

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: Z. Z.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 16353-14-15 KE

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

Charles E. Steele, Esquire

Christopher N. Elnicki, Esquire

428 Forbes Avenue, Suite 700

Pittsburgh, PA 15219

Local Education Agency

Pittsburgh School District

341 South Bellefield Avenue

Pittsburgh, PA 15213-3516

LEA Attorney

Aimee Rankin Zundel, Esquire

Weiss Burkardt Kramer, LLC

445 Fort Pitt Boulevard, Suite 503

Pittsburgh, PA 15219

Date Record Closed:

January 20, 2016

Dates of Hearing:

7/27/2015, 8/31/2015, 9/23/2015,

10/28/2015, 12/9/2015, 12/10/2015,

12/18/2015

Date of Decision:

January 30, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student who is a resident within the boundaries of the Pittsburgh Public School District (District) and currently eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student attended school in the District upon entry into school-aged programming through the end of the third grade year before enrolling in a private school; the Parent later sought to re-enroll Student in the District. In May 2015, Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and the federal and state regulations implementing those statutes from the time of Student's first enrollment as well as through current program development.

The case proceeded to a due process hearing convening over several sessions,³ at which the parties presented evidence in support of their respective positions. There was considerable evidence of Student's extremely disconcerting early life experiences that was necessary to understand because those events and circumstances continue to impact Student through the present. The Parent sought to establish that the District failed to timely identify Student as eligible for special education, and failed to offer and provide Student with an appropriate educational program. The District maintained that its educational program, as offered and implemented, was appropriate for Student.

Initially, the Parent sought relief for claims from the spring of 2009 through Student's enrollment in private school in the fall of 2011, as well as for the program proposed by the

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.

² 20 U.S.C. §§ 1400-1482.

³ References to record will be to the Notes of Testimony (N.T.), Parent Exhibits (P-), School District Exhibits (S-), and Hearing Officer Exhibit (HO-) 1. References to duplicative exhibits may be to the copy introduced by one party other the other, or to both.

District during the 2014-15 school year when the Parent contemplated returning Student to public school. In an interim ruling following presentation of evidence on the statute of limitations, the scope of the claims was limited to the time period from May 2013 forward. The Parent's motion to reconsider that ruling was granted following the Third Circuit's decision in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), but there was no change to the final determination on the scope of the claims following reconsideration. As a result of the interim ruling, there will be no discussion on the merits of the Child Find claim or the provision of FAPE prior to the program proposed for the 2014-15 school year.

For the reasons set forth below, I find in favor of the District, but will order it to convene an Individualized Education Program (IEP) meeting to collaborate with the Parent on an appropriate program going forward.

ISSUES

1. Whether the District proposed a program for Student during the 2014-15 school year;
2. If the District did propose a program, whether that program was reasonably calculated to provide Student with FAPE;
3. If the District proposed a program that did not offer FAPE, whether Student is entitled to compensatory education and/or an order for placement in a private school;
4. If the District did not propose an educational program for Student, whether the Parent should be ordered to participate in a meeting to devise a program.

FINDINGS OF FACT

1. Student is a mid-teenaged child who is a resident of the District. Student is eligible for special education under the IDEA. (N.T. 39-40; P-47 pp. 7-8)

General Background

2. Student was adopted from a foreign country in early 2009. Student's age is unknown but is estimated based on measurements taken from x-rays, and Student is currently believed to be mid-teenaged. Student did not have any medical records at the time of the adoption, nor have any such records from that time period been provided subsequently. Student spoke only a few words of English at the time of the adoption. (N.T. 39, 168-69, 171-72, 174, 223, 1021, 1030, 1073)
3. When in the foreign country, Student lived in an orphanage, but had previously survived on Student's own in the streets after a short time living with family members. Student was physically abused and experienced at least three traumas to Student's head, resulting in a diagnosis of Traumatic Brain Injury in recent years. When Student was placed into the orphanage, Student suffered from a variety of illnesses and conditions and required hospitalization. (N.T. 172-73, 192-93, 1032-33, 1328, 1354-57)
4. Student has been diagnosed with Post-Traumatic Stress Disorder, Oppositional Defiant Disorder, and Reactive Attachment Disorder (RAD), and Student has treated with several psychologists. Student has also been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) for which Student takes medication. Student's difficulty with attention and focus is quite significant. (N.T. 181-82, 201-02, 232-34, 236, 1038-42, 1045-46, 1079-80, 1097-98; P-26 p. 7, P-27f p. 12)
5. Student has a moderate to severe conductive hearing loss in one ear and a mild high-frequency hearing loss in the other ear that does not impede Student's ability to hear speech sounds. Student currently uses a hearing aid except during periods of active ear infection. It is unknown whether Student's mild hearing loss might progress in the future. (N.T. 1035-36, 1074-76, 1090, 1099, 1222-23, 1329, 1356; S-32)
6. The Parent enrolled Student in the District in March 2009 for the end of first grade; and Student remained in the District until the end of the 2010-11 school year (third grade) in regular education with English Language Learner (ELL) and speech/language services. At the beginning of the 2011-12 school year, Student began attending a private school (hereafter First Private School). Student was still attending First Private School at the time of the due process hearing. (N.T. 183, 195, 205, 228, 251-52; P-2, P-4, P-32, P-40; S-1, S-2, S-3, S-27, S-28, S-31)
7. Student struggled academically during the first, second, and third grade school years, and exhibited problematic behavior both at home and at times at school, particularly in third grade. The District and Parent discussed Student's difficulties with basic skills throughout those years, but the District did not refer Student for a special education evaluation. (N.T. 186-87, 189-90, 195-98, 378, 388, 392-93, 401, 413-14, 441-42, 519, 543, 562-63, 565, 595, 598, 614)
8. The local Intermediate Unit (IU) conducted an evaluation of Student in February 2012 after staff at First Private School made a referral. The IU issued a Psychological Report (PR) that included cognitive (Wechsler Intelligence Scale for Children – Fourth Edition

(WISC-IV), Kaufman Assessment Battery for Children – Second Edition (KABC-II), and select subtests of the Developmental Neurological Assessment – Second Edition) and academic skills and achievement (Woodcock-Johnson Tests of Achievement – Third Edition, Gray Oral Reading Test) testing, as well as assessment of adaptive behavior. Student demonstrated borderline cognitive functioning with variability, and the evaluating psychologist noted that the scores should be viewed with caution. The IU PR did not reach a conclusion that Student was eligible for special education, recognizing that academic delays were predictable for Student who was an ELL and had started school later than was typical. At the time, Student’s academic performance was in the low average to average range when compared to same-grade peers. (N.T 308, 312, 325-26; P-3)

9. The Parent obtained a private Neuropsychological Evaluation (NE) in November 2012. The neuropsychologist reported results of cognitive and achievement assessments, with borderline intellectual functioning (consistent with the IU PR) and achievement generally comparable to expectations based on ability. The neuropsychologist also assessed, among other things, Student’s sensory and motor functioning, attention, memory, executive functioning, and behavior. The NE report determined that Student did not have a specific learning disability, and concluded that Student was making “developmentally appropriate gains” (P-5 p. 16, P-28 p. 24). However, the NE further noted a need for “individualizing [] demands and expectations” through modifications and adaptation to the curriculum based on Student’s level of functioning (P-5 p. 16, P-28 p. 24), which would become increasingly more necessary as Student progressed to grade levels with more complex content. Student’s ADHD was recognized as impacting Student. (N.T. 212; P-5, P-28 pp. 10-24; S-5)
10. Throughout Student’s enrollment at First Private School, Student was provided with accommodations; beginning in fifth grade, Student was provided with a modified curriculum. At some point, Student was also assigned a learning coach. (N.T. 268-70, 286-87, 292-93, 1318)
11. Sometime during the fifth grade school year (2013-14), the Parent and First Private School discussed whether First Private School was able to meet Student’s needs at that time. Student struggled with learning basic skills even with a modified curriculum and learning coach. The Parent decided to re-enroll Student in the District. (N.T. 211-12, 256, 268-69, 296, 337-38, 1318)

Preparation for District Re-enrollment: Spring and Fall 2014

12. Student was evaluated again by the IU in April 2014. The resulting more recent 2014 Evaluation Report (ER) included cognitive (WISC-IV) and achievement (Wechsler Individual Achievement Test – Third Edition (WIAT III)) testing, a classroom observation, and input from teachers and a speech/language therapist. Student’s intelligence was estimated to be at the lower end of the low average range (General Ability Index 81), and achievement scores were delayed in most areas. Teacher rating scales (Conners Third Edition) reflected ADHD symptoms (inattention, learning problems/executive functioning, and hyperactivity/impulsivity), with one teacher

indicating additional concerns with defiance/aggression and peer relations. This ER reached a conclusion that Student was eligible for special education on the basis of a specific learning disability in basic reading skills, reading fluency, mathematics problem solving, as well as in mathematics computation and written language; it also found a secondary disability category of Other Health Impairment based on ADHD. (N.T. 339; P-7; S-6)

13. Following issuance of the 2014 ER, the Parent elected to retain Student's enrollment in First Private School but be provided support through equitable participation through the IU. She also did not approve a subsequent Notice of Recommended Educational Placement (NOREP) issued by the District that proposed learning support through the District. Student returned to First Private School for the 2014-15 school year. (N.T. 910-11, 914-15, 1331; P-10, P-11; S-7, S-8)
14. The Parent arranged for a private audiology evaluation in June 2014. Results reflected a moderate hearing loss in the right ear but with good speech reception, and excellent speech reception in the left ear. (S-15)
15. In October 2014, the Parent contacted [a second specialized private school], (hereafter Second Private School) that she believed might meet Student's needs. (N.T. 212-13, 252, 1320-21, 1346-47, 1377)
16. In November 2014, a District Supervisor of Special Education received an enrollment packet for Student for Second Private School and an Application for Educational Assignment to Approved Private School (Form 4010). She contacted Second Private School as well as the Parent and learned that the Parent intended to enroll Student there. The process followed was very different from the usual circumstance when a parent seeks a private school placement, particularly since the District was not involved in placement discussions but was asked to seek state approval for Student's enrollment in Second Private School via the Form 4010. (N.T. 663-67, 678-79, 690-91, 747-50, 753, 920, 1320-21; P-16, P-17; S-12)
17. The District Supervisor of Special Education reviewed the records sent by Second Private School, sought information about Student's prior enrollment in the District, and obtained permission from the Parent to contact First Private School and other evaluators for additional information and records. She also suggested that the Parent tour the neighborhood District middle school that Student would attend based on geography. The Special Education Supervisor considered that middle school a starting point, not a final determination of placement. (N.T. 684-88, 695, 753-55, 764-67, 772; P-18, P-31 p. 50; S-13, S-26 pp. 28-33)
18. The District followed up with an invitation to participate in an IEP meeting in late November 2014. This meeting was not held. (N.T. 695-96, 742, 770-71; P-19; S-14, S-26 pp. 24-26)

19. The Parent also met with an advocate in November 2014. The advocate and the Parent determined that it would be helpful to have a meeting to help the District understand Student's needs. (N.T. 821-22, 824, 875, 1322-23)
20. The District Supervisor of Special Education was invited by the advocate to a meeting at Second Private School on December 2, 2014, and did attend. The invitation included an agenda prepared by the advocate, who also invited representatives of First Private School and service providers of outside institutions. (N.T. 706-07, 712-14, 777-79, 824-26, 869-72, 1323-24, 1352; P-20, P-31 pp. 33-35; S-26 pp. 18-20)
21. At the meeting, the District Supervisor of Special Education spoke generally about a program for Student, and was willing to consider placement options for Student. She was not prepared to discuss specific programming for Student, and doing so would require a meeting of the IEP team. Second Private School explained how it could meet Student's needs. (N.T. 715-16, 720-22, 831-32, 879-80)
22. The Parent expressed an interest at the meeting in Student learning American Sign Language (ASL) because of the hearing loss that she believed was progressive. The District professionals who are involved with speech and hearing did not believe the hearing loss was progressive. (N.T. 726-29)
23. The Parent expressed her preference for a small educational environment for Student, and stated that the District neighborhood middle school would not be appropriate for Student. (N.T. 833-34, 891, 945-47)
24. The parties discussed holding an IEP meeting on December 30, 2014, because the Parent was concerned about where Student would attend school following the winter break. That meeting did not occur, and Student was not re-enrolled in the District then or by the time of the due process hearing. (N.T. 700-01, 740-41, 772-73, 789, 794, 1330, 1454; S-26 pp. 1-2)
25. The District asked the Parent for input into its IEP in December 2014, but none was received. (N.T. 711-12, 799-800; S-26 p. 21)

Spring of 2014-15 School Year

26. An IEP meeting convened in May 2015. The District developed a draft IEP for that meeting based upon the document first created in December 2014. (N.T. 710-11, 735-37, 767, 795-98, 1367-68; S-19, S-20, S-21)
27. The Parent advised the District at the IEP meeting that Student had recently been diagnosed with diabetes, and the District asked for medical information about that condition. The Parent also explained that she had recent additional information from other evaluators and service providers, and the District sought consent to conduct an evaluation. (N.T. 806-07, 809-11, 931, 936, 1298; P-23)
28. The draft IEP contained a summary of Student's present levels of academic achievement and functional performance from First Private School and the 2014 ER, including

audiological evaluations. Student's below grade level expectations in reading/language arts and mathematics were noted, as well as Student's needs for support in all academic content areas particularly in regard to reading materials; receptive and expressive communication; and self-advocacy skills with respect to accommodations for Student's hearing loss. Parent input from the 2014 ER was also included, noting concerns with reading, homework, and understanding content materials and assignments. (S-21 pp. 6-8)

29. The draft IEP set forth programming needs related to reading fluency and decoding; written expression (spelling and sentence composition); basic mathematics computation and problem solving (place value, fractions, and money concepts); self-advocacy for accommodations for hearing loss; auditory memory; and communication skills as they related to grammar and social skills. A communication plan was also included. (S-21 p. 8, S-22)
30. The draft IEP contained goals addressing oral reading at a third grade level (consistent with the most recent information of Student's independent/instructional reading level); reading comprehension at a third grade level; written expression (paragraph writing); ordering numbers; fractions; making change; communication using proper grammar; speech/language (social skills); and hearing support (developing self-advocacy skills, listening comprehension, phonemic awareness skills, and expressive sign language). Program modifications/specially designed instruction included systematic reading instruction with repetition and practice of vocabulary and comprehension; direct instruction of mathematics computation with modeling and practice; multisensory strategies and approaches; test, study guide, and assignment accommodations; and oral interpreting services. Specified related services were in the areas of audiology, hearing support, and speech/language therapy. This IEP included a plan for post-secondary transition. (S-21)
31. The draft IEP proposed education in the regular classroom except for small group speech/language therapy and individual hearing support. The level and type of special education was supplemental deaf or hearing impaired support and learning support. Student's neighborhood middle school was identified as the name of the school building where the IEP would be implemented. (S-21)
32. The team did not finish reviewing the entire IEP at the May 2015 meeting but did discuss portions of its content; although the Parent was to provide written input following the meeting, none was sent. (N.T. 688-90, 736-38, 798-99, 803-05, 890-92, 928-30, 944-45, 948, 952, 1228-30, 1298-99, 1369, 1393-94)
33. The draft IEP included the neighborhood middle school as the placement because the school location was inserted by the software program; however, the Parent and advocate understood that the proposed placement was the District middle school. The District understood the Parent to have decided upon Second Private School. (N.T. 688-89, 794, 808, 856, 889, 928-29, 932-33, 936-37, 942-43, 945-46, 1305, 1335, 1337, 1457, 1474; S-19, S-20)

34. The District personnel did not consider the May 2015 IEP a final draft and did not believe a placement decision for Student had been made. No NOREP was issued after that meeting, and as of the time of the due process hearing, the District was awaiting completion of its evaluation to resume the process of developing a program for Student. (N.T. 733-34, 798-99, 802-04, 808, 812, 940-41)
35. The neighborhood middle school services approximately 500 students in grades six through eight. The school has special education services available to its students, including learning support, autistic support, life skills support, and emotional support; hearing and audiology support; and speech/language, occupational, and physical therapy. English as a Second Language support, and nursing and mental health services are also available. (N.T. 937-40, 1004, 1009-10, 1168-70, 1249-50, 1254-57, 1277, 1297)
36. The District was not given consent to conduct a functional listening assessment which would have provided information on how Student's hearing of speech was affected based on distance from the source of sound and noise in the environment. (N.T. 1171-74, 1126-27, 1234-35)
37. Although the Parent was not unwilling to provide consent to the District to conduct evaluations of Student during the 2014-15 school year and beyond, the permission was qualified out of concern for Student's history of evaluations and assessments, and illness. She did give signed consent to an evaluation in May 2015, and provided a copy of that Permission to Evaluate (PTE) form in July 2015 because the District did not receive the original. (N.T. 1338-41, 1366-67; P-24; S-23)
38. Student was not able to attend First Private School for a time after the diabetes diagnosis because the school could not accept Student returning with that condition without a nurse. (N.T. 1262-63, 1332-33, 1340, 1363, 1385-87)
39. The Parent arranged for a new audiological evaluation in May 2015. That evaluation reflected a moderately severe hearing loss in the right ear and hearing within normal limits in the left ear with a mild high-frequency hearing loss, with excellent speech recognition in both ears. (S-32)
40. The Parent also arranged for a private neuropsychological evaluation in May 2015, and the private neuropsychologist issued a report (NER). The private neuropsychologist summarized concerns with Student's attention and focus, task initiation and completion, impulsivity, hyperactivity, and defiance. At the time of the evaluation, Student was not taking ADHD medication. The private neuropsychologist also could not conduct an observation because Student was not then in school. (N.T. 73-74, 79, 106, 114; P-22; S-24)
41. Cognitive assessment (Reynolds Intellectual Assessment Scales) for the NER reflected borderline overall functioning, consistent with previous evaluations. Student's academic achievement (WIAT-III) composite scores ranged from well below average (Basic Reading) to borderline (Total Reading; Reading Comprehension and Fluency;

Mathematics; Oral Language) with better scores (low average to average) on the written expression subtests. (N.T. 92, 94-95; P-22; S-24)

42. The NER also reported on assessment of attention and executive functioning (Conner's Continuance Performance Test, portions of the Delis-Kaplan Executive Function System, and Behavior Rating Inventory of Executive Function (BRIEF)) and behavioral and emotional functioning (Behavior Assessment Scale for Children, Second Edition (BASC-2)). Only the Parent rating scales of the BASC-2 and BRIEF were obtained. The Parent's BASC-2 scales reflected clinically significant concerns with attention and functional communication and several at-risk concerns; and her BRIEF results indicated clinically significant concerns with inhibition, working memory, planning/organizing, and at-risk concerns with initiation and monitoring functioning. The private neuropsychologist concluded that Student exhibited significant deficits with sustained attention when not taking medication, and with inhibition and impulse control (part of executive functioning). She concluded that Student met the criteria for Social Engagement Disorder, new terminology in the DSM-5⁴ that encompasses RAD. (N.T. 79-81, 83, 91, 93, 102, 118-19, 124; P-22; S-24)
43. The NER provided a number of recommendations for Student's educational program, including a small, specialized environment with close supervision; breaking down and chunking of information and tasks; coaching in executive functioning skills; multisensory and individualized presentation and instruction; modified assessments; a focus on key concepts; and practice, repetition, and rehearsal. (P-22; S-24)

Second Private School

44. Second Private School conducted an evaluation of Student in October 2014 as part of its intake process when the Parent was considering enrolling Student there. A Psychoeducational Reevaluation Report (PRR) was issued summarizing the results. (N.T. 1112-13, 1133, 1135-36, 1138, 1320-21, 1377; P-15; S-9)
45. The PRR included assessment of cognitive (select subtests of the KABC-II) and achievement (Kaufman Test of Educational Achievement – Third Edition (KTEA-3)) abilities, as well as the Developmental Test of Visual-Motor Integration (VMI). Student scored in the lower extreme to below average range on all KABC-II Indices, including the Fluid Crystallized Index; and in the below average range on the VMI. On the KTEA-3, Student earned below average scores on all of the reading and mathematics subtests. (P-15; S-9)
46. The evaluating psychologist at Second Private School observed that Student's history, hearing loss, and delayed entry into education all affected Student's language development in addition to the fact that English is a second language for Student. He concluded that a total communication environment "may benefit" Student (S-9 p. 8), and that Second Private School was an available option to provide that environment. Finally, the evaluation contained recommendations for Student's educational programming,

⁴ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

including individualized instruction and materials based on Students strengths and interests; applied learning; and instruction using multiple modalities. (P-15; S-9)

47. An Audiological evaluation was also conducted at Second Private School, reflecting severe conductive hearing loss in the right ear, normal hearing ability in the left ear, and excellent word recognition scores in both ears. Multisensory instruction was again recommended in addition to accommodations for the classroom, strategies to supplement auditory information (sign language, visual cues), and monitoring of hearing ability. (P-13, P-14; S-10, S-11)
48. Not all students at Second Private School have a total hearing loss, but it serves students along the full continuum of mild to severe hearing loss. Some of its students can communicate verbally. (N.T. 1115, 1164-65; P-38 p. 2)
49. Sign language is used in all classes and throughout the school buildings at Second Private School. Sign Supported English and/or ASL are used in classes depending on the needs of the particular students in the classroom. (N.T. 1117-18, 1127-28, 1159-62; P-38)
50. There are 47 certified teachers at Second Private School, 41 of whom are certified in deaf education. Classes typically have five or six students. All students have IEPs and are generally under adult supervision throughout the school day. (N.T. 1115-16, 1122, 1161; P-38)
51. Student would be provided a modified curriculum at Second Private School, working below grade level. (N.T. 694, 781-82)
52. Second Private School has two school counselors on staff as well as an art therapist, occupational therapist, and physical therapist. While Second Private School can address social, emotional, and behavioral needs, it cannot provide a therapeutic level of support. (N.T. 1123; P-38 p. 3)
53. Student continued to attend First Private School for the first half of the 2015-16 school year. (N.T. 1385-86)
54. The District conducted an evaluation of Student in fall 2015 pursuant to the signed July 2015 PTE. Several attempts to contact the Parent were made in July and August 2015; however, Student was not available for some of that time period due to a death in the family. Assessments of Student by the school psychologist occurred in November 2015. As of the final session of the due process hearing, that evaluation was not yet final. (N.T. 1413-15, 1419-20, 1428, 1439; P-47; S-33)

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 Parent 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 to the best of his or her recollection; any minor inconsistencies in the testimony appeared to be nothing more than a product of individual memory and perspective. The Parent is clearly a devoted and loving parent who wants what is best for this child who had very difficult early life experiences, and currently has a number of significant challenges that were not evident when Student was present at the hearing. The District personnel all presented as very dedicated and qualified professionals with genuine concern for Student and Student’s educational program. The testimony and reports of the various professional evaluators collectively provided a wealth of insight into Student’s strengths, needs, and abilities; of particular note, the school psychologist at Second Private School provided quite candid testimony about whether and how Student’s needs might be met in that environment, particularly with respect to learning ASL.

In reviewing the record, the testimony of every witness and the content of each exhibit were thoroughly considered⁵ in issuing this decision, as were the parties' Closing Arguments.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies for special education services. 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 v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local education agencies (LEAs), including school districts, 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. An LEA “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’” *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-

⁵ However, it should also be noted that this hearing officer did not consider any evidence of discussions regarding the mediation process in December 2014, including the email communications regarding that session; while the email messages were made part of the record without objection, they were disregarded. 20 U.S.C. § 1415(e)(2)G); 34 C.F.R. § 300.506(b)(7) (providing that any discussions during the mediation process may not be used as evidence in a due process hearing).

534 (3d Cir. 1995) (quoting *Rowley, supra*, at 201). In other words, 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). 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).

The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Thus, placement decisions must follow IEP development. Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

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

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

Another essential consideration in this matter is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa

Code § 14.145(5). Although special education placement means more than physical location, as the Department of Education explained when it issued its final regulations implementing the 2004 version of the IDEA:

[A] child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location. Even though the Act does not mandate that a child with a disability be educated in the school he or she would normally attend if not disabled, section 612(a)(5)(A) of the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement.

71 Fed. Reg. 46,588 (August 16, 2006).

District's Proposed Programming

The first issue is whether the District presented a final proposed program for Student during the 2014-15 school year. The record compels the conclusion that it did not.

The District was obligated to begin its process of proposing an educational program upon learning in November 2014 that the Parent intended to re-enroll Student in the District and seek a new placement. *See James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000) (holding that a school district's obligation toward a child with a disability attending a private school arises from his or her residence within the district and not on enrollment, and a school district IDEA obligation accrued when the parents approached the district about re-enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp. 762 (E.D. Pa. 2012) (denying the school district's motion to dismiss the claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district). The District's knowledge was followed almost immediately by a

meeting arranged by the Parent and her advocate, in which a District Supervisor of Special Education participated despite the unusual procedural course. The District's efforts to then schedule an IEP meeting in December 2014 were certainly timely and appropriate in undertaking its IDEA obligation to develop a program for Student.

It is now necessary to examine the circumstances that resulted in the May 2015 meeting, as both parties point to the other for delays in convening that meeting despite the overtures made in December following the Parent's expressed interest in District enrollment. The reasons for the delay are not entirely clear, but I find that both parties shared some of the responsibility for allowing months to pass after the unsuccessful efforts to schedule a meeting in December 2014. However, I also conclude that, under the circumstances, no one was truly ready for such a meeting much before May 2015, particularly once counsel became involved by early 2015 (*e.g.*, S-18). Thus, while it is unfortunate that the parties did not meet to discuss an IEP until May 2015, Student continued attending First Private School, and there did not appear to be any sense of urgency to develop a program in the second half of the 2014-15 school year. Additionally, there was no indication that the Parent had made the decision to re-enroll Student in the District before the school year ended. Based on the record as a whole, the delay in holding the IEP meeting cannot be solely attributed to either party, and at best amounts to a procedural irregularity under the IDEA with no substantive implications.

The IEP that was discussed in May 2015 was a draft based on information the District had available to it in December 2014. The evidence overwhelmingly establishes that the parties left the May 2015 meeting with the understanding that the Parent would provide input for and respond to the draft IEP, and that was not done. Although the Parent contends that the District impermissibly prolonged the program development process, relying on, *inter alia*, *Upper*

Freehold Regional Board of Education v. T.W., 496 F. App'x 238 (3d Cir. 2012), this was not a circumstance where the parties had reached an impasse such that the draft IEP should be considered the District's final proposal; nor does the record demonstrate that the District was requiring the Parent to continue negotiations indefinitely. There was one draft IEP, one IEP meeting, and a reasonable and agreed expectation that the Parent would provide written input into that draft for consideration by the team. Moreover, the Parent was plainly not denied the opportunity to participate meaningfully in that IEP development process. In short, the parties had not yet reached the point of a District firm offer of FAPE, and the draft IEP simply cannot be considered such a proposal.

Review of the draft IEP reveals that it was responsive to the needs of Student known to the District in December 2014 and May 2015 in many respects. The document reflected programming needs in reading fluency and decoding; written expression; basic mathematics computation and problem solving; self-advocacy for accommodations for hearing loss; auditory memory; and communication skills as they related to grammar and social skills. Annual goals addressed those identified needs: oral reading at a third grade level (consistent with the most recent information of Student's independent/instructional reading level); reading comprehension at a third grade level; written expression (paragraph writing); ordering numbers, fractions, and making change; communication; speech/language (social skills); and hearing support (developing self-advocacy skills, listening comprehension, phonemic awareness skills, and expressive sign language). Program modifications/specially designed instruction and related services, as well as a plan for post-secondary transition, were all included. Viewed as a whole, the draft IEP was and is a very good starting point for the IEP team that will now have the opportunity to assimilate the new information now available and then make necessary changes

based on Student's current strengths, needs, and abilities.

Going forward, this hearing officer also suggests that the parties remain focused on the level and type of programming that is necessary to address Student's needs, rather than on the percentage used for PennData statistical reporting purposes, in evaluating the appropriateness of the IEP. (Parent Closing Argument at 21-24) Special education can take countless forms and be provided in a variety of settings, including push-in support, many of which cannot be captured by the PennData page of the IEP. As PDE explains on its annotated IEP form, "Educational environment reporting is not an indication of the amount of special education service a student with a disability receives."⁶

Having determined that the District did not propose an offer of FAPE during the 2014-15 school year, it is unnecessary to reach a conclusion on whether it was appropriate, or go on to decide whether the Parent's request for an order of placement at Second Private School should be considered. Nonetheless, it does appear to be prudent to address the parties' common contentions that the other party pre-determined a placement for Student in this process: that the District was firm in recommending the neighborhood middle school, and that the Parent was convinced that Student would attend Second Private School. I find that both parties were reasonable in those beliefs of the perspective of the other under all of the attendant circumstances. Critically, though, because no final IEP was developed, there were not, and under the law could not have been, any placement determinations, since that decision must follow, and be based upon, the content of the IEP.

In this regard, it merits repeating that the placement determination must ordinarily begin

⁶ Individualized Education Program (IEP) School Age Annotated at 47, available at http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=53566e428b03327c2a8b4569&bor=ag=School%20Age**l=English (last visited January 29, 2016).

with the clear IDEA preference for the neighborhood school, regardless of how appealing a more restrictive environment, including a private school, might be. For example, there is nothing in the record to suggest that ensuring Student's safety and supervision (*e.g.*, N.T. 96-98, 1052-54, 1063-64, 1070, 1087-88, 1092-94), would be impossible to achieve at the District neighborhood middle school. The evidence reflects many positive aspects in both the District neighborhood middle school and Second Private School that may meet Student's current unique needs and abilities. There are undoubtedly many other options for the IEP team to consider when it finalizes the special education program and placement. Here, fortunately, the parties now or soon will have a new completed District evaluation, in addition to other recently obtained evaluations and assessments, that will guide the parties in all programming decisions, including placement, for Student's complex profile. The special education program and placement, thus, will require consideration of all available current information, and it would be wholly premature and inappropriate for this hearing officer to issue any opinion or directive with respect to placement of Student going forward.⁷ Having concluded that the District did not propose a final program for Student, it is not necessary to further address the substantive appropriateness of the draft IEP.

Remedies

I decline to order a prospective placement for the reasons set forth above. The District will be directed to invite the Parent to an IEP meeting so that the parties may consider the recent evaluation together with all available information to collaborate on a new IEP for Student, and use that document as the basis for the placement decision. Should the Parent advise the District

⁷ The record does, however, reflect ambiguous evidence on Student's potential for using ASL as a means of communication as of the fall of 2015. (N.T. 729-30, 1053, 1087-88, 1090-93, 1096-99, 1102-03, 1116-19, 1125-26, 1299-1300) Again, however, the placement determination must be made by the IEP team based on the information known to it at the time of the meeting(s).

that she no longer intends to re-enroll Student in the District, the directive will be suspended until such point in time as the Parent elects to pursue a public school program for Student.

To the extent that the Parent continues to seek compensatory education (Parent Closing at 28), the interim ruling obviated the need to consider the Child Find issue (HO-1). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). More specifically, compensatory education is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Alternatively, compensatory education may be awarded in “an amount ... reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Our Third Circuit has endorsed this manner of awarding compensatory education “to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” *G.L., supra*, at 625.

Student is clearly eligible for special education at the present time and presents with significant need for specially designed instruction and related services across academic, communication, social, emotional, and behavioral domains. (P-22, P-47) Nevertheless, it would be legally unsound, as well as inequitable, to order the District to provide compensatory education absent a denial of FAPE on its part, and I have found no such deprivation by the

District.⁸ Moreover, this remedy cannot be considered for the time period that is within the scope of this decision, since Student remained in First Private School at the election of the Parent through the end of the due process hearing. *P.P. v. West Chester Area School District*, 585 F.3d 727, 739 (3d Cir. 2009) (holding that, “compensatory education is not an available remedy when a student has been unilaterally enrolled in a private school.”). Because there was no claim for tuition reimbursement (N.T. 34), no further discussion regarding remedies is necessary.

Finally, it is evident that the parties’ currently less than harmonious relationship may impede their ability to return to the table to collaborate on a new IEP as the attached Order will direct. It is respectfully suggested that the parties consider involvement of a neutral IEP facilitator, which is a service offered by the Office for Dispute Resolution, to help the participants communicate meaningfully with a focus on the critical objective of developing a program going forward that addresses Student’s challenging needs as Student continues to mature into a young adult.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, I conclude that the District did not propose a program for Student during the 2014-15 school year that rose to the level of an offer of FAPE. The District will be ordered to invite the Parent to an IEP meeting to resume the special education program planning for Student.

⁸ It is also not insignificant that Student has not attended school in the District since the spring of 2011, and has attended an institution that has had concerns with its ability to provide Student with appropriate programming for at least a portion of those intervening years.

ORDER

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

1. The District did not propose a final offer of FAPE for Student, and did not make a placement decision.
2. The District did not delay development of a final IEP for or offer of FAPE to Student.
3. Within ten calendar days of the date of this Order, the District shall invite the Parent to an IEP meeting to be held within thirty calendar days of the date of this Order to discuss and develop a new IEP and, once finalized, to determine a placement. In that invitation, the District shall offer to the Parent no less than three meeting dates within those thirty calendar days to convene the meeting of Student's IEP team.
4. Should the Parent fail to respond to the IEP meeting invitation described in ¶ 3, or advise the District that she is no longer seeking to enroll Student in the District, no IEP meeting need be held unless and until the Parent elects to seek re-enrollment.
5. The District is not ordered to take any further action.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms, including the scheduling of an IEP meeting at a mutually convenient time.

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: January 30, 2016