

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

Child's Name: C. J.

Date of Birth: [redacted]

ODR File No. 17382-15-16 KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents
Parent[s]

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Dates of Hearing:

June 1, 2016, June 9, 2016,
June 16, 2016

Date Record Closed:

June 21, 2016

Date of Decision:

July 11, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student who resides within the geographic boundaries of the Penn Manor School District (District). Student, who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA),² previously attended school in the District but currently attends a public charter school (Charter School) that is some distance from the family's home. In February 2016, Student's Parents filed a due process complaint against the District asserting that the program it offered to Student in December 2015 did not provide a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.⁴

The case proceeded to a due process hearing convening over three sessions.⁵ The Parents sought to establish that the District failed to offer FAPE to Student in its program developed for the 2015-16 school year, and requested reimbursement for expenses associated with Student's placement in the Charter School and an Independent Educational Evaluation (IEE). The District

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision to the extent possible. Any such details that are provided were deemed by this hearing officer to be necessary to an understanding of this decision; those matters will be redacted before the document is made available to the public by the Office for Dispute Resolution in compliance with 20 U.S.C. 1415(h)(4) and 34 C.F.R. § 300.513(d).

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ The federal regulations implementing the IDEA are at 34 C.F.R. §§ 300.1 – 300.818; and those implementing Section 504 are at 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are at 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14 implementing the IDEA) and 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15 implementing Section 504).

⁵ References to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. The parties moved for admission of following exhibits, all of which were admitted without objection, at the hearing: P-1 through P-36, and S-1 through S-72 (N.T. 602-03); however, this hearing officer was unaware at the time that there was no exhibit provided and marked as P-29, S-30, S-42, or S-52 (perhaps to avoid duplication of documents as District exhibits, and due to the non-existence of P-29 (see N.T. 286)); those particular exhibits are therefore hereby excluded from the record as not offered. References to the few remaining duplicate exhibits will be to one or the other or both. Finally, references will be made to Parents in the plural where it appears that both were involved or one or the other were acting on behalf of both.

maintained that its special education program, as offered, was appropriate for Student, and that no remedy was due to the Parents. The record closed upon receipt of a document produced in response to this hearing officer's request for additional evidence, namely the version of Student's 2015-16 Charter School IEP that was current as of the end of October 2015 as referenced in the testimony.⁶

For the reasons set forth below, the Parents will prevail on their claim for transportation expense reimbursement, but the District will prevail on the issues of IEE reimbursement and expert witness fees.

ISSUES

1. Whether the District's special education program proposed for Student for the 2015-16 school year was appropriate;
2. If the District's proposed program was not appropriate, whether Charter School is appropriate for Student and, if so, whether equitable considerations operate to reduce or deny reimbursement for expenses incurred by the Parents for Charter School;
3. Whether the District should be ordered to provide door to door transportation to Charter School prospectively;
4. Whether the Parents are entitled to reimbursement for an IEE; and
5. Whether the Parents are entitled to reimbursement for fees incurred in connection with the testimony of their expert witness at the hearing?

⁶ The IEP was promptly produced together with other relevant information in a single document, and the document was accepted without objection from the parties and marked collectively as HO-1. Although there was some delay in coordinating schedules for the hearing dates in this case, the timing of the receipt of the requested additional evidence coincided with the date of certification of the final hearing transcript and, therefore, did not impact the timeliness of this decision. HO-1 is hereby admitted into the record.

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District. Student is eligible for special education under the IDEA and is a protected handicapped student under Section 504 and Pennsylvania Chapter 15. (N.T. 43-44)
2. Student is very interested in the arts and has performed theatrically in the community and at Charter School. Student is motivated to succeed academically when theater arts participation is contingent upon that success. (N.T. 47, 76-78, 84, 109, 130, 176, 211-12, 223, 228)
3. Student exhibits difficulty with focusing, paying attention to task, and impulsivity, as well as with organization. Student also has social skill needs and has experienced significant difficulty with peer relationships prior to attending Charter School. Student has exhibited behaviors that impact Student's learning, including making sounds that distract others, and "meltdowns" when Student would yell and sometimes elope from a frustrating situation such as when Student believed someone was upset with Student. Meltdowns could last several hours and often required intervention by one of the Parents. (N.T. 46, 49, 72, 79, 99-100, 120-21; P-1)
4. Student was diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) in approximately 2009 and began treatment that included medication. (P-1 p. 1)
5. Student has been suspected of being on the autism spectrum, and has been diagnosed with, or considered eligible for special education on the basis of, Autism Spectrum Disorders (ASD) at various times. (P-1, P-3; S-16, S-25, S-63)

District Programming: 2007-08 through 2012-13 School Years

6. Student attended a District elementary school from second through sixth grades beginning in the 2007-08 school year, passing all classes each year. (N.T. 48-49; S-6, S-7, S-8, S-9, S-10)
7. Student was first evaluated for special education in early 2008 by the District. The resulting Evaluation Report (ER) identified speech/language related concerns (articulation), but the conclusion was that Student was not eligible. (S-12)
8. A new ER completed in early 2009 reflected similar and new speech/language concerns. Student was determined to be eligible for special education to address articulation and pragmatic language, with eligibility identified as a speech/language impairment. (S-13, S-14)
9. In the fall of 2009, Student repeatedly engaged in appropriate touching of peers, particularly children of the opposite gender, and Student was suspended as a result. Those behaviors decreased with the provision of a one-on-one aide. Student also exhibited difficulty engaging with peers in other ways: dominating play and conversations, singing or humming out loud and distracting others, and failing to

comply with peers' requests to stop those behaviors. (S-16 pp. 2, 8, S-17, S-19 p. 2, S-23 p. 11, S-25 pp. 5-6)

10. During the 2009-10, 2010-11, and 2011-12 school years, subsequent evaluations determined that Student was eligible for special education under other categories, namely ASD and specific learning disability. Individualized Education Programs (IEP) were developed to address Student's special education needs and revised as necessary. A Positive Behavior Support Plan (PBSP) was also developed in response to various behavioral incidents, and that document was similarly revised as needed. (S-16, S-18, S-19, S-20, S-22, S-23, S-24, S-25, S-27, S-28, S-29, S-32, S-34, S-35, S-36, S-39, S-40, S-43, S-44)
11. Student entered a District middle school in seventh grade (2012-13 school year). Student struggled academically, socially, behaviorally, and emotionally that year, even with the support of an aide; Student's IEPs were revised multiple times over the course of the school year. (N.T. 51-56, 65, 68, 214-15, 360-61, 367, 386, 394-96, 463-66, 468-71; P-20; S-38, S-39, S-45, S-46, S-47, S-48, S-49, S-51, S-53, S-55)
12. The District conducted an evaluation of Student during the 2012-13 school year and issued a Reevaluation Report (RR) in January 2013. A meeting convened to discuss the RR, and the Parents did not express any disagreement with that document. (N.T. 436, 563-65; P-3)
13. At the time of the January 2013 RR, the Parents were concerned with how the aide assisted Student, with Student's social skills and interactions with peers and school staff, and with Student's difficulties with mathematics class and written expression. (P-3 p. 1)
14. Teacher input into the January 2013 RR reflected positive comments in some classes, but concerns in others with assignment completion, remaining on task, spending instructional time outside of the classroom, organizational skills, class preparation, following directions, and distracting classmates. Student's present levels of performance in mathematics and writing were reported with needs identified in those areas. (P-3)
15. The District conducted cognitive assessment (Woodcock-Johnson Tests of Cognitive Abilities – Third Edition), with Student demonstrating average to superior scores on the majority of subtests but with a weakness in processing speed. An academic achievement measure of mathematics skills revealed low average to average scores. (P-3 pp. 17-19)
16. The RR included the Behavior Rating Inventory of Executive Functioning by Student's teachers, with concerns by at least some teachers reflected on all scales and composites. Student's working memory and monitoring abilities were noted as very significant concerns. (P-3 pp. 18, 20)
17. Results of speech/language and occupational therapy assessments were also included. Student exhibited above average pragmatic language abilities (Test of Pragmatic

Language (TOPL)), but continued to demonstrate a need for social skills based on a student checklist. With respect to occupational therapy, Student demonstrated weaknesses with sensory processing and regulation. (P-3 pp. 20-25)

18. The January 2013 concluded that Student was eligible for special education with autism the primary disability category and specific learning disability the secondary category. A number of recommendations were included in the RR to address identified needs in the areas of sensory processing and integration; social awareness, cognition, and communication; written expression; attention, focus, and executive functioning; and tolerance for frustration. (P-3 pp. 25-27)
19. A new IEP was developed in February 2013. Annual goals addressed adherence to safety procedures, organizational skills, written expression, and using coping skills to manage frustration. Itinerant autistic support, a one-on-one aide, and occupational therapy were noted as related services. (P-4)
20. In April 2013, Student reported several incidents where Student was called names that included derogatory references [of a sexual nature]. These instances were corroborated by other students on investigation by the District after Student's Parents reported the incidents. (N.T. 463-67; S-55)
21. As of the end of the third quarter of the 2013-14 school year, Student's grades were all passing, ranging from a D in science to A grades in social studies and technology education. (S-5)

Private School: Spring 2013 through End of 2014-15 School Year

22. Student enrolled in a private school (Private School) in April 2013 after the Parents became concerned with Student's academic and social difficulties at school. The District agreed to partially fund that placement for the remainder of the 2013-14 school year and the 2014-15 school year. As part of that agreement, the parties also consented to specific conditions for the 2015-16 school year, with certain notifications to be made beginning in January 2015. (N.T. 68, 70, 113, 473, 535-36; P-6)
23. Private School serves children with learning differences from kindergarten through twelfth grade. Approximately 75 students were enrolled at Private School during recent school years. Class sizes are small, averaging six students to one adult. (N.T. 508-09, 529-30)
24. Student transitioned easily to Private School. (N.T. 231-32)
25. Student demonstrated needs in the areas of mathematics, written expression, and social skills including pragmatic language while attending Private School. (N.T. 509-11, 517-24, 527; S-66)
26. Student repeated eighth grade at Private School during the 2014-15 school year because, while Student was succeeding academically, Student was not emotionally ready for high school. (N.T. 73-74)

27. By the end of the 2014-15 school year, Student had made progress on goals toward improving reading comprehension and verbal impulsiveness, improving writing fluency and written expression, and passing written Algebra I assessments; Student achieved passing grades in all classes. Student continued to demonstrate needs to continue overall reading comprehension and vocabulary development; to review or repeat Algebra I; to collaborate with peers; to maintain focus and participate in class; and to develop and maintain friendships. (S-67, S-68, S-69)
28. The parties entered into another settlement agreement in the spring of 2015 to continue Student's attendance at Private School. Pursuant to that agreement, the District again agreed to partially fund Student's placement at Private School for the 2015-16 school year. The parties also agreed to specific conditions should student leave Private School and for planning for the 2016-17 school year. (N.T. 81, 539; P-15)

Independent Educational Evaluation (IEE) Fall 2014

29. The Parents arranged for an IEE in the fall of 2014 by a private psychologist who is a nationally certified and Pennsylvania licensed school psychologist. (NT. 250; P-23).
30. The private psychologist who conducted the IEE issued a report and met with the Parents to review it on November 17, 2014. (N.T. 250, 291; P-7)
31. The private psychologist administered assessment of Student's cognitive abilities (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) and results reflected overall average functioning (Full Scale IQ 98). Working memory was a relative strength and processing speed a relative weakness, and the General Ability Index score (99) was also in the average range. (P-7)
32. The private psychologist also administered the Wechsler Individual Achievement Test – Third Edition (WIAT-III) and the academic fluency subtests of the Woodcock Johnson Tests of Achievement – Third Edition (WJ-III-ACH)). On the WIAT-III, Student attained scores that ranged from borderline/poor (math fluency – addition) and below average (math fluency – subtraction and overall math fluency) to above average (essay composition) and very superior (reading comprehension); all remaining scores were in the low average to average ranges. Academic fluency performance on the WJ-III-ACH was below grade level expectations in all areas (reading, writing (including handwriting), and mathematics). (P-7)
33. Social/emotional/behavioral functioning was assessed using the Behavior Assessment System for Children – Second Edition (BASC-2). Parent rating scales reflected clinically significant concerns in the areas of anxiety, conduct problems, hyperactivity, activities of daily living, and functional communication; and at risk concerns in the areas of aggression, attention problems, atypicality, depression, adaptability, and leadership. Teacher rating scales reflected clinically significant concerns only in the area of hyperactivity; with at risk concerns in the areas of attention problems, atypicality, and adaptability. Other instruments related to inattention, hyperactivity, and impulsivity also suggested concerns in those areas. (P-7)

34. Adaptive behavior was also assessed through rating scales completed by the Parents and a teacher. The Parents rated student in the extremely low range, whereas the teacher rated student in the middle of the average range. (P-7)
35. In the IEE, the private psychologist described in detail Student's low self-esteem, social withdrawal, anxiety, feelings of depression, and Student's self-reports of peer rejection. (P-7)
36. The private psychologist obtained and considered rating scales for ASD, with discrepant results: the Parents' scales suggested a high likelihood, but the teacher's scales suggested the opposite. The private psychologist did not conclude that Student presented as a child with ASD.⁷ (N.T. 258, 260, 295-96; P-7)
37. The private psychologist made a number of recommendations for Student's educational program on the basis of eligibility as a child with an other health impairment and specific learning disabilities in reading fluency, mathematics calculation, and mathematics problem solving. Specific recommendations were for a particular mathematics program and direct instruction in social skills improvement to include social cognition. (P-7)
38. The private psychologist was familiar with Private School, and did not believe that Student required the level of intense academic support that Private School provided. (N.T. 262-63, 283)
39. The private psychologist recommended to the Parents that they consider a school that offered programs in the arts due to Student's interest and strengths, as well as to provide Student with incentive and motivation to succeed and participate in the school environment. (N.T. 259-60, 264, 283)
40. The IEE was provided to the District in approximately December 2014. (N.T. 566)

Charter School (2015-16 School Year)

41. In the spring of 2015, the Parents began to consider a different placement for Student because Student was making academic progress but continued to have difficulties with peers and social relationships. (N.T. 81-82, 128-29, 131, 134-35)
42. Charter School conducted an evaluation of Student and issued a Reevaluation Report in early August 2015. This RR provided a brief summary of the IEE, referencing the full report, and identified Student as eligible for special education on the bases of an other health impairment and specific learning disability. Needs specified in the RR for Student were to improve reading fluency, mathematics reasoning, mathematics problem

⁷ The most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) combined the various autism related disorders that were used in the DSM-IV; the psychologist referenced some of the DSM-IV disorders in her IEE report because that was the current version at the time. (N.T. 294-96)

solving, social cognition, recall of basic mathematics facts, and visual scanning and tracking speed. (P-33; S-61)

43. The family explored several charter schools for the arts in Pennsylvania in early 2015. Student applied at a different charter school for the arts that is located closer to the family's home, but Student was not able to audition, a requirement for application. (N.T. 85-86, 130-31)
44. Student applied to and was accepted at Charter School in April 2015 following an audition, and attended there for the 2015-16 school year. Charter School is accredited by the Pennsylvania Department of Education and provides a "creative academic approach to learning" (P-25 p. 1) in a college-preparatory curriculum, offering programs in a number of artistic areas including performing arts. Student and the Parents accepted the offer of admission. (N.T. 44, 131-32, 135, 158-60, 162; P-25, P-32 p. 1)
45. Charter School held an IEP meeting in August 2015 before the school year started. The Parents attended the meeting. (N.T. 87-88, 164-66, 180-81; P-34 p. 3.1)
46. Charter School held another IEP meeting in early September 2015 so that staff could become familiar with Student's IEP. (N.T. 164-65, 181; P-34 p. 3)
47. The IEP marked "final" as of September 3, 2015 noted that the team would reconvene by October 30, 2015 to update the present educational levels including adding baselines to the goals and reviewing the specially designed instruction. (P-34 p. 2)
48. The September 3, 2015 IEP indicated that Student did not exhibit behaviors that impeded Student's learning or that of others. Present levels of academic achievement and functional performance were briefly summarized, with needs identified as improving reading fluency and mathematics calculation. Transition services reflected a college-preparatory curriculum and addressed the goal of obtaining post-secondary education and training. (P-34)
49. The Charter School IEP contained two annual goals. One addressed problem-solving on a curriculum-based assessment in an unspecified subject (although the reference to Pennsylvania state standards suggests that mathematics is the subject area) and the other addressed reading comprehension. Both goals identified "to be determined" as the baseline and the goal expectations. (P-34)
50. Program modifications and items of specially designed instruction addressed preferential seating, test and assignment accommodations, an extra set of textbooks at home, classroom notes, access to the academic support classroom, and monitoring of organizational skills. Student's program was itinerant learning support. (P-34)
51. The IEP team met on October 21, 2015 to revise the IEP to provide the baseline data and goal expectations. The problem-solving goal reflected a baseline of 83% with a goal of 85% mastery; and the reading comprehension goal reflected a baseline of 83% and goal of 85% mastery. (HO-1 pp. 4-5, 20-23)

52. The Charter School schedule is divided so that half of the school day is devoted to academics and the other half is devoted to the arts (three classes each day). Student is involved in theater arts. The theater arts program presents several performances over the course of a school year that require auditions. Student has assisted with performances in various roles. (N.T. 91-92, 156-58, 174, 221-23, 233-34; P-25)
53. Approximately 550 students attend the Charter School high school, and class sizes vary. Academic classes have fewer students per classroom, approximately 20-24, than the arts classes with approximately 30 students. (N.T. 159, 161; P-25 p. 1)
54. Academic classes at Charter School may be co-taught by general and special education teachers. (N.T. 166)
55. Student was in a co-taught English class and one co-taught theater class. (N.T. 166)
56. Student was in an Algebra I class, and also had an Algebra Extension class for support with homework. (N.T. 225)
57. Student had an academic support class once per 4-day cycle for one 50 minute period for any support Student needed as well as to practice organizational skills. Student could also access the academic support classroom and teacher during study halls. Student had academic support at least one period per day at Charter School. (N.T. 166-67, 194-98, 218-19, 224-25, 228-29)
58. When Student first began attending Charter School, Student had some difficulty with transportation arrangements and sometimes missed school as a result. However, Student transitioned easily to Charter School. As of the end of the school year, Student felt wholly accepted by peers at Charter School. (N.T. 95, 167-68, 219-20, 232)
59. Student's grades for the first two quarters at Charter School were in the A- to C- range. (P-28)
60. Student has friends at Charter School, and participates well with group activities. (N.T. 92, 225-26)
61. Student's performance on the IEP goals by the end of the third quarter was quite variable; average accuracy on probes reflected a downward trend on both goals (problem solving from a baseline of 83% and a first quarter average of 81.4% to an average of 68.9%, and reading comprehension from a baseline of 83% and a first quarter average of 82.8 % to an average of 77.7%). (P-36; HO-1 pp. 20-23)
62. Charter School does not provide transportation for its students but relies on local school districts to do so. A bus service does operate a van pool in the local area at a cost that depends on the number of riders; the fee during the first three quarters of the 2015-16 school year averaged approximately \$330/month for each rider. In late August 2015, the Parents asked the District to provide transportation to Student, either door-to-door or in the form of reimbursement for their own expenses, but it declined. (N.T. 87-88, 552-53, 594-95; P-26 -p. 1-3, P-32 p. 3)

63. Student has a one-way commute of approximately 66 miles between the family home and Charter School. Student is driven by the Parents to the home of a peer, and takes the van to Charter School in the morning and back to the peer's home in the afternoon where the Parents pick Student up for the return home. The cost to the family for their round trip drive to the van pick-up and drop-off point at the federal mileage rate is \$71.71, with the Parents making two such trips each school day. (N.T. 89-90, 111-12, 234; P-26)
64. After the District advised of its decision not to provide Student with transportation to Charter School, the Parents by letter dated August 20, 2015 asked for FAPE from the District. On that same date, the District, responding to the notice that the Parents had elected to disenroll Student from Private School, offered to begin the reevaluation and IEP process but noted that Student would be provided a temporary program at the start of the 2015-16 school year in the interim. (P-32 pp. 3-6)
65. Prior to August 20, 2015, the Parents had not asked the District to provide a program for Student or transportation to another school. (N.T. 554-55)
66. After the Parents' did request transportation for Student in late August 2015, the District determined that its cost to provide Student with transportation to Charter School, using its contracted bus transportation company, would be \$588 per day. (N.T. 562-63)

District 2015 Evaluation and Proposed Program

67. The District conducted another reevaluation of Student with a report issued in December 2015 following consent by the Parents on October 12, 2015. This RR included a review of records with a notation that Parent input would be gathered at the reevaluation meeting. Information from the teachers at the Charter School indicated that Student demonstrated many grade level skills, but needs with respect to written expression as well as assignment completion, following directions, preparation for class, organizational skills, and attention to tasks. (N.T. 436, 552; P-16; S-63)
68. Student participated willingly in the assessments for the RR. The District school psychologist administered testing of Student's academic achievement (Kaufman Test of Educational Achievement – Third Edition). Student scored in in the average range on all readings subtests, with relatively weaker performance on all mathematics subtests; student also obtained an average score on the written expression subtest. (P-16 pp. 6-8)
69. The District assessed behavioral functioning using the Social Responsiveness Scale – Second Edition, reflecting behaviors consistent with ASD; and BASC-2 rating scales from two Charter School teachers and Student. The BASC-2 results revealed at risk or clinically significant concerns of the teachers with respect to hyperactivity, attention problems, learning problems, while Student endorsed concerns with anxiety and hyperactivity. (P-16 pp. 8-10)
70. Speech/language assessment of Student's use of language reflected some areas of need in several skills areas (pragmatic language skills, social/emotional development, and

inhibiting behavior), despite overall average scores and the previous report of the TOPL⁸ revealing all average or above average range scores. (P-16 pp. 11-12)

71. The December 2015 RR concluded that student was eligible on the bases of an other health impairment (due to ADHD) and a specific learning disability. Needs were identified in the areas of mathematics calculation and problem-solving, and attention, focus, and executive functioning skills. (P-16 p. 12)
72. A meeting convened in December 2015 to discuss the RR. Autism was added as an additional disability category in the final version of the document at the request of the Parents. (N.T. 443-44, 556-57, 560; S-64 p. 12)
73. The District high school utilizes block scheduling for all students. In that schedule, classes are 75-88 minutes long, and most students have four classes over the course of a semester. Two days each week, classes are 88 minutes long; and three days each week, classes are 75 minutes long allowing for a 45-minute homeroom period. During the homeroom period, students may participate in clubs, receive tutoring, or use the time as a study hall. (N.T. 323-25, 349-51)
74. Students are required to take four core subject area classes (mathematics, science, English, and social studies), and also take four electives, over the course of the school year. (N.T. 329-30)
75. Most of the high school teachers provide a variety of learning activities during any single block period. (N.T. 329, 352-53)
76. Approximately 1700 students attend the District high school, with approximately 400-450 students in each grade. (N.T. 333-34, 569)
77. Students at the high school have the opportunity to participate in various clubs and extracurricular activities. A thespian club is among those available to students, and it meets once per week. The thespian club typically presents two productions during the school year. (N.T. 335-36, 342, 373, 570-71)
78. The District convened an IEP meeting in December 2015, which the Parents attended. The team discussed the content of the IEP including the goals. (N.T. 97-98, 560, 600-01)
79. The proposed IEP included information from the most recent RR in the section on present levels of academic achievement and functional performance, including the standardized assessments administered and input from Student's Charter School teachers. The special considerations section did not indicate that Student exhibited behaviors that impeded Student's learning or that of others. Needs were identical to those set forth in the most recent RR (improvement of mathematics calculation and

⁸ The reference to a December 2013 administration of the TOPL at P-16 p. 11 appears to actually relate to testing in December 2012 (see P-3 pp. 20-21).

mathematics problem solving skills, and improvement to attention, focus, and executive functioning skills). (P-17)

80. The proposed IEP contained three annual goals: one for Student to demonstrate relevant concepts, reasoning, and problem solving skills in the Algebra curriculum (with baselines to be determined based on data collected within three weeks of Student's attendance at the high school); one for Student to demonstrate appropriate executive functioning skills in identifying strengths and needs in a given situation and strategies to compensate as needed to accomplish a self-identified goal (with baselines determined as above); and one for Student to identify perspectives of others in a social situation (with baselines to be determined as above). Program modifications and items of specially designed instruction addressed prompting and redirection, direct instruction and reteaching of mathematics concepts, direct social skills instruction, preferential seating, testing and assignment accommodations, an alternate (slower paced) algebra class, check ins for organization and assignment completion, copies of class notes, and use of a calculator. Student's program was one of itinerant learning support with itinerant autistic support. (P-17)
81. The District has two social skills groups at the high school. One group is led by an itinerant autistic support teacher who is employed by the local Intermediate Unit (IU). That group meets once each week during homeroom. (N.T. 343-45, 413)
82. Student would have had both group and individual sessions targeting social skills (pragmatic language and perspective taking), and would also focus on problem solving, executive functioning including organizational and planning skills, and any other needed support. (N.T. 402-08, 419-21; P-17 pp. 29-30)
83. There is no bullying prevention program at the high school, but the District has a cyber-bullying policy. This policy is reviewed with students at the beginning of each school year. (N.T. 336-37, 578; S-65)
84. The Parents did not agree with the District's proposed program on the NOREP signed on December 23, 2015. (P-18)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, 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). Accordingly,

the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, testifying forthrightly and to the best of their recollection; the few discrepancies that existed in the testimony were minor and had no real bearing on the issues presented. Student’s own testimony was particularly insightful and straightforward, and was remarkable in its passion for Charter School, an enthusiasm that is, unfortunately, not as common at the high school level as one might hope.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties’ helpful closing arguments.

GENERAL IDEA PRINCIPLES

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. For children who are eligible for special education, states are mandated to provide a “free appropriate public education” (FAPE). 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson*

Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. More specifically, “[a]n IEP consists of a specific statement of a student's present abilities, goals for improvement of the student's abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 557 (3d Cir. 2010). However, the IEP need not “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). The standard is not maximization of the child’s potential. *Rowley, supra*, 458 U.S. at 198. Importantly, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

SECTION 504 PRINCIPLES

Section 504 specifically prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood, supra*, at 253 (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *Lower Merion, supra*, at 931. In this matter, the Section 504 and IDEA claims are the same, challenging the obligation to provide FAPE, and will be addressed together.

DISTRICT’S FAPE OFFER TO STUDENT

In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11. In this case, the Parents enrolled Student in a public charter

school but did ask the District to develop and offer a program for Student, and the District complied by conducting a reevaluation and developing an IEP. Although Student is enrolled in a public charter school in the fall of 2015, the parties agree that the appropriate analysis is that typically conducted for claims relating to reimbursement for private school tuition.

That test applies when parents believe that a public school is not providing FAPE to their child, and they unilaterally place him or her outside of the District and thereafter seek reimbursement for tuition and related expenses. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242. Such reimbursement is an available remedy for parents to receive the costs associated with their child's unilateral placement where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Carter*; *Burlington*. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Id.*; *see also 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); *Carter*, *supra*. A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter*, *supra*.

Appropriateness of District Program

Thus, the first question to be answered is whether the District's program was reasonably calculated to provide the child with FAPE. While there are many aspects of the District's program which must be viewed as appropriate and responsive to Student's needs, there are countervailing components of the program proposed in December 2015 that ultimately compel the conclusion that it was not an offer of FAPE.

The Parents' evidence that focused on the District's block scheduling and inclusion of programming to address pragmatic language skills, as well as the absence of a PBSP, merits some discussion. First, while the Parents have what appear to be very genuine concerns that Student would experience difficulty with long class periods particularly given Student's ADHD, block scheduling does not mean that students are expected to remain seated and involved in a single classroom activity for the entire class period. The evidence as a whole simply does not establish that block scheduling, in and of itself, renders the District's program inappropriate. Indeed, even the Parents' expert declined to offer any opinion on whether Student would struggle with longer class periods (N.T. 276-77). Second, the information that the District had in December 2015 was that Student did exhibit some deficit in the area of pragmatic language skills despite an earlier 2013 TOPL, and in any event the District's proposal to provide Student with practice in the pragmatics of language are directly related to Student's difficulties in maintaining positive peer relationships. Third, despite the lack of a PBSP, the behaviors that Student was exhibiting at Charter School at the time of the December 2015 RR and IEP (lack of focus and attention, following directions, assignment completion, preparing for class, and organizational skills) are all addressed elsewhere in the IEP and most notably in the various program modifications and items of specially designed instruction.

The Parents also suggested that the District did not adequately consider or incorporate the IEE or its recommendations. As their expert noted, however, the District's December 2015 RR was not inconsistent with the findings of the Parents' private psychologist (N.T. 268). Moreover, the District's IEP contained the vast majority of the IEE recommendations, with the notable exceptions of the specific mathematics and social skills interventions that the private psychologist recommended. The record therefore supports the conclusion that the District did

not ignore the IEE but rather integrated many of its suggestions into the program proposed for Student.

Nevertheless, there are components of the District's program that render it not appropriate for Student as offered. The most evident element of the program that falls short is the absence of sufficiently intensive and individualized intervention to address Student's significant difficulties with peer relationships and social skills that were evident when Student last attended the District, were fully explored in the IEE, and remained a concern when Student left Private School at the end of the 2015-16 school year.

The most recent comprehensive information available on Student's social skill deficits is the fall 2014 IEE, where the private psychologist described a child with low self-esteem, social withdrawal, anxiety and depression, and rejection by peers. This information is consistent with many of Student's difficulties at the District middle school as well as throughout Student's tenure at Private School, and are part of Student's disability under the IDEA and Section 504. While it may be argued that Student did not exhibit those characteristics to the same extent during the 2015-16 school year, the District did not undertake significant inquiry into what Student's specific social skills needs were in order to gauge whether weekly individual and group interventions targeting not only social skills, but also problem solving, organization, and other skills, were adequate. Furthermore, whether or not one might agree that Student was the victim of bullying in the District middle school, the District was aware from its experience with Student, as well as from the IEE, that Student perceived outright rejection by peers. While the District was certainly free to choose a program or programs to implement in order to address these needs, rather than adopt the specific program recommended by the private psychologist, this hearing officer concludes that this significant area of need was not sufficiently

individualized and adequately addressed in the District's proposed program.

Another component of the program that is of concern is that each of the goals in the IEP are rather broad and vague, and accordingly are not objectively measurable. The absence of baseline data or other objective indicia of Student's functioning in the goal areas further compounds the reader's inability to properly understand the goals and evaluate whether they address educational needs that Student has.

This flaw is quite significant in the area of mathematics, where there was no attempt made to determine what specific skills Student had not mastered. The mathematics goal is written in terms of how Student would perform using the District's specific curriculum, with reference to present levels that are grounded in anecdotal teacher reports and standardized assessments. The District contended that it needed to instruct Student in its Algebra curriculum in order to perform the measures that would form the baseline. However, by December 2015, Student had already successfully completed an Algebra I course at Private School and had had nearly one full semester repeating Algebra I that also included a support class. Student also participated willingly in the District's reevaluation in December 2015, and was living and attending school within commuting distance of the District. There is simply no reason that the District could not have conducted necessary assessments in order to develop a goal in mathematics that specified where Student was performing and what growth Student was expected to achieve in one year's time. As the Parents' expert cogently and persuasively explained, Student requires curriculum-based assessment to identify the mathematics skills that Student has and does not have, so that specially designed instruction may target the areas that Student needs to develop and practice. (N.T. 282-83) Thus, even assuming that achievement based on the District's curricular assessments is appropriate for Student to address mathematics

skill deficits, the failure to identify where Student was performing renders impossible any meaningful consideration of whether the goal was appropriate.

Similarly, the second goal aims for Student to “demonstrate appropriate executive functioning skills,” again with no baseline. (P-17 p. 27) One need only look at the description of Student’s executive functioning weaknesses in the District’s 2013 RR (P-3 p. 20) to recognize that the IEP goal that purports to address those that remained a concern in December 2015 is impermissibly vague. Without some indication of the specific areas that the goal targets, and clear objective measurement of Student’s current functioning and anticipated growth, the IEP cannot be deemed appropriate on this record under the applicable law.

For all of these reasons, this hearing officer concludes that the IEP developed and proposed in December 2015 did not meet the requisite standard of an offer of FAPE to Student.

Appropriateness of Charter School for Student

The next prong of the analysis requires examination of Charter School to determine whether the Parents’ chosen placement was appropriate.

Charter School is a public school accredited by the Pennsylvania Department of Education. 24 P.S. § 17-1703-A. As such, Charter School is required to comply with the IDEA and Section 504, and their implementing regulations. 22 Pa. Code §§ 711.1 – 711.62. Charter provides a college-preparatory curriculum that includes a half day of academic classes and a half day of arts-related programs, similar to what one might find in a vocational-technical program. The performing arts element of Student’s program is aligned with Student’s strengths and interests.

Student was evaluated by Charter School prior to the start of the school year. The team developed an IEP at Charter School, with two annual goals and several program modifications

and items of specially designed instruction. Student had two classes co-taught by a special education teacher and a daily period of academic support. Student was succeeding academically, socially, and behaviorally at Charter School, and was motivated to exert the effort needed to do well. By all accounts, and particularly the testimony of Student, Student thrived at Private School and completed a very successful year despite some attendance concerns at the start of the school year.

The District points out that Charter School similarly did not include baseline data in its IEP goals, and that Student did not exhibit growth toward meeting those goals. However, it is important to keep in mind that whether or not Charter School complied with its public school obligations under the IDEA and Section 504 is not an issue presented. As noted above, parentally-selected placements need not satisfy the same standards that are imposed on the resident school district. Furthermore, for purposes of the reimbursement analysis, the overall benefits Student has received from attending Charter School far outweigh any shortcomings one might glean from a review of the IEP documentation. In sum, this hearing officer concludes that Charter School is appropriate for Student and that the Parents have met the second prong of the test for reimbursement.

Equitable Considerations

The final step of the test requires application of equitable principles that may reduce or deny reimbursement. The only pertinent factor that relates to this prong is the Parents' delay in seeking financial support from the District until just before the start of the 2015-16 school year. At that point in time, the District would have needed some reasonable period to explore options for assisting with Student's transportation to Charter School more than 60 miles from the family

home and outside of its obligations under the Public School Code.⁹ This hearing officer concludes that 30 calendar days after the written notice, or until September 19, 2015, is a reasonable period of time for the District to have made the arrangements had it been given the opportunity to do so, and the remedy will account for the late notice.

The Parents sought as their preferred remedy a direction that the District provide direct transportation to Student between the home and Charter School; or, in the alternative, reimbursement for actual expenses incurred. At the outset of the hearing, the Parents explicitly limited the issue to the 2015-16 school year, which had concluded by the time that the record closed. Despite their suggestion in their closing argument that prospective relief may be awarded for the 2016-17 school year, the record, and this hearing officer's authority, is limited to the issues that were clarified on the record and about which evidence was presented.¹⁰ (N.T. 35-36, 144-45)

Having found that the District's program was not appropriate for Student, and that Charter School was appropriate for Student, the Parents will be awarded reimbursement for transportation expenses. That reimbursement will be limited to the federal mileage rate for the total roundtrip distance between their home and Charter School (133 miles based on P-26), twice each day, at the federal mileage rate for every day that Student attended Charter School beginning with September 20, 2015; in addition, the Parents may recoup to the actual cost to them of the van pool.

IEE REIMBURSEMENT

The next issue is the Parents' request for reimbursement for the fall 2014 IEE. When

⁹ 24 P.S. § 13-1361.

¹⁰ In any event, equitable considerations (including environmental factors) would plainly favor reimbursement over the District expending resources to arrange for bus or van transportation of one child the distance to and from Charter School. The Parents recognized reimbursement would be a proper remedy. (N.T. 36, 619-20)

parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Following a parental request for an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the Parents did not make a request of the District for an IEE; indeed, they arranged for the IEE to be completed during a time that Student was attending Private School, and nearly two years after the District's then-most recent RR. Furthermore, the Parents' request for the IEE made in their Due Process Complaint was not based upon a disagreement with that or any District evaluation; and, the IEE report was not shared with the District as part of the process of its development of an IEP for Student, a step that the parties did not undertake for a full year after its completion. *See L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 *75, 2015 WL 1725091 (E.D. Pa. 2015) (denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). While the IEE is comprehensive and was clearly helpful to the IEP team, the law does not support reimbursement for its cost.

EXPERT WITNESS FEES

The remaining issue is the Parents' request for reimbursement for the fees incurred by them for their expert, the private psychologist who conducted the IEE, to testify at the hearing. That witness provided testimony that was helpful to the hearing officer, in elaborating on the IEE report, and as noted above. However, the basis for this requested remedy is Section 504, which provides in relevant part that "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k) (emphasis added). Similar language in the IDEA has been construed as not applying to

administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006) (concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). Accordingly, this hearing officer declines to order that remedy.

Finally, having reached all of the above conclusions with respect to FAPE under the IDEA, the same determinations are made with respect to a denial of FAPE under Section 504. There is, therefore, no reason to further address Section 504 separately.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the Parents have established their entitlement to reimbursement for transportation costs to Charter School for the 2015-16 school year based on the District’s denial of FAPE; but have not proven grounds to order reimbursement for the IEE or expert witness fees.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District’s December 2015 proposed program did not offer FAPE to Student.
2. The Parents are entitled to, and the District is ordered to provide, reimbursement for transportation costs to Charter School at the applicable federal mileage rate, for a total of 266 miles per day for each day that Student attended beginning with September 20, 2015 and continuing through the end of its 2015-16 school year.

3. Within 20 calendar days of receipt of Student's official attendance record from Charter School, and proof of payment of van pool expenses for the entire 2015-16 school year, the District shall reimburse the Parents in full subject as set forth in ¶ 2.
4. The Parents are not entitled to reimbursement for the IEE or expert witness fees.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 11, 2016