

*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:**

25406-21-22

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

S.D.

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

[redacted]

#### **Parents:**

[redacted]

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

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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

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

03/15/2022

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, S.D. (Student),<sup>1</sup> is a middle elementary school-aged student residing within the boundaries of the School District of Philadelphia (District). 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> Student currently is in a private school placement (Private School) at the option of the Parents.

In the fall of 2019, the parties executed a settlement agreement that provided for, among other things, a process for development of a program for future school years. Following the District's proposal for the 2021-22 school year, the Parents filed a Due Process Complaint challenging that program under the IDEA, Section 504, and the Americans with Disabilities Act (ADA).<sup>4</sup> As remedies, the Parents sought reimbursement for tuition and related expenses or in the alternative compensatory education, an order for pendency, and reimbursement for a private evaluation.

The case proceeded to a very efficient due process hearing.<sup>5</sup> The Parents sought to establish that the District's evaluation and proposal were

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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> 42 U.S.C. §§ 12101-12213.

<sup>5</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, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The

not appropriate on both procedural and substantive grounds, that Private School meets Student's needs, and that they should be reimbursed for tuition and the cost of their private evaluation. The District maintained that its special education program, as offered, was appropriate for Student under the IDEA, that it complied with all of its obligations, and that no remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parents must be granted in their entirety.

## **ISSUES**

1. Whether the District complied with its obligations to Student both procedurally and substantively in its completion of the spring 2021 evaluation;
2. Whether the District complied with its obligations to Student both procedurally and substantively in its program offer for the 2021-22 school year;
3. If the District failed in its obligations to Student, whether the Parents and Student are entitled to reimbursement for tuition and related expenses at the private school or alternatively compensatory education;
4. Whether the Parents are entitled to reimbursement for a private evaluation of Student; and
5. Whether an order for pendent services at the private school is warranted?

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cooperation of the parties and their counsel in presenting a succinct yet comprehensive record, including written stipulations (HO-2), is commendable.

## **FINDINGS OF FACT**

1. Student is a middle elementary school-aged resident of the District. Student is eligible for special education based on Autism Spectrum Disorder (ASD), Speech/Language Impairment, and Other Health Impairment. Student is also disabled and entitled to Section 504 protections by the District. (N.T. 52-56, 350-51; HO-1.)
2. The Parents have been very actively involved in Student's educational programming. (N.T. 54-55.)
3. Student has expressive language deficits due to childhood apraxia of speech. Student's vocalizations generally involve no more than two or three words at a time and is of limited intelligibility to those unfamiliar with Student's speech. (N.T. 58-59, 318-21; P-4.)
4. Student has sensory needs that result in dysregulation; is unable to perform basic activities of daily living; and does not tolerate close contact with peers. (N.T. 57-60, 318-21.)
5. Student was evaluated by the District in 2017 as Student was preparing to transition to school-age programming. In the resulting Reevaluation Report (RR), the District noted Student's then-current Applied Behavior Analysis (ABA) programming (ten hours per week) along with speech/language and occupational therapy. Student was determined to be eligible for special education based on ASD and Speech/Language Impairment; recommendations included instructional programming incorporating ABA. (P-5.)
6. Student attended a private school placement beginning in [redacted] (2018-19 school year) through the first half of the 2020-21 school year

(first private school). That placement was at District expense pursuant to a settlement agreement. (N.T. 61-62; P-2.)

7. The Settlement Agreement was executed in October 2019. Express terms included a requirement that the Parents convey by February 1 of the then-current school year (to a specific email address) any request for the District to develop a program for Student; and the District would have the opportunity to offer an Individualized Education Program (IEP) by April 31 [sic] of that then-current school year. The Agreement further provided that the first private school placement that Student attended beginning in the fall of 2018 would be the pendent placement in the event of a future disagreement or District failure to comply with the specified timelines in the document. (N.T. 219; P-2 at 5.)
8. Student was asked to leave the first private school placement midway through the 2020-21 school year because of aggressive behavior. The Parents enrolled Student in a cyber charter school for the remainder of that school year. Student was also provided private behavioral health services (ABA) as well as occupational and speech/language therapy. (N.T. 62-64, 102.)
9. The first private school developed an IEP for Student in June 2019.<sup>6</sup> That document contained annual goals with short term objectives, addressing receptive language, expressive language, pragmatic language, motor speech, early reading skills, reading comprehension, early mathematics skills, written expression, social studies and science content knowledge, and occupational therapy (social skills, sensory

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<sup>6</sup> This is the IEP that was provided to the District in early 2021. There is a subsequent IEP in the record (P-41) from June 2020 that evidently was not provided at the time of the Parents' January 2021 communication to the District. (P-6.) In any event, the June 2020 IEP contains essentially the same needs and no goals were added; however, the section on program modifications/items of specially designed instruction was revised to reflect services during school closures due to the pandemic.

regulation and awareness, fine motor skills, vestibular processing, auditory and visual processing, gross motor skills, balance). Numerous program modifications and items of specially designed instruction were also included. (P-6 at 48-79.)

10. The first private school program provided for occupational therapy (4 hours each week and speech/language therapy (10.5 hours each week), with ABA services, and an 11-month term of educational programming. (P-6; P-19; S-4.)

### **Preparation for 2021-22 School Year**

11. The Parents intended to enroll Student in the District for the 2021-22 school year. On January 28, 2021, they sent a message to the specified District email address set forth in the Settlement Agreement and asked “that the District offer FAPE and placement [] for the 2021-22 school year.” They also attached records to that message (academic achievement and speech/language evaluations by the first private school in 2019, and Student’s IEP from June 2019). (N.T. 67; P-6.)
12. A reply from the specified District email address was sent to the Parents on February 2, 2021, copied to several District staff members. The Parents were asked to sign a form for release of information, and they did so on February 11, 2021. (P-7; P-8; S-9 at 25.)
13. On April 9, 2021, the District advised the Parents via email that a multidisciplinary team had reviewed Student’s records and asked permission to conduct a reevaluation with assessment of psychological and cognitive functioning, academic achievement, social/emotional functioning, adaptive behavior, and occupational therapy needs. The Parents replied with their consent on April 13, 2021. (P-9; P-10; S-2; S-3; S-10 at 6.)

14. On April 19, 2021, a District school psychologist contacted the Parents with two rating scales for them to complete and a parent input form. The school psychologist and the Parents then communicated about the method of administering assessments. (P-11; P-12; P-13; S-10 at 1-2, 8-9, 22.)
15. The parties discussed various options for conducting in-person assessments of Student in the spring of 2021. One option, for Student to undergo a COVID-19 test prior to test administration, was considered to be not possible because of Student's sensory regulation difficulties and the impact on any assessment afterward. The parties ultimately agreed to forgo in-person assessment until the fall, with the Parents deferring to the expertise of the school psychologist. (N.T. 75-79, 120-21, 141-43; P-13; P-14; S-10 at 1-2, 21.)
16. The Parents completed all required forms, with one returned in an abbreviated format after some delay. (N.T. 81, 140, 143, 154, 157; P-16; P-30.)
17. On May 18, 2021, the Parents sent a message to the District email address specified in the Settlement Agreement and to a District representative with whom they were in contact in early April, informing the District of their intention to place Student in a private school at its expense because no program or placement had yet been offered. (P-15.)
18. The District has no record of receiving the Parents' May 18, 2021 email message.<sup>7</sup> (N.T. 193, 215-16.)

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<sup>7</sup> The District representative included on the Parents' May 18, 2021 message was no longer employed by the District at some point in or about the spring of 2021.

## **June 2021 RR**

19. The District issued its June 2021 RR based on a review of records, including previous evaluations. (N.T. 137-38, 139-40.)
20. The June 2021 RR summarized previous history and records and input from the Parents and a first private school related service provider, noting Student's history of ABA services and occupational and speech/language therapy. Parent input included memory and effort as strengths, with speech, behavior, academic skills, and occupational therapy as needs, as well as support for changes to routine. They provided Student's diagnoses of ASD, Apraxia of Speech, ADHD, sensory processing disorder, and an expressive/receptive communication disorder; and identified Student's needs for a one-on-one aide with ABA training and program oversight by a BCBA. (P-19 at 2-6; S-4 at 1-5.)
21. The first private school representative's input into the June 2021 RR reflected reading and spelling as strengths, with needs including behavioral concerns and compliance. In a conversation, staff also relayed that Student was in a class with 7 students, 6 aides, 2 classroom assistants, and a teacher, and sometimes therapists were also present. For approximately two months in early 2021, prior to Student's disenrollment, Student was in a separate classroom with only an aide and teacher due to significant behavior (aggression). (P-19 at 2-3; S-9 at 11; S-4 at 1-2.)
22. Rating scales were completed by the Parents and a first private school representative for the June 2021 RR (Vineland Adaptive Behavior Scales – Third Edition (Vineland-III) and Behavior Assessment System for Children – Third Edition (BASC-3)). (P-19 at 8-17; S-4 at 8-16.)



23. On the BASC-3, the teacher ratings for the June 2021 RR indicated clinically significant concerns with hyperactivity, aggression, conduct problems, depression, attention problems, atypicality, withdrawal, social skills, leadership, study skills, and functional communication; with an at-risk concern with anxiety. The Parents' scales endorsed clinically significant concerns with hyperactivity, atypicality, withdrawal, attention problems, social skills, leadership, activities of daily living, and functional communication; and at-risk concerns with aggression and adaptability. (P-19 at 9-14; S-4 at 8-13.)
24. The Vineland-III rating scales for the June 2021 RR yielded results overall well below the norm at below the 1<sup>st</sup> percentile (teacher) and at the 1<sup>st</sup> percentile (Parents). (P-19 at 14-17; S-4 at 13-16.)
25. The June 2021 RR identified Student as eligible for special education based on ASD and Other Health Impairment (ADHD). Recommendations included a highly structured, language-enriched environment with a low student to teacher ratio; a curriculum emphasizing functional academics, communication, adaptive skills, and socialization; a Functional Behavioral Assessment (FBA) and Positive Behavior Support Plan (PBSP); and a variety of strategies to address Student's various needs. (P-19 at 26; S-6 at 9.)
26. The District convened a meeting with the Parents on June 8, 2021. The Parents were not provided the RR or IEP prior to the meeting. (N.T. 69, 87-88, 192; P-18; P-19 at 1; S-5.)

### **June 2021 IEP**

27. A proposed IEP was developed in June 2021. The IEP contained annual goals addressing emotional and behavioral regulation; interpersonal communication; and functional academics (sight words, reading fluency,

reading comprehension, mathematics computation and problem solving, telling time). Several program modifications/items of specially designed instruction were included: support for transitions, emotional and behavioral regulation, sensory processing, and understanding directions; frequent breaks and extended time; and small group instruction. Speech/language (individual and group, 60 minutes weekly) and occupational therapy (individual, 20-25 minutes weekly) in addition to a one-on-one aide were noted as related services. (P-19 at 46-87.)

28. The June 2021 IEP determined that Student was eligible for extended school year (ESY) services; and proposed a program of autistic support at a supplemental level in the neighborhood school, with Student participating in general education when not receiving instruction with respect to IEP goals. Student would have had a one-on-one aide throughout the day with the exception of lunch, when other staff would support Student. Although District team members considered an ABA-based program, that was not the proposal made. (N.T. 130-31, 184-85; P-19 at 89-93; P-26.)
29. The District intended to conduct a reevaluation in the fall of 2021 and then revise the IEP to reflect current needs. (N.T. 168.)
30. There were no speech/language or occupational therapy goals in the June 2021 IEP because Student had not been assessed by those related service providers. No speech/language or occupational therapist provided input into the June 2021 proposed IEP. (N.T. 168-69, 197-98.)
31. The Parents returned the Notice of Recommended Educational Placement accompanying the June 2021 IEP on June 18, 2021,

disapproving the proposal. They requested mediation at that time. (P-20.)

32. The District provides ABA-based services through each of its autistic support programs. All of its teachers and support staff in autistic support programs are trained in ABA principles. (N.T. 177-78, 184-85, 189, 202.)
33. Another IEP meeting was held with the Parents in late September 2021 after the parties were unable to resolve their disagreement through mediation. The Parents were not provided with a copy of the new IEP prior to the meeting, but it was revised only to add weekly communication with the parents. (N.T. 93-95, 190-91, 194; P-24.)

### **Independent Educational Evaluation**

34. The Parents obtained an Independent Educational Evaluation (IEE) that was conducted over a six month time period in 2021, ending with an observation in October at Private School. Multiple testing sessions were necessary with time in between as the Parents sought physician consultation to explore medication trials to address Student's inattention and distractibility that impacted Student's participation in assessments. (N.T. 96, 351-55, 370-72; P-3.)
35. Assessment of cognitive ability (Differential Ability Scales – Second Edition Early Years Battery) for the IEE reflected Student's better performance with visual tasks (16<sup>th</sup> percentile) than with verbal tasks (below the 1<sup>st</sup> percentile). Student attained a score below the 1<sup>st</sup> percentile on assessments of memory and comprehension of instructions. (P-3 at 12-13, 21.)
36. On assessments of academic achievement, results in the IEE reflected emerging basic reading and writing skills with more difficulty with

reading comprehension (an applied task), and less developed mathematics skills (computational and applied). (P-3 at 15, 22.)

37. Assessment of language skills for the IEE revealed significant receptive language deficits. (P-3 at 13-14, 21.)
38. Student's emotional/behavioral functioning was also assessed for the IEE ((BASC-3) and Behavioral Rating Inventory of Executive Functioning – Second Edition (BRIEF-2)) completed by the Parents. One or both Parent ratings endorsed clinically significant concerns with hyperactivity, atypicality, withdrawal, social skills, functional communication; they also reported elevated concerns across Indices of executive functioning (behavioral regulation and emotional regulation) and overall. (P-3 at 14-15, 23.)
39. Assessment of Student's adaptive functioning through parent and teacher rating scales reflected poor adaptive skills with respect to Conceptual, Social, and Practical Composites (Parents) and, for the teacher, all Composites. The Parents reported average range functioning with Home Living. (P-3 at 16, 24.)
40. Additional assessment of Student's visual, perceptual, and motor skills for the IEE revealed a strength in some visual-spatial skills, with some weaknesses in fine motor skills. (P-3 at 14, 22.)
41. The private neuropsychologist identified significant deficits with respect to expressive and receptive language; attention and self-regulation; and adaptive functioning. Cognitively, she determined that Student met criteria as a child with Intellectual Disability; she also identified ASD and ADHD as additional diagnoses. (P-3 at 16-17.)

42. The private neuropsychologist recommended a specialized program and placement for Student based on ABA principles with intensive one-on-one instruction, intensive speech/language/communication support, and behavioral support; academic and fine motor skills needs were also areas of need. She further advised that Student's instruction could not be delivered in a small group. (N.T. 357-62, 366, 369-70; P-3.)
43. Student requires an educational program supervised by a BCBA. (N.T. 395-96, 401.)

### **Private School**

44. On August 3, 2021, the Parents signed an enrollment contract with Private School "to secure [Student's] spot" (P-35 at 1) for the upcoming school year. Student was enrolled. (N.T. 60-61, 90; P-35.)
45. The Parents provided notice to the District on August 23, 2021 of their enrollment of Student in Private School. They also noted their continued interest in a District evaluation of Student in person in the fall of 2021. (P-22.)
46. The District denied the Parents' request to fund Student's placement at Private School. (P-22.)
47. Private school serves children with ASD, particularly those with behavioral difficulties, ages six through twenty-one. There are thirty students in Private School this school year. (N.T. 61, 257.)
48. Class sizes at Private School are small, with three to six students in each and no fewer than one staff member to three students. Student is in a class of three students for the 2021-22 school year. (N.T. 257-58.)

49. Student is provided individual, one on one instruction throughout the school day at Private School with the exceptions of lunch and two recess periods. Student's instruction is intensive with ongoing repetition, redirection, and reinforcement. Student is provided with ABA programming throughout the school day overseen by a BCBA. Student's needs are addressed across all aspects of Student's program. (N.T. 244-47, 257-59, 267-70, 271, 326.)
50. Student's work space at Private School has dividers from peers' work spaces to limit Student's distractions and support Student's task engagement. Student is not able to engage in a group setting. (N.T. 264-65, 321-22, 336.)
51. Student does not have the skills necessary to engage with peers at Private School. As of February 2022, Student could tolerate sitting at a lunch table with peers for a period of three minutes. (N.T. 259, 262-64, 277-78, 297-98, 321-22.)
52. Private School developed an IEP for Student in November 2021. Needs identified were to increase flexibility; improve reading, written expression, and mathematics skills; increase use of functional communication and expressive language skills; and improve social skills. Annual goals with short term objectives addressed each of these areas as well as adaptive behavior, daily living skills, and fine and gross motor skills. The objectives included specific definition of the behavior/skills addressed and Student's present levels. (P-37.)
53. The November 2021 IEP at Private School contained a number of program modifications/items of specially designed instruction, including individual, ABA instruction; errorless learning; prompts and reminders; support for transitions; visual supports; and behavioral supports.

Occupational and speech/language therapy (150 minutes and 120 minutes weekly, respectively) as well as ESY were also included in a program of full time autistic support. (P-37.)

54. Following an FBA, a Behavior Intervention Plan was also developed for Private School to address the identified target behaviors (screaming, tantrumming with or without aggression) through antecedent strategies, teaching of replacement behaviors, and consequences. (N.T. 287; P-39; P-40.)
55. Student is provided a structured multisensory reading program at Private School. That program targets Student's reading decoding and comprehension skill deficits. (N.T. 266, 281-82.)
56. Student receives speech/language therapy services for four thirty-minute sessions by a qualified provider at Private School to address deficits in all domains of language (receptive, expressive, and pragmatic). Student's program also includes push-in language support across school settings. (N.T. 317-20, 322-28.)
57. Student receives daily occupational therapy services for thirty minutes from a qualified provider at Private School addressing fine and gross motor skill deficits and bilateral coordination, as well as sensory regulation and sensory-seeking/sensory avoidance behaviors. (N.T. 232-33, 237-42.)
58. The IEP at Private School was updated in January 2022 to include results from a recent administration of the Verbal Behavior Milestone Assessment and Placement Program (VB-MAPP) and other assessments. (P-37.)

59. Private School collects data on Student's progress toward IEP goals and objectives. Student has acclimated well to Private School, is able to follow routines there, and works independently for brief periods of time. Student has made gains in acquiring prerequisite skills and exhibited progress on Private School IEP goals and objectives. (N.T. 245-46, 295-96, 298-300, 337; P-38.)

## **DISCUSSION AND APPLICATION 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. 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). Accordingly, the burden of persuasion in this case must rest with the Parents who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "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. In the relatively few instances that there were contradictions among witness accounts, those are attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead. The weight accorded the evidence, however, was not



equally placed. Specifically, the testimony of the Parents' private neuropsychologist (N.T. 347-83) was extremely knowledgeable and persuasive; that testimony together with her report were accorded significant weight. The testimony of the Private School representatives was similarly well-informed and convincing with respect to Student's current programming and how needs are addressed; and that of the Parents' educational consultant (N.T. 387-420) was insightful regarding Student's need for intensive ABA programming, although it was rather cumulative in other respects. Less weight was given to the testimony of the District witnesses who were certainly credible but lacked firm understanding of Student's disability-related needs as of the summer of 2021 and start of the 2021-22 school year.

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, 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). Additionally, 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). “The IEP *must aim* to enable the child to make progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original). IEP development, of course, must follow and be based on an evaluation as monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

## **Evaluation Requirements**

Substantively, the IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i). Certain procedural requirements are set forth

in the IDEA and its implementing regulations that are designed to ensure that all of the child's individual needs are appropriately 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[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide

relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see *also* 20 U.S.C. § 1414(b)(3).

In Pennsylvania, LEAs are required to provide a report of an evaluation or reevaluation to parents within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

Finally, when parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Parents are entitled to an IEE funded by the LEA if its evaluation does not meet IDEA criteria. Here, the Parents obtained an IEE and thereafter sought reimbursement for its cost. However, the analysis is the same in this context.

### **General IDEA Principles: Least Restrictive Environment**

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

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).

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

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

*Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007).

### **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.*

### **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). Further, the substantive 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). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

## **The Parents' Claims**

The first issue is whether the District's RR issued in June 2021 met its obligations to Student. As noted, the District was to respond to the Parents' request for a program offer by conducting an evaluation by the end of April of the then-current school year. The Parents notified the District as agreed in late January 2021 of their interest in such an offer. The District immediately responded and sought release of information. However, it was not until two months later that the District sought to actually conduct the reevaluation.

While one can certainly understand the impact of the pandemic on the District's ability to administer assessments under the circumstances presented, and perhaps even accept that the procedural delay is excusable, the June 2021 RR did contain a wealth of information about Student to guide the IEP team. However, it is perplexing that no speech/language or occupational therapists was involved, nor was a BCBA consulted, despite the District's clear knowledge of Student's significant needs in those areas. The parties' agreement to delay assessments until the fall of 2021 cannot be construed as an acquiescence to an incomplete evaluation, or one that failed to serve its purposes: determining disability and identifying educational needs. The District's June 2021 RR clearly failed to adequately explore the latter and, thus, did not assess all areas of Student's disabilities. Accordingly, the June 2021 RR was substantively inappropriate under the express IDEA criteria.

It is logical to next proceed to the Parents' request for reimbursement for their private evaluation. The IEE was conducted by a qualified professional who conducted a variety of assessments over a period of time that allowed for valid results. While it is true that the IEE was not issued until after Student enrolled in Private School and was not available at the time of the District's program offer, the circumstances surrounding the delay

were beyond the control of the evaluator and the Parents. Her recommendations for programming are wholly supported by the record as a whole, and this hearing officer concludes that there is no reason to deny reimbursement for that IEE.

The next issue is whether the program that was offered was appropriate for Student. This analysis requires consideration of both the procedural and substantive aspects of the proposed IEP. Procedurally, the June 2021 RR and IEP did not meet the deadlines in the Settlement Agreement, but the parties did meet at that time to discuss the program that the District developed, prior to Student's enrollment at Private School, and the delays may be considered harmless error for purposes of this decision.<sup>8</sup> The fundamental procedural flaw in the IEP is that it lacked any indication that Student would be provided with ABA services or that a BCBA would be involved and, if so, to what extent. The need for ABA is evident throughout Student's history and is documented in the District's previous evaluations. This significant omission must be examined in light of some authority that limits review of this type of claim to the four corners of the IEPs. *See, e.g., R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012)(rejecting retrospective testimony about services beyond those contained in the IEP or that would suggest an alteration to its terms, but accepting evidence that explains or justifies its provisions). This "four corners" principle can be somewhat contradictory to the law's mandate for a meeting of the IEP team in order to discuss the document itself. *See* 20 U.S.C. §§ 1414(d)(1)(B) and (C); 34 C.F.R. §§ 300.321, 300.322. As such, review of a proposal cannot wholly disregard information that is beyond the IEP content.

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<sup>8</sup> As previously set forth, this issue is decided outside of any claim of breach of the agreement. (HO-1.)



There was testimony at the hearing that the District did intend to involve a BCBA in Student's program that would include and was based upon ABA services. The District did therefore recognize Student's needs for those elements in its program, and that testimony supports the other evidence in the record that Student does requires such programming. But the Parents cannot be expected to glean a complete understanding of a program offer that goes far beyond the content of the IEP, even as may have been discussed at a meeting. This hearing officer concludes that the omission of critical ABA services in the proposal renders the Parents' participation in decision-making less than that contemplated by the IDEA. "As a practical matter, meaningful participation requires a reasonable degree of understanding to allow parents to make an informed decision about their child's education." *Montgomery County Intermediate Unit No. 23 v. A.F.*, 506 F. Supp. 3d 293, 309 (E.D. Pa. 2020)(citation omitted). And, these flaws also amount to substantive inappropriateness. *Id.* For all of these reasons, the conclusion is inescapable that the program proposed by the District in June and September 2021 was not reasonably calculated to provide meaningful educational benefit for Student.

This is not to say that the District's proposed program is wholly inappropriate based on information known. For example, the only information the District had in June 2021 regarding Student's ability to participate in small group instruction was a report of a limited time period in early 2021 by a school Student no longer attended. And, it may well be that the District could have revised Student's IEP as planned following assessments as staff gained necessary understanding of Student's unique circumstances. But the Parents had to make a decision in June 2021 based on what was proposed then, not what may have occurred in the future.

Having found a denial of FAPE for purposes of tuition reimbursement, the next issue is whether Private School is appropriate. Private School

provides the small, structured, ABA-intensive program that Student requires in order to make progress. Student's instruction is individualized, delivered one-on-one, and overseen by a BCBA. The program as a whole is implemented to enable Student to make gains across domains. Private School addresses all of Student's needs through an IEP that is extremely detailed and includes a behavior plan, and for Student, is the LRE. This hearing officer concludes that the Parents have more than preponderantly established the appropriateness of Private School for purposes of the second prong of the analysis.

The *Burlington-Carter* test further requires a balancing of the equities. There were a number of challenges presented to the parties in this case, but the equities do not favor or disfavor either over the other. As such, there is no basis to reduce or deny tuition reimbursement.

The final issue is whether Private School is Student's pendent placement going forward. This question was addressed in a previous ruling at length.<sup>9</sup> Following completion of the record, and to the extent it remains an issue, the question must also be answered in the affirmative, for all of the reasons set forth above, unless and until the parties agree otherwise or a subsequent administrative or court decision is issued.

## **CONCLUSIONS OF LAW**

1. The District's June 2021 RR was not appropriate on substantive grounds.

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<sup>9</sup> HO-1.

2. The District's proposed program for Student for the 2021-22 school year was not appropriate on both procedural and substantive grounds.
3. Private School is appropriate for Student and the Parents are entitled to reimbursement for tuition and related expenses.
4. Private School is the pendent placement for Student from the date of this decision and order.
5. The Parents are entitled to reimbursement for the IEE.

## **ORDER**

AND NOW, this 15<sup>th</sup> day of March, 2022, 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 June 2021 did not meet its substantive IDEA obligations.
2. The District's offer of programming for the 2021-22 school year was not appropriate for Student.
3. Private School is appropriate for Student.
4. The Parents are entitled to full reimbursement for tuition and related expenses at Private School for the 2021-22 school year.

5. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all existing invoices and receipts for tuition and related expenses for Student at Private School for the 2021-22 school year.
6. Within fifteen calendar days of receipt of any additional or future invoices, the Parents shall provide documentation to the District of all subsequent tuition and related expenses for Student at Private School.
7. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all existing invoices for the IEE.
8. Within sixty calendar days of receipt of the above documentation, the District shall reimburse the Parents for the full amounts pursuant to this order.
9. Private School is Student's pendent placement through the date of any contrary administrative or court order, or subsequent written agreement of the parties.

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. 25406-21-22