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

FINAL DECISION AND ORDER

Student's Name: S.T.

Date of Birth: [redacted]

ODR No. 16540-1516KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Heather Hulse, Esq. McAndrews Law Office, P.C. 30 Cassatt Ave. Berwyn, PA 19312
Carbondale Area School District 101 Brooklyn Street Carbondale, PA 18407	William McPartland, Esq. Marshall, Dennehey, Warner Coleman & Goggin, P.C. 50 Glemaura National Blvd. Moosic, PA 18507

Dates of Hearing: 12/04/2015, 01/14/2016

Record Closed: 02/08/2016

Date of Decision: 02/23/2016

Hearing Officer: Brian Jason Ford

Introduction

[The Student's Parent] (Parent) is the parent of [the student] (Student). The Student was enrolled in a charter school until 2013-14 school year. While enrolled in the charter school (Charter School), the Student attended school at a private school (Private School). The Student was still attending the Private School when the Parent enrolled the Student in the Carbondale Area School District (District) at the start of the 2013-14 school year. Thereafter, while enrolled in the District, the Student continued to attend the Private School. The Student currently attends the Private School.

The Parent requested this due process hearing against the District, seeking an individualized educational program (IEP) from the District, tuition reimbursement for the cost of the Private School from the 2013-14 school year until the District offers an IEP, and a District-funded independent educational evaluation (IEE).

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

Issues[1]

1. Must the District offer an IEP to the Student?
2. Is the Student entitled to an IEE at public expense?
3. Is the Parent entitled to tuition reimbursement?

Findings of Fact

The parties participated in ODR's electronic exhibits pilot program, whereby they submitted my copy of exhibits electronically. I thank the parties and their attorneys for their willingness to participate.

Pre-Kindergarten

1. The Student briefly attended a pre-kindergarten program housed within the District.

2010-11 School Year through 2012-13 School Year

2. The 2010-11 school year was the Student's kindergarten year.

3. On September 3, 2010, the Parent withdrew the Student from the District. The Parent enrolled the Student in the Charter School around the same time. At that time, the Charter School became the Student's local educational agency (LEA) and responsible for the provision of a free appropriate public education (FAPE) to the Student. S-2.

4. On February 24, 2011, the Student received an IEP from the Charter School. That IEP does not explicitly identify the Student's disability(ies), but includes goals for letter identification, number identification, counting, knowing the months, and a behavioral goal. S-3.

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[1] These issues were presented in a slightly different order during the hearing. I have re-ordered the issues to aid the analysis.

5. The Charter School reevaluated the Student and presented a reevaluation report (RR) dated May 4, 2011. S-5. That RR concluded that the Student is a student with a disability under the primary category of Other Health Impairment (OHI) with a secondary disability category of Speech and Language Impairment. *Id.*

6. In December of 2011, while still enrolled in the Charter School, the Student began to attend the Private School.[2] S-7.

7. The Student continued to attend the Private School during the 2011-12 school year (1st grade). *NT, passim.*

8. The Student continued to attend the Private School during the 2012-13 school year (2nd grade). *NT, passim.*

2013-14 School Year through Present[3]

9. The Student continued to attend the Private School during the 2013-14 school year (3rd grade). *NT, passim.*

10. On September 12, 2013, while the Student was attending the Private School, the Parent registered the Student in the District. S-10. At that time, the District became the Student's LEA and responsible for the provision of FAPE.

11. On the enrollment paperwork, the Parent indicated that the Student was receiving special education, had been identified as a student in need of special education, had learning disabilities and a speech and language impairment and, more specifically, had ADHD, dysgraphia and dyslexia. S-10.

12. The Parent's writing on the enrollment paperwork is the only document submitted as evidence in this case to state that the Student has any of the diagnoses that the Parent wrote out. However, both parties appear to agree that the Student has been diagnosed with dyslexia. To the extent that there is disagreement, I find that the Student does have this diagnosis, based on the Parent's credible testimony at NT 47. I make no finding as to when that diagnosis was first given.

13. There was a misunderstanding between the Parent and District staff when the Parent registered the Student. The Parent came to the District with registration paperwork and

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[2] There is no dispute that the Charter School funded the Student's attendance at the Private School. The District believes that this funding was pursuant to a settlement agreement between the Parent and the Charter School. The Parent neither confirmed nor denied the existence of such a settlement agreement. The District sought an order compelling the Parent to produce the settlement agreement or say that there is no such settlement agreement. In the absence of a discovery process in Pennsylvania special education due process hearings, I denied the District's motion.

[3] A reevaluation report (RR) dated April 11, 2014, was made part of the record as P-1 at NT 122 when it was referenced by a witness. There was no substantive testimony concerning this RR. The RR states that the Student was attending the Charter School at the time of the report. If the date is correct, that is not true. If the date is not correct, there is no way to place this RR in time. Further, beyond stating that the Student has speech and language needs, and qualifies as a student with a disability on that basis, it sheds no light on this case. Consequently, while the RR was made part of the record, I did not rely upon it in any way.

information about the services that the Student was receiving. The Parent also explained that the Student was attending the Private School. While I make no finding about what District staff actually said to the Parent, the Parent came away from the interaction believing that the District would instigate truancy proceedings if the Student enrolled but did not attend the District's schools. *See, e.g.* S-2.

14. The foregoing interaction notwithstanding, the District understood the Parent's desire was to keep the Student at the Private School and continue to receive speech and language services from the IU. *See, e.g.* NT at 39.

15. Despite some testimony to the contrary, I find that the District's understanding of the Parent's intention was correct. The Parent chose to keep the Student in the Private School and did not seek placement from or within the District. *See, e.g.* NT at 39.

16. After the Student registered in the District, the Student continued to receive speech and language services from the IU, but now at the District's expense.[4] S-8; NT at 27-30.

17. The Student continued to attend the Private School with District-funded IU speech and language services during the 2014-15 school year (4th grade). *NT, passim.*

18. On July 1, 2015, the Parent requested this due process hearing.

19. On July 15, 2015, the District sought the Parent's consent to conduct an educational evaluation of the Student. S-11. More specifically, the District proposed an evaluation to determine whether the Student requires an IEP (that is, to determine whether the Student has a disability and is in need of special education) and to determine the Student's educational needs. *Id.*

20. To evaluate the Student, the District proposed a "[r]eview of records, teacher input, Parent input, observation, assessment of intellectual functioning, assessment of academic achievement, assessments of behavioral, social, and emotional functioning, speech and language assessment, occupational therapy assessment, and physical therapy assessment." S-11, *see also* S-14

21. The Parent refused to give consent for the District to evaluate the Student. S-11. In doing so, the Parent stated her belief that the District's offer to evaluate the Student was an "… inappropriate response to [the Parent's] request for an IEE…" *Id.*

22. On July 16, 2015, the Private School reported the results of a Woodcock-Johnson III, Form A assessment that it administered to the Student on May 28, 2015. S-13. The report is only a statement of the Student's scores, reported as grade equivalencies without standard scores or percentile ranks, and the publisher's description of what those scores purport to measure. S-13.

23. On the May 2015 administration of the Woodcock-Johnson III, the Student's reading scores ranged from a 2.1 to 2.6 grade equivalency. The Student's math scores ranged from a 3.0 to 3.6 grade equivalency. The Student's written language scores ranged from the 1.4 to 2.5

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[4] The District funded the IU's services in accordance with Pennsylvania's dual enrollment and equitable participation laws. *See, e.g. Lower Merion Sch. Dist. v. Doe,* 593 Pa. 437 (Pa. 2007).

grade equivalency. The July 16, 2015 includes no analysis of these scores. Again, standard scores and percentiles were not reported.[5] S-13

24. The Student continued to attend the Private School with District-funded IU speech and language services during the 2015-16 school year (5th grade). *NT, passim*.

The Private School

25. The Private School is a school for students with dyslexia, although many students attending the private school also have organizational and attentional needs. NT at 106, 151-152. The current enrollment in the entire school is 73 students attending first through eighth grade. NT at 103.

26. The Student takes the following classes at the Private School: Structure and Linguistics, Worth, Oral Reading, Language Arts, Spelling, Auditory (a listening comprehension class), Math, Social Studies, Science, Gym, Music, Art, Computer, Hundred Mile Club, and Social Values. NT at 104-105.

27. The Student's local intermediate unit (IU) provided speech and language services for the Student while the Student attended the Private School. S-8. These services are in addition to the Private School's classes.

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 their 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 S*hore 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.

Child Find

In the parlance of special education law, "child find" is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.111(c)(1).

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[5] It is important to recognize that grade-level scores are a type of developmental score that must be interpreted cautiously and carefully, as they can be misleading. *Salvia, J., Ysseldyke, J., & Bolt, S., Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; *Sattler, J. M., Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

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 a meaningful educational benefit to the Student in the least restrictive environment.

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 its 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).

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *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 counsel against reimbursement or affect the amount thereof. *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.

Discussion

The Student's Right to an IEP

The first issue presented in this case is whether the District must offer an IEP to the Student. It is telling that the District does not argue to the contrary. In regard to this demand, the District argues only that it was never given an opportunity to provide a FAPE.

Analysis of the District's obligation to offer an IEP to the Student is straightforward. There is no dispute that the Student is a child with a disability, as defined at 20 U.S.C. § 1401(3). The Student is enrolled in the District, and the Parent has asked for an IEP. Consequently, the District must provide one. However, the District cannot craft an IEP from thin air. Rather, the IDEA is equally unambiguous that an IEP must be derived from an evaluation that complies with all of the requirements found at 20 U.S.C. § 1414. No such evaluation currently exists. I will order the District to provide an IEP only after such an evaluation is completed.

The Parent's Right to an IEE at Public Expense

A current, comprehensive reevaluation is undoubtedly needed. The parties disagree about who should do the evaluation. The District has offered to evaluate the Student but the Parent wants an independent evaluation.

The IDEA required the District to request a hearing when the Parent demanded an IEE. In this case, that demand came in the Parent's Complaint. Even so, the District did not request a hearing when that happened. Under similar circumstances, I have shifted the burden of proof to the LEA for this discrete issue. In this case, that shift is not outcome determinative.

As noted above, the right to an IEE at public expense is not triggered until the Parent disagrees with the District's evaluation.[6] In this case, there is no District evaluation for the Parent to disagree with. As such, the Parent cannot seek an IEE at public expense.

I note that the Parent references an OSEP letter of February 23, 2015, to argue to the contrary. The letter clarifies that a parent may seek an IEE at public expense when the LEA fails to conduct a complete evaluation. When that happens, the Parent need not disagree with the part of the evaluation that the LEA completed in order to seek out what is missing. The Parent attempts to extend that letter by arguing that the missing part of the District's evaluation is all of it. I decline to read the OSEP letter so broadly.

The Parent also argues that the right to an IEE at public expense is also triggered when an LEA has an obligation to evaluate but does not do so. I agree, but the record does not reveal a single

[6] The right to an IEE at public expense is also triggered when an LEA refuses a parental request for an evaluation. Otherwise, the parent would never obtain an evaluation at all, let alone one to disagree with. Those are not the circumstances of this case. In this case, the District proposed an evaluation as soon as the Parent requested one.

instance under which the District would be obligated to evaluate the Student prior to the District's receipt of the Complaint.

The Child Find regulations require LEAs to evaluate children suspected of having a disability. *See* 34 C.F.R. § 300.111(a)(1)(i). In this case, from the moment of enrollment, the District had actual knowledge that the Student had a disability and was receiving special education services from the IU while attending a school for dyslexic children. This does not indicate a Child Find violation. This indicates that the child was found. The Parent exercised a choice to privately educate the Student. The District was aware of that choice, and was paying for IU services at the private school.

The purpose of an evaluation is to determine whether a student requires an IEP and, if so, what the IEP must provide. But the Parent had chosen to forego public education and the IEP that would have come with it in favor of the Private School. The District's actions and inactions in response to that choice were appropriate.

In most cases, the Child Find regulations affirmatively require LEAs to propose evaluations for exceptional or thought to be exceptional students. Under the circumstances of this case, I find that the District was not obligated to propose an evaluation until the Parent expressed an interest in receiving services from the District. When the Parent expressed such an interest, the District quickly proposed an evaluation, satisfying its obligation.

The Parent's Right to Tuition Reimbursement

The Supreme Court has determined that children need not set foot in their LEA's schools before seeking tuition reimbursement. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241 (U.S. 2009). Even assuming that the pre-kindergarten program was operated by the District itself (an unsafe assumption) that fact is not relevant. The Parent may be entitled to tuition reimbursement even if the Student has never been educated by the District. *Id.*

Given the unambiguous Supreme Court precedent, I turn to the three-factor *Burlington-Carter* test stated above. The first prong of that test is satisfied if the District failed to offer an appropriate program to the Student. Here, the District offered no program to the Student. Under the circumstances, it is easy to see why. The Parent had exercised the right to educate the Student privately, while dually enrolling the Student to obtain District-funded IU supports. *See, e.g. Lower Merion Sch. Dist. v. Doe,* 593 Pa. 437 (Pa. 2007).

In many ways, the circumstances of this case are the opposite of those that the Parent cites to in the Parent's post-hearing brief – particularly *I.H. v. Cumberland Valley School District*, 842 F.Supp.2d 762 (M.D. Pa. 2012). In *I.H.*, the parent was desperately trying to get an IEP from Cumberland Valley in order to get I.H. back into a public school district. In this case, rather than pressing to put the Student into public school, the Parent made a choice to privately educate the Student, and expressed no desire for the Student to return until the Complaint was filed. Even under the extreme facts of the *I.H.* case, Cumberland Valley had no obligation to offer an IEP until the I.H.'s guardian asked for one. In this case, the Parent's Complaint represents the first demand for an IEP from the District.

Under these unique circumstances, while no IEP was offered, the District did not violate the Student's right to a FAPE and, as such, the Parent has failed to satisfy the first prong of the *Burlington-Carter* test. I recognize that this finding is atypical. In circumstances where LEAs are required to offer an IEP and completely fail to do so, FAPE is denied *per se*. The District

concedes that no program was offered at all. For clarity, I am not finding that the District offered an appropriate program. I am finding that the District was not obligated to offer a program until the Parent changed her mind about private school and sought placement within the District. That did not happen until the Complaint was filed.

I note that the IDEA does not require parents to say magic words in order to secure their rights and the rights of their children. If a student is attending school in a public school district, and the district thinks that the student may be eligible for special education, the parents do not have to do anything. It is the school's obligation to identify and evaluate the student, and offer an IEP if the student qualifies. Those obligations extend to students who do not attend the district's schools. But parents are also free to choose private education. I find that the District's actions (funding IU services) and inactions were proper in response to the Parent's choice to send the Student to private school.

Both parties referenced *Forest Grove Sch. Dist. v. T.A.*, *supra*, for different reasons in their briefs. *Forrest Grove* explicitly highlights the importance of equitable considerations in tuition reimbursement cases – especially when the child has not previously been educated by his or her school district. Typically, when parents fail to satisfy the first prong of the *Burlington-Carter* test, the analysis ends. Given the importance of equitable considerations that the Supreme Court stresses under similar circumstances, I exercise my discretion by addressing equitable considerations. The Supreme Court placed some emphasis on the requirement for 10 days notice prior to a private school placement, and the "circumstances in which a parent's failure to give notice may or must be excused." *Id* at 240. In doing so, the Supreme Court directed us back to the IDEA at 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv). The Parent's Complaint includes the Parent's first demand for tuition reimbursement. The District was not made aware of any disagreement, nor was it notified of any claims for reimbursement, prior to July 1, 2015. The record does not support any of the mitigating factors at 20 U.S.C. § 1412(a)(10)(C)(iv). The Parent's failure to provide 10 days notice in the absence of mitigating factors would require significant reduction or denial of any tuition reimbursement.

Conclusion

The Student has a right to an IEP from the District. That IEP must flow from an evaluation that does not yet exist. The Parent has not proven entitlement to have that evaluation completed by an independent evaluator at public expense. The Parent is also not entitled to tuition reimbursement, for the reasons expressed above.

ORDER

Now, February 23, 2016, it is hereby **ORDERED** as follows:

1. Within ten (10) days of this Order, the District shall seek the Parent's consent to reevaluate the Student. The reevaluation shall be consistent with the requirements of 20 U.S.C. § 1414.

2. Upon completion of the reevaluation, the District and Parent shall develop an IEP for the Student in accordance with 20 U.S.C. § 1414.

3. Nothing in this Order precludes the Parent from obtaining an independent educational evaluation at the Parent's own expense.

4. Nothing in this Order precludes the Parent from seeking an independent educational evaluation at the District's expense if the Parent disagrees with the District's reevaluation when it is completed.

5. The Parent's demand for an independent educational evaluation at public expense is denied.

6. The Parent's demand for tuition reimbursement is denied.

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

/s/ Brian Jason Ford
HEARING OFFICER