

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

DECISION

ODR No. 15751-1415KE

Child's Name: A.K.

Date of Birth: [redacted]

Dates of Hearing: 2/18/15, 3/24/15, 3/31/15

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Parent[s]

None

School District

Methacton

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Date Record Closed:

May 8, 2015

Date of Decision:

May 26, 2015

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The high school-aged Student in this case was identified as IDEA eligible due to specific learning disabilities near the end of kindergarten, after the District conducted an initial evaluation at Parents' request due to concerns about Student's early difficulty in acquiring pre-academic/academic skills.

To resolve Parents' dissatisfaction with Student's progress during middle school, the District agreed to fund a Parent-selected private school placement for Student from 7th through the end of 9th grade, when the most recent agreement between the parties expired. For the current school year, the District offered an IEP and NOREP proposing that Student receive special education services in the District high school in a combination of special education and co-taught regular education academic classes. Parents rejected that proposal, believing that Student would be unsuccessful in a larger educational setting. After attempting to resolve the matter over a period of several months, Parents filed a due process complaint seeking tuition reimbursement for the 2014/2015 school year and prospective placements at the private school for a 2015 ESY program and for the 2015/2016 school year.

The hearing was held in three sessions from mid-February to the end of March 2015. Although it is certainly understandable why Parents feel so strongly about maintaining Student's private school placement, their claims must be denied. The District has offered a placement and services for Student that are reasonably likely to result in meaningful educational progress. In addition, the IEP goals and services can be adjusted to provide additional special education services if necessary. Finally, Student's lack of progress/regression in some math skills, as measured by standardized tests, and the lack of formal, coordinated transition services calls into question the appropriateness of the private school placement.

ISSUES

1. Did the School District offer an appropriate IEP for the 2014-2015 school year, including appropriate goals, objectives, specially designed instruction and additional services, including transition from the private school and postsecondary transition, as part of the proposed IEP?
2. If not, should the School District be required to fund Student's placement at the Private School Student is attending for the 2014/2015 and 2015/2016 school years, including ESY for the summer of 2014/2015, in that the Private School meets Student needs that would not be met by the School District's IEP and is otherwise appropriate?

FINDINGS OF FACT

Background

1. Student, a [late teenaged] child born [redacted,] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 17, 18)
2. Student has been identified as IDEA eligible in the Specific Learning Disabilities (SLD) category in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 18, 19)
3. Student was initially evaluated at Parents'¹ request and found to have specific learning disabilities in basic reading skills, math computation and math problem-solving while attending kindergarten in the District. (J-1 p. 1)²
4. Subsequently, the family moved to another state, where Student received learning support special education services. The District provided an IEP in a supplemental learning support placement when the family returned to the District in the middle of Student's 2nd grade school year. (J-4 p. 3)
5. The parties entered into a settlement agreement at the beginning of Student's 7th grade year, whereby the District agreed to fund Student's placement at the private school that Parents selected and that Student still attends. The agreement was extended through the end of the 2013/2014 school year (9th grade). (N.T. p. 237; J-3)

¹ The term "Parents" is used throughout this decision to refer to both Parents as well as to one of them when either Mother or Father, individually, participated in matters relevant to this case, such as communications with the District or classroom observations. Both Parents actively participated in all hearing sessions and were united in their positions concerning their child's education.

² Commendably, the parties agreed to submit primarily joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter "J" followed by the exhibit number. Additional exhibits submitted by the School District are designated "S" followed by the exhibit number.

2014 Reevaluations

6. On March 31, 2014 in accordance with the explicit terms of the settlement agreement, the District issued a Permission to Reevaluate (PTRE), to which Parents agreed. (J-3 p. 4, ¶10, J-4 pp. 1, 2)

7. During the period in which the District's evaluation was underway, Parents also arranged for a brief reevaluation by the same private neuropsychologist who had evaluated Student twice in the past (2010, 2013). Parents provided the most recent neuropsychological report to the District by e-mail on July 19, 2014. (N.T. pp. 283, 284, 370; J-1, J-6)

8. Since the most recent cognitive assessment available to the District school psychologist at the time of her 2014 reevaluation had been completed by the independent evaluator in 2013, and cognitive ability generally remains stable over time, the District school psychologist did not consider it necessary to assess Student's cognitive ability as part of the District reevaluation. (N.T. pp. 372—374)

9. The independent evaluator repeated the same cognitive assessment that had been administered to Student several times before. (WISC-IV—Wechsler Intelligence Scale for Children-Fourth Edition) for her reevaluation, with results nearly identical to the 2013 reevaluation. Student's Full Scale IQ (FSIQ) is in the average range, with three of the four index scores in the same range. Processing speed, in the low average range, is a relative weakness for Student.³ (N.T. p. 375, 376; J-4 pp. 4, 5, J-6 p. 4)

10. Verbal ability, the strongest area in Student's cognitive profile, is also the best predictor of academic success, since it encompasses vocabulary, listening, concept formation and comparison skills. (N.T. pp. 376, 377; J-4 pp. 4, 5, J-6 p. 4)

11. With respect to academic achievement, both evaluators administered the reading and math fluency subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III). Student's scores on both evaluations were in the average range for reading fluency, although below grade equivalency.^{4 5} On the math fluency subtest, Student was in the below average range, with a standard score of 83 (13th %ile) on the District administration of that subtest, and a standard score of 87, at the 19th %ile, obtained by the

³ WISC-IV 2013/2014 results: FSIQ = 92/93; Verbal Comprehension Index (VCI = 98/100; Perceptual Reasoning Index (PRI) = 92/96; Working Memory Index (WMI) = 99/94; Processing Speed Index (PSI) = 85/85) (J-6 p. 4)

⁴ Independent Reevaluation standard score : 90 (25th %ile, Grade Equivalency (GE) @ 7.5); District reevaluation standard score: 89 (22nd %ile, GE @ 7.7)

⁵ Although GE is not ordinarily considered a good measure of academic achievement, both the District school psychologist and the independent evaluator believe it provided good information with respect to Student because Student repeated a grade in the early school years and Student's place in the age cohort is on the relatively younger side. For the same reasons, both psychologists considered grade-based norms preferable to age-based norms for assessing Student's academic achievement. (N.T. pp. 343—345, 379)

independent evaluator. In the 2013 independent reevaluation, Student's standard score for math fluency was 90 (26th %ile). (J-4 p. 6; J-6 p. 5)

12. The District evaluator also administered the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) and obtained results generally consistent with the WJ-III results. All of Student's math subtest scores were in the lower average or below average range, while reading and written language scores were in the average range. On that assessment, Student showed a particular strength in listening comprehension, and was also above grade equivalency in written language and both component subtests (written expression, spelling). Student's scores were below grade equivalency on the reading subtests, except for reading comprehension, on which Student's GE was above 12th grade. (N.T. pp. 396, 398; J-4 p. 6)

13. The District school psychologist observed Student for several hours at the private school in late April 2014 in both the language arts and the math class (Basic Algebra 1). She also solicited and received reports of Student's progress, as well as teacher observations, comments, recommendations, descriptions of modifications, and instructional strategies provided to Student. The forms completed by the private school teachers were included in the District's reevaluation report (RR). (N.T. pp. 381—386 ; J-4 pp. 9—15)

14. Assessments of Student's social/emotional functioning were included in both the District and private evaluation. The independent evaluator administered only the self-report checklists of the BASC-2 (Behavior Assessment System for Children-Second Edition) to Student. The District school psychologist provided the BASC-2 checklists to four of Student's teachers, to Parents and to Student. None of the ratings identified any significant problems or behavior issues. (N.T. pp. 387—391; J-4 pp. 17—19)

15. The District school psychologist assessed Student's executive functioning with another checklist, the Behavior Inventory of Executive Functions (BRIEF). None of the scores from two teachers, Parents and Student disclosed significant deficits in any area of executive functioning. The language arts teacher's and Parents' ratings generated slightly elevated scores with respect to the Initiate and Organization scales, suggesting difficulties in independently beginning tasks, generating ideas, responses and problem-solving strategies, as well as in managing task demands in terms of planning ahead and ordering information and materials to complete tasks. (N.T. pp. 391, 392; J-4 pp. 19—21)

16. The results of standardized tests of academic achievement administered by the independent evaluator in 2010, 2013 and 2014, and by the District school psychologist in 2014, disclosed that Student made little or no progress in a number of areas, and showed regression in math. In 2014, Student scored below the level achieved in the 2013 testing on several math subtests, revealing gaps in Student's understanding of math concepts. Standardized test results have never shown Student to be at grade level in reading and math.⁶ (N.T. pp. 306—317, 347—350; J-4 pp. 5—7, J-6 pp. 5, 6)

⁶ Student also appeared to exhibit deficits in phonological processing in the 2014 independent evaluation that were not exhibited in 2013. That, however, could be due, at least in part to the independent evaluator's administration of

District's Proposed IEP/Placement

17. After the District's evaluation was completed, the parties met for an IEP meeting in May 2014 and scheduled another meeting in August to review and amend the proposed IEP after the District received the independent evaluation report. (N.T. pp. 62—67, 70, 72; J-5, J-7, S-1, S-2)

18. Based upon the evaluation results, the District proposed an IEP that included academic goals for improving basic math skills; for decoding and understanding new words in reading; for developing self-advocacy skills, and for writing, with separate goals for focus and for conventions/mechanics. (N.T. pp. 479, 480 ; J-6 pp. 26—31)

19. Recognizing Student's weakness in processing speed, the specially designed instruction (SDI) in the District's proposed IEP includes strategies to address Student's needs in that area, including extra time for completing academic tests and other tasks, guided notes and study guides, modified homework. (N.T. pp. 376, 488, 489, 493; J-7 pp. 32, 33)

20. To build on Student's strengths in verbal skills, generally, and listening comprehension in particular, electronic textbooks and novels are among the SDI in the proposed IEP. That SDI also address Student's need for repetition, review and reinforcement of concepts. (N.T. pp. 380, 491; J-7 p. 33)

21. The proposed IEP also includes SDI to address potential executive functioning issues in initiating, planning and organizing tasks via chunking of assignments, including specific completion deadlines for each segment, and direct instruction in organizational skills on three days of each six day cycle. (N.T. p. 393; J-7 pp. 33, 34)

22. Student's attention/focus needs are also addressed by the guided notes and study guides SDI, as well as by the SDI for preferential seating, reminders to check work/proofread, restating directions, checks for understanding, extended time, chunking of assignments. (N.T. pp. 488, 490, 491; J-7 pp. 32—34)

23. The District's proposed post-secondary transition services include improving basic reading, writing and math skills to further Student's goals of attending college and obtaining competitive employment. The transition plan activities include exploring career interests, creating goals to work toward, and developing plans for achieving the goals. (N.T. pp. 431—442; J-7 pp. 19, 20)

24. The IEP also provides for consultation between regular and special education teachers, reading specialist support, a transition plan from the private to the public school and daily check-ins with a special education teacher to make certain that Student is ready for the day in the morning, knows what must be done at home and has everything needed to complete the homework. (N.T. pp. 450—453, 484—486, 495, 498; J-7 pp. 36, 37)

the second edition of the Comprehensive Test of Phonological Processing in 2014 (CTOPP-2), while the original version was used in 2013 (CTOPP). (N.T. pp. 314, 342; J-6 p. 6)

25. The District recommends a supplemental learning support placement in the District high school, with small group instruction in a special education classroom for basic math skill and; for an intensive, research-based reading and writing program (Read 180), as well as additional instruction in reading decoding and basic math skills. For core content classes, the District proposes instruction in regular education classes co-taught by a special education teacher, and inclusion in general education classes for electives. (N.T. pp. 400, 454—457, 479, 481, 483, 484; J-7 pp. 39, 40, 42, 44)

26. The basic literacy class in which Student’s reading goal would be implemented currently includes 9 students in one section and 11 in another. Within each class, the students are placed in smaller instructional groups. (N.T. pp. 461, 467, 468)

27. Special education supplemental math classes generally include interactive and collaborative small group instruction, using a variety of instructional methods and strategies, as well as considerable one-on-one instruction in accordance with student needs and IEP provisions. The content of supplemental math classes follow the regular curriculum for the type of class (*e.g.*, Algebra, Geometry), but, the pace of instruction is slower than it would be for nondisabled students. Dual disabilities in math and reading are accommodated by assuring that students with reading disabilities understand directions, with clarifications as needed. (N.T. pp. 143—147, 152, 153, 184, 185)

28. Classroom management techniques designed to create a comfortable, non-threatening environment are often sufficient to encourage class participation by reluctant students. Organization, attention and focus needs are regularly addressed in supplemental math classrooms. Regular progress monitoring is conducted to determine whether students are meeting their IEP goals. (N.T. pp. 144, 147—150)

29. In addition to the specific instructional services and supports included in the proposed IEP, Student would be assigned to the Curriculum Support Room (CSR) for a supported study hall with access to special education teachers and tutors for additional teaching and review. The CSR period can also be used to implement the SDI for additional reading and math instruction in the IEP proposed for Student. (N.T. pp. 49—51, 151; J-7 p. 36)

30. To assist Student in successfully transitioning from the private to public school setting, a guidance counselor will check with Student’s teachers and meet with Student to address any issues or concerns. (N.T. pp. 92, 93; J-7 pp. 35, 37)

Concerns About the District’s Proposed Placement

31. The neuropsychologist who provided the 2014 private evaluation of Student agreed that it is appropriate for Student to receive reading, writing and math instruction in a small group learning support classroom, as the District proposes. Both she and Parents acknowledged and that the proposed IEP incorporates many of her recommendations for modification of instruction and classroom supports. (N.T. pp. 120, 327—335, 340; J-6 p. 11, J-7 pp. 32—36)

32. Although Parents' independent evaluator freely acknowledged Student's lack of progress/ regression during the 2013/2014 school year, that Student remains below grade level with respect to reading, writing and math skills on her standardized assessments, and that the private school educational plan must be revised in order to meet Student's needs and assure that Student is making progress, she recommended Student's continued placement at the private school. (N.T. pp. 306—315, 327, 336; J-6 p. 10)

33. The independent evaluator believes that Student's learning disabilities create needs that can only be met in the smaller classes available at the private school, that Student will not be able to keep pace with peers in the larger co-taught classes the District proposes, and is particularly concerned about the effects of Student's very slow processing speed in large classroom settings. The independent evaluator also believes that Student is "blossoming" in the private school. (N.T. pp. 286—290, 299, 326, 327; J-6 p. 10)

34. The independent evaluator did not observe the classroom settings the District proposed for Student, and did not observe Student at the private school or in the District, at any time or solicit teacher input concerning Student's progress (N.T. pp. 301—305, 326, 327, 330, 336; J-6 p. 10)

35. Parents were the sole source of the independent evaluator's information concerning Student's academic and social progress at the private school. Parents also informed the independent evaluator of the District's recommendation for co-taught classes, of how a District co-taught class is conducted, based upon their observation, and of their concerns about returning Student to a larger public school setting, which Parents also expressed at the IEP meetings in May and August 2014. (N.T. pp. 74, 113, 123, 294, 295, 325, 326, 330, 335, 336; J-6 p. 10, S-1 p. 3, S-2 p. 2)

36. Parents believe that the District's proposed IEP does not provide an educational plan that will appropriately meet Student's academic learning needs because of the much larger setting, particularly in terms of maintaining focus and attention with the distractions inherent in larger classes. To a lesser degree, Parents have concerns with respect to how Student would adapt to the public school setting. (N.T. pp. 104, 105, 123; S-1, S-2)

37. Parents are concerned that although the proposed special education classes would provide the type of small group instruction in which Student thrives, the larger co-taught classes would not appropriately meet Student's needs. They also appreciate, and do not want to lose, the consistency in teaching methods at the private school, and especially, the level of personal care and concern for Student shown by the private school teachers. (N.T. pp. 122—124)

38. Between due process hearing sessions, Parents observed both a learning support literacy class and a co-taught biology class, in which 19 of 21 registered students were present on the day of the observation. Parents continued to have concerns about Student's ability to succeed in co-taught classes. They believe that less "chunking" of the content, as well as the level of noise and movement among students during the class

would make it difficult for Student to derive any benefit from the instruction. (N.T. pp. 203—208, 219—223, 474, 520, 522, 523)

39. Parents acknowledged that implementing the SDIs included in proposed IEP, such as study guides and outlines of notes, use of a laptop or tablet to have instructional material directly in front of Student during independent work, as well as visiting the CSR classroom for review and repetition, might help Student keep pace with the instruction and assure understanding of material that Student may miss during class. (N.T. pp. 223, 225—229, 233)

Private School Instruction/Services

40. The private school Student is attending serves only students with learning differences. The school philosophy is based upon recognizing and celebrating the strengths of the students while supporting them and helping the students overcome their academic difficulties. (N.T. pp. 236, 239, 240)

41. The private school provides a highly supportive program from the middle school years through 10th grade, based on an individual learning profile that summarizes each student's strengths, learning challenges, accommodations and helpful compensatory strategies. During 11th and 12th grades, supports are lessened to encourage students' independence, individual responsibility and self-advocacy, with the expectation that academic skills have been remediated as much as possible by then. (N.T. pp. 243, 244, 246, 247, 275, 276)

42. The size if the private school academic classes is generally four to eight students. Class sizes increase to 13—15 students during 11th and 12th grades. Students also have the opportunity to take a larger, multi-disciplinary "college bridge" class with 20—28 students. (N.T. pp. 235, 245, 246, 276, 277)

43. Teachers are available before and after school hours, during the lunch period, study hall periods, and teacher prep time to provide extra help to students when and if needed. (N.T. p. 241)

44. The private school provides no formal post-secondary transition services. Preparation for life after graduation includes helping students gain an understanding of their individual learning and needs, developing compensatory strategies, and assisting families in preparing to obtain accommodations in a college setting. The school counselor begins meeting with students and parents in 9th grade for college counseling. (N.T. pp. 239, 240, 277, 278)

45. Student progress is monitored by means of curriculum-based assessments, anecdotal teacher comments and by periodically administering a nationally standardized group test (MAP). The private school uses Pennsylvania standards as a reference in designing its curriculum but does not follow the state standards. (N.T. pp. 247, 256)

46. The private school considers Student to be at grade level for reading. For several years, Student was required to enroll, at an extra cost, in an intensive reading/ language arts class, primarily for decoding. The intensive class replaces the regular language arts class for students who are required to take it. Student is not enrolled in the intensive language arts class during the current school year. (N.T. pp. 238, 248—250, 271—274, 280)

47. The private school offers a similar program for intensive math instruction, at the same extra cost, but does not typically require it in order for a student to remain at the private school, as is the case with the intensive language arts instruction. (N.T. pp. 279—281)

48. The college acceptance rate for the private school over the past several (5—10) years has been 98%--100%. (N.T. pp. 240)

DISCUSSION AND CONCLUSIONS OF LAW

IDEA Legal Standards

FAPE/Meaningful Benefit

The legal obligation of school districts to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009)

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). A school district fails in its obligation to offer a FAPE to an eligible child if the proposed IEP and placement is not likely to produce progress, or would provide only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, school districts are not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Tuition Reimbursement Legal Principles

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student’s right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child’s placement, although they certainly place themselves at financial

risk if the due process procedures result in a determination that the school district offered a FAPE or otherwise acted appropriately. The right of parents to seek reimbursement for private school tuition was later codified in the IDEA regulations at 34 C.F.R. §300.148.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington and Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the school district are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. A decision against the parents at any step of that process results in a denial of reimbursement.

Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents requested relief in this case in the form of tuition reimbursement for the current school year, as well as prospective private school placements they were required to establish, first and foremost, that the

District failed to propose an appropriate IEP for the 2014/2015 school year, and if necessary, that the private school in which Student is enrolled is an appropriate placement. As a practical matter, however, allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “ equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).

In this case, the essential issue, the appropriateness of the District’s proposed IEP did not present a close question, so the outcome was not affected by allocating the burden of persuasion

Appropriateness of the District’s Proposed Placement

There is no doubt that the District’s proposed IEP includes goals that address Student’s educational needs in reading, and in math, in which Student remains well below grade level. (FF 11, 12, 16, 18) Parents really did not suggest otherwise, or raise any issue concerning the District’s proposal for placing Student in a special education class for small group instruction in those basic skills. The neuropsychologist who evaluated Student several times, and whose testimony Parents presented to bolster their opinion that Student should remain in the private school placement explicitly agreed that such instruction would meet Student’s needs. (FF 31)

In addition, the District’s IEP proposal takes into account needs arising from Student’s slow processing speed, as well as potential needs with respect to attention, focus and executive functioning. (FF 15, 19, 20, 21, 22). Parents’ expert witness acknowledged that the District incorporated into its final proposed IEP all of her recommendations for strategies and supports to address Student’s educational needs. (FF 31)

Parents' Concerns about the District's Ability to Effectively Address Student Needs

The essence of the concerns expressed by Parents and by the neuropsychologist who testified for them centers on the District's proposal to place Student in co-taught regular education classes for academic content classes, such as science and social studies. Parents and their neuropsychologist witness are convinced that the noisier, more stimulating environment of the larger public school classes will be more distracting than Student can reasonably tolerate, resulting in little or no academic success. Those concerns, however, do not establish that the District's proposed placement is not an offer of a FAPE for Student.

In the first instance, it is impossible to predict how well Student will adapt to a larger classroom setting. It may well be that the services, accommodations and direct instruction included in the District's proposed IEP will enable Student to develop strategies to maintain focus and "tune out" distractions more quickly than expected by Parents and the neuropsychologist who testified to Student's need for small class sizes in order to make meaningful progress. The District offered varied and extensive specially designed instruction to address all of Student's identified needs. (FF 19, 20, 21, 22, 29, 30) Notably, Parents suggest that the general characteristics of a public school placement, particularly large class sizes make it inherently inappropriate for Student. The evidence does not support a conclusion that Student's ability to learn is so impaired that it is unreasonable to expect Student to succeed in public school regardless of the services and accommodations that are available to Student.

Second, the District has an ongoing, affirmative obligation to appropriately meet Student's educational needs in terms of providing services and supports reasonably calculated to result in meaningful progress. Consequently, had Student attended the public high school during the current school year, and did not make progress as the District expected with the proposed IEP,

and/or if Student inordinately struggled with the effects of slow processing speed, focus and attention due to difficulty in coping with a larger educational environment, the District would have been required to develop additional strategies and services to further support Student's ability to benefit from academic instruction.

If Student begins attending the public school under the current proposed IEP, or an updated proposal for the 2015/2016 school year, the District will have the same obligation to monitor Student's ability to benefit from instruction in the co-taught content classes, and to adjust the IEP if necessary give Student a reasonable opportunity for meaningful progress. Additional supports might include assignment to more supplemental learning support classes, at least temporarily, explicitly scheduling one to one instructional sessions with a special education teacher for re-teaching and/or review of concepts to assist Student in benefitting from instruction in the co-taught classes. In short, the District has both the resources, and the obligation, to be responsible, creative and flexible in addressing Parent concerns and meeting Student needs that can reasonably be anticipated, and/or as additional may emerge with experience in the public school setting.

Third, as the testimony of the private school academic dean suggested, there comes a time when a student with learning difficulties needs to acclimate to a larger classroom environment, regardless of the benefit he or she appears to derive from small classes. During the later high school years, therefore, the private school, therefore, provides its students with diminished supports and larger class sizes to provide its students with classroom experiences closer to what they might encounter in a private school that does not serve only children with learning differences. (FF 41, 42)

A public school classroom is, of course different from most private schools, where class size is still likely to be smaller than in a public school setting. The more varied public school experiences, however, are more likely to reflect situations Student will encounter after high school. Although Parents' fears were echoed by their neuropsychologist witness who has no independent or firsthand knowledge of either the public or the private school, there is no real, rather than speculative reason to believe that Student would be less likely to succeed in a public school co-taught classroom, with the extensive services and supports available in the proposed IEP, than in the larger private school classes. If class size is as critical a factor as Parents argue, Student will be subject to increased distraction in the private school classes, but with no explicit plan for addressing any of the difficulties Parents foresee if Student is placed in larger classes.

Although the public school setting will still provide a much larger environment than any private school, Student's overall progress, and progress toward IEP goals will be regularly monitored, and as noted above, adjustments must be made when, as and if necessary. Consequently, it may well be better for Student to begin acclimating to larger classes in a setting where there is a legal requirement to assure a reasonable opportunity for meaningful educational progress.

Finally, from the testimony of Parents and their neuropsychologist witness, it appears that their belief that the IEP will not effectively address Student's needs is best summarized by the witness's statement, referring to the inclusion of her recommendations into the IEP that, "...I don't know how it's going to be done, though." (N.T. p. 330, lines 2, 3) Based upon Parents' observation of a District co-taught class, both they and the independent neuropsychologist are concerned about potential difficulty in implementing the IEP, not that it does not, "on paper" meet Student's needs. Parents' concerns about whether the IEP can be effectively implemented

in a way that will assure Student's success in a large public school setting is certainly understandable, but is not a basis for concluding that the IEP is inappropriate, especially where there is no basis in experience for such concerns. *See, e.g., R.B. v. NYC Department of Education*, 65 IDELR 62, 115 L.R.P. 11592 (2nd Cir. 2015) at p. 3. If concerns about appropriate prospective implementation could support a conclusion that a proposed IEP is inappropriate, any school district proposed IEP for a child attending a private school could be successfully attacked on the basis that it might not be implemented effectively. Such a conclusion would put school districts in the impossible position of having to predict the future, and to guarantee the success of their best efforts to address an eligible student's needs in order to have their proposed IEPs found appropriate. The legal standards that apply to IEP offers provide that a proposed school district IEP must be assessed at the time it is offered, not at a later time, regardless of subsequent experience. *Susan N. v. Wilson School District*, 70 F.3d 751 (3d Cir. 1995). That is true even if, by the time a hearing is held, the proposed IEP has been implemented and the student in question is not achieving the expected level of progress. There is certainly, therefore, no basis for concluding that a proposed IEP is inappropriate based on a feared or predicted lack of success. Here, the District has had no opportunity, based on experience, to determine whether Parents' concerns are justified, and no opportunity to address any issues that may come to light as the proposed IEP is implemented. Regardless of Parent concerns for the future, which are, as the District points out, based in large part on fear of the unknown (and unknowable without actual experience), Parents' desire for smaller class sizes for Student is not a sufficient basis for concluding that the District's placement offer is inappropriate under any circumstances, much less where, as here, the availability of smaller class sizes in the private school is, in effect, the only real basis for Parents' rejection of the District's proposed

IEP. The District, however, has appropriately identified Student's educational needs and proposed an IEP reasonably designed to address those needs effectively. The record of this case, therefore, provides no basis for concluding that the District's proposed IEP is inappropriate.

Although it is certainly understandable that Parents see great advantages for Student in remaining in a private school, such advantages may be obtained at public expense only if the District fails to offer an appropriate education in the public school setting. In order to meet the standards for an appropriate placement, the District is not required to provide program and placement that Parents consider optimum, or that is objectively better than the private school placement Parents prefer. Moreover, the District is not required to assure that all difficulties and struggles inherent in adapting to a large public school setting be eliminated, since that would be an impossible standard to meet. It is likely that a large public high school placement would be considered a less than ideal setting by many parents of an IDEA eligible student. A public school placement becomes inappropriate, however, only if that setting, combined with a lack of appropriate services, is likely to result in a lack of meaningful progress for an IDEA eligible student. The record of this case provides insufficient persuasive evidence that such a situation was likely to occur had Student returned to the District for this school year, or if Student returns to the public school for the upcoming school year.

Appropriateness of the Private School Placement

Ordinarily, when the question of the appropriateness of the public school placement is resolved in favor of the District, further inquiry into the appropriateness of the private school program is unnecessary. Here, however, since Parents are so convinced of the value, even the necessity, of the private school program, it is useful to consider the appropriateness of the private

school program in greater detail than usual when a school district proposed placement is appropriate.

In this case, although Student appears to be comfortable in the small private school setting, and although the neuropsychologist who independently evaluated Student three times, suggested that Student should remain there, it would be unreasonable to give any weight to that recommendation. Student made modest progress toward overcoming the effects of the learning disability in reading, and in improving writing skills during the time Student has attended the private school. (FF 11, 12) More important, however, and fatal to any reasonable determination that Student is making meaningful progress in the private school, are the significant indications that Student's math skills regressed between the spring of 2013 and the spring of 2014. (FF 11, 16, 32) Standardized test scores that decline over time rather than remain at relatively the same level suggest a marked lack of progress. Although it may well be true that Student has made some progress relative to him/herself, albeit limited and slow, that level of progress falls short of the meaningful progress standard that is required to conclude that an educational placement is appropriate.

In addition, if Parents are correct in their belief that Student has made as much progress in math and reading as can reasonably be expected in light of the severity of Student's learning disabilities, Student will likely need significant accommodations to attend college after high school graduation. An IDEA-required transition plan, therefore, will be very helpful in supporting Student in moving into post-secondary education. As described in testimony at the hearing, it is apparent that the private school program has no transition plan and lacks adequate transition services. (FF 44) The District, however, has offered an appropriate transition plan and services. (FF 23) Although a private school program does not have to mirror public school

services, it must adequately meet an eligible student's needs. Student in this case needs the kind of systematic and cumulative transition plan that the District IEP provides and the private school lacks.

ESY

Because the focus of the hearing was on Student's learning disabilities/special education needs and whether the District's proposed IEP can effectively address those matters, there was no testimony with respect to whether Student should receive ESY services during the summer of 2015, and if so, what the services should be. It is possible that notwithstanding the ongoing due process hearing, which ended a number of weeks ago, the parties discussed Student's eligibility for ESY services and came to an agreement, or a contingent agreement depending upon whether Parents or the District prevailed on the school year tuition claims. In the event that did not occur, however, this decision and the order that follows must address ESY services, given the evidence concerning Student's learning disabilities and need for repetition and reinforcement to retain information and maintain skills.

The parties' settlement agreement provided that the District was responsible for funding, Student's ESY services provided by the private school through the summer of 2014, up to a specified amount. (J-3 p. 1, ¶1) The IEP proposed by the District in late May 2014 included tutoring services for ESY in the summer of 2014. (J-7 p. 38) Parents did not provide evidence specifically related to the ESY services offered by the private school. There is, therefore, no basis for determining whether the private school can provide an appropriate ESY program for Student.

There was evidence, that Student shows a significant need for continuing practice in order to maintain and consolidate learning, since academic achievement tests given in

consecutive years demonstrated that Student gains academic skills at a much slower rate than average in comparison to a national sample of students at the same grade level, and that even with ongoing instruction, Student has difficulty maintaining academic skills, based upon standardized assessments of academic achievement in consecutive school years that showed regression in basic math skills. Consequently, the District's 2014 offer of ESY services should be extended to the upcoming summer, and tutoring services, as offered by the District in 2014, remain an appropriate option for ESY services.

The record does not provide sufficient evidence for more specificity in terms of whether summer tutoring should be evenly divided among reading and math skills, or focus more, or exclusively, on math. The parties are urged to meet and discuss appropriate ESY services for Student as soon as possible, if they have not yet done so. By this decision and accompanying order, the District's ESY obligation for Student is limited to tutoring services as offered in its 2014 IEP proposal. The parties, however, are certainly free to agree on different services. Moreover, Parents can, of course, decline whatever services the District offers and elect to either skip ESY services entirely for Student or to provide a summer program of their choice at their own expense.

The order in this case simply provides a "default" for ESY in order to assure that appropriate ESY services are available to Student this summer, and to delineate the limits of the District's obligation, since ESY for the summer of 2015 is an issue raised in the due process complaint and identified and identified as an issue for decision at the beginning of the due process hearing.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims asserted in the due process complaint submitted in this matter for tuition reimbursement for the 2014/2015 school year and for payment of private school tuition for the 2015/2016 school year are **DENIED**.

Accordingly, the School District is not required to reimburse Parents for tuition paid for the education of Student to the private School for the 2014/2015 school year, or to fund Student's placement at the private school for the 2015/2016 school year.

It is **FURTHER ORDERED** that the School District shall offer ESY tutoring services to Student for the summer of 2015 as proposed in the School District's IEP offer dated May 27, 2014 (J-7 p. 38).

It is **FURTHER ORDERED** that the School District shall have no obligation to provide additional or different ESY service(s) or placement(s) to Student for the summer of 2015 unless the parties otherwise agree.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

May 26, 2015