

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:

24534-20-21

Child's Name:

B.P

Date of Birth:

[redacted]

Parents:

[redacted]

Local Education Agency:

Norristown Area School District
401 N. Whitehall Road
Norristown, PA 19403

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

September 30, 2021

Information and Procedural History

Student¹ is [a late teenaged student] and last attended school in the District in the fourth grade. At the beginning of the 2018-2019 school year, the Parents unilaterally placed Student in the tenth grade in a private school (Private School). The Student graduated from the Private School at the end of the 2020-2021 school year. Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² The Parents filed a due process complaint alleging that the District failed to offer the Student a free appropriate public education (FAPE), in violation of the IDEA, as well as the federal and state regulations implementing that statute.³ The Parents seek reimbursement for tuition costs and expenses for Student's attendance at a Private School during the 2020-2021 school year. In response, the District maintained that its offered program and placement were appropriate.

For the reasons that follow, the claims of the Parents are denied.

ISSUES

1) Did the District's proposed program and placement for the 2020-2021 year offer a FAPE to Student?

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

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

2) If the District's proposed program for the 2020-2021 school year was not appropriate and offer FAPE, are Student and the Parents entitled to reimbursement for tuition and related expenses for the private school placement Student attended during the 2020-21?

FINDINGS OF FACTS

First through Fourth Grade

1. The Student attended elementary school in the District from first through fourth grades. (J-1, p. 3)
2. In January 2013, the Center for Management of ADHD assessed the Student. The Student had average intellectual functioning, with low average verbal ability and average performance ability. Reading comprehension was low, while decoding and word identification skills were below average. Math problem solving was low, with computation below average. Scales assessing attention were elevated and the Student was determined to meet the diagnostic criteria associated with ADHD, combined type, and a specific learning disability in both reading and in math, with a note to assess for writing disorder. The report provided strategies and recommendations for treatment and that the Student have an IEP to address learning challenges. (J-3, p. 5)

Fifth through Ninth Grade

3. During the 2013-2014 school year, in the fifth grade, the Student transferred to a Charter School and was determined eligible for special education. (J-1)

4. The Student attended the Charter School through the ninth grade, ending with the 2017-2018 school year. (J-1)

2018 Private Evaluation

5. In August 2018, after Student completed ninth grade, the Parents obtained a private educational evaluation to address concerns about academic progress. The private evaluation assessed Student's aptitude, achievement, and levels of behavioral functioning. (J-1)
6. On the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) the Student demonstrated average cognitive ability. To assess academic achievement, the Wechsler Individual Achievement Test-Third Edition (WIAT-III) and the Grey Oral Reading Test, Fifth Edition (GORT-5) were administered to assess reading, writing, listening, and math skills. (J-1)
7. In reading, the Student's basic reading/word reading and decoding skills were in the average range. Student's passage/reading comprehension and oral fluency skills were below average. In writing, the Student's written expression composite fell within the lower end of the average range. In essay composition, the Student scored in the below average range. (J-1, pp 7-8, 22)
8. The Student's math skills were assessed using the math problem solving and fluency subtests. On the math fluency subtest, the Student scored in the average range on combined math fluency, with some variation between operations. Addition and subtraction fluency were both within the average range. Multiplication fluency was in the below-

average range. On the Math problem-solving subtest, the Student was permitted to use paper and pencil and the tasks were untimed. The Student earned a score in the average range. (J-1, pp. 8, 22)

9. In listening comprehension, as measured by the receptive vocabulary and oral discourse comprehension subtests, the Student demonstrated below-average skills. (J-1, p. 9)
10. The 2018 private concluded that the Student met primary classification criteria associated with a specific learning disability in reading and listening comprehension and a secondary classification of other health impairment (OHI) based on a diagnosis of ADHD inattentive type. (J-1, J-3)
11. The evaluator recommended goals and specially designed instruction (SDI) designed to support development of reading/writing skills and attention/executive functioning. It was further recommended that the IEP continue to implement Student's math goal until mastered. (J-1)
12. Based on Student's endorsement of items on the BASC-3, the evaluator advised that Student would benefit from individual counseling/mentorship to increase confidence and evidence-based cognitive behavioral therapy if the family chose a therapeutic route. (J-1, p. 18, J-3, pp. 11-13)
13. During the summer of 2018, through an agreement with the Charter School, the Student attended a summer program at the Private School.

2018-2019 School Year-Tenth Grade

14. At the commencement of the 2018-2019 school year, the Student enrolled in the tenth grade at the Private School attended during the summer. (J-3)
15. On April 16, 2019, the Parents contacted the District. They provided educational background, a summary of former evaluations and special educational needs, attributes of the Private School, and expressed interest in exploring the options their home district could offer. (P-16)
16. On May 24, 2019, the District issued permission to evaluate the Student. It proposed the administration of measures of cognitive functioning, academic achievement, social/emotional functioning, a review of records, and collection of teacher input. That same day the Parents consented to the evaluation of the Student. (P-16, S-20)

2019-2020 – Eleventh Grade

17. During the 2019-2020 school year, the Student attended the Private School enrolled in the eleventh grade at parental expense. (J-3)

District Evaluation

18. For completion of the District evaluation, the Parents provided the District with a 2013 evaluation from the Center for Management of ADHD, a 2016 evaluation completed by the Charter School, the 2018 private evaluation, the Student's report card from the 2017-2018

school year and a completed parent information form. (N.T. pp. 271-272)

19. The Parents' input concerned the Student's poor academic progress and educational needs in reading fluency and comprehension, expressive writing, staying on task, remaining organized as well as overall time management skills, self-advocacy, and "almost every conceivable area of executive functioning." (S-8)
20. On the parent information form, the Parents indicated that Student received mental health services. Although requested, the Parents did not provide treatment information to the District. (S-8; N.T. 369)
21. To complete the evaluation, the District administered WIAT-III achievement testing, conducted classroom and testing observations, collected input from teachers, Parents, and the Student, and reviewed existing evaluative data and educational records. The District and the Parents determined that additional aptitude testing was unnecessary because Student received three previous cognitive assessments that indicated average to low average ability. (J-5; N.T. pp. 362-363).
22. On the WIAT-III to assess reading skills, the Student received average scores in total reading and basic reading. On sub-tests, the Student demonstrated average performance in word reading and decoding and below-average skills in oral reading fluency and reading comprehension. The Student demonstrated the most difficulty with

reading comprehension with below-average performance in the seventh percentile. (J-5, pp.8- 9)

23. In Math, the Student's performance was below average in math problem solving, average in numerical operations, and average in math fluency. The Student's composite score in Math, derived from the math problem solving and numerical operations subtests, was below average. (J-3, p. 15-17).
24. In writing, the Student received an average score in written expression, with below-average sentence composition skills, average essay composition skills and average spelling skills. (J-5, p. 10)
25. Through administration of the BASC-3 and Conners rating scales, the District gathered information regarding Student's social-emotional, behavioral, and adaptive functioning. (J-3, pp.18-22)
26. The BASC-3 rating scales completed by teachers at the Private School indicated no concerns with Student's social/emotional behavior or externalizing/internalizing of school problems. (J-3, pp. 18-22)
27. The Conners-3 rating scales completed by teachers at the Private School indicated average hyperactivity/impulsivity scores but very elevated ratings for inattention and learning problems. Student's ratings relative to hyperactivity, defiance/ aggression, and peer relations were all average. (J-3, p.20; N.T. pp. 365-366)
28. On BRIEF-2 rating scales completed by a teacher, Student's behavioral, emotional, and cognitive regulation index scores were

average. On the self-report, the Student's task completion rating was mildly elevated. The Student's self-rated working memory, planning and organizing, emotional and behavior regulation as average. (J-3, pp. 21-22).

29. The District conducted two observations of the Student at the private school. In history class, Student and was not engaging in off-task motor or verbal behaviors and did not demonstrate any more distractibility than the other students in the classroom. In English, Student engaged in off-task behaviors. Student was a few minutes behind other students in following directions, engaged in conversations, rocked in the chair more than peers, and was about half the time engaged in off-task behaviors when the class was about 75 % more on task. (J-3, p. 1-2; N.T. pp. 370-371)
30. The private school teachers indicated that the Student had great social skills, good peer interactions in the classroom, was very likeable, had needs in the areas of comprehension and confidence, and that generally assignments were turned in on time. (J-3, p. 3; N.T. 372)
31. The District's 2019 evaluation determined Student had needs in oral expression, listening comprehension, reading comprehension, oral reading fluency, math problem solving, and focus/attention. (J-3, p.17; N.T. pp. 374-375)
32. Through the evaluation, the District concluded that the Student was eligible for special education based on a primary disability of specific learning disability (oral expression, listening comprehension, reading fluency skills, reading comprehension, mathematics problem-

solving). Student also qualified under a second disability category as a student with an Other Health Impairment (OHI) due to a diagnosis of ADHD. (J-3, p. 22; N.T. 374)

33. Programming recommendations for Student included multi-modal instruction, graphic organizers, chunking of material, wait time, verbal and non-verbal prompts, repetition of directions, and positive reinforcement. (J-3, p. 22-23; N.T. pp. 376-377)
34. On October 4, 2019, the District completed its evaluation report of Student, and the team convened to discuss the report with the family. At the meeting, the Parents did not express concerns or ask questions. (N.T. pp. 378-379)
35. On October 30, 2019, the District offered an IEP. On November 29, 2019, the Parents rejected the IEP, citing concerns that the offered programming would not prepare Student for college. The Parents expressed that Student needed a smaller, rigorous setting to make progress. The Parents requested an appropriate program and in the alternative that the District pay an amount to maintain the Student in the private school of attendance. (P-14)
36. On January 10, 2020, the District offered a second IEP. On January 16, 2020, citing numerous flaws, the Parents rejected the IEP. (P-11)
37. On April 27, 2020, the Parents contacted the District, referenced ongoing litigation and requested to discuss programming for the Student for the 2020-2021 school year. (P-1, p. 8)

38. On May 1, 2020, the District asked that the Parents provide Student's most recent (IEP), a copy of individualized programming, services, interventions currently used by the private school attended, information from any outside providers, and an updated transcript. The District also requested to set up virtual meetings with the Student to complete math and reading probes to establish and update current levels and baselines. (P-1)
39. In May 2020, the District started Aimsweb benchmark testing of the Student to determine current academic levels. (J-5, p. 11)
40. On May 5, 2020, the Parents provided the District with the last IEP implemented at the Charter School and an updated transcript from the private school attended. The Parents indicated that they did not have information or reports from outside providers. (P-1, p. 7)
41. On May 26, 2020, the District advised the Parents that Student needed to complete an assessment to obtain data for completion of a goal in silent reading fluency/reading comprehension. The District offered an IEP meeting for June 8, 2020. That same day the Parent replied that the Student would complete the Aimsweb by Friday. (P-1)
42. On the Aimsweb, Student's vocabulary level was average. In reading comprehension, Student's scores demonstrated an above-average ability to understand literary and informational text. In oral reading fluency, Student demonstrated below average ability to read stories aloud. (J-5, p. 11)

43. Although the District provided multiple reminders, the Student did not complete the baseline testing for the silent reading probes. (N.T. 279-280)
44. In Math, the Student received average scores for number sense fluency, number comparison fluency, mental computation fluency, and concepts and applications. Based on the assessment, the District concluded that Student was capable of instruction with grade level curriculum but recommended a goal in number sense fluency to address mental computation and basic problem-solving needs based on needs as reported in the evaluation report. The team determined that Student's number sense fluency skills were at grade level. (J-5, p. 12)

June 2020 IEP/FAPE Offer

45. On June 10, 2020, the IEP team convened to discuss programming for the Student for the 2020-2021 school year. The Parents were at the meeting along with a regular and special education teacher (case manager), a local education agency representative, the Director of special education, and District legal counsel. (J-5; N.T. pp. 282-283)
46. Student's present levels of academic achievement and functional performance in the June 2020 IEP summarized data from privately obtained evaluations; the 2019 District evaluation report, 2020 benchmark data, attendance and behavioral information from the Private School, Student's academic performance through previous grades, and post-secondary education and employment goals. (J-5, pp. 6-17)

47. The team determined that the Student met eligibility requirements for special education based upon a specific learning disability and OHI. (J-5)
48. The team determined that Student had academic, developmental, and functional needs in oral expression, listening comprehension, silent reading fluency/ reading comprehension, oral reading fluency, math computation/problem solving, focus/attention, writing - sentence composition, coping skills, and emotional well-being. The District proposed addressing Student's needs in oral expression through a speech evaluation to occur within the first month of Student's enrollment. All other needs were addressed through offered goals, SDI, and related services. (J-5)
49. The IEP contained a post-secondary transition plan developed from information supplied by the Parents, the Student and the Private School. Student's post-secondary education goal was to attend college; the employment goal was to obtain competitive employment. The transition plan outlined the service/activities and courses of study that supported each goal and the location, frequency and dates, duration, and responsible entity. (P-24, p. 20, J-5, pp. 20-21; N.T. 417)
50. The June IEP offered goals designed to address Math-number sense fluency, Reading Comprehension, Reading Fluency, Writing, and active engagement. (J-5)

51. The proffered math goal expected the Student, when given a probe at the current instructional level (11th grade), to improve number sense fluency, including mental computation, problem-solving, and concepts from a baseline of 24 (57th percentile) to a score of 30 (67th percentile) on three consecutive, bi-weekly probes. (J-5)
52. The District determined Student's instructional level in math at eleventh grade because at the time the Aimsweb assessments were administered, the Student was in the eleventh grade. Learning support was recommended to provide Student with a smaller group setting with instructional material at grade level with adaptations and modifications. The Student's progress toward the math goal would be monitored and measured using Aimsweb probes. (J-5; N.T. pp. 448-450)
53. The reading comprehension goal expected the Student when given a reading passage at the ninth-grade level and ten literal comprehension questions, to improve from a baseline of 64% accuracy to a goal of 80% accuracy on 3 out of 4 consecutive probes at or above 80% accuracy. The Student's progress toward meeting the reading comprehension goal would be measured through bi-weekly probes. (J-5, p. 24)
54. The reading fluency goal expected the Student when given a probe/expository paragraph at the 9th grade level, to read the words at a rate of 142 words per minute as measured on three consecutive bi-weekly probes. The determined baseline was 116 words per minute on an 8th grade level. The Student's progress toward meeting the fluency goal would be measured through bi-weekly probes. (J-5, p. 25)

55. The writing goal expected the Student when given a prompt and access to the PA writing assessment domain scoring guide, to improve conventions, including sentence building, from a baseline of 1 out of 4 in conventions to a goal of 3 out of 4 over three consecutive bi-weekly probes. The Student's progress toward meeting the writing goal would be measured through bi-weekly probes. (J-5, p. 26)
56. The active engagement goal expected the Student during a 30 minute observation session, to improve active engagement (writing, raising hands, reading aloud, talking, to teacher or peer about assigned material), and passive engagement, (listening to lecture, silently reading material, looking at blackboard during instruction, looking at worksheets) from a baseline of 34.375% engagement to a goal of 70% engagement as measured on three consecutive weekly observations. The Student's progress would be measured through weekly observations using District generated rubrics. (J-5, p. 27)
57. Progress on all offered IEP goals would be reported every quarter. (J-5)
58. The June 2020 IEP offered SDI that included extended time for assignments and assessments, a resource room check-in, verbal repetition, attention supports, use of a calculator, writing accommodations, 1:1 technology (Chromebook) with access to talk to type features, push-in support in general education classes to assist with long term projects and class engagement, small group instruction for English and Math, direct instruction in reading strategies and a plan

to assist with the transition from the Private School to the District high school. (J-5, pp. 28-29; N.T. pp. 288-289)

59. Related services offered in the June 2020 IEP included thirty minutes of weekly individual counseling services. The team deferred an extended school year (ESY) determination until February 2021. (J-5, pp. 28-29)
60. The June 2020 IEP offered an educational placement in supplemental learning support where the Student would spend 70% of the day inside the regular classroom. English, math, and reading intervention instruction would occur in a learning support classroom. (J-5, p. 30-31; N.T. pp. 423, 457-458)
61. On July 6, 2020, the Parents contacted the District with questions related to alternatives to the business math class proposed, supports for social studies, science, and additional reading and writing programs for students with dyslexia. The District answered that the reading intervention program would be based on start-of-the-year assessments. The District explained that the business math course offered additional support and invited the family to provide alternatives. The Parents did not respond. (P-4, p. 3; N.T. pp. 245, 297-298)
62. On July 30, 2020, the Parents advised the District of their decision to continue Student at the Private School. The Parents requested public funding. (P-4, p. 1)

63. During the 2020-2021 school year, the Student attended the Private School enrolled in the twelfth grade. (J-15)

64. On January 25, 2021, the Parents filed a Complaint seeking a due process hearing. (J-15)

DISCUSSION AND CONCLUSION OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. It is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, the burden of persuasion, in this case, must rest with the Parents. Application of this principle, however, 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. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of factfinders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *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). This hearing officer found most of the witnesses who testified to be credible as to the facts. The testimony was quite consistent overall, and there was no indication of any intent to deceive.

Substantive FAPE

The IDEA requires that states 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. 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 comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’”. “Meaningful benefit” means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply de minimis or minimal education progress. *Endrew F. ex rel. Joseph F. v. Douglas County School District*, 580 U.S. 137 12 S. Ct. 988, 197 L. Ed. 2d 335, (2017) “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206- 09) (other citations omitted). Individualization is the central consideration for purposes of the IDEA. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. 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). 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). At a

minimum, an IEP must include, in part, a statement of the child's present levels of academic and functional performance, a statement of measurable annual goals designed to meet the child's needs to enable him or her to be involved in and make progress in the general education curriculum, a statement of how progress on the goals will be measured, and a statement of the special education and related services and supplementary aids and services, based upon peer reviewed research, to be provided to the child. 34 C.F.R. §300.320.

Procedural FAPE

From a procedural standpoint, the 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).

Tuition Reimbursement

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). Tuition reimbursement is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School*

District of Philadelphia, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); see also, *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all 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.*

LEA Obligation for Students Not Enrolled

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program, it is incumbent upon the district to comply. *A. B. v. Abington School District*, No. 20-1619, 2021 WL 71699, at *3 (3d Cir. January 8, 2021) 7 ; see also *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district's motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. December 14, 2018) (applying I.H. to resident school

district when the student was in a residential placement in another district but was expected to be discharged). "Because the IDEA imposes no obligation on school districts to sua sponte evaluate and develop IEPs for students unilaterally placed in private schools, 'the first question' a court must answer in determining whether a district violated its FAPE obligations by failing to propose a special education program for such a student is whether the parent made a 'request' pursuant to the IDEA." *A.B., supra*, 440 F. Supp. 3d at 435 (citations omitted). In other words, the trigger is that the "parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE." *I.H., supra*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073). Nevertheless, "it is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school." *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 at *41 (M.D. Pa. Sep. 28, 2017) (emphasis added).

Parents' Claims

The Parents seek reimbursement for tuition and related expenses for Student's enrollment at the Private School, which requires analysis of the above three-part inquiry. The first prong is whether the proposed program offered by the District was reasonably calculated to provide meaningful educational benefit given Student's unique circumstances.

In their Complaint, the Parents contend that the District's evaluative process resulted in an inappropriate proposed program with numerous flaws resulting in a substantive and procedural denial of FAPE. Based on the

totality of the evidence, the Parents have failed to sustain their burden of proof.

This Student last attended school in the District in the fourth grade. During the fifth grade, while attending a Charter School, the Student was identified and determined eligible for special education. During the 2018-2019 school year, the Parents unilaterally placed Student in the tenth grade in the Private School. In April 2019, the Parents contacted the District and expressed an interest in exploring programming options for the Student. The District, with the Parents' consent, commenced the evaluative process. The final evaluation report concluded the Student qualified for special education services as a student with a specific learning disability in the areas of oral expression, listening comprehension, reading fluency skills, reading comprehension, and mathematics problem-solving. Student also qualified under a second disability category as a student with an Other Health Impairment (OHI) due to a diagnosis of ADHD. The District's evaluation later served as the basis for October 2019 and January 2020 offers of FAPE, both rejected by the Parents.

The District's evaluation was comprehensive and appropriate. In addition to a review of the Parent supplied previously conducted private evaluations, the most recent from 2018, the District administered achievement testing, compiled behavioral data, collected information from the Parents and Private School teachers, and conducted observations of the Student. The Parents agreed that new aptitude testing was unnecessary because the Student had three previous cognitive assessments and the findings were consistent. The District's evaluation was comprehensive, incorporated data from the Parents' privately obtained evaluation, and included a variety of testing instruments that were technically sound,

reliable, used for valid purposes, nondiscriminatory, administered in the native language, in accordance with directions, and after completion of requisite training in each instrument. Moreover, the District evaluated the Student in all areas of need. §300.304(b)(2) §300.304(b)(3) The Parents have presented no credible evidence that the information collected, the data analyzed, and the conclusions reached during the 2019 evaluation were flawed, deficient, or inadequate.

In April 2020, during Student's eleventh-grade year at the Private School, the Parents re-contacted the District to discuss placement for the 2020-2021 school year. In response, the District collected information from the Parents and administered benchmark testing of the Student to update academic levels in reading, writing, and math. Although requested, the Student did not complete the requested silent reading fluency probes. Despite the Parents' assertions, the District had no obligation to conduct a complete reevaluation of this Student less than a year after its last evaluation⁴. Overall, the 2019 evaluation and the updated assessments satisfied the requirements of the IDEA; they determined that Student was a child with a disability and fully outlined all educational and functional needs.

The June 2020 IEP contained five annual goals that addressed Student's academic and functional needs. Although the Parents expressed concerns about the instructional levels of some of the goals, overall, they were appropriately ambitious considering Student's unique learning profile,

⁴ In their closing the Parents improperly relied upon *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (concluding that a parent's request for an evaluation to a public school before enrollment triggers the duty to conduct an evaluation and develop an IEP) and *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012) for the proposition that this District violated its IDEA responsibilities toward this Student by not initiating a second evaluation. In this case, the Parents requested an offer of FAPE, to which the District responded. No request was made for a second evaluation.

abilities and college attendance plans. All five goals were appropriate, included baselines, were measurable, and indicated how and when progress monitoring for each goal would occur.

The Parents' assertion that the IEP goals were deficient was unsupported by the evidence introduced in this case. Concerning math, across evaluative measures in 2018 and 2019, Student's math problem-solving skills fluctuated between average and below average. However, the baseline testing administered in 2020 suggested that the Student was capable of grade-level work; that goal offered an instructional level at the eleventh grade. To develop appropriate baseline information for the reading and writing goals, the District considered its 2019 data along with the Aimsweb probes. The Parents' concerns in conjunction with all evaluative measures all led to the undisputed conclusion that reading comprehension and fluency were areas of need for which programming was necessary. This District complied with its FAPE obligations to offer a reading program that would enable this Student to make meaningful educational progress while acknowledging this Student's historical challenges with fluency and comprehension reading skills. Concerns that the writing goal was not measurable were similarly unsubstantiated. The goal clearly outlined the condition, clearly defined the behavior, and outlined expected performance criteria.⁵ The writing goal was appropriate.

The proposed program contained extensive and appropriate program modifications and specially designed instruction that were directly responsive

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to Student's identified deficits in (reading comprehension, reading fluency, written expression, mathematics problems solving) and (focus/attention). The accompanying SDI included: extended time for assignments and assessments, resource room check-in, a speech-language evaluation within 30 days of attendance, verbal repeat of instructions to address listening comprehension, attention supports, use of a calculator, writing accommodations, 1:1 technology (Chromebook) with access to talk to type features, push-in support in general education classes to assist with long term projects and class engagement, small group instruction for English and Math, direct instruction in reading strategies and a plan to assist with the transition from the Private School to the District high school.

With respect to the Parents' contentions that Student's emotional support needs were disregarded through the offered programming, the evidence indicated otherwise. The 2018 privately obtained evaluation indicated Student exhibited symptoms of depression and individual counseling for the Student was suggested. Although records substantiating the details of the Student's current mental health treatment were requested from the Parents, none were received. Despite the lack of updated information, the District offered, weekly individual counseling sessions to the Student to address emotional needs.

The June 2020 IEP included present levels of academic achievement and functional performance that provided baselines for the annual goals. The proffered IEP further included a transition services plan incorporated within the proffered IEP that included a post-secondary education goal of college attendance and an employment goal. The transition plan was based on a survey completed by the Parents and the Student. It outlined the service/activities and courses study that supported each goal and the location, frequency and dates, duration, and responsible entity. The

transition plan, although not perfect, satisfied the FAPE mandate of the IDEA. 20 U.S.C. § 1414(d)(1)(A)(VIII); 22 Pa Code 14.131(a)(5)

Through the proffered IEP, the Student would have received grade-level instruction within the regular general education classes with four blocks of eighty-six-minute-long classes. A supplemental level of learning support was proposed, with 70% of the day spent inside the regular classroom. English, math, and the reading intervention classes would be in a learning support classroom taught by a special education teacher.

Finally, the Parents contend that the proposed program was fatally defective; they were deprived of a role in educational planning, and the offered program was not the least restrictive. While the development of an IEP is expected to be a collaborative process, an LEA's issuance of a NOREP does not require either complete agreement of the IEP team or acquiescence to a parent's preferences. As the U.S. Department of Education cogently explained in 2010, [t]he IEP team should work towards a general agreement, but the public agency is responsible for ensuring the IEP includes the services that the child needs to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). The record evidence is preponderant that the Parents were full participants in the process of developing an educational program for Student for the 2020-2021

school year, and that the IEP team met its various obligations in determining placement. Accordingly, the District committed no procedural FAPE violation

Moreover, also very crucial is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code 14.145. FAPE and LRE are related, but separate, concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012). As is relevant here, in examining the LRE factor, “[i]f the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.” *Oberti*, *supra*, at 1216. A private school is certainly on the more restrictive end of the LRE continuum when compared to the neighborhood school. Here, the team was required to deliberate on placement in a regular education setting before proceeding to consider more restrictive environments, including the Private School that Student attended. That is what occurred.

In sum, the District’s proposed program was reasonably calculated to yield meaningful benefit to Student in light of Student’s unique circumstances and was therefore appropriate for Student.

CONCLUSION

The Parents in this matter want to do all possible to maximize their child's opportunity to succeed. That desire is admirable. Their heartfelt and undeniably genuine wish for Student to continue in a placement where Student made progress and was comfortable is understandable. As noted above, however, a school district is not required to provide the "best" program, but one that is appropriate in light of a child's unique circumstances. *Endrew F., supra; Ridley, supra; Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) (observing that the law demands "provision of an education that is 'appropriate,' not one that provides everything that might be thought desirable by "loving parents."") (Citations omitted.) In sum, this hearing officer is compelled to conclude that the District's proposed program as of June 2020 met the standards for FAPE for this Student under the IDEA. As such, there is no need to discuss whether the Private School was appropriate or any equitable considerations.

ORDER

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

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

October 2, 2021