

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:

27141-22-23

Child's Name:

E.W.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

Mark W. Voigt, Esquire
600 West Germantown Pike, Suite 400
Plymouth Meeting, PA 19462

Local Education Agency:

Perkiomen Valley School District
3 Iron Bridge Drive
Collegeville, PA 19426

Counsel for LEA:

Timothy E. Gilsbach, Esquire
10 Sentry Parkway, Suite 200
Blue Bell, PA 19422

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/30/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, E.W. (Student),¹ is a high school-aged student who resides in the Perkiomen Valley School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).²

Student previously attended school in the District with a program that included general and special education. The parties executed a settlement agreement for the 2020-21 and 2021-22 school years for Student's tuition at a private school; the agreement also provided for a reevaluation of Student followed by a newly developed District program for the start of the 2022-23 school year. The Parents rejected that proposed program, and filed a Due Process Complaint under the IDEA. As remedies, the Parent sought reimbursement for private school tuition for the current school year as well as reimbursement for a private evaluation. The District responded with its own claim seeking to defend its reevaluation in the spring of 2022. The case thereafter proceeded to an efficient due process hearing.³

¹ 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).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The District's objection to P-23 (N.T. 69-71, 448-49) was taken under advisement and is hereby sustained based on a lack of relevance to the issues presented. The term Parent in the singular is used to refer to the mother who filed the Complaint and appeared to be more actively involved in programming decisions, and to the plural where both were involved.

Following review of the record and for all of the reasons set forth below, the Parent's claims must be granted in part and denied in part, and the claim of the District must be granted.

ISSUES

1. Whether the District's proposed program and placement for Student for the 2022-23 school year was appropriate based on Student's needs;
2. If the District's proposed program and placement for Student was not appropriate, whether the private school program was appropriate for Student;
3. Whether there are equitable considerations that might reduce or deny reimbursement for the private school tuition;
4. Whether the District's spring 2022 reevaluation of Student was appropriate; and
5. If the District's spring 2022 reevaluation was not appropriate, whether the Parent should be reimbursed for the private evaluation?

FINDINGS OF FACT

1. Student is a mid-teenaged high school student residing within the boundaries of the District. Student has been identified as eligible under the IDEA based on Specific Learning Disability. (N.T. 42-45.)

2. Student exhibits significant deficits in the area of reading, as well as weak working memory and processing speed skills. Working memory is the weaker of those two skills. (N.T. 49-51, 324-26.)
3. Student attended school in the District during the 2019-20 school year, and was provided special education in the areas of reading, written expression, and mathematics in a program of itinerant learning support. Student experienced difficulty with homework at home that school year, and the Parent reported concerns with Student's ability to keep up with all classes. (N.T. 55-56; P-5; P-7.)
4. Student was reevaluated by the District in January 2020. At the time, teachers all reported that Student required considerable individual assistance to complete assignments; Student also exhibited significant difficulty with focus/attention, and with accessing and understanding grade level materials. Student's needs were identified to be in the areas of basic reading skills, reading comprehension, and reading fluency; written expression and spelling; mathematics computation and problem solving; executive functioning; and attention and focus. (P-4.)
5. The parties executed a settlement agreement in the fall of 2020 that provided for District funding of Student's tuition at a private school (Private School) for the 2020-21 and 2021-22 school years. Additional provisions in that agreement required a reevaluation to be conducted in the spring of 2022 followed by development of an Individualized Education Program (IEP) for the 2022-23 school year. (P-9.)
6. Student enrolled in Private School for the 2020-21 and 2021-22 school years, earning final grades in the A to B range both years. Teacher comments were overall generally positive and included suggestions for necessary supports. (P-36; P-37.)

7. In November 2021, the Parent contacted the District and asked that it support and fund Student's continued placement at Private School. (P-24 at 2-3.)

District High School

8. The District offers co-taught classes in the high school that are provided in general education settings, taught by both a general education teacher and a special education teacher. There may be up to twenty-four students in those classes. (N.T. 231-32, 258, 398-99, 407.)
9. The District has a learning support classroom at the high school that provides modified and essentialized content with a slower pace of instruction than in general education. The class sizes are typically smaller than in general education, up to twelve students with a teacher and classroom paraprofessional. (N.T. 231-32, 262-63, 382-83.)
10. The learning support English/language arts class at the District high school follows a modification of the general education curriculum. During the 2022-23 school year, with six students, the reading level of the students in that class ranges from third to sixth grade, and instruction is provided based on those levels using materials at each student's level. Frequent repetition and practice are provided in that class. (N.T. 383-86, 399-401; P-12 at 9.)
11. The learning support mathematics class at the District high school uses a spiral curriculum and modified content. Direct whole group instruction is provided followed by group or independent practice, using materials at each student's level. During the 2022-23 school year, this class has eight students and the student's levels ranged from third to sixth grade. (N.T. 416-19, 433-3; P-12 at 9.)

12. The District has an instructional seminar class in the high school where focused support, pre-teaching/review, and instruction is provided based on a child's individual needs, and aligned with an IEP if a student has one. Supports for executive functioning skills including planning tasks and organization are also part of that class, which also provides opportunities for test accommodations and self-regulation when needed. The class size is small with approximately eight to twelve students. (N.T. 233-34, 250-51, 291-92, 294, 423, 431; P-12 at 11-12.)

Spring 2022 Reevaluation

13. The District conducted a reevaluation in the spring of 2022 with the Parent's consent, and issued a report (RR) in April 2022. (N.T. 320-21; P-11; S-1.)
14. The April 2022 RR summarized information from prior District records as well as grades at Private School over the 2020-21 school year. (P-11 at 1-7.)
15. The Parents completed a parent input form for the District's April 2022 RR, but it was not provided to the District school psychologist. The input reflected slow progress, weak reading skills, and a need for one-on-one assistance. (N.T. 321-23, 342-43; P-10; P-11 at 3.)
16. Teacher input from Private School into the April 2022 RR noted that Student benefitted from individualized small group instruction at Student's pace; multisensory instruction with visual resources; modeling; writing templates and examples; pre-reading and repetition; preferential seating; and academic support for new material. (P-11 at 7-9, 10.)
17. The District school psychologist conducted an observation of Student at Private School for the April 2022 RR. (N.T. 323-24; P-11 at 9.)

18. Cognitive assessment for the April 2022 RR (Wechsler Intelligence Scale for Children – Fifth Edition) yielded an average range Full Scale IQ, with some variability among the Composites. Student scored in the average range on the Verbal Comprehension, Visual-Spatial, Fluid Reasoning, and Processing Speed Composites, but in the low average range on the Working Memory Composite. The General Ability Index score was also in the average range but slightly higher than the Full Scale IQ score. (P-11 at 12-15, 26.)
19. Student’s performance on an assessment of academic achievement for the April 2022 RR (Wechsler Individual Achievement Test – Fourth Edition) was generally and overall below expectations. Student’s scores were in the low average range on the Phonological Processing and Listening Comprehension Composites; in the very low range on the Mathematics, Basic Reading, Decoding, Math Fluency, and Sentence Composition Composites; and in the extremely low range for Total Achievement and on the Reading and Written Expression Composites. (P-11 at 16, 27-29.)
20. The April 2022 RR also assessed social/emotional functioning through rating scales completed by the Parent and two teachers. The Parent’s ratings did not reflect concerns, but one of the teachers noted an at-risk concern with social skills. (P-11 at 18-19, 30-31.)
21. On the Parent’s Conners Rating Scales – Third Edition, an instrument assessing typical characteristics of Attention Deficit Hyperactivity Disorder, the Parent identified elevated concerns with learning problems. Teacher rating scales sent to Private School for the April 2022 RR were not returned. (N.T. 329-30; P-11 at 17-18, 31-32.)
22. Student’s executive functioning skills were also assessed for the April 2022 RR by rating scales completed by the Parent and two teachers.

The Parent endorsed a clinically significant concern with initiation, and at-risk concerns with shifting, working memory, and planning/organizing. The teachers endorsed a potentially clinically significant concern with working memory, and an at-risk concern with initiation. Globally, Student's executive functioning skills were not noted to be concerning by any rater. (P-11 at 16, 32.)

23. No assessment of fine motor or visual perception skills was conducted because those were not raised as areas of concern and the April 2022 RR did not reveal a need for those. (N.T. 333-35.)
24. The April 2022 RR determined that Student was eligible for special education based on Specific Learning Disability (reading, written expression, mathematics, and listening comprehension) and Other Health Impairment. Educational strengths (motivation and working well with others) and needs (reading, mathematics, written expression, listening comprehension, and executive functioning skills) were identified. (P-11 at 19-20.)
25. Recommendations in the April 2022 RR at school were for planning and organization support; chunking of verbal directions with visual presentation and restatement for understanding; graphic organizers and rubrics; assignment accommodations; teacher notes for lectures; and preferential seating. (P-11 at 21-22.)
26. The District provided the April 2022 RR to the Parent, who did not raise any concerns with the evaluation to the District school psychologist at a subsequent meeting. (N.T. 336-37.)

Spring 2022 IEP

27. An IEP was developed in May 2022 for the 2022-23 school year. Student completed assessments at the District in order to determine baselines for the IEP. Those included a Qualitative Reading Inventory

and other measures reflecting Student's instructional reading level was at third grade. Written expression and mathematics assessments also conducted for the IEP revealed below expected performance. (N.T. 230, 234-35; P-12.)

28. The IEP identified strengths to include motivation and working well with others; in addition, the following needs were noted: reading fluency, reading comprehension, written expression, mathematics computation, mathematics concepts and applications, listening comprehension, and executive functioning skills. (P-12 at 12.)
29. Transition services in the May 2022 IEP noted that Student had been provided with but not yet completed a transition survey. (P-12 at 11, 13-14.)
30. Annual goals in the May 2022 IEP were for reading fluency; reading comprehension; written expression; mathematics computation; and mathematics concepts and applications. The goals included baselines and identified a third grade level for the reading and mathematics goals. (P-12 at 16-17.)
31. Program modifications and items of specially designed instruction in the May 2022 IEP were for direct, explicit reading instruction (decoding, fluency, comprehension, and encoding); multisensory presentation (verbal and visual); instructional seminar class; at-level reading materials; support for written expression with guided practice; visual supports, instruction, and practice for executive functioning; repeated directions; checks for understanding; and test and assignment accommodations, (P-12 at 18-19.)
32. The May 2022 IEP provided for Student to be in an instructional seminar class (described as support for academics and executive functioning skills, with examples including progress monitoring on

goals, pre-teaching and review, and supplemental instruction), and also have a daily reading class, as well as learning support for English/language arts, mathematics, science, and social studies classes; health/physical education and an elective were also specified. Learning support was described as having modified instruction based on essential concepts, a small student to teacher ratio (approximately 12:1), and a slower pace than in general education. The proposed program was one of learning support at a supplemental level, but the extent of Student's participation in general education was unspecified and unclear ("Discussed at meeting" and "[Student] will receive accommodations and specially designed instruction to support [] participation and progress in the regular education classroom".) (P-12 at 20). (P-12 at 9, 20.)

33. The IEP team discussed the District's proposed reading intervention class where a program addressing Student's specific reading needs would be provided in a class with eight students and one teacher with paraprofessional support. One of the program options was an Orton-Gillingham-based program; another option was a reading class with a specific curriculum that provided large- and small-group instruction as well as independent reading and a computer component for practicing skills. The IEP team did not identify the program to be provided to Student because it lacked adequate information about Private School's reading program and interventions. (N.T. 242-46, 265, 281-84.)
34. The District provided the May 2022 IEP to the Parent the day before the May meeting. The Parents responded immediately that they did not agree with the placement identified, and disputed the proposed special education services. (N.T. 145-46, 230; P-24 at 6-7.)
35. The Parents attended and participated in the IEP meeting in May 2022. There was no general education teacher present at that meeting. The

District considered the options to be learning support either in the special education classroom or in co-taught classes, but the special education teacher attending the meeting provided no input. (N.T. 79, 230-31, 301-02, 386, 395, 397-98.)

36. Immediately following the May 2022 IEP meeting, the Parent provided notice of intention to maintain Student's Private School placement for the 2022-23 school year. The District did not agree to the request for tuition funding. (P-24 at 5-7.)
37. The District issued a Notice of Recommended Educational Placement (NOREP) following the May 2022 meeting for special education services at a supplemental level at the District high school. The NOREP indicated that the team had considered and rejected a program of special education as well as Student's continuation at Private School. (P-13.)
38. Student's IEP was revised in August 2022. The revised IEP provided more detail about the instructional seminar (focused intervention based on IEP goals, small group direct instruction, support for executive functioning skills, and implementation of test and assignment accommodations). (P-14 at 9-10.)
39. Parent concerns noted in the August 2022 IEP in addition to those from May included a description of the classes and available support; transition to the District high school; the level of detail in some items of specially designed instruction; and ESY eligibility. (P-14 at 13.)
40. The August 2022 IEP included the following recommendations for Student's class schedule: reading intervention in a small group (8:1 student to adult ratio); co-taught social studies (12:1 ratio); science in the learning support classroom (6:1 ratio); mathematics in the learning support classroom (8:1 ratio); English/language arts in the

learning support classroom (9:1 ratio); and instructional seminar, along with lunch and health/physical education. Additional paraprofessional support would be available in some of those classes. (P-14 at 9-10.)

41. The August 2022 IEP made slight revisions to the goals. Additional program modifications and items of specially designed instruction were added were: an IEP team meeting within the first two weeks of the school year; support for transitioning between classes (early dismissal/late arrival); a peer buddy; adapted written expression expectations; an alternative for small group lunch setting; meeting weekly with a counselor for first marking period and extended as necessary; check-ins with designated adult when needed; and instructional seminar. The provision for at-level reading materials was revised to add detail. (P-14 at 20-21.)
42. The August 2022 IEP maintained a learning support program at a supplemental level. (P-14 at 23.)
43. The Parents attended and participated in the IEP meeting in August 2022. They expressed concerns with Student transitioning between classes but did not agree with the suggestion for Student to leave classes early; they also had concern with a thirty minute lunch period in a large environment as not providing enough time. The special education teacher who attended the meeting did not speak at all. (N.T. 88-89, 93-95 99-100, 241, 419, 424.)
44. The Parents rejected the NOREP for the August 2022 IEP on August 18, 2022. (P-15.)
45. The day after the August 2022 NOREP was rejected, the Parents provided the transition survey form to the District. (P-16.)

46. The District did not contact the Parents to schedule a tour of the high school prior to the start of the 2022-23 school year because they had provided the signed NOREP rejecting the proposal before those tours occurred. (N.T. 297, 299.)

Independent Educational Evaluation

47. The Parents requested an Independent Educational Evaluation (IEE) at public expense in July 2022. The District denied that request and filed its own Due Process Complaint to defend its decision; that case was dismissed after the Parents withdrew the IEE demand. (P-25.)
48. The Parents obtained an evaluation styled as an IEE in September 2022, after the school year for Private School had started. This evaluator identified Student as eligible for special education based on Specific Learning Disability in the areas of basic reading skills, reading comprehension, reading fluency, written expression, math reasoning, and math calculation. (P-17.)
49. After receipt of the private evaluation, the District sought consent to conduct another reevaluation of Student, but the Parent declined. (P-20.)
50. The private evaluator issued two supplemental reports in the fall of 2022, neither of which followed or related to additional assessments but rather provided opinion supporting the Parents' position on the issues presented in this case. (P-18; P-19.)

Private School

51. Private School serves students with learning differences from first through twelfth grade. Students in grades nine through twelve attend the upper school with a total of approximately 140 students. (N.T. 173-74, 181; P-28 at 2.)

52. Private School provides a college preparatory curriculum with an emphasis on Orton-Gillingham principles. Students in the upper school have courses in English/language arts, mathematics, science, and social studies, as well as electives, with block scheduling (sixty-five minute periods). Students also have two daily advisory periods with organizational, planning, and time-management support, and time to meet with their advisor in small groups and teachers as needed. (N.T. 174-77, 179-80, 197-98, 213-14; P-28.)
53. Class sizes at Private School range from four to eleven students with one teacher. (N.T. 176, 195-97, 223)
54. Teachers at Private School are provided with a learning profile of each student wherein their individual academic strengths and weaknesses and any social/emotional needs are set forth. Student's learning profile for the 2022-23 school year is two pages in length. (N.T. 191; P-29 at 1-2.)
55. Extracurricular activities such as clubs are available at Private School. (N.T. 175; P-28.)
56. The Parents signed an enrollment contract with Private School for the 2022-23 school year in March 2022, but their first payment was not made until early September 2022. (P-31.)
57. As of the end of the first trimester of the 2022-23 school year, Student was exhibiting progress in all classes, at times with supports such as modeling and practice, frequent check-ins, chunking of tasks; and one-on-one conferencing, coaching, and instruction were noted to be helpful for Student. The grades at the end of that trimester were all in the A to B range. (P-29.)

58. The Parents have observed that Student has gained confidence at Private School, enjoys attending there despite the commute, and has demonstrated success in areas of deficit. (N.T. 66-69, 73-76.)
59. The Parents have incurred expenses for transporting Student to Private School over the 2022-23 school year. (P-34.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, the burden of persuasion in this case rests with the Parent on the issues presented by that Complaint, and the District bears that burden with respect to its reevaluation. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also 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); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them and based on his or her perspective, and without any intention to mislead. The weight accorded the testimony was not, however, equally placed, and is discussed below as necessary.

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

General IDEA Principles: Substantive FAPE

The IDEA requires each of 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. Some 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 various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student 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 confirmed, 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, thus, a focal point for purposes of IDEA programming. 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 that are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Andrew F.*, *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 standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

General IDEA Principles: Procedural FAPE

The special education program is developed by a team that includes the parent(s); at least one regular education teacher if the student will or may participate in regular education; at least one special education teacher, and an LEA representative, among other participants. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.320, 300.321(a). From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E). This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 (OSEP 2001)(confirming the position of the Office of Special Education Programs that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents).

General IDEA Principles: Least Restrictive Environment

The IDEA contains a fundamental mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards. Such determinations are based on what is appropriate for the individual child.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); *see also 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).

LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. The “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115. An out-of-district private school is, of course, a more restrictive setting than an in-district school.

General IDEA Principles: Parental Placements

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., supra*, 575 F.3d at 242. 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); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The District's Claim

The issues are best addressed by beginning with the District's April 2022 RR and whether it was appropriate, since it formed the very foundation for the development of the May and August 2022 IEPs and the request for reimbursement for the private evaluation. This issue raised by the District seeks to establish that its reevaluation of Student in April 2022 met all requirements of the IDEA, and that the Parent is not entitled to reimbursement for the private evaluation. The Parent disagrees, arguing that specific omissions in the reevaluation are fatal, entitling her to relief.

The District's reevaluation in April 2022 unquestionably utilized a variety of assessment tools, strategies, and instruments (rather than any single measure) to gather relevant functional, developmental, and academic information about Student, all relating to areas of Student's suspected disabilities. This is precisely what the IDEA and its implementing regulations require.

More specifically, the April 2022 RR included assessment of cognitive ability and academic achievement; and utilized several forms of rating scales to evaluate Student's social/emotional functioning including characteristics of ADHD, as well as executive functioning skills. The District expressly incorporated results of previous evaluations it conducted; obtained and reported information from the Private School teachers; and included a classroom observation by the District school psychologist at Private School. The April 2022 RR summarized and reviewed all data and available information that was gathered, assessed all relevant areas of need, and then proceeded to determine Student's eligibility for special education based on its results. The testimony of the District school psychologist was accorded significant weight in considering the parties' respective positions on the adequacy of the April 2022 RR, namely whether all areas of suspected disability were adequately assessed. Certainly any evaluation could include more types or forms of assessment, but the basis for not conducting additional testing was persuasively explained by the District school psychologist.

This RR identified a number of Student's areas of strength and weakness, and made programming recommendations for the IEP team to address Student's individual profile. A meeting convened with the Parent to review the April 2022 RR. Viewing the record as a whole, and according appropriate weight to the testimony of the evaluating professionals discussed above and below, the record evidence is preponderant in this particular case that the District's April 2022 RR was sufficiently comprehensive to identify Student's special education and related service needs in all areas of suspected disability. This RR thus served the purposes of a special education evaluation; and, the District has met its burden of

persuasion. Accordingly, the Parent is not entitled to reimbursement for the private evaluation.⁴

The Parent's Claims

The next issue to address is whether the District's proposed IEP in April 2022 as revised in August 2022 was reasonably calculated to permit Student to achieve meaningful educational benefit. It is noteworthy in relation to this issue that both parties suggest that the other party predetermined Student's placement. There is evidence in the record to support both assertions to some degree, but proper consideration of this prong of the tuition reimbursement test requires a more thorough analysis.

The parties proceeded according to the terms of their agreement to develop programming for the 2022-23 school year following an RR. A complete draft IEP was provided to the Parent the day before a scheduled meeting, and the only version of the IEP in the record bears the same May date as that of the meeting. That IEP specifies placement in the District high school in a program of learning support at a supplemental level. The Parents immediately, and prior to the meeting, questioned the proposed placement. Although the May 2022 NOREP indicates that both regular education and Private School were options considered, nothing in the record corroborates that statement, and it is contradicted by the IEP itself.

Moreover, even assuming that the District did not predetermine the placement, the record is clear that the Parent has had ongoing concerns with Student accessing grade level materials, something with which Student struggled over the 2019-20 school year across classes in the District. The District's May 2022 IEP proposed participation in general education for at

⁴ As the District correctly observed throughout the hearing, this evaluation was not available to the IEP team at the time of the May and August 2022 meetings, so its contents cannot be considered in evaluating its proposed program. The supplemental reports are not evaluations and would not qualify for reimbursement in this forum in any event.

least part of the school day, yet no regular education teacher was present to describe how that would be implemented effectively for Student. This procedural error resulted in a serious obstacle to the Parents' ability to participate meaningfully in the development of the IEP and the crucial placement decision by the team. Additionally, this flaw was not cured at the time of the August 2022 revision, and is accordingly a basis for a remedy.

Substantively, the IEP as developed in May and revised in August 2022 was directly and appropriately responsive to Student's identified needs, including targeted goals for identified areas of deficit; direct reading instruction; individualized instruction and expectations; a small student to teacher ratio; executive functioning support and instruction; modeling, practice, and repetition; and access to the general education curriculum with materials appropriate for Student's level of functioning. The concerns of the Parents about Student's likely difficulty in making the transition back to public school were addressed through a variety of provisions including a tour of the building and weekly meetings with a counselor. In sum, the record more than preponderantly supports a conclusion that the proposed IEP for the 2022-23 was substantively appropriate under the law.

Some of the Parent's expressed concerns with the content of the IEP warrant discussion. As is relevant to this case, the law does not require that IEPs include the specific educational methodologies within the document. *M. v. Falmouth School Department*, 847 F.3d 19, 27-28 (1st Cir. 2017)(citing 20 U.S.C. § 1414(d)(1)(A)(ii)(I); 41 Fed. Reg. No. 156 at 46665 (2006)). The items of specially designed instruction she described as vague (N.T. 82-83, 155) suggest not a dispute about those provisions, but rather a lack of trust that the District would implement them, which is an entirely different question. The objection to other students with disabilities who have different needs being present in Student's classrooms (N.T. 80-81) is

puzzling at best; all students with disabilities have rights under the law that the District is mandated to provide, including participation across educational settings and in the least restrictive environment. Finally, the Parent's belief that the proposed IEP is essentially a continuation of the program during the 2019-20 school year, which she considers to have been largely ineffective, is evidence only a basis for her objections; Student is older and presents with different abilities, needs, and maturity that prevent any conclusions to be drawn by such direct comparisons even if one agrees that the 2022 proposed IEP was the same as one in the past.

Having found that the District's proposed May and August 2022 IEPs were procedurally inappropriate, the next issue is whether Private School is appropriate. At the time that the Parents ultimately determined that Student would attend Private School for the 2022-23 school year, Student had already exhibited progress in that environment and was demonstrating growth. The teachers at Private School reported Student's achievements and successes and their ability to provide for individual needs. Private School provides programming that is aligned with Student's areas of deficit in small class sizes with individual attention. This hearing officer concludes that Private School is appropriate for purposes of the second step of the tuition reimbursement analysis. The program at Private School is additionally remarkably similar and comparable to that offered by the District in May and August 2022.

The last question is whether the equities favor a reduction or denial of the remedy. The Parents without a doubt advocated for Student's continued enrollment at Private School in November 2021 and into the spring of 2022; signed an enrollment contract with Private School in March 2022; declined to permit another reevaluation by the District after their private evaluation was completed; and, their rejection of the May 2022 IEP was immediate upon receipt of the draft and again following the meeting, reflecting a lack of any

deliberation or true consideration. On the other hand, they contributed to the April 2022 RR and attended the May and August 2022 IEP meetings, providing input and concerns; made Student available for testing for development of the IEP; responded promptly when asked throughout the relevant time period; and did not make the first payment for the tuition for the 2022-23 school year until September 2022. On balance, in the view of this hearing officer, the Parents' ongoing objective manifestations of an intention to continue Student at Private School provide an equitable basis for reducing the reimbursement for tuition for the 2022-23 school year by 10% but nothing more.

The attached order provides a remedy for the procedural IDEA violation for the 2022-23 school year, and also provides directives to the IEP team to prepare for the 2023-24 school year. It may be appropriate at that time for Student to return to the public school environment, a much less restrictive setting where even the Parent wishes Student to attend (N.T. 87-88).

CONCLUSIONS OF LAW

1. The District's April 2022 reevaluation of Student was appropriate and the Parent is not entitled to reimbursement for the private evaluation.
2. The District's proposed IEP for the 2022-23 school year was substantively appropriate for Student, but the procedural flaws were significant and warrant relief.

3. The Parent is entitled to reimbursement for 90% of the total cost of tuition at Private School for the 2022-23 school year together with transportation expenses.

ORDER

AND NOW, this 30th day of January, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's reevaluation of Student in April 2022 was appropriate under the law.
2. The District's proposed IEP for the 2022-23 school year was substantively appropriate for Student.
3. Procedural flaws in the District's proposed IEP for the 2022-23 school year significantly impeded the Parents from meaningful participation in its development and the placement decision.
4. The Parent is entitled to reimbursement of 90% of the cost of Student's tuition to Private School for the 2022-23 school year. The District shall provide reimbursement within thirty calendar days of receipt of (a) proof of payment to date and (b) invoices for future payments for the 2022-23 school year.
5. The Parent is entitled to reimbursement for the expenditures incurred in providing transportation for Student to Private School for the 2022-23 school year. The District shall provide reimbursement within fifteen calendar days of the date of this order for the full amount set forth on P-34 at 7, and within thirty calendar days of receipt of future transportation expenses

provided in the same format and with the same detail. The District, at its election, may provide that transportation for Student at any time through the end of the 2022-23 school year and end its reimbursement to the Parent for those expenses.

6. Within forty-five calendar days of the date of this order, the District shall convene a meeting of Student's IEP team including the Parents to begin discussion of a program for the 2023-24 school year. A final proposed IEP shall be provided to the Parents no later than May 3, 2023, followed by a new NOREP within seven calendar days. All procedural safeguards shall attach to that NOREP.
7. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms provided such agreement is in writing.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 27141-22-23