

*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:**

24679-20-21

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

[G.G.]

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

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents:**

David Arnold, Esquire  
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#### **Local Education Agency:**

West Chester Area School District  
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#### **Counsel for LEA:**

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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

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

08/13/2021

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student residing within the West Chester Area School District (District) who currently attends a private school. Student has 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>

In the spring of 2021, Student's Parents filed a Due Process Complaint against the District asserting that Student was deprived of a free, appropriate public education (FAPE) by the District under the IDEA and Section 504 for two school years. The case proceeded to a due process hearing at which the parties presented evidence in support of their respective positions.<sup>4</sup> The Parent sought to establish that the District failed to provide or offer Student with FAPE beginning in the fall of 2019, and sought reimbursement for private school tuition for the 2019-20 and 2020-21 school years. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that no remedy was due.

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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 School District Exhibits (S-) followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

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

## **ISSUES**

1. Whether the District's program for the 2019-20 school year was appropriate for Student;
2. Whether the District's proposed program for the 2020-21 school year was appropriate for Student;
3. If the District's program for either or both school years was not appropriate, is the private school an appropriate placement for Student; and
4. If the District's program for either or both school years was not appropriate, and the private school was appropriate, whether there are any equitable factors that should serve to reduce or deny reimbursement for tuition and related expenses for the private school?

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student residing within the District and is eligible for special education on the basis of Autism. Student attended a private school (Private School) for a majority of the 2019-20 school year and the entire 2020-21 school year. (N.T. 30-31; P-38; P-39.)

### **Prior Educational History**

2. Student attended private [redacted] schools from kindergarten through the end of Student's sixth grade year, followed by one year at Private School for seventh grade. (N.T. 44-45, 380-81.)
3. The Parents obtained a private neuropsychological evaluation of Student in the spring of 2016. Student was diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD), and weaknesses were noted in executive functioning skills. (N.T. 50; P-29.)
4. Student was provided with private psychological counseling beginning in 2016. By the fall of 2018, Student was treating with a private psychiatrist. Sometime during the 2018-19 school year, Student transitioned solely to private psychiatric services. (N.T. 51-53, 109, 193, 240; P-3 at 3; P-32 at 1-18, 42-55.)
5. The District conducted an initial evaluation of Student in the spring of 2017 at the request of the Parents. An evaluation report (ER) issued in early March of that year. At that time, they reported that Student had previously experienced bullying and at times did not want to go to school. Teachers reported that Student had difficulty interacting with peers and participating in group activities. Student was determined to be eligible for special education with Autism as the primary disability category and no secondary category. Recommendations in the ER related to written expression tasks, social skills deficits, positive reinforcement, daily check-ins, and test and assignment accommodations. (P-3; P-30.)
6. The District developed an Individualized Education Program (IEP) for Student following the initial ER. That IEP specified autistic support at an itinerant level. The Parents opted to enroll Student at Private School for the 2017-18 school year (seventh grade). (P-4; P-5; P-6 at 9.)

### **Spring 2018**

7. A new IEP was developed in April 2018 in anticipation of Student's enrollment in the District in the fall. Identified needs at that time were social skills/social awareness in addition to organizational and self-advocacy skills. Student would also be at the age when post-secondary education planning was necessary. (P-6.)
8. Parent concerns for the April 2018 IEP were for Student potentially shutting down; and wanted Student to be successful, have social opportunities, and make friendships. (P-6 at 14.)
9. Annual goals in the April 2018 IEP addressed social skills/problem solving, and study and organizational skills. Program modifications and items of specially designed instruction included direct instruction in social skill and study skills, access to an identified adult as needed, support for written assignments, daily check-ins, positive reinforcement, test and assignment accommodations, and a speech/language evaluation. (P-6 at 21-25.)
10. Student's program and placement in the April 2018 IEP was one of itinerant autistic and learning support, with Student participating in regular education except for social skills and study skills instruction. (P-6 at 28-29.)

### **2018-19 School Year**

11. Student was enrolled in the District for the first time for the 2018-19 school year when Student was in eighth grade, the last year of middle school in the District. (N.T. 45, 57, 161.)
12. The April 2018 IEP was revised in late August 2018 following a team meeting. The social skills/problem solving goal was replaced with a new goal focused on active listening; and a new self-advocacy goal was added for seeking assistance. Slight changes were made to a few

of the program modifications and items of specially designed instruction; and new to that section were additional test/assignment accommodations, prompting and redirection to task, monitoring and facilitation of group interactions, and additional direct social skills instruction. Baselines for the goals were also added in early October 2018. (P-8 at 2, 9-11, 24-32; P-10 at 2, 22-26.)

13. When the treating psychiatrist first evaluated Student in October 2018, he arrived at diagnoses of Autism Spectrum Disorder, ADHD, and Generalized Anxiety Disorder. At that time, Student reported a history of bullying that was no longer occurring. (P-32 at 1-4.)
14. In December 2018, the Parents communicated with the District about concerns that Student was experiencing difficulty with peers in the hallway and cafeteria, and stated that Student did not want to attend school. The counselor met with Student, honoring confidentiality and the Parents' wish that Student not know of their communications with her. Student did not share details with the counselor about the concerns, but Student was provided a pass to leave class early to limit interactions with peers in the hallway. The counselor also suggested a meeting and permission to speak with the treating psychologist. (N.T. 488, 507; P-24 at 1-3, 6-8.)
15. The middle school counselor continued to meet with Student during the 2018-19 school year to check in and when Student needed counseling or help addressing any concerns. She was careful to honor the Parents' request for confidentiality about their communications. District professionals also took steps to conduct multiple observations of and to monitor Student at school, including in the cafeteria, for any suspicions of bullying or negative peer interactions. (N.T. 460-61, 485-86, 689-91, 697, 719-20.)

16. In January 2019, the again Parents communicated with the District, raising concerns that Student was upset about peers making remarks to Student about the Parents and a certain family circumstance. Student did not know the peers. (P-24 at 4-6.)
17. Student's IEP team met again in January 2019. At that time, the Parents' expressed their concerns about Student: making friends at school, negative peer interactions at school that Student did not feel comfortable sharing or reporting to anyone, taking assessments, self-advocacy, and "social interactions outside of school" (P-11 at 9). The IEP was revised to provide for additional supports including strategies for addressing peer interactions, options for raising concerns about peers, and counseling to address the social concern outside of school. (N.T. 451; P-11 at 2, 9, 18.)
18. Progress reporting at the time of the January 2019 IEP revision reflected progress on the study skills goal, and mastery of the active listening and self-advocacy goals in the first quarter. (P-11 at 29-31.)
19. A speech/language screening conducted in January 2019 included formal assessment and informal observations. That screening revealed no deficits requiring speech/language services including in the area of pragmatic language skills. (P-12 at 8-9.)
20. In early April 2019, Student reported several instances of peer conflict to the treating psychiatrist: a peer entering Student's locker; another peer hitting Student in the back of the head and elbowing Student; and someone taking Student's dessert. By May 2019, however, these incidents (described as bullying) had stopped, according to Student's report to the psychiatrist. (P-32 at 9-12.)
21. In the spring of 2019, the District middle school counselor was given permission to, and did, speak with Student's treating psychologist and

psychiatrist. Both of those treating professionals mentioned concerns that Student had expressed to them, but did not have details on what those concerns were. (N.T. 274-75, 293, 442, 485-86, 498-99; P-24 at 17-18, 22; P-32 at 19-23.)

22. An IEP meeting convened in April 2019 in preparation for Student's transition to the high school, and a new IEP was developed. (N.T. 454, 457, 554, 594-95, 608, 757-58, 811-12; P-12.)
23. Identified needs in the April 2019 IEP were study skills, self-advocacy and self-monitoring, and social skills. None of Student's teachers reported concerns with Student having inappropriate peer interactions for that IEP. (P-12 at 9-13, 17.)
24. Progress monitoring reported in April 2019 reflected mastery of the active listening goal, inconsistent progress on the self-advocacy goal, and progress on the study skills goal. (P-12 at 11-14.)
25. Parent concerns for the April 2019 IEP were for Student being bullied in the hallway and cafeteria, in addition to communication about Student's missing assignments, confidentiality of home-school communications, and use of successful teaching strategies. (P-12 at 16.)
26. Annual goals in the April 2019 IEP addressed study skills, organization/planning skills, and self-advocacy (maintaining the previous goal). Program modifications and items of specially designed instruction included direct instruction in social skill and study skills, access to an identified adult as needed, support for written assignments, daily check-ins, positive reinforcement, prompting and redirection to task, monitoring and facilitation of group interactions, guidelines for working in a group, and test and assignment accommodations. (P-12 at 27-36.)

27. Student's program and placement in the April 2019 IEP was one of itinerant autistic and learning support, with Student participating in regular education except for social skills and study skills instruction. (P-12 at 38-39.)

**2019-20 School Year**

28. Prior to the start of the 2019-20 school year, Student was provided a tour of the high school, including walking through the daily schedule, and Student was able to meet the special education teacher who would be the high school case manager. (N.T. 69-70, 890-91.)
29. Student entered the District high school at the start of the 2019-20 school year. The first day of school was August 26, 2019. (N.T. 62, 161, 277, 608.)
30. The District does not assign students to cafeteria tables at the high school, but does provide staff supervision of the lunch periods. Student generally sat with a group of peers who all participated in a shared leisure activity during the lunch period. (N.T. 769-70; P-27.)
31. Student's case manager for the 2019-20 school year checked in with Student regularly once or twice each week. (N.T. 546, 611-12.)
32. At the end of September 2019, Student reported to the treating psychiatrist that bullying was not occurring. (P-32 at 13-14.)
33. No District professionals reported any concerns about Student in the fall of 2019, including with peer interactions. (N.T. 622; P-15 at 6.)
34. Student at times after the start of the 2019-20 school year told the Parents that statements were made at school by peers in a specific location such as a hallway. Student did not reveal to them any details about those statements. (N.T. 118-19, 203-04.)

35. Student at times after the start of the 2019-20 school year complained about feeling sick to the stomach. By mid-October 2019, Student also complained of stomach pain. The Parents reported the stomach illness to the District on October 16 and 17, 2019 after advising that Student would return to school at that time. They continued to report stomach illness into the end of October. (N.T. 162; P-25.)
36. Student did not attend school in the District from October 10, 2019 forward. On the first four of those school days, Student went on a family trip. Beyond that, Student did not relate to the Parents the reason for declining to go to school, but the Parents concluded that Student would not return to that high school building campus.<sup>5</sup> (N.T. 63-64, 68, 114, 163; S-7; S-9.)
37. On October 14, 2019, the Parents reported to the District that Student had been “having problems with bullying everyday” (P-25 at 4) and losing friends. They asked to meet with the case manager, counselor, and high school principal to discuss their concerns. On October 17 and 18, 2019, they reiterated that Student was “bullied everyday” (P-25 at 5), which was the cause of the stomach illness. (P-25 at 4-6, 12-14.)
38. The Parents had Student medically evaluated in mid-October 2019 to determine if there was a physical cause for Student’s stomach pain and refusal to go to school. They provided a medical excuse to the District for three days due to illness. (N.T. 66-67, 82, 162-63; P-26.)
39. In late October 2019, Student told the treating psychiatrist that Student was bullied by a peer who shared a lunch table with Student at school, beginning approximately one month after the start of the 2018-19 school year. Student told the psychiatrist that the peer had

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<sup>5</sup> The record does not establish if or when the District was told that Student would not return to the same high school building, but one of the Parents understood that a purpose of the November 2019 meetings was to have Student do so. (N.T. 121-22.)

made untrue statements about both of Student's parents on a number of occasions. The psychiatrist understood that Student was very upset about the statements that were characterized as bullying. (N.T. 242, 243, 246; P-32 at 15-16.)

40. In October 2019 after Student no longer attended school, the District asked, and the Parents consented, to District professionals speaking with Student's psychiatrist. (N.T. 81-82; P-25 at 8-9, 32-33; P-28; P-32 at 30.)
41. Student's psychiatrist recommended to the Parents that Student return to Private School rather than the District high school in the fall of 2019. (N.T. 125; P-32 at 28.)
42. The Parents provided notice of their intention to enroll student in Private School and seek reimbursement for tuition on November 1, 2019 on the basis that the District could not provide a "safe environment" (P-25 at 31) for Student. Student began attending Private School in approximately mid-November 2019. (N.T. 87; P-25 at 31.)
43. A meeting convened on November 7, 2019 to address Student's lack of school attendance. The Parents raised concerns at the meeting that Student had been bullied during the 2019-20 school year, but none of the District professionals had similar concerns. (N.T. 75, 172-83, 560-62, 617, 622, 774-75, 893-84; P-15.)
44. Student's IEP was revised at the November 7, 2019 meeting. The revision documented Student's lack of attendance and the Parents' concerns with bullying. Additions to the program modifications and items of specially designed instruction section were for additional adult support when needed and a change in homeroom to the emotional support/autistic support room. (P-15 at 2, 6, 34.)

45. On November 13, 2019, the District denied the Parents' request to fund Student's tuition at Private School. The Parents disapproved the Notice of Recommended Educational Placement (NOREP). (P-18.)
46. Another meeting convened with the Parents on November 14, 2019 to develop a plan for Student's return to the District high school building. That meeting convened at a District building other than the high school Student had attended. (N.T. 75-76, 568-69, 574-76, 629-30, 777, 779-81, 835-36, 899-902, 955; P-25 at 26, 39-44.)
47. The District's proposed plan for reintegrating Student to school included emotional support; instruction in coping strategies; check-ins with several adults; a gradual return to classes with several options for each class period based on how Student was feeling; and options for lunch and facilitation of a return to the cafeteria including choosing peers to join. The plan provided details of the various options for each class period. (P-25 at 39-43.)
48. The District also conducted an investigation of the asserted bullying at school in November 2019, and spoke individually with all of the students reportedly involved. The principal of the high school Student had attended also asked to meet with Student as part of that investigation. (N.T. 311, 312-15; P-25 at 9, 13; P-27.)
49. The Parents did not permit Student to discuss any instances of alleged bullying with District professionals after Student stopped attending school in the District because they did not want to subject Student to being put "on trial" (P-25 at 22). (N.T. 215, 218-19; P-25 at 20-23.)
50. The principal of the high school Student had attended asked to speak with Student's psychiatrist and was granted permission by the Parents. They did not speak but communicated via email. However, the psychiatrist was not able to glean, and did not share, any information

about Student's concerns with peer interactions and/or bullying other than the untrue statements about the Parents. He suggested that the high school principal call Student. (N.T. 310, 347; P-25 at 16-18.)

51. The District provided to the Parents a summary of the results of the investigation that did not support a finding that bullying had occurred. The principal conducting the investigation did not find any common thread as he expected he would if the allegedly bullying occurred as reported by Student, but the group of students did admit to engaging in impolite verbal exchanges among themselves, generally when participating in the shared leisure activity in the cafeteria. (N.T. 355, 358-59, 361-62; P-25 at 25.)
52. Student began attending Private School again on November 14, 2019. (N.T. 382; P-25 at 59.)
53. In early December 2019, the District wrote to the Parents and advised of their right to seek a reevaluation of Student by the District. (P-19.)

#### **2020-21 School Year**

54. A meeting convened remotely in early August 2020 to discuss a program for the 2020-21 school year. Parent concerns at that time were Student's need for additional support during virtual instruction at Private School; implementation of the District IEP during virtual instruction; and Student having "no interest" in returning to the previous District high school building (P-20 at 16). (N.T. 88, 799-800; P-20; S-11.)
55. The August 2020 IEP was similar to the November 2019 IEP in many respects, but with additional input from Private School. That document did add a number of program modifications and items of specially designed instruction: a re-integration plan for a return to the District high school; emotional support at the start of the school day

and in the afternoon; one-on-one time with the teacher daily during any period of virtual instruction; and opportunities for feedback and editing of assignments. (P-20.)

56. The Parents rejected the NOREP for the 2020-21 school year mainly because Student was expected to return to the same District high school. They also provided written notice of their intention to seek reimbursement from the District for the 2020-21 school year. (N.T. 90; P-22; P-23.)

### **Private School**

57. Private School serves approximately seventy five children in grades five through twelve who have disabilities. It is accredited by the Pennsylvania Association of Independent Schools. (N.T. 378-79, 394, 417.)
58. Class sizes at Private School are typically five to eight students, and supports are individualized based on each student's needs. Private School does not develop IEPs for its students. (N.T. 379-80, 392, 394.)
59. During the 2019-20 school year, Student had classes in literature, language arts (written expression), algebra, biology, world cultures, art, health, and physical education. Student continued to manifest difficulty with self-advocacy skills, but reporting for the end of the school year was brief in light of the pandemic. (P-34.)
60. Private School transitioned to remote learning in March 2020 when all Pennsylvania schools closed, and for a period of approximately four weeks during the 2020-21 school year. (N.T. 387-88.)
61. Student experienced some difficulty with remote instruction but was overall successful. (N.T. 402-06; P-34; P-35.)

62. Student earned grades in the A to B range at Private School during the 2019-20 and 2020-21 school years. (P-34; P-35.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

The burden of proof is generally viewed as comprising two elements: the burden of production and the burden of persuasion. In cases such as this, 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, here, the burden of persuasion rests with the Parents who filed the Complaint and requested this administrative hearing. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise,” however. *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume a role as a fact-finder, 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 generally credible as to the facts as they recalled them. In the relatively few instances where witness accounts varied, those are attributed more to lack of specific recollection and differing perspectives, rather than any intention to mislead.

The weight accorded the evidence, however, was not equal. The documentary evidence was quite persuasive, particularly where there were understandable memory lapses. The Parents are clearly devoted and caring advocates who want what is best for Student, resulting in frustration with

the District in hindsight. However, the testimony of the District professionals with first-hand observation and knowledge of Student's functioning at school was credited over that of others lacking such direct involvement. The testimony of the treating psychiatrist, while certainly heartfelt, was based in large part on his own assumptions about public schools and Student's experiences there; and, his insistence that Student's social awareness deficits would not impact Student's perceptions (N.T. 270-71) is perplexing. While no one, including this hearing officer, can fault that professional for his care about a patient, his demeanor strongly suggested general disapproval of the District that rendered his conclusions and recommendations less than persuasive on the issues presented in this case, particularly in light of his clear preference for Private School.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and content of exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the entirety 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), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has observed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is clearly the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

### **General IDEA Principles: LEA Obligation for Students Not Enrolled**

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, the district is required to comply. *A. B. v. Abington School District*, 440 F. Supp. 3d 428, 435 (E.D. Pa. 2020); *see also James v. Upper Arlington City School District*, 228 F.3d 764 (6<sup>th</sup> Cir.

2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP). "Because the IDEA imposes no obligation on school districts to *sua sponte* evaluate and develop IEPs for students unilaterally placed in private schools," they must do so when a parent has made a request under the IDEA. *A.B.*, *supra*, 440 F. Supp. 3d at 435 (citations omitted).

### **General IDEA Principles: Reimbursement for Tuition**

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *see also C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the

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

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

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

### **General Section 504 Principles**

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

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

### **The Parents’ Claims**

The primary focus of the Parents’ contentions is that the District failed in its obligations to Student because it did not respond appropriately to incidents with peers that they describe as bullying. There can be no dispute that bullying has become a considerable concern in our nation. As the U.S. Department of Education recognized, “Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of

its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>6</sup>

“Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA[.]”<sup>7</sup>

“Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.”<sup>7</sup> And, “[w]hether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.”<sup>8</sup>

Our own Third Circuit has recognized that a student who is the victim of bullying and whose education is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). A New York federal district court more fully addressed a claim that a school district deprived a student of an appropriate special education program because it failed to take appropriate steps to address bullying of the student by other students, thereby negatively affecting the victim student’s opportunity for an appropriate education. *T.K. v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011). In an extensive analysis of the concept of bullying and how it is manifested in society, the Court noted that “[e]very disagreement among children does not amount to bullying.” *Id.* at 300. “What distinguishes bullying from other forms of childhood aggression, whether a hard-fought basketball game or rough-and-tumble play, is unequal and coercive power.” *Id.* (citation omitted). “Increased power need not be actually present, but there must be

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<sup>6</sup> U. S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 1 (October 26, 2010).

<sup>7</sup> U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000).

<sup>8</sup> U.S. Department of Education, Office of Special Education and Related Services, Dear Colleague Letter, 61 IDELR 263 (2013).

at least a perceived advantage for the bully either physical or psychological.” *Id.* (citation omitted). Bullying is generally viewed as a pattern of negative acts committed over time. *Id.* at 298.

Assuming, *arguendo*, that the reported incidents to which the Parents cite during the 2018-19 and 2019-20 school years constituted, or were perceived by Student to be, bullying, here, unlike in *T.K.*, the District responded promptly to each and every concern of the Parents including those that suggested inappropriate peer interactions. During the 2018-19 school year, the Parents on three occasions reported incidents in December 2018, January 2019, and April 2019. The District convened meetings following these reports and took steps to speak with Student’s treating professionals while maintaining the confidentiality requested by the Parents. Lacking details about the incidents, they also met with, observed, and monitored Student for any peer interactions that may have been inappropriate.

By the end of the 2018-19 school year (and into the fall of 2019), Student was not reporting concerns with peers even to the treating psychiatrist. Student’s IEPs addressed social skill and related deficits based on information known at the time they were developed. There is no indication in this record that the District failed to permit the Parents to meaningfully participate in program and planning decisions for Student, or that it ignored any of their concerns. Finally, the testimony of the experienced District witnesses that they did not discern any behaviors to support the Parents’ concerns about the alleged bullying was supported in the documentary record and overall quite persuasive. All of the foregoing does not establish that the District should have done more in preparation for Student’s entry into high school in the fall of 2019.

There is no suggestion in the record about any continued difficulty with peers in the 2019-20 school year until reports made after Student stopped

attending the District high school. The parties' positions on the pervasiveness of peer conflict in this case are widely divergent. However, there is no evidence to support a finding that the District should have been aware of, and intervened to address, Student's reported concerns with peer remarks and interactions early in the fall of 2019. Once again, the reasonableness of an LEA program in the context of providing FAPE must be evaluated upon information known to it at the time, and not in hindsight.

The Parents also contend that the District's plan to return Student to the same high school building was a major factor in their decision to enroll Student in Private School again in the fall of 2019. Yet, as late as October 17, 2019, the Parents reported to the District that Student would promptly return to that high school. When Student did not, the District convened additional meetings to develop a plan for Student's gradual reintegration into the same school environment. It is not even clear on this record what the District's knowledge was at the time of the November 2019 meetings about Student's disinterest in returning to that building.

The Parents further cite to the District's failure to suggest a Functional Behavioral Assessment (FBA) in the fall of 2019. Student stopped attending school in the District on October 10, 2019, and excuses for a family trip and illness thereafter were provided. On November 1, 2019, the Parents gave written notice of their intention to place Student in Private School. This hearing officer cannot find the District's actions during that few week period to be unreasonable or unresponsive under the circumstances presented; on the contrary, the District communicated with the Parents, convened meetings, and invited the Parents to provide input into its plan to return Student to school. LEAs must be granted reasonable time to respond to information and events as they arise and, here, the District did so appropriately even without proposing an FBA.

The program in place for the 2019-20 school year, as revised in the fall of 2019, was reasonably calculated to provide meaningful educational benefit for Student. The program for the 2020-21 school year similarly addressed Student's known needs based on all available information including that from Private School, which had not been implementing IEP goals or monitoring Student's social skill and other weaknesses. The IEP also increased the level and types of support, and incorporated a plan for Student to transition back to the District. In sum, both the 2019-20 and 2020-21 programs were appropriate in light of Student's unique circumstances.

The Parents also point to the fall 2020 instructional format in the District that continued remote learning as inappropriate for Student. It is important to recall that the pandemic has been a global event that has affected each and every individual, organization, and entity. The District was required to make decisions for its students based on local health and safety guidance for the area, and to respond as necessary as guidance and circumstances changed. Student's largely successful experience with remote learning at Private School without an IEP does not establish that the District's program in the fall of 2020 would have been inappropriate on that basis.

It is, of course, understandable that the Parents might prefer Private School and its smaller supportive environment over the District public school. They are certainly free to enroll their child in a private school, as they have done for many years. One can also empathize with them as they have struggled to learn details on Student's perceptions about peers in the District (and presumably in previous schools), and continually sought to ensure a safe environment for Student. But this decision must be based on the evidence presented and the applicable law. Here, the Parents have not met their burden of establishing that the District denied Student FAPE for the

2019-20 and 2020-21 school years and, as such, they are not entitled to public funding for the unilateral placement. Accordingly, it is not necessary to proceed to the remaining issues presented or separately address Section 504.

### **CONCLUSION OF LAW**

The District did not fail to provide or offer FAPE to Student for the 2019-20 or 2020-21 school years, and no remedy is due.

### **ORDER**

AND NOW, this 13<sup>th</sup> day of August, 2021, in accordance with the foregoing findings of fact and conclusion of law, it is hereby **ORDERED** that the Parents' claims are DENIED in their entirety and DISMISSED.

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. 24679-20-21