp. 16-17)
66. On September 19, 2019, the Parents signed the NOREP indicating disagreement with the District's offer of FAPE. (S-21, p. 3; N.T. 650)
67. On October 16 and 17, 2020, the District conducted speech and language and occupational therapy assessments of Student. (S-16, pp.19-20; N.T. pp. 205, 244)
68. On November 25, 2019, the District conducted a physical therapy assessment of Student. (S-16, p. 23, N.T. 281)
69. On December 18, 2019, the District requested records from [School 2] where Student was enrolled during the 2019-2020 school year. (S-16, p. 28, S-23; N.T. 651)
70. On January 3, 2020, the District administered curriculum-based assessments to Student. (S-16, p. 26)
71. On January 8, 2020, in response to Parents' inquiry, the District confirmed that the face-to-face testing components were complete, but teacher input and rating scales from [School 2] were still needed. (S-24, p. 1)
72. On January 9, 2020, [School 2] confirmed receipt of the District's request for student information. (S-24, pp. 2, 4,5)
73. On January 25, 2020, the District's school psychologist requested additional information from Parents to complete the reevaluation. (S-24, p. 6)

74. On March 2, 2020, the District completed the reevaluation report (RR). (S-25)
75. The RR summarized Student's background information, the privately obtained March 2019 evaluation, teacher and Parent input, speech-language, occupational therapy, and physical therapy evaluations, a student interview, aptitude, and achievement data (WISC-V, KTEA-3), attention/executive functioning data (NEPSY-2, social-emotional functioning (BASC-3, Beck Youth Inventories-2nd Edition, Autism Spectrum Rating Scales (ASRS), and current curriculum-based assessment data. (S-25)
76. Parent input for inclusion in the RR indicated that Student remained susceptible to negative attention, frustration tolerance had improved and that friendships with peers in the community existed. (S-25, p.4)
77. Based on the reading, listening comprehension, and math assessments performed for inclusion in the RR, the District noted no academic concerns. (S-25, pp.13-14)
78. Based on clinical observation of fine and visual motor skills, Parent input, and standardized assessments, the Student did not qualify for school-based occupational therapy services. (S-25, p.19; N.T. pp. 255-262)
79. Based on expressive/receptive and social language assessments, Parent input, and informal observation, the Student did not qualify for school-based speech/language therapy services. (S-25, p. 21, N.T. pp. 223-227)
80. Based on an assessment of mobility skills, strength and balance, gross motor skills, and standardized testing, Student did not qualify for school-based physical therapy services. (S-25, pp. 21-22)
81. [School 2] input indicated that Student is bright, engaged, needs frequent check-ins from teachers, and support for executive functioning, written expression, and deeper comprehension levels. (S-25, p.23)
82. The RR concluded that Student had strong cognitive, verbal comprehension, visual-spatial, fluid reasoning abilities, and working memory with a processing speed within the upper limits of the low average range. Academic assessment indicated average to above-average academic skills. Student's social-emotional functioning based on parent and teacher rating scales indicated elevated levels regarding social skills. (S-25, p. 36)
83. The RR concluded that Student met eligibility criteria for special education services under the primary classification of Other Health Impairment (OHI) because of challenges with attention regulation and executive functioning and secondary classification of Autism. (S-25)

84. The RR determined Student had executive functioning needs requiring direct instruction with emphasis on cognitive flexibility, sustaining attention, inhibitory control, and planning/organization. (S-25, p. 39)
85. The RR determined Student had social skills needs requiring direct instruction with emphasis on coping skills on perception taking and regulating behavioral responses to frustrating circumstances. (S-25, p.39)
86. The RR suggested the IEP team consider psychological services for improving self-confidence and developing self-regulatory strategies for both classroom and social contexts. (S-25, p. 39)
87. The RR contained a list of suggested recommendations and accommodations to address Student's needs related to executive functioning and social skills. (S-25, p. 39)
88. The RR was comprehensive and assessed Student in all areas of suspected disability and utilized technically sound assessment tools that were administered by qualified individuals. (S-25)
89. On March 16, 2020, the District provided the draft IEP to the Parents in preparation for a March 18, 2020 IEP meeting. (S-24, p. 13)
90. Because of the COVID-19 pandemic and mandated school closures, the March 18, 2020, IEP meeting occurred via teleconference. The District provided procedural safeguards to the Parents after the IEP meeting. (S-24, pp. 16-17)
91. The March 2020 IEP identified that Student needed to increase perspective-taking within social situations as well as the ability to identify antecedents to anxiety and apply coping skills, supports to help with attention regulation and executive function, application of coping skills, and self-confidence improvement. (S-30, p. 18)
92. The March 2020 IEP offered goals to address coping skills, social skills (peer influence), (perspective), and executive functioning. (S-30, pp. 27-31, 47)
93. [redacted]. (S-30, p. 27)
94. The coping skills goal expected that Student with direct instruction in self-regulation and problem-solving strategies, in response to contrived scenarios, will verbalize and demonstrate coping strategies to reduce anxiety on four out of five opportunities over two marking periods. (Baseline: data collection within the first three weeks of IEP implementation). (S-30, p. 28)
95. The social skills (peer influence) goal expected that Student with direct instruction will independently identify the problem and two possible solutions, choose a solution, and evaluate the effects of implementing the chosen solution in four out of five opportunities

over two consecutive marking periods. (Baseline: data collection within the first three weeks of IEP implementation). (S-30, p. 29)

96. The social skills (perspective) goal expected Student with direct instruction in social skills will verbally identify perspective, the perspective of others and provide an example of how to adjust words and actions to demonstrate flexibility and remain calm with prompts fading to independence in four out of five opportunities over two consecutive marking periods. (Baseline: data collection within the first three weeks of IEP implementation). (S-30, p. 30, N.T. 98-101)
97. The executive functioning goal expected Student with direct instruction to complete a day planner to identify each class, by period any assignments due, preparation needed for tests and materials and texts needed, use planner at the beginning of each day to self-monitor completion of assignments, prepare for tests and have required materials and texts in four out of five opportunities over two consecutive marking periods. (Baseline: data collection within the first three weeks of IEP implementation). S-30, p. 31)
98. Modifications and specially designed instruction (SDI) offered in the March 2020 IEP included a highly structured classroom, checklists, extended time, preferential seating, graphic organizers, a 1:1 aide, scheduled breaks, direct social skills instruction, [redacted], personalized lunch selection, a transition plan, direct executive functioning instruction, movement breaks, weekly counseling with a social worker, a FBA for PBSP development and observation by a BCBA to assess classroom functioning. (S-30, pp. 35-40)
99. Related services in the March 2020 IEP included transportation, a one-to-one aide, [redacted], social skills training/behavior specialist, social skills with AS teacher/speech/counselor, and social work services. (S-30, p. 40)
100. The March 2020 IEP proposed a school day one to one aide to assist with Student's acclimation back to a public setting with responsibility to escort Student and provide behavioral and social support throughout the school day. To reduce anxiety, the District proposed the assignment of two different aides to Student. (S-30, p. 35; N.T. 104-105, 189-190)
101. The March 2020 IEP proposed supports for the general and special education teachers, the educational team, and the [redacted] regular education teachers. (S-30, p. 42)
102. The IEP team concluded Student to be eligible for extended school year (ESY). (S-30, pp. 43-45)
103. The March IEP contained ESY goals for coping skills, social skills (peer influence), and executive functioning. (S-30, pp. 43-44)

104. The March 2020 IEP proposed a supplemental level of autistic [redacted] support. (S-30, p. 47)
105. After the IEP meeting, the Parents contacted the District with concerns about the proposed 1:1 aide, the regular education setting, and classroom size. (S-24, p. 15)
106. On April 14, 2020, the District sent the final IEP with the NOREP to the Parents proposing a supplemental level of autistic support. (S-31, S-32; N.T. 97, 665).
107. On May 4, 2020, the Parents indicated their disapproval of the recommended program and placement and requested a due process hearing. (S-31, p. 3)
108. May 27, 2020, the Parents, through counsel, requested District funding of Student's placement at [School 2] for the 2020-2021 school year. (P-22)

DISCUSSION AND CONCLUSIONS 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. Before consideration of the Parents' claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, the burden of persuasion, in this case, must rest with the Parents.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive. The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. In reviewing the record, the testimony of all witnesses and each admitted

exhibit's content were thoroughly considered in issuing this decision, as were the parties' closing statements.

Applicable Legal Principles

The IDEA requires the provision of 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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court considered the application of the *Rowley* standard, and it 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). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d at 352.

The *Endrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Endrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the "best" program, but rather one that is appropriate in light of a child's unique circumstances. *Endrew F.* In addition, an IEP must be judged "as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, 24 as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07 A procedural violation occurs when a district fails to abide by the IDEA's safeguard requirements. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A

substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.*

Least Restrictive Environment

One crucial component of the IDEA is the obligation for eligible students to be educated in the “least restrictive environment” (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code 14.145. FAPE and LRE are related but separate concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); see also *L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

Evaluation

Substantively, an IEP follows and is based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether 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 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 service needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b).⁵ However, under a regulatory exception, the timeframe does not apply to an LEA if the parent of a child repeatedly fails or refuses to produce the child for the evaluation. 34 C.F.R. 300.301(d)(1)

LEA Obligation for Students not Enrolled

A school district's obligation to provide FAPE is triggered by the student's residency, not enrollment. In a case where an eligible child is not enrolled in the school district of residence, but the parents ask that the school district to develop a special education program for him or her, it is incumbent upon the District to comply. *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

⁵ Under 34 C.F.R. 301 (c) (1), an evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. See also; 34 C.F.R. 300.303 Revaluations.

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 to a public school before enrollment triggers the duty to conduct an evaluation and develop an IEP). See also *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); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. December 14, 2018) (applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged). However, the trigger is that "parents either reenroll their child in public school or request evaluations so they can reenroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE." *I.H.*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073). See also, *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 (M.D. Pa. September 28, 2017) (school district had an obligation to evaluate the student unless there was a clear expression by the parent that the student would not return: "it is not the parent's obligation to request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school." *Id.* at 41). Cf. *Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315, 214 (Pa. Commw. Ct. 2002) (a district has no duty to evaluate a child pursuant to the IDEA while the child remains outside the state in a unilateral placement). *H.D. v. Kennett Consol. Sch. Dist.*, 18-3345 (E.D. Pa. October 4, 2019) (regarded *Great Valley* as persuasive authority in the absence of Third Circuit case law to the contrary).

Tuition Reimbursement

Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. Still, they put themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parents' selected

placement is inappropriate. “Parents who believe that a public school is not providing a FAPE may unilaterally remove their disabled child from that school, place him or her in another school, and seek tuition reimbursement for the cost of the alternate placement.” *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009) (citing 20 U.S.C. §1412(a)(10)(c); *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 374 (1985)). “A court may grant tuition reimbursement if the School District failed to provide the required FAPE and the parents sought an appropriate private placement.” *Id.*

In *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985), the United States Supreme Court established the right to consideration of tuition reimbursement for students placed unilaterally by their parents. *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are 1) Whether the District’s proposed program was appropriate; 2) If not, whether the parents’ unilateral placement was appropriate, and 3) If so, whether the equities reduce or remove the requested reimbursement. This three-part analysis is referred to as the “*Burlington-Carter*” test for tuition reimbursement claims under the IDEA. The second and third tests need be applied only if the first is resolved against the school district.

A court may reduce or even deny the reimbursement if:

- 1) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;
- 2) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of [their intent to enroll their child in private school at public expense] or
- 3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents. 34 C.F.R. 300.148(d).

Section 504 Principles

In the context of education, Section 504, and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, 34 C.F.R. §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; see also *Lower Merion School District, supra*, 878 A.2d 925. Further, the standards for evaluating claims under Section 504 and the ADA are essentially identical. See, e.g., *Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Because the claims in this case made under § 504 are parallel to the IDEA claims, resolution of the IDEA issue, in this case, will also resolve the Section 504 claims.

The Parents’ Claims

As a fifth grader, during the 2016-2017 school year, Student’s school behavior was troubling resulting in disciplinary intervention. For sixth grade, the Parents disenrolled Student from the District to attend a Pennsylvania private school. Early in the 2017-2018 school year, the Parents determined that the private school no longer met Student’s needs and briefly considered Student’s return to the District but instead chose enrollment in [School 1,] a therapeutic boarding school, located [out of state]. Student continued to attend [School 1] seventh grader during the 2018-2019 school year. The Parents had no communication with the District until March 2019, when through counsel, they requested an offer of FAPE. In response, the District commenced a reevaluation of Student. On August 1, 2019, while the reevaluation process was underway, the Parents advised the District that Student would attend [a different out of state] boarding school [School 2] for the 2019-2020 school year. Later in August, the District offered an “interim” IEP to the Parents, which they rejected. In March 2020, The District completed the reevaluation and held an IEP meeting. The final IEP was offered in April 2020, which the Parents rejected.

Student continues to attend [School 2] during the 2020-2021 school year, currently enrolled in the ninth grade. Parents seek reimbursement for tuition and out of pocket expenses incurred through Student's attendance at [School 1 and School 2] during the 2018-2019, 2019-2020, and 2020-2021 school years.⁶

In support of their claim for tuition reimbursement for Student's 2018-2019 attendance at [School 1], the Parents contend that the District's last offer of FAPE, in May 2017, was not appropriate. This allegation is unsupported by the evidence established at the due process hearing. In March 2017, the District held an IEP meeting with the Parents to discuss Student's concerning behaviors. Although the District issued a permission to reevaluate the Student, the Parents did not sign or return it. In April 2017, the Parents advised the District that Student would attend a Pennsylvania private school for the 2017-2018 school year. In May 2017, the District held another IEP meeting to discuss IEP revisions. Although the District issued a NOREP, the Parents did not sign or return it. In July 2017, the District sent a second permission to reevaluate Student and requested its return. The Parents reiterated that Student would attend a private school for the 2017-2018 school year. At that point, the District requested that Parents indicate they were not consenting to a reevaluation of Student. Early in the 2017-2018 school year, after determining the Pennsylvania private school was not a good fit, the Parents contacted the District and explored briefly reenrolling Student back into the District. Although the District internally prepared for Student's possible return, even offering a middle school tour, the Parents chose not to enroll Student. Instead, Parents removed the student from the Pennsylvania private school and enrolled at [School 1]. Student finished the sixth grade at [School 1] and continued to attend as a seventh-grader during the 2018-2019 school year. In March 2019, the Parents, through counsel, requested an offer of FAPE from the District.

Parents have not preponderantly established that the District denied Student FAPE for the 2018-2019 school year. After the May 2017 IEP meeting and attempts to engage the Parents, they did not sign or return the NOREP. Additionally, after Parent's disenrolled the Student from

⁶ In their Complaint, the Parents also requested reimbursement for costs of all independent evaluators' professional testimony at the due process hearing. This issue was not placed on the hearing record at the inception of the hearing and the Parents' did not introduce the testimony of any independent evaluator. This issue is moot.

the District, they did not request FAPE until years later. Although in the fall of 2017, the Parent contacted the District, exploring the possibility of re-enrollment, they made only “general inquiries,” did not request FAPE, and ultimately removed Student from one private school for placement in a different private school. *Moorestown Township, supra* 811 F.Supp.2d 1057 (concluding that a parent’s request for an evaluation to a public school before enrollment triggers the duty to conduct an evaluation and develop an IEP). The District's obligation to propose a special education program for Student was not triggered. In this matter, the District did not have an obligation to develop an IEP for Student and did not deny a FAPE. Any further analysis under *Burlington-Carter* is unnecessary.

Next, the Parents allege that the District’s failure to offer FAPE before the first day of the 2019-2020 school year satisfies the first prong of the *Burlington-Carter* test for tuition reimbursement for attendance at [School 2]. I disagree. The Parents have presented no preponderant evidence that a two-day delay in the District’s offer of an educational program resulted in a denial of FAPE.⁷ While Student attended [School 1], the Parents requested FAPE for the upcoming 2019-2020 school year. On April 29, 2019, the Parents consented to a reevaluation of Student. When issued, the PTE indicated that assessments were planned that would require the Student’s in-person availability. Specifically, the District planned to administer “psychoeducational tests, perceptual-motor, academic and social/emotional functioning, speech/language, physical therapy and/or occupational therapy assessments.” However, communication lapsed between the parties during May and most of June with phone calls attempting to move the process forward, either unreceived or unacknowledged between the parties. On July 16, 2019, the Parents advised the District that Student would be available for in-person testing at the end of August.⁸ On July 29, 2019, the Parents provided the District with a privately obtained psychological assessment of Student. Although this evaluation occurred months before, the Parents did not share it with the District. By August 1, 2019, before Student graduated from [School 1], the Parents had decided that the Student would attend [School 2] for

⁷ At the beginning of each school year, each local educational agency...shall have in effect, for each child with a disability in the agency’s jurisdiction, an individualized educational program, as defined in paragraph (1)(A). 20 U.S.C. 1414 (d)(2)(A)

⁸ Testimony at the hearing revealed that Student returned to Pennsylvania in July 2019 for a couple of days before embarking on an out of state family vacation; that availability was not shared with the District.

the 2019-2020 school year. The Parents then advised the District that Student would be available for testing, in person, between August 20, 2019 (after graduation from [School 1]) and September 3, 2019 (commencement of school year at [School 2]).

Two days after the school year began, while Student was undergoing testing, the District held an IEP meeting with the Parents. At the meeting, the District offered an “interim” IEP.⁹ Generally, an IEP team cannot determine the appropriate placement for a child until decisions have occurred about the child’s needs, usually after an evaluation process. However, the IDEA does not preclude an LEA from temporarily placing an eligible child with a disability in a program as part of the evaluation process before an IEP is finalized. In some instances, this measure assists a school district in determining the child's appropriate placement. *Letter to Boney* (OSEP 1991) recognized the appropriateness, in some situations, of providing services to a student, through an interim IEP before the evaluative process is complete.

The District’s need to gather updated evaluative data before finalizing a proposal of FAPE was reasonable and responsible. In this case, although the reevaluation process just started, the District relied upon the privately obtained evaluation of Student recently supplied by the Parents. Although the private evaluation suggested a step down from [School 1’s] therapeutic setting to another boarding school might be appropriate, it also provided instructional recommendations for incorporation into a school setting. The District incorporated some of those suggestions into its interim offer of FAPE. The interim IEP proposed supplemental autistic support and services [redacted] with goals designed to address Student’s known [redacted] executive functioning, social skills, and behavior needs. Program modifications and specially designed instruction (SDI) included a highly structured classroom, a checklist with expectations, a one-to-one aide to provide behavior and social supports throughout the school day, and a transition plan for adjustment back to a community public school setting. When the District offered the interim IEP, Student had recently returned from placement in [School 1], entered mid-way through sixth grade. Student was now an eighth-grader. Based on the information obtained through the private evaluation of, Student’s maturation, independence, and social

⁹ On September 19, 2019, the Parents signed the NOREP indicating disagreement with the District’s August offer of FAPE. (S-21)

growth, this Student's needs could be met through the offered interim IEP, slated to be in place only until November of 2019. Based on information available at the time, the August interim IEP proposed an appropriate educational program in the least restrictive environment and was reasonably calculated to enable this Student to make educational progress. *Endrew F.*, *supra*. The Parents have failed to preponderantly establish that the interim IEP proposed for implementation during the 2019-2020 school year failed to offer Student FAPE. As such, further analysis under the remaining prongs of *Burlington-Carter* is unnecessary.

Next, Parents contend that the RR and IEP, finalized in 2020, were procedurally and substantively deficient, denying FAPE, thereby satisfying the first prong of the *Burlington-Carter* test for tuition reimbursement for the 2020-2021 school year. The alleged procedural violation stems from the time taken for the District to complete the RR.¹⁰ After a few days of testing at the end of August 2019, the Student began a new school year, this time in [School 2]. Although the Parents continued to make Student available during school breaks on random days throughout the fall and winter, the evaluation process moved slowly forward. During this time, the District continued to request boarding school input and perform face to face assessments and evaluations when Student was made available for testing. Despite these efforts, the reevaluation was not completed until March 2, 2020. Many factors contributed to the delay, so a determination that a denial of FAPE resulted based solely on the number days needed to complete the RR is not determinative of this issue.

The District relies on *H.D. v. Kennett Consol. Sch. Dist.*, 18-3345 (E.D. Pa. October 4, 2019) and *Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315, (Pa. Commw. Ct. 2002) for the proposition that it had no obligation to evaluate this Student unilaterally placed by the Parents in out of state boarding schools.¹¹ Although that caselaw appears to be on point, there are factual differences. In *Great Valley*, the parent placed the student in a therapeutic program in Idaho after

¹⁰ 22 Pa Code §§ 14.123(b), 14.124(b)

¹¹ The District Court in *H.D.* recognized *Great Valley* as not binding but regarded it as persuasive authority in the absence of Third Circuit caselaw to the contrary.

his discharge from a Pennsylvania inpatient clinic. Following the completion of the Idaho program, the parent enrolled the student in a California private residential school. The parent then requested an evaluation from the school district of residence and signed the PTE. However, the school district declined to send school staff to California to evaluate the student. On appeal, the Commonwealth Court held, “the burdens initially assumed by those unilaterally enrolling a child in a remote educational institution are burdens associated with the location of that institution. Where a school district has not participated in a placement decision, no burden associated with the location can be assigned to it. Thus, a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside Pennsylvania in a unilateral placement.” *Id.* at 321-22

Unlike *Great Valley*, in this case, the District commenced the evaluative process and requested the Student and Parents' cooperation on suggested days for testing. The District requested information from the Parents and the boarding schools, scheduled and conducted in-person assessments, ostensibly for inclusion in a finalized RR and IEP. Understanding the geographic limitations in place, this District must indeed have some level of accountability to proactively move the evaluation process forward once it agrees to undertake the responsibility for an out-of-state student evaluation. This inquiry must center on the reasonableness of the District's actions under the circumstances.

The Student attended [School 1] and then [School 2] for most of the evaluative period. This decision effectively rendered Student unavailable for the performance of necessary assessments needed to complete the reevaluation. The parties communicated their availability, and except for Student's undisclosed return to Pennsylvania in July, the Parents did their best to comply and made Student available. However, the longest period of Student's availability was mid-August 2019 until early September. This timeframe provided a limited window during the summer of 2019 (during which the District had no obligation to evaluate). The District had no responsibility to push Student's evaluation to the front of the line during the summer when the Parents had already decided to place Student in another out of state placement. This District did not participate in any decisions to place Student in out of state boarding schools. The Parents made all decisions regarding placement of the Student.

After the start of the 2019-2020 school year, the same pattern continued. Student remained in [School 2]. The parties communicated their availability and made Student available on select days for continued assessment. Overall, the District's actions were reasonable. Furthermore, the delay in completing the RR did not result in either the loss of an educational opportunity for the Student, infringement of the Parents' opportunity to participate in the IEP formulation process, or deprivation of an educational benefit. *supra*, *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953.

Next, the Parents' claim that a denial of FAPE resulted because the District over evaluated Student by wasting time on speech and language, occupational therapy, physical therapy, and curriculum-based assessments. However, the Parents also simultaneously assert that those professionals failed to obtain necessary social skills and sensory needs information from the boarding schools. The evidence has established that the RR utilized various assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected and known disability. The District conducted its own testing and incorporated data from the private evaluation of Student's current cognitive ability and academic achievement, neuropsychological functioning; obtained and reported input provided from teachers at the private schools; incorporated results of previous evaluations; obtained and summarized parental input, summarized information directly from Student; and provided a variety of rating scales to evaluate, in both the home and school settings, Student's social/emotional/behavioral functioning, including executive function and social skills. The District requested information from [School 1 and School 2], and the information received was used to develop the March IEP. Areas of concern expressed by the Parent and private school teachers were examined. The evidence supports the conclusion that the District's March 2020 RR was sufficiently comprehensive to identify Student's special education and related service needs. Furthermore, the District school psychologist responsible for administering the cognitive ability, academic achievement, and related assessments is professionally qualified and concluded that Student was cooperative with testing demands and that the results were valid. Possible speech/language therapy, occupational therapy, and physical therapy needs were also fully examined. The Parents placement of Student in a therapeutic boarding school and their continued insistence that a residential setting is needed thrust a duty upon the District to evaluate this

Student thoroughly. The Parents have failed to establish by a preponderance of the evidence that the District's evaluative process and resulting RR denied Student FAPE.

In March 2020, the District provided the completed reevaluation report (RR) to the Parents with an IEP draft for discussion during the IEP meeting. Because of the COVID-19 pandemic, the meeting occurred via teleconference. The Parents assert that the March 2020 IEP denied FAPE for many reasons, including that it was not responsive to Student's needs, contained erroneous goals, and offered an unnecessary one to one aide. The Parents have failed to meet their burden of proof. The March 2020 IEP proposed a supplemental level of support with [redacted], coping skills, social skills (peer influence), (perspective), and executive functioning goals. Modifications and specially designed instruction (SDI) properly included a highly structured classroom, checklists, extended time, preferential seating, a one-to-one aide, scheduled breaks, social skills instruction, [redacted], personalized lunch selection, a transition plan, executive functioning instruction, and weekly counseling.

Last, the Parents contend that the proposed coping skills, social skills, and executive functioning goals did not offer Student FAPE. Based on the record evidence in this matter, the IEP goals and SDI were directly responsive to the Student's needs identified in the District's RR. The previous and current evaluative data and the Parent's testimony extensively referenced Student's history and former diagnosis of an anxiety disorder and the impact of this condition on functioning. In fact, [School 1] selected by Parents and for which they seek tuition reimbursement specialized in treating children with ADHD, Autism, anxiety, and depression. The IEP goals were interrelated and designed to teach the Student necessary coping and self-regulatory behaviors while acknowledging the ongoing struggle with anxiety. The proposed coping skills goal was designed to help Student self-identify feelings of anxiety and incorporate introduced strategies to reduce those feelings. Specifically, the District offered direct instruction in the areas of self-regulation and problem-solving. Instruction would occur three times per six cycle day during counseling sessions to review coping strategies and anxiety management. This goal was based on the results from the assessments of emotional functioning, the Parent concerns, and the input received from the boarding schools Student attended. All that information was consistent that Student although academically talented, required an educational

plan with explicit behavioral expectations. Likewise, social skills goals were appropriate. The RR determined Student had social skills needs requiring direct instruction, emphasizing coping skills, perception taking, and regulating behavioral responses to frustrating circumstances. Appropriately, the March IEP proposed two social skills goals designed to address peer influence and perspective. Direct instruction focusing on reciprocal conversation, social cues, and peer relations supported both goals. The District proposed these goals in direct response to Student's identified needs as outlined in recent parent and teacher input and corroborative evaluative data. The Parents' assertion that the executive functioning goal ignores identified needs is also unsupported by the evidence. The completed RR concluded that Student had challenges with attention regulation and executive functioning, warranting special education eligibility as a child with OHI. The evaluative conclusions recognized that Student needed direct instruction in "cognitive flexibility, attention, inhibitory control and planning/organization.", precisely what the IEP proposed. Through this goal, Student would receive direct instruction focusing on day planner usage, organization, work completion, test preparation, task initiation, and time management.

During the IEP meeting, the Parents expressed concerns about the possible stigmatization Student would experience through the assignment of a school day one to one aide. When the IEP was proposed, Student had just spent years in small residential boarding schools in various parts of the country. In addition to the aide, counseling services and a transition plan were proposed for gradual acclimation to a larger school environment. Under this plan, in the morning, the Student with the aide would report to the autistic support classroom to review the daily schedule. Student would then report to the appropriate class for fifteen minutes with time increasing consistent with a growing comfort level. A BCBA was also proposed to conduct a classroom observation, collect data, and make recommendations about the necessity of continued support by the one-to-one aide. The proposal of an aide was in direct response to concerns about Student's potential for anxiety and coping skills associated with adjustment to a public school. To reduce possible anxiety, the District proposed the assignment of two different aides to Student. Testimony from the District established that as Student learned and then implemented the social and behavioral skills, a reduction of the aide's time would commensurately decrease.

Based on the totality of evidence presented, the Parents have failed to establish by a preponderance of the evidence that the March 2020 IEP did not offer FAPE.

The District's reevaluation process and final report were appropriate. The District's offers of FAPE through the interim and final IEPs, offered an educational program reasonably calculated to enable this child to make progress appropriate in light of the child's circumstances, in the least restrictive environment. *Endrew F.*, 137 S. Ct. at 999; *Oberti*, 995 F.2d 1204 at 1215. Understandably, these Parents want their child to have the highest quality educational experience in a supportive, nurturing environment with access to an array of choices and resources. But educational programs are not required to be optimal, and LEAs must be afforded a reasonable time to try interventions, including regular education supports, and evaluate whether they are working; and, if not, to respond appropriately. The Parents' request for tuition reimbursement for the 2018-2019, 2019-2020, and 2020-2021 school years must be denied.

CONCLUSION

The District did not fail to comply with its obligations to Student under the IDEA or Section 504, and no remedy is due or ordered.

ORDER

AND NOW, this 6th day of January 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are DENIED in their entirety.

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

Joy Waters Fleming, Esquire

Joy Waters Fleming, Esquire
Special Education Hearing Officer

January 6, 2021