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 Due Process Hearing Officer
Final Decision and Order

Closed Hearing

ODR File Number:

22355-1819

Child's Name

B.M.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

Counsel for Parent(s)/Guardian(s)

Jennifer Y. Sang, Esquire
8 Penn Center
1628 JFK Boulevard, Suite 1000
Philadelphia, PA 19103

Local Educational Agency

William Penn School District
100 Green Avenue
Lansdowne, PA 19050

Counsel for LEA

Jason Fortenberry, Esquire
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

12/23/2019

Introduction

This special education due process hearing concerns the educational rights of a student (the Student).[1] The Student's parent (the Parent) requested this hearing against the Student's School District (the District).

The Student attended a private placement (Private School 1) from the 2015-16 school year though the 2018-19 school year pursuant to written agreements between the Parent and the District. The final agreement between the parties established an agreed-to procedure to reevaluate the Student and offer a special education placement within the District for the 2019-20 school year. The Parent alleges that the District violated the agreement and offered an inappropriate special education placement.

The Parent argues that the District's actions and inactions violate the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. There is no dispute that the District is the Student's local educational agency (LEA) or that the Student is a "child with a disability" as defined by the IDEA at 20 U.S.C. § 1401.

The Parent demands a District-funded independent educational evaluation (IEE), and tuition reimbursement for the Student's attendance at a different private school (Private School 2) during the 2019-20 school year.

For reasons addressed below, I find in favor of the Parent.

Issues

The issues presented for adjudication are:

1. Is the Student entitled to an IEE at public expense?

2. Is the Parent entitled to tuition reimbursement for the Student's attendance at the Private School during the 2019-20 school year?

Findings of Fact

I carefully considered the record of this matter in its entirety. I make findings of fact only as necessary to resolve the issues presented.

[1] Except for the cover page of this document, personally identifying information is omitted to the extent possible.

I find as follows:

Private School 1 Placement

1. On February 23, 2015, the Parent and the District executed a Settlement Agreement and Release placing the Student in the Private School 1 at the District's expense.

2. On August 28, 2017, the Parent and the District executed another Settlement Agreement and Release (the 2017 Settlement).[2] S-3.

3. The 2017 Settlement is a type of agreement commonly referred to as an "in lieu of FAPE"[3] agreement. The Parent agreed to accept the consideration provided through the agreement "in full satisfaction of the provision of any offer of a [FAPE] or any educational placement, program, or services provided by the District for the Student from the beginning of time until the first day of the 2019-20 school year…" S-3 ¶ 1. *See also* S-3 ¶¶ 13, 14.

4. Through the 2017 Settlement, the District agreed to pay for the following:

    a. The Student's participation in the Private School 1's summer program during the summer of 2017. S-3 ¶ 1(a).

    b. The Student's tuition to attend the Private School 1 during the 2017-18 school year. S-3 ¶ 1(b).

    c. The Student's participation in the Private School 1's summer program during the summer of 2018. S-3 ¶ 1(c).

    d. The Student's tuition to attend the Private School 1 during the 2018-19 school year. S-3 ¶ 1(d).

5. The 2017 Settlement explicitly contemplates the Student's return to the District in the 2019-20 school year. Specifically, the District and Parent agreed that:

    a. The "District shall conduct a reevaluation of the Student, which will commence at any point after January 1, 2019." S-3 ¶ 10.

[2] The Parent signed the 2017 Settlement on August 8, 2017, and the District signed on August 28, 2017.
[3] FAPE is a Free Appropriate Public Education – further explained and discussed below.

b. The Parent gave consent for the reevaluation through the 2017 Settlement. S-3 ¶ 10.

c. "The reevaluation report shall be completed and mailed or hand-delivered to the Parent by March 30, 2019…"[4] S-3 ¶ 10.

d. The Parent reserved the right to challenge the adequacy of the reevaluation. S-3 ¶ 10.

6. The 2017 Settlement explicitly contemplates a dispute arising between the parties regarding the Student's educational placement or program for the 2019-20 school year. Specifically, the parties agreed that:

a. The District will offer a special education program and placement through an Individualized Education Program (IEP) and Notice of Recommended Educational Placement (NOREP) for the 2019-20 school year. S-3 ¶ 11.

b. If the District offers an IEP and NOREP for the 2019-20 school year on or before April 30, 2019, the IEP and NOREP, not Private School 1, "or any other private school," constitute the Student's pendent placement during any dispute.[5] S-3 ¶ 11.

c. If the District fails to offer an IEP and NOREP by April 30, 2019, the parties agreed that the Student's pendent placement "shall be a school of the Parent's choice capped at the then-current [Private School 1] tuition unless the delay to offer an IEP is due to the Parent."[6] S-3 ¶ 11.

2017 Private Evaluations

7. Around July 28, 2017, the Parent obtained a private Psycho-Educational Evaluation of the Student. The Parent did not provide that to the District until May 20, 2019. S-50.

[4] The sentence goes on to address what would have happened if the Student left the Private School earlier than the parties expected.
[5] The IDEA's pendency or "stay put" rule prohibits LEAs from unilaterally changing a child's special education placement while a due process hearing or other litigation is pending. *See* 34 C.F.R. § 300.518(a).
[6] As discussed below, the parties anticipated the Student aging out of Private School 1 at the end of the 2018-19 school year.

8. On August 31, 2017, the Parent obtained a private Neuropsychological Re-Evaluation of the Student. The Parent did not provide that to the District until May 15, 2019. S-51.

9. Both of the 2017 private evaluations reveal significant problems with the Student's attention, behavior, social skills, and pragmatic language abilities. Both concluded that the Student should be diagnosed with Autism Spectrum Disorder. Neither conclude that the Student is a child with an Emotional Disturbance. S-50, S-51.

2019 Reevaluation, IEP, and NOREP

10. On April 5, 2019, the District started a reevaluation by reviewing existing evaluation data in its possession. S-52 at 1.

11. The District determined that additional data was needed and attempted to conduct a Psychoeducational Reevaluation. S-52 at 8.

12. The District contacted the Parent on April 10, 2019 to schedule testing. The District also reached out to the Private School. The District wanted to test the Student during the week of April 15. The Student was scheduled for PSSA testing that week, and the Student's private BCBA advised that the reevaluation and PSSA testing together would be too stressful for the Student. The Private School relayed that information to the District. The Parent also explained the situation to the District on April 12, 2019. P-26.

13. The District proposed no other dates and did not test the Student directly. *See* P-26, S-52.

14. The District's psychologist sent two rating scales to the Parent on April 15, 2019. Those were a BASC-3 and a SAED-2.[7] The District's psychologist provided the same rating scales to the Student's teacher at the Private School. The Parent completed and returned both rating scales on April 16, 2019. The teacher also completed and returned the rating scales. P-26, S-52.

15. The District finalized its reevaluation and provided it to the Parent on April 29, 2019 (the 2019 RR). S-52 at 8.

[7] The BASC-3 is the Behavior Assessment System for Children, Third Edition. The SAED-2 is the Scales for Assessing Emotional Disturbance, Second Edition.

16. On April 29, 2019 (the same day that the 2019 RR was finalized), the District convened the Student's IEP team and presented a draft IEP. S-54.

17. The Parent attended the IEP team meeting with an educational consultant. During the IEP team meeting, the Parent and the consultant shared that the Student had been diagnosed with Autism. They expressed their belief that Autism, not an Emotional Disturbance, was the Student's proper IDEA classification. The Parent had not previously mentioned any concerns about Autism to the District. NT 148-150, 176, 197, 199-201, 264, 272-2273.

18. At the time of the 2019 IEP team meeting, the District did not have the 2017 private evaluations. *Supra*.

19. During the IEP team meeting, the Parent and the District agreed to further testing to explore the Parent's concerns about Autism. *Id*. There is no record, however, of the District ever proposing another evaluation or attempting to complete the Psychoeducational Reevaluation referenced in the 2019 RR.

20. The District revised the draft IEP shortly after the IEP team meeting. The revisions were based on the IEP team's discussion during the meeting. S-54, S-55, P-15.

21. The District added a statement about possible pragmatic language concerns, replaced a math application goal with a math word problems goal, and added goals for completing long-term assignments and daily homework, and for generalizing strategies to deal with frustration. *C/f* S-54, S-55.

22. Goals for using coping strategies during times of stress, following directions and remaining on task, appropriately gaining staff attention, and writing remained the same. *C/f* S-54, S-55.

23. Program modifications and specially designed instruction (SDI) were also revised. The substantive difference between the draft and the revision is small. Generally, the revisions clarified language to reflect skills that the District would teach to the Student.[8] *C/f* S-54, S-55.

[8] For example, the draft called for the District to "chunk" or break down the Student's assignments into manageable pieces. The revision specified that the District would teach the Student how to do that work instead of relying upon teachers.

24. In the revised IEP, SDI included (among other things) small group instruction in all core subject areas, small group testing, extended time on tests, direct instruction in mindfulness and coping skills for 30 minutes per day, and assistance with planned transitions. S-55.

25. No changes were made to the Student's IDEA classification or related services or supports for school personnel. The draft and the revision both provided behavior consultation once per month; individual 30-minute counseling sessions, four times per month; and group 30-minute counseling sessions, four times per month. *C/f* S-54, S-55.

26. Both the draft and revised IEP offered an Emotional Support placement at the supplemental level. The revision, however, increased the Student's time in regular education classrooms from 2.75 hours per day to 3.15 hours per day. *C/f* S-54, S-55.

27. A Positive Behavior Support Plan (PBSP) was attached to both the draft and revised IEPs and was not edited. *C/f* S-54, S-55.

28. The District finalized the revised IEP (S-55) and issued that with a NOREP to the Parent via email on April 30, 2019. P-15.

29. The NOREP places the Student in a District-run program housed within one of the District's schools. The program is called the New School. The NOREP describes the New School as "a non-traditional therapeutic high school classroom setting and program within the district, for supplemental emotional support and therapeutic counseling." P-29.

30. The District offered to let the Parent tour the New School. After some back and forth emails, the District permitted the Parent's educational consultant to tour the New School as well. P-31.

31. Children attending the New School receive core academic instruction through pre-recorded online lessons, although a regular education teacher is also in the room. Students attending the New School take Physical Education and one elective class with students from the District's general (regular) education classes. NT 225.

32. The Parent rejected the NOREP on May 9, 2019.[9] P-29.

33. On May 9, 2019, the Parent sent an email to the District expressing their believe that the IEP and NOREP were inappropriate and requesting a private placement at the District's expense for the summer of 2019 and the 2019-20 school year. The email does not specify any private placement. P-30.

Private School 2

34. Private School 1 ends in 8th grade, and so the Student could not remain at Private School 1 in the 2019-20 school year. *Passim*.

35. During the 2018-19 school year, the Parent began exploring other private schools and learned about Private School 2.

36. In January 2019, the Parent set up two visitation days for the Student. The Student shadowed another student at Private School 2 for two full school days on January 15 and 16, 2019. P-36.

37. Sometime shortly after the Student's visit, Private School 2 determined that the Student was a good fit for its program and offered admission to the Student. The offer was made on an undated form letter.[10] P-37.

38. Private School 2 sent an enrollment contract to the Parent with the admission letter.[11] P-37, P-38. The Parent signed the enrollment contract. I make no finding as to when the Parent signed the enrollment contract. However, the Parent wrote July 9, 2019 in the date lines following the digital signature.[12]

[9] The Parent's signature on the NOREP is dated May 8, 2019. The Parent returned the NOREP to the District via email on May 9, 2019.
[10] It appears that the admission letter was sent to the Parent electronically, but there is no record of any such email in evidence. While such an email would establish the exact date, I find that the admission offer was sent very shortly after the Student's visit based on the text of the letter.
[11] Like the admission letter, I believe that evidence showing when the Parent received the enrollment contract exists but was not produced. My finding that the admission letter and the enrollment contract were sent at the same time is based on the text of the letter.
[12] The Parent filed the Complaint initiating these proceedings on June 11, 2019. The complaint includes a demand for tuition reimbursement at an unspecified private school. If the date on the enrollment contract is correct, the Parent signed the enrollment contract 28 days after initiating this hearing.

39. Private School 2 holds itself out as a private, college preparatory school for children with "complex learning differences" such as ADHD, auditory and visual processing disorders, written expression disorders, social skills deficits, "high functioning Autism," anxiety disorders, and executive functioning deficits. P-34.

40. At Private School 2, the Student receives a "Personal Education Plan," not an IEP. NT 682. The Student's Personal Education plan was not presented at this hearing.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, to the extent witnesses testified as fact witnesses, I find that all witnesses testified credibly. To the very limited extent that different witnesses testified to contradictory facts, I find that the discrepancy is due to honest differences in memory.

The Parent called an educational consultant to testify as both a fact witness and as an expert witness. To the extent that this witness gave opinion testimony, that testimony was not credible and is afforded no weight. Although the witness explicitly denied working as an advocate for the Parent or Student, there is simply no other way to define her work for the family.[13] The witness did not evaluate the Student or write a report. This places the

[13] The witness testified that her background and credentials made her different than an advocate. I agree that few non-attorney advocates share the witness' credentials. Her work in this case, however, was clearly advocacy.

witness's opinion testimony on a very shaky foundation. From that shaky foundation, the witness proceeded to render opinions grounded almost exclusively upon unsupported assumptions about the services available within the District, and the profile of students that the District places into various programs. Often, it was difficult to separate the witness's observations from her assumptions. I have no doubt that the witness has personally observed a host of special education placements in a wide variety of schools. That does not give the witness an ability to render an opinion about what is and is not available in this District.

To be clear, to the extent that the Parent's consultant testified as a fact witness regarding the Student or the placement within the District that she observed, I find her testimony credible.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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 each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically the Third Circuit has interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard requires LEAs to provide more than "trivial" or "*de minimus*" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The *Endrew F.* case does not change the fact that schools need not maximize a child's potential to comply with the law. However, in *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimus*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017).

Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much

more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Tuition Reimbursement

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Evaluation and Reevaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those requirements are the same for initial evaluations and revaluations. 20 U.S.C. § 1414. Evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1).

"If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Discussion

Parental Interference

The District argues that the Parent purposefully thwarted the District's effort to offer a FAPE as part of a plan to secure tuition reimbursement at Private School 2. The District points to examples of the Parent withholding information about Private School 2, concerns about the Student, and the Student's Autism diagnosis. The District also argues that the Parent refused to make the Student available for its 2019 reevaluation. The District's ultimate argument is that the Parent should not be rewarded for a calculated effort to secure the Student's enrollment at Private School 2 at public expense.

I agree with the District that the Parent decided to send the Student to Private School 2 long before the District offered an IEP. The Parent's protestations to the contrary were not credible, and her decision to not reveal dates of documents from Private School 2 that were transmitted or accessed electronically is, more likely than not, intentional. However, the Parent's decision to send the Student to Private School 2 in advance of the evaluation and IEP processes is not fatal to the claims presented in this hearing *per se*. It was perfectly permissible for the Parent to push for a desired outcome, provided that the Parent did so in a way that did not deny the District an opportunity to provide a FAPE to the Student.

The IDEA and applicable case law set up tests for IEEs at public expense and tuition reimbursement. The District's argument about parental predetermination has merit only if the District failed any part of those tests as a result of parental interference.

The Student Is Entitled to an IEE at Public Expense

The District completed its reevaluation on April 29, 2019 – nearly a month after the March 30, 2019 deadline established by the 2017 Settlement. This breach, in and of itself, could warrant an order requiring the District to fund an IEE. Regardless, I award an IEE at public expense on a different basis: the 2017 RR did not comply with IDEA standards.

The 2017 RR was, by the District's own admission, incomplete. As the District wrote in the 2017 RR, its review of records revealed that new testing was necessary. Unfortunately, the District did not complete the necessary testing. Rather, it issued the 2019 RR with the information that it had: a review of records, parent and teacher input, and two rating scales. As such, the 2019 RR is missing information that the District itself considered necessary at the time.

The Parent did nothing to thwart the District's effort to reevaluate the Student. Under the terms of the 2017 Settlement, the District had a longer

period of time to evaluate the Student than the IDEA would otherwise provide. The District could have started any time after January 1, 2019. If it started at its first opportunity, the District would have had 88 days to evaluate the Student. The District did nothing during those 88 days. Instead, according to the 2019 RR, the District started the process six days after its deadline to finish the reevaluation (April 5, 2019) with a records review. The District also made no attempt to schedule the Student's testing until April 10, 2019. April 10, 2019 was a Wednesday. The District proposed to test the Student the next week, which happened to be the same week that PSSAs were administered at Private School 1. The Student's private BCBA advised the Parent against subjecting the Student to PSSA testing and psychoeducational testing at the same time. As such, the Parent was justified in withholding the Student from RR testing that week.

If the District had tried more than once to schedule testing, or if the Parent consistently refused to make the Student available, the District would have a strong argument. But those are not the facts of this case. Having started its evaluation after the deadline for its completion, the District made no other effort to schedule testing.[14]

Strictly speaking, the District's reasoning for finalizing an RR that it knew was incomplete is irrelevant for IDEA purposes. Yet the District was explicit and candid about its reasoning both at the time and during the hearing. The District understood that if it failed to offer an IEP and NOREP by April 30, 2019, pendency would attach to a private school of the Parent's choice. The District was determined to meet the IEP/NOREP deadline, and so it went with what it had despite knowing the 2019 RR was incomplete.

A large amount of testimony was presented during the hearing concerning the accuracy with which the District both reported information provided by the Student's teachers from Private School 1 and interpreted the rating scales. I find that information reported in the 2019 RR is accurate and properly interpreted. I do not fault the 2019 RR for what it contains. The 2019 RR falls short for what it is missing.

The Student is awarded an IEE at public expense to remedy the District's failure to comply with IDEA mandates in its completion of the 2019 RR. The District may propose evaluators, but Parent may choose any evaluator who is qualified to conduct the type of testing that the District deemed necessary in the 2019 RR, regardless of the District's proposal (if any). The District

[14] The Parent requested this hearing on June 11, 2019. Any effort by the District to reschedule the testing after the hearing was requested is irrelevant to the analysis. I look at the Student's right to an IEE at public expense on the day that the hearing was requested.

must pay for the IEE, which must be reduced to a written report. The District's obligation to fund the IEE is, however, limited to market rates for similar evaluations within its geographic area.

The District Failed to Offer an Appropriate IEP

The District's IEP was largely based on the 2019 RR. The 2019 RR was inappropriate because the District did (not) evaluate the Student after concluding an evaluation was necessary. Consequently, to the extent that the District's IEP was based on the 2019 RR, the IEP was also inappropriate.

Importantly, this is the *only* basis for which I find the District's IEP was inappropriate. I reject the Parent's argument that the New School is inappropriate for the Student *per se* (that is, the New School is inappropriate for the Student regardless of the IEP or NOREP). LEAs have broad discretion to make building placement and methodology choices when offering appropriate special education through an IEP. *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011); *P.V. v. Sch. Dist. of Philadelphia*, No. 2:11-cv-04027, 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. Feb. 19, 2013). None of the evidence in this case establishes that the Student cannot learn from computer-based instruction provided as part of an appropriate special education program, or that the New School cannot be rendered appropriate through the addition of necessary supports and services. This is not to say that the computer-based instruction is best for the Student – the Parent's concerns are legitimate. Rather, the Parent has not proven that the New School is inappropriate for the Student *per se*.

I also reject the Parent's arguments that the IEP was inappropriate because it cannot be implemented in the New School, that the IEP was predetermined, that what goals it had were inappropriate, and that it failed to properly classify the Student. The District offered the IEP within the timeline set by the 2017 Settlement. The process by which the District drafted the IEP complied with IDEA procedural mandates except for those related to evaluations. The District gave the Parent a meaningful opportunity to participate in the IEP's development. The District revised the IEP in both form and substance based on parental input. The IEP included measurable, objective goals with the best baseline data available at the time (sometimes going outside of the 2019 RR to obtain the baselines). The IEP spelled out what the District would do to enable the Student to meet the IEP's goals

through SDI and program modifications. There is no evidence that the IEP could not be implemented in the New School.[15]

The IEP was appropriate in relation to the information available to the District at the time the IEP was drafted. The problem, however, is that the District knew that it was missing information. The District concluded that a psychoeducational evaluation was necessary but did not complete one. Rather than risk pendency attaching to a private school, the District issued an IEP knowing that the information used to draft the IEP was incomplete. The District had no way to know what additional testing would reveal, and so it had no way to know if it was offering a substantively appropriate IEP.

Under *Schaffer v. Weast, supra*, the Parent must prove that the District failed to offer a FAPE – the District need not prove that its IEP was appropriate. In this case, the Parent has proven that the District had no way to know that its IEP was substantively appropriate when the District issued it. In a hyper-technical sense, proving that the District could not have known whether it was offering a FAPE and proving that the District did not offer a FAPE are different things. I find that distinction makes no difference under the unique facts of this case. The IDEA imposed an affirmative obligation on the District to offer a FAPE through an IEP. In this case, the District could not know that it was offering a FAPE through its IEP and so it could not guarantee that the Student would receive a FAPE through its offer. Consequently, the Parent was justified in rejecting the District's offer.

In making this determination, I am sensitive to the District's argument that the Parent purposefully withheld information about the Student's Autism diagnosis during the reevaluation and IEP development. Assuming that the Parent purposefully withheld this information does not change the outcome. The District drafted the best IEP it could with the information available. I do not fault the District for not knowing information that the Parent concealed. Rather, I fault the District for not evaluating the Student when it knew an evaluation was necessary. Under the facts of this case, the District's failure to evaluate resulted in an inappropriate RR that it used to draft an IEP. The IEP, therefore, is also inappropriate.

Private School 2 is Appropriate

The Parent argues that Private School 2 serves children with profiles similar to the Student's. The Parent did not prove this argument. Above, I fault the

[15] At best, evidence shows that similar IEPs were not being implemented at the New School when the Parent and the Parent's consultant visited. That evidence does not prove that the offered IEP *could not be implemented* in the New School.

District for offering an IEP based on a reevaluation that the District knew was incomplete. The Parent demands an IEE at public expense to fill in the missing information. I found in favor of the Parent and ordered the IEE. The same lack of information that renders the 2019 RR and IEP inappropriate applies equally to Private School 2. The Parent cannot argue that Private School 2 fits the Student's profile after successfully arguing that the Student's profile has not been appropriately evaluated.

The remaining evidence concerning Private School 2, however, preponderantly establishes that Private School 2 is appropriate for the Student. Specifically, the Student spent two days shadowing another child at Private School 2. The Parent and Private School 2 concluded that Private School 2 could meet the Student's needs based on that experience. The District offers no contrary evidence, or evidence suggesting that the Parent and Private School 2 should have reached a different conclusion. This small amount of uncontradicted evidence constitutes a preponderance for purposes of an IDEA due process hearing. *See Shane T. v. Carbondale Area Sch. Dist*., No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683 (M.D. Pa. Sep. 28, 2017).

Equitable Considerations

The equities of this case do not favor a reduction in tuition reimbursement. After starting its evaluation late, the District faults the Parent for not making the Student available for testing during the one and only week that the District proposed. As discussed above, the Parent was justified in withholding the Student during that week.

Moreover, the District argues that the Parent simply "went through the motions" during the reevaluation and IEP development process without cooperating and contributing, and was content to withhold concerns (including information about the Student's Autism diagnosis) because the decision to place the Student in Private School 2 "was a *fait accompli*."[16] Bluntly, I agree with the District that the Parent made a decision to place the Student in Private School 2 well in advance of the reevaluation and IEP development processes. Under the unique facts of this case, however, that does not mitigate against tuition reimbursement. The Parent took no action that forced the District to start its evaluation after the deadline set by the 2017 Agreement expired. The Parent took no action that prevented the District from proposing an evaluation on some day that the Student did not also have PSSA testing. The Parent did not force the District to finalize the 2019 RR before it was complete or issue the IEP without sufficient

[16] District's closing at 15-16.

information. The District made those choices to avoid the pendency clause drafted into the 2017 Settlement.

The District also challenges the Parent's "10 day notice" – the demand for private school tuition sent on May 9, 2019. I agree that it would have been better for the Parent to name Private School 2 in that email. I reject the District's argument, however, that the Parent demanded tuition reimbursement before it had time to complete its evaluation. Ten days passed between the IEP team meeting and the Parent's demand. During those 10 days, the District proposed no new evaluation (as was discussed during the meeting) and did not propose completing its original evaluation. Further, I reject the District's argument that its original evaluation was still "pending" at that time. *See District's Closing* at 4. The District had issued its evaluation report, drafted an IEP based on that report, and did not propose additional dates for testing.

I caution the Parent, however, that efforts to manipulate the IEP development process by withholding information to secure the Student's placement at Private School 2 are not well taken. Had the District undertaken a greater effort to obtain the information it knew was missing, the Parent's actions would mitigate against a tuition imbuement award at least in part. While I find that the District's shortcomings are not the result of the Parent's actions, I will compel the Parent to share the results of the IEE with the District simultaneously. Were it within my authority, I would also order the Parent to share any future information provided by Private School 2 and any future private evaluations beyond the IEE ordered herein with the District upon receipt as well.

The District Owes the Parent Tuition Reimbursement

Above, I find that all three prongs of the *Burlington-Carter* test are met. The District must reimburse the Parent for the cost of tuition at Private School 2 during the 2019-20 school year. Such payments are limited to the tuition fee written in the enrollment contract (P-38), less any scholarship, financial assistance, or other fee reduction that the Student or Parent receive or would be eligible to receive in the absence of this order.

ORDER

1. The Student is entitled to an IEE at the District's expense. The evaluator shall be chosen in accordance with the accompanying decision. The District's expense is limited as described in the accompanying decision. Any contract that either party executes with the evaluator shall specify that the evaluator shall transmit all reports

to both parties simultaneously. If the evaluator will not agree to such terms, for all reports, whichever party receives the report first shall transmit the report to the other party immediately upon receipt.

2. The Parent is owed tuition reimbursement for the Student's tuition at Private School 2 during the 2019-20 school year. The District's expense is limited as described in the accompanying decision.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER