

**PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER FINAL
DECISION AND ORDER**

Closed Hearing

ODR File Number: 24427-20-21 AS

Child's Name:

J.H.

Date of Birth:

[REDACTED]

Parents:

[REDACTED]

Counsel for Parents:

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision: July 9, 2021

INTRODUCTION

The high-school aged Student¹ resides in the Upper Merion School District (District) and has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³ Student currently attends a private school at the election of the Parents.

On December 24, 2020, the Parents filed a Complaint alleging that the District failed to provide a Free Appropriate Public Education (FAPE) to the Student and requesting reimbursement for the Independent Educational Evaluation (IEE) they obtained privately, tutoring, and private school tuition. The case proceeded to a due process hearing convening virtually over six sessions.⁴

For the reasons set forth below, the Parents' claim is granted in part and denied in part.

ISSUES

1. Did the District deny FAPE from December 24, 2018 through February 12, 2021, the date the Student began attending a private school? If so, is the Student entitled to compensatory education?

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

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

³ 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).

⁴ References to the record throughout this decision will be to the Notes of Testimony (NT-), School Exhibits (S-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

2. Are the Parents entitled to reimbursement for the Independent Educational Evaluation (IEE) they obtained privately?
3. Are the Parents entitled to reimbursement for private tutoring and related services they obtained privately for the Student?
4. Are the Parents entitled to reimbursement for the cost of The Fusion Academy (TFA) where the Student attended classes during the summer of 2020?
5. Are the Parents entitled to reimbursement for tuition and the cost of transportation at the IRS mileage rate to and from The Concept School (TCS), a private school placement that the Student began attending in February 2021?

RELEVANT PRIOR EDUCATIONAL HISTORY

1. Shortly after birth, the Student suffered a hemorrhagic stroke and a seizure that have ultimately impacted memory, receptive language, and executive functioning. (P-18 at 1-2, 12; P-20, at 31-32; S-17 at 11)
2. The Student attended Early Intervention Services through the Intermediate Unit beginning in infancy. An evaluation conducted in conjunction with the Student's transition to Kindergarten found the Student eligible for special education under the exceptionality of Other Health Impairment (OHI) as defined by the Individuals with Disabilities Education Improvement Act (IDEA) with the diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). (P-18 at 2-3) The Student has continued to be eligible throughout elementary, middle and high school. (P-18 3-6)
3. The IEP covering the Student's end of 8th through 9th grade dated May 8, 2018 states, the Student "will participate in Special Education Classes for Study Skills, Math Concepts, History Concepts, and English Concepts and regular education classes with non-disabled peers for

Science and tech, teen issues, digital academy, and electives.” (S-6 at 24) The Student also received Social Skills Training. The Student was in regular education for 84% of the school day. (S-6 at 26)

4. The IEP covering the Student’s end of 9th through 10th grade dated April 1, 2019 indicates that the Student “will have general education for the entirety of [the] school day with the exception of Study Skills, Social Studies Concepts, Math Concepts, and English Concepts courses.” (S-9- at 29) The Student was in regular education for 67% of the school day. (S-9 at 30)
5. In March 20, 2020, the District conducted a Reevaluation that included a record review of prior evaluations and information gathered from teachers. (S-16)
6. The Parents enrolled the Student at the Huntington Learning Center (HLC) where Student received 234 hours of tutoring between May 20, 2019 and June 18, 2020. (P-40, 1-4)
7. The Parents enrolled the Student in TFA for 23 sessions of tutoring and mentoring from July 29, 2020 through August 28, 2020. (P-5)
8. In April 2020, a new IEP that would cover the end of 10th through 11th grade was developed for the Student. (S-17) The proposed IEP was subsequently revised in September 2020. (S-21)
9. An IEP Meeting to discuss revised IEP was held on October 14, 2020 in response to an email from the Parent notifying the School that she was planning to enroll the Student in a private school at the District’s expense because she did not believe that the District was meeting her child’s educational needs. The revised IEP placed the Student in special education for Reading Concepts (double period), Math Concepts and Study Skills. The IEP also includes placement in Extended School Year (ESY) based on regression and, as part of the Transition Goals, the Student was placed at the local Technical High School (THS) for ½ day

to study public safety. The IEP team reduced the Student's time in special education to 57% of the school day. (S-22 at 43)

10. In the Fall of 2019, the Parents hired by an educational consultant. Her "brief academic report and observations" report dated February 4, 2021 (P-22) is based on a records review, Readworks testing, interviews and observations.
11. In December 2020, the Parents hired a private neuropsychologist to conduct the neuropsychological evaluation of the Student (P-19; 67), and between November 2020 and February 1, 2021, they hired a speech and language specialist to conduct an Independent Speech and Language Educational Evaluation to complete the IEE. (P- 20; P-63)
12. On December 24, 2021, the Parents filed a Complaint alleging a denial of FAPE, and seeking compensatory education, reimbursement for the cost of the IEE, the tutoring and mentoring, and the private school tuition listed above.
13. On February 12, 2021, the Parents enrolled the Student in TCS, a private school for students in grades 6-12 who learn differently. (P-6 at 1; P-52 at 1)

FINDINGS OF FACT

All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' extensive written closing statements was considered. Only the findings of fact are cited as needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Parents diligently attempted to help their child with homework because they were concerned about their child's struggle with memory and comprehension issues. The Parents believe that the District failed in adequately programming for their child in light of math deficits and

executive functioning challenges, that the evaluations the District provided were not adequate, and that the child lacks the essential building blocks necessary to progress academically. (NT at 51-55)

2. During the early school years, the Student did fairly well “when academic tasks were more concrete” (P-18 at 12), but “[a]s school tasks became more complex, and as students were expected to become more independent, [the Student] had great difficulty keeping up with demands. Comprehension of what he read or of teacher instructions was very challenging for [the Student], and [the Student] had great difficulty with multi-step math problems.” (P-18 at 3). In middle school, the learning gap appeared to broaden. The Student began struggling. At the same time, the School proposed more mainstreamed and co-taught classes. (P-22 at 2)
3. The Student was assigned to Algebra classes for three years during high school even though the Student had not mastered “prerequisite concepts.” (P-22 at 31) At an IEP meeting to discuss the Student’s progress, the Mother was assured that her child was making progress. To support that argument, she was told that the Student earned 100% on an Algebra quiz. This quiz is apparently one that an Evaluator, privately hired by the Parents, observed and reported seeing a teaching assistant giving the Student “every answer, and a special calculator was used to convert the answers to the different formats required (percentages, fractions, or decimals).” (P-22 at 31-32)
4. The hearing officer found the following evidence to be particularly compelling to demonstrate that it is highly unlikely that the Student could access the Pre-Algebra and Algebra curricula used in classes where the Student was placed by the District: (1) the copies of the Huntington Learning Center Math Placement Exam (P-42 at 6-49); (2) the Educational Consultant’s Report indicating that the Student’s math

abilities “hover between 4th and 5th grade level skills, but [redacted] adaptive or functional math abilities appear to be lower.” (P-22 at 9); and (3) the TCS Algebra Assessment (P-49, 1-22).

5. The evidence cited in the paragraph above stands in contrast to the chart of the Student’s Algebra Progress Monitoring and Algebra Assessment (P-59 at 1) and the IEP Progress Monitoring Report (P-14 at 4-5) which indicate that the Student was making progress on the Algebra goals.
6. The record also demonstrates that while the Student’s reading level was at times two to three grades lower than the curricula taught in the English Language Arts classes in which the Student was placed by the School. Furthermore, the class sizes in the School’s special education English Concepts and Read Modify classes ranged from 9-15 students, which although smaller than regular education classes did not provide the Student with the individualized attention needed to progress.

Parents’ Claim

It is the Parents’ position that the District failed in its obligation to provide FAPE to the Student during the 2018-2019, 2019-2020 and 2020-2021 school years because it did not understand the Student’s needs and subsequently failed to tailor its instruction to the Student’s academic levels. As a result, the Student did not progress, forcing the Parents to spend countless hours teaching their child at home and paying private educational service providers out-of-pocket for the services the District should have provided.

To support their FAPE claim, the Parents argue that (1) placing the Student in regular education classes of up to 25 students was inappropriate in light of the Student’s propensity for distraction and need for individualized instruction; (2) not offering Extended School Year during the summer of 2019 and an inadequate program in 2020 were inappropriate due to the

Student's memory and retention deficits; (3) placing the Student in high school Reading Concepts when the Student was testing at least three grades below the level of the coursework; and (4) placing the Student in Algebra for three consecutive years when the Student was performing *four to five grade levels* below the level required to access algebra. The Parents request compensatory education from December 24, 2019 through February 12, 2021 when the Student entered TCS.

The Parents contend that 2020 evaluation was inadequate because it merely consisted of a records review, parental and teacher input when it should have also included an updated neuropsychological evaluation and speech and language assessment. Therefore, the Parents claim reimbursement for the IEE they paid for privately because the District's March 18, 2020 evaluation was inadequate.

Furthermore, the Parents claim they are entitled to reimbursement for the tutoring and related services they obtained privately to provide the accommodations the Student needs to address core deficits.

The Parents request reimbursement for tuition and travel to and from TCS at the IRS mileage rate because the District's failed to offer an adequate program and placement. TCS meets the Student's needs by providing a small class size, multisensory instruction, the tools to build confidence and motivation needed to progress educationally.

District's Claim

It is the District's position that it offered and provided the Student with FAPE for the 2018-2019, 2019-2020 and 2020-2021 school years. It argues that the Parents failed to meet their burden of proof and, therefore, their claim for compensatory education, reimbursements for tutoring and summer services, an IEE at public expense, and private school tuition should all be denied.

The District claims that during the 10th grade, it was responsive to the Parents' concerns about the Student's reading and writing levels, it changed the Student's placement from a special education English Concepts class to Reading Modified, a special education class focused on reading comprehension skills. And, then in 11th grade, it doubled the period to provide additional support.

The District contends that its Algebra placements provided appropriate supports for the Student to learn algebraic concepts and that some of the Parent's expert's testimony was inconsistent with that of the Student's math teachers. (NT at 490, 508, 544, 842) Finally, the District argues that the Student was making progress in math. (S-9 at 9-10; NT at 498, 502, 505, 530)

The District provided transition services based on the Student's stated area of interest, public safety. (S-9 at 13-24, NT at 1090) The District noted that the vocational curriculum was part lecture and part hands-on work. Furthermore, the Student's specially designed instruction (SDI) were implemented in the class. (S-17 at 16-17)

The District avers that the RR was appropriate and equitable. The District rebuts the Parent's claim that the Student should have been assessed for and provided speech services, as not being supported by the evidence. The District claims that its Winter 2016 evaluation fell within normal limits and any weaknesses were addressed through SDI. (P-11 at 8-13) It alleges that IDEA and the implementing regulations do not require the District to conduct the full scope of testing performed in the initial evaluation for an RR. In particular, the District contends, the evaluation performed by the Educational Consultant was sought out by the Parents prior to the District's completion of the RR. (NT at 1623) Therefore, the IEE at public expense should be denied.

The District contends that the Parents failed to establish that the tutoring program was appropriate because the curricula was nonspecific and not based on a set, research-based curriculum for use with disabled students. The District claims the summer academy also did not involve a set curriculum. The District concludes that reimbursement for both private placements should be found to be improper and reimbursement denied.

In regard to private school tuition, the District alleges that the Parents did not provide notice of their intent to enroll the Student at TCS in writing, at any point, nor has the Parent provided evidence that TCS remedied any of the alleged deficiencies in the program offered by the District, other than smaller class size. The District also claims that the SDI offered by TCS “virtually mirror” the accommodations offered by the District. (P-46 compared to S-22 at 37-39) Furthermore, TCS does not offer vocational programming (NT at 1029).

In conclusion, the District urges a finding that the District provided the Student with FAPE, and the Parent’s requested relief should be denied.

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parents. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence

produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipoise.” On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

The Parents met their burden of persuasion by a preponderance of the evidence.

Witness Credibility

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of witnesses’ testimony. 22 Pa. Code §14.162 (requiring findings of fact); 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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their ability and recollection concerning facts necessary to resolve the issues presented. In particular, the Parents’ expert witnesses who provided detailed assessments of the Student, were credible and not biased toward the Parents, as the School posits.

The FAPE Standard

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board*

of Education v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and also comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), 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.’” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court again observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “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); see also 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). And, a proper assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

The IEP

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*

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

For an IEP to "meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Distr. RE-1*, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017)

In this situation, the Student's IEPs were not designed to permit the child to benefit educationally from the program. The IEE experts report a multitude of failings in the recent IEPs.

The high school IEPs in question placed the Student in reading, writing and math classes that were several years above the Student's comprehension level crippling the Student's ability to comprehend the curricula and progress, despite the School's progress reports which, in light of the evidence, are called into question.

The Educational Consultant's Report states in pertinent part, that the Student's IEPs and placements have not fully acknowledged the scope of disabilities, and have therefore not been able to address deficits. For example, "the IEPs do not recognize or address [the Student's] significant speech and language deficits, and do not offer [redacted] assistive technology. The IEPs do not recognize [redacted] reading deficits and do not address them. They do not recognize [redacted] executive functioning deficits and do not address them. They do not recognize [redacted] working memory delays and do not address them." (P-22 at 31)

The Neuropsychologist echoes the Educational Consultant's concerns about the non-inclusion of the Student's speech and language needs in the IEP. Without updating the testing, the IEP team appears unaware that this is a need. The Neuropsychologist recommends that the Student should have a "comprehensive speech and language evaluation, with services provided as recommended. Specific attention to listening comprehension, word retrieval, and cognitive organizational skills should be paid. [The Student] should also be evaluated for pragmatic language skills, with services and social thinking interventions provided in this area for him. The speech and language pathologist should consult regularly with [the Student's] teachers." (P-18 at 14) The hearing officer finds that the conclusions of the Neuropsychologist and the Educational Consultant are persuasive and supported by the record.

Furthermore, by failing to update testing and evaluations in its 2020 RR, the District did not accommodate the Student's needs for multisensory education and small classrooms. The special education classes consisted of about 9-15 students and the regular education classes were even larger. The IEEs initiated by the Parents demonstrated that the Student needs a class size where individual attention can be provided and that instruction should be "hands-on and multisensory." (P-22 at 34)

IEPs based on record reviews can tend to become stale when they continue to regurgitate old information. For example, in this case, the IEPs repeatedly mention behavior issues, while there was no evidence demonstrating that the Student continues to have those issues. The teachers and the experts describe the Student as a pleasure it is to work with, using words like “polite,” “cooperative,” “nice kid” and “kind.” (P-18 at 6) In fact, the Neuropsychologist’s report recommends that based on discussions with the Student’s teachers and Parents, the Student he does not exhibit any behavioral problems in high school and that references to behavioral problems should be removed from the IEP. (P-18 at 14) The hearing officer agrees with that conclusion.

Based on all of the above, the Student’s IEPs fell short of IDEA mandates, resulting in a substantive denial of FAPE. The IEPs were not reasonably calculated to enable the Student to make progress in light of the child’s circumstances. The IEPs did not offer learning placements in line with the Student’s present levels hindering the Student’s ability to achieve meaningful benefits under the IDEA. Therefore, an award of compensatory education is proper in this case.

Compensatory Education

Compensatory education is an appropriate remedy where a District knows, or should know, that a child’s educational program is not appropriate or that the student is receiving only a trivial educational benefit, and the District fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996).

Traditionally, Pennsylvania courts have recognized two distinct methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the “hour-for-hour” method, embraced by *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996), a student would receive one hour of compensatory

education for each hour that FAPE was denied. The Third Circuit has also endorsed an alternate approach, sometimes described as a “make-whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); see also *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). In *Reid*, the court concludes that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the Reid standard or Reid method. The more nuanced Reid method was endorsed by the *Pennsylvania Commonwealth Court* in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the child would have occupied but for the school district’s violations of the IDEA.”).

Despite the preference for the Reid method, that analysis poses significant practical problems when, in administrative due process hearings, evidence is not presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the

default when no such evidence is presented: "... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies." *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 36- 37.

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). In some cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted.

In the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is the necessary default.

In this matter, the Parent's claim for compensatory education is for two years prior to the filing of the Complaint. Therefore, the Student is entitled to 5.5 hours of compensatory education for each day⁵ that the District high school was in session between December 25, 2019 and February 11, 2021.

Reimbursement for the IEE

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

Under the terms of the IDEA, "(a) parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...." (34 C.F.R. 7 §300.502(b)(1); 22 PA Code §14.102(a)(2)(xxix)). Upon requesting an IEE

⁵ 22 Pa. Code 11.1 – 11.3 requires 990 hours per school year. 5.5 is computed by dividing 990 by 180 days.

at public expense, a school district has one of two choices: the school district must provide the evaluation at public expense, or it must file a special education due process complaint to defend its re-evaluation process and/or report. (34 C.F.R. §300.502(b)(2)(i)-(ii); 22 PA Code §14.102(a)(2)(xxix)). An evaluation (or re-evaluation, as the evaluation provisions of IDEA apply equally to re-evaluations as well [34 C.F.R. §§300.15, 300.304-311; 22 PA Code §14.102(a)(2)(iii),(xxv),(xxvi)]), must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining” an understanding of the student’s disability and the content of the student’s IEP. (34 C.F.R. 300.304(b)(1); 22 PA Code §14.102(a)(2)(xxv)) Furthermore, the school district may not use “any single measure or assessment as the sole criterion for...determining an appropriate educational program for the child.” (34 C.F.R. 300.304(b)(2); 22 PA Code §14.102(a)(2)(xxv)).

In this case, the Parents disagreed with the RR provided by the District because they believe the IEP Team does not understand the Student’s needs based on the neurological deficits that are the result of an early brain injury. The Parents watched their child struggles with memory and comprehension issues become more severe as their child was given more complex material that goes beyond the basics and requires inferential thinking, more advanced executive functioning skills, and individual attention. The class size, the instructional approach, and the accommodations offered in the high school IEPs did not provide the Student with sufficient support to access the curricula offered by the School in order to achieve a meaningful educational benefit. Therefore, the Parents were justified in seeking independent educational evaluations in a quest to better understand Student’s needs and how they could be appropriately addressed in high school.

While “the IDEA and its implementing regulations do not require the District to perform anew the full scope of testing properly included in the child’s initial evaluation,” *Robert B. ex rel. Bruce B. v. West Chester Area Sch. Dist.* No. CIV.A. 04-CV-2069, 2005 WL 2396968 at 5 (E.D. Pa. Sept. 27, 2005), in this case the Student’s needs appeared to be changing dramatically as the curricula became more complex. Furthermore, the School’s lack of understanding is clearly demonstrated by repeatedly placing the Student in Algebra classes when the Student did not understand basic math concepts, as evidenced by the Student’s work at HLC (P-42 at 6-49), the Educational Consultant’s report (P-22 at 9), and TCS (P-49, 1-22). This demonstrates that the School did not comprehend and program for the severity of the Student’s changing needs, putting into question the Progress Reports the RR used as a basis for this placement.

Reimbursement for Private School Tuition

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place the Student in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009).

Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); see also *C.H. v.*

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

In this situation, the record demonstrates the three-prongs of what is now called “the Burlington-Carter test.”

1. The Parents believed that the District did not offer FAPE and that a private placement was necessary. And, based on the record, the high school IEPs offered by the District were not reasonably calculated to yield meaningful education benefit to the Student.
2. The Parents provided requisite notice to the District in the Fall of 2020, months before placing the Student at TCS in February 2021 and the District was provided with ample time and opportunity to offer provide FAPE. Therefore, there is no equitable basis to reduce the tuition reimbursement award.
3. The private school placement at TCS is appropriate because it provides significant learning and is reasonably calculated to confer the Student with a meaningful educational benefit. The record demonstrates that TCS meets the Student’s needs by providing a class size small enough to provide individual attention, a hands-on, multisensory approach to instruction, and the tools necessary to succeed such as instructional strategies aimed at building concrete comprehension and memory skills, improving executive functioning, and ensuring that the Student has basic math skills while at the same time increasing the Student’s motivation and self-confidence.

CONCLUSION

The School denied the Student FAPE during the two years preceding the filing of the Parent’s Complaint so compensatory education is an

appropriate remedy, the IEEs commissioned by the Parents were justified, and the Parents' placement of the Student in a private school that they believe can more appropriately accommodate the unique needs of their child is appropriate. However, reimbursing the Parents for the educational consultant, the tutoring and related services in which they privately placed the Student is not justified.

ORDER

The Parents' claims are granted in part and denied in part.

1. Compensatory education for a denial of FAPE: The Parents are hereby awarded compensatory education:

- a. 5.5 hours for each day the District high school was in session from December 24, 2018 through February 11, 2021; and
- b. ESY (for four hours per day for four weeks/16 hours) for the summer of 2019 when the District did not place the Student in ESY.
- c. The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory

education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress.

Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The compensatory education may be used for reimbursement of the expenses claimed for the relevant time period for tutoring.

2. Reimbursement for the IEE contracted for by the Parents:
 - a. The Neuropsychological Evaluation (P-18) as invoiced in P-19.
 - b. The Independent Speech and Language Educational Evaluation report (P- 20) as invoiced in P-63.
3. The above award of compensatory education is intended to fully remedy the deprivation of FAPE for the time period in question. Therefore, it would not be appropriate to also award reimbursement

for tutoring and other expenses during the same period of time.

Therefore, additional reimbursement is denied for:

- a. The private school the Parents unilaterally placed the Student during the summer of 2020 when there was an offer of ESY in the IEP.
 - b. Tutoring and mentoring services.
 - c. The Educational Consultant privately contracted by the Parents prior to the completion of the District's 2020 RR.
4. Reimbursement for private school tuition from February 12 through June 17, 2021, and invoiced (P-52), plus transportation at the IRS reimbursement rate, is awarded.



Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision

July 9, 2021

ODR 24427-20-21