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 on Remand

CLOSED HEARING
ODR File Number: 19921-17-18

Child's Name: S. T. **Date of Birth:** [redacted]

Dates of Hearing:

Parent:
[redacted]

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Hearing Officer: Brian Jason Ford, JD, CHO **Date of Decision:** 03/21/2018

Introduction and Procedural History

This matter is the resolution of a case remanded to me from the United States District Court for the Middle District of Pennsylvania. The underlying matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. I now reconsider the Parent's right to tuition reimbursement incurred when the Parent continued the Student's private school placement after enrolling the Student in the District. I conclude that the Parent is entitled to a portion of that reimbursement.

On July 1, 2015, the Parent requested a special education due process hearing against the District.[1] The Parent raised three issues:

1. Must the District offer an Individualized Education Plan (IEP) to the Student?
2. Is the Student entitled to an Independent Education Evaluation (IEE) at public expense?
3. Is the Parent entitled to tuition reimbursement?

On February 23, 2016, I issued a final due process decision and order resolving those issues. I ordered the District to evaluate the Student and then issue an IEP. I denied the Parent's requests for an IEE at public expense and reimbursement for tuition costs incurred when the Parent unilaterally sent the Student to a private school (the Private School). *See* ODR No. 16540-1516KE.

Regarding tuition reimbursement, I found that the Parent enrolled the Student in the District but did not seek placement in the District. Consequently, I found that the District had no obligation to provide a free appropriate public education (FAPE) to the Student. In the absence of a FAPE obligation, I found that the District did not breach its duty to provide a FAPE to the Student. Consequently, the Parent failed the *Burlington-Carter* test (discussed below) at the first level. *See* ODR No. 16540-1516KE. I declined to consider the appropriateness of the Private School. *Id*. I also found that, if the first two parts of the *Burlington-Carter* test had been met, equitable factors would "require significant reduction or denial of any tuition reimbursement." *Id* at 9.

The Parent appealed my determinations about the IEE and tuition reimbursement.

On September 28, 2017, upon consideration of cross-motions for judgement on the administrative record, the United States District Court for the Middle District of Pennsylvania reversed my tuition reimbursement analysis and remanded this matter to me for further proceedings.[2] *[Student] v. Carbondale Area Sch. Dist.*, No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683, at *20-21 (M.D. Pa. Sep. 28, 2017).[3]

Specifically, the court reversed my determination that the Parent did not seek a special education placement from the District. Rather, the court found that the Parent's actions when enrolling the

[1] Except for the cover page of this decision, identifying information is omitted to the greatest extent possible.
[2] Other aspects of the decision, including my determination about the IEE, District evaluation, and issuance of an IEP were affirmed.
[3] The court's decision is captioned using the Student's first name and last initial. ODR redaction procedures require me to alter that caption. Only the Student's initials are used, and only in the cover page of this decision.

Student were sufficient to trigger the District's obligation to offer a FAPE to the Student. *[Student] v. Carbondale, supra* at 38-41. The court also found that the District did not discharge its FAPE obligation by paying for special education services that the Student received while attending the Private School pursuant to Pennsylvania's dual-enrollment and equitable participation laws. *Id* at 39, 49-51.

After the remand, the parties agreed that further evidentiary hearings were not necessary. The parties agreed instead to file post-remand briefs. Briefs were filed after a few scheduling motions, and the matter is now ripe.

Discussion

The *Burlington-Carter* Test

The court agreed that the *Burlington-Carter* test, named for *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993), is the proper test for tuition reimbursement in this case. *See also, Forest Grove School District. v. T.A.*, 557 U.S. 230, 246–47 (2009); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The *Burlington-Carter* test is a three-part test. First, the Parent must establish that the District failed to offer a FAPE to the Student. Second, the Parent must establish that the Private School is appropriate for the Student. Third, I must consider whether equitable factors warrant either a denial or a reduction of tuition reimbursement. In most cases, those steps are taken in sequence and the analysis ends if the party requesting reimbursement fails at any level.

The District Did Not Offer a FAPE to the Student

The decision remanding this matter back to me all but completes the first prong of the *Burlington-Carter* test. The court did not explicitly find that the District failed to offer a FAPE to the Student – but it is now impossible to hold otherwise.

As explained in the due process decision, my determination was "atypical" because in "circumstances where LEAs are required to offer an IEP and completely fail to do so, FAPE is denied *per se*." ODR No. 16540-1516KE at 9. The District conceded "that no program was offered at all." *Id*. Under those circumstances, I did not find that the District offered an appropriate program. Rather, I found that the District had no obligation to offer a program. The court reversed this conclusion.

The court found that the District's child-find obligations were triggered when the Parent enrolled the Student on September 12, 2013.[4] The District knew that the Student was a "child with a disability" as defined by the IDEA at that time. *See* ODR No. 16540-1516KE at FF #10-12. The District considered the Student to be dually-enrolled and paid for special education services provided in the Private School by the Intermediate Unit (IU) in which the District is located.

[4] Technically, this was a re-enrollment. The Student was previously enrolled in the District and then withdrew to attend a charter school.

In sum, from September 12, 2013, the District had a FAPE obligation to the Student, and had actual knowledge that the Student is a child with a disability. Despite this, the District did not propose an evaluation or offer an IEP. The court has concluded that the District did not discharge its obligation by funding IU services. Consequently, the only possible conclusion is that the District failed to offer a FAPE to the Student, and the first prong of the *Burlington-Carter* test is satisfied.

The Private School Was Appropriate

I made findings of fact about the Private School in the original due process decision, but I made no determination about its appropriateness. I now find that the Private School was appropriate under the standards for tuition reimbursement.

For tuition reimbursement analysis, a private placement need not meet the same standard of "appropriate" that is required of public schools as part of their FAPE obligation. *See Florence County School District v. Carter*, 510 U.S. 7, 13-15 (1993). The question turns on the private placement's ability to educate the Student, not the private placement's technical adherence to the IDEA. *Id. See also Lauren W. v. DeFlaminis*, 480 F.3d 259, 276-77 (3d Cir. 2007).

The Third Circuit has provided guidance for the analysis. In the Third Circuit, a private placement is appropriate if "it provides significant learning and confers meaningful benefit...." *Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009) (quoting *DeFlaminis, supra* 480 F.3d at 276). As such, "parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir. 1999). Rather, the substantive educational benefit that the student receives is the primary factor in the analysis, and not procedural compliance with IDEA or state educational standards. *Id. See also Munir v. Pottsville Area School Dist*., 723 F.3d 423, 432-33 (3d Cir. 2013) (holding that a private placement selected for medical, not educational purposes failed the test – the court found the educational component of the program lacking).

The Student was diagnosed with dyslexia, dysgraphia, and ADHD. The Student also had a speech and language impairment. ODR No. 16540-1516KE at FF #11, 12. The Private School is, primarily, a school for students with dyslexia. *Id* at FF #25. The Private School also addresses the organizational and attentional needs of its students. *Id*. In addition to what would be considered core academics in a public school, the Student received instruction intended to remediate dyslexia at the Private School. *Id* at FF #26. The Student also received speech and language support from the IU while attending the Private School at the District's expense.

At a surface level, the foregoing suggests that the Private School was reasonably calculated to be appropriate for the Student. The difficulty in this case is that the Student did not enroll in the Private School in September 2013. Rather, the Student had already attended the Private School for most of the 2011-12 and all of the 2012-13 school years. *[Student] v. Carbondale Area Sch. Dist.*, No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683, at *4-5, 7 (M.D. Pa. Sep. 28, 2017). The Student then continued in the Private School for all of 2013-14 and 2014-15 school years. By May 2015, the Student had second grade reading skills, third grade math skills and first and

second grade writing skills.[5] ODR No. 16540-1516KE at FF #23. Based on these facts, the District argues that the Private School was not appropriate for the Student even under the more forgiving test for tuition reimbursement.

Case law does not provide guidance about whether I must judge the appropriateness of the Private School at the time it was selected (sometime after November 2011), at the time the District became responsible for the provision of FAPE (September 2013), or at the time reimbursement was demanded (July 2015). Similarly, there is also some ambiguity in the case law about whether I must decide if the Private School was reasonably calculated to be appropriate, or whether the Private School actually provided a meaningful benefit to the Student.

I find that July 2015 (when the complaint was filed) is not the correct date to judge the claim. The Parent demanded tuition reimbursement for the 2013-14 and 2014-15 school years. [The Parent] demanded a placement in the District for the 2015-16 school year. In practice, those demands shifted slightly as the hearing progressed. Demands for reimbursement for the 2015-16 school year, although not presented in the complaint, are discussed below.

I find that the Private School was reasonably calculated to be appropriate in November 2011 and September 2013. It was reasonable for the Parent to place the Student, who has a reading disability, into a school for children with reading disabilities. Gaps in the program for speech and language support were filled in by IU services at the District's expense. It is striking that the District paid to cure deficiencies in the Private School's program, thereby bolstering the Parent's tuition reimbursement claim. Even so, from the Parent's perspective, there was no reason to believe that the Private School was inappropriate in any way in November 2011 or September 2013.

I find that the evaluation in May 2015 does not change this analysis. Ignoring that the Student's actual progress in the Private school might not be relevant, the absence of information about the Student's progress in the Private School is surprising. Beyond that, I cannot accept the District's argument that the May 2015 evaluation is proof that the Private School was inappropriate. As noted in the original due process decision, the Private School only reported grade equivalency scores from a standardized, normative assessment. ODR No. 16540-1516KE at FF #23. Grade equivalency scores are the least meaningful, least reliable metric produced by such tests. Grade-level scores must be interpreted cautiously and carefully, as they can be misleading for many reasons. *See* 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. For example, grade equivalents tend to exaggerate minor variations in performance. Grade equivalents vary from instrument to instrument, and even from subtest to subtest, and are therefore quite difficult to compare. *Assessment of Children* at 106. This is why reports of normative tests should be presented with confirmation of standardized testing conditions, presentation of scaled scores, and presentation of percentile ranks. Even then, the results typically are accompanied by narrative analysis from highly trained professionals

[5] There is some ambiguity in the record as to whether the Student repeated Kindergarten or was considered to be a first grader upon entering the Private School. Without revealing the Student's age, the Student had just completed either 4th or 5th grade in May 2015. Either way, standardized tests indicated that the Student was significantly below grade level. The meaningfulness of those tests is discussed herein.

interpreting the results. Such completeness is important because the same score on the same test could have different implications for different children depending on a host of circumstances.

In this case, it is impossible to draw broad inferences from the grade equivalency scores in isolation. I cannot accept the scores as evidence of the Student's progress. Apart from the standardized tests, evidence of the Student's progress in the Private School comes primarily from the Private School principal's testimony. *See, e.g.* NT 114-115. Like testimony from the Parent, I did not find that testimony particularly compelling. Nevertheless, the order remanding this matter to me leaves no doubt that when unsupported testimonial evidence is the best evidence in the record, I cannot ignore it. Consequently, I must find that the Student made progress in the Private School.

The record compels findings that the Private School was reasonably calculated to be appropriate both at the time of the initial placement and in September 2013. It must be stressed that "appropriate" for this analysis is not the same as "appropriate" in a FAPE analysis. The Private School would fail the higher FAPE standard. The record also compels a finding that the Student made some amount of progress at the Private School. For these reasons, the Private School was appropriate for purposes of the *Burlington-Carter* test. I go on to consider the equities.

Equitable Considerations

Having found that the first two prongs of the *Burlington-Carter* test are met, I must now determine if reimbursement should be reduced or denied based on equitable considerations. *Forest Grove*, 557 U.S. at 246-47. As explained by the court remanding this matter to me, this "inquiry aligns with the statute's express limitations on reimbursement if there are certain equitable findings." *[Student] v. Carbondale Area Sch. Dist.*, No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683, at *36 (M.D. Pa. Sep. 28, 2017) (citing 20 U.S.C. § 1412(a)(10)(C)(iii)).

Regarding the "statute's express limitation on reimbursement," the IDEA includes the following:

> (iii) Limitation on reimbursement - The cost of reimbursement … may be reduced or denied—
>
> (I) if—
>
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

20 U.S.C. § 1412(a)(10)(C)(iii)(I).

The Parent's demand for tuition reimbursement came in the July 2015 complaint. The complaint was filed 657 days after the Parent's "nasty" experience during the enrollment process. I do not believe that the Parent waited in hope for an IEP from the District without taking action for 657 days. More closely adhering to the statute, 469 business days passed between the Student's enrollment and the demand for tuition reimbursement.[6] Ignoring the fact that the Student had attended the Private School for nearly two years before enrolling in the District, the Parent's notice is 459 business days too late.

When weighing equitable considerations, the Third Circuit has found that a more-than-one-year delay warrants denial of tuition reimbursement. in *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 158 (3d Cir. 1994). The court remanding this matter to me highlighted that even after a two-year statute of limitations was added to the IDEA in 2004, courts continued to apply the reasoning of *Bernardsville* when equitable considerations warrant denying tuition reimbursement. *See Mittman v. Livingston Twp. Bd. of Educ.*, No. 09-4754 (DRD), 2010 U.S. Dist. LEXIS 107419, 2010 WL 3947548, at *5 (D.N.J. Oct. 7, 2010). I note that the decision remanding this matter to me was issued after the Third Circuit's decision in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), which discusses the application of the IDEA's statute of limitations in great detail. This suggests that the court remanding this matter to me still finds value in *Bernardsville* and *Mittman* even after *G.L. v. Ligonier Valley*. Both *Bernardsville* and *Mittman* hold that an unreasonable delay is grounds for denying tuition reimbursement, regardless of the IDEA's statute of limitations.

I hold that, under the facts of this case, a 657-day delay is unreasonable. The court has concluded that the Parent enrolled the Student to see what services the District would offer. I further accept the Parent's description of the District's actions during enrollment (highlighted by the court) as true. As such, there is considerable merit to the Parent's argument that, with no IEP offered by the District, the Parent had no choice but to continue the Private School placement. At the same time, these facts highlight the unreasonableness of the Parent's delay. The Parent sent a statutorily required tuition reimbursement notice to the District 657 days after the "nasty" experience during enrollment – 657 days after wanting a placement at the District and not getting one – 657 days after going out of pocket for a private placement.

The Parent argues that IDEA's notice rules do not apply in this case because the District failed to provide a procedural safeguards notice. The Parents are correct that "the cost of reimbursement shall not be reduced or denied for failure to provide [the 10 business day notice] if … the parents had not received [a notice of procedural safeguards]." 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(bb). Even so, remanding this matter to me, the court said:

> In particular, the court notes that [Parent] did not follow up with the District for over a year and, instead, waited for the District to reach out to [Parent] after [Student's] re-enrollment on September 12, 2013. This unusual delay took place despite the fact that [Parent] had some experience requesting IEPs before. (See Doc. 8-4 at 16 (testifying that [Student's] initial IEP at [a charter school] was done at [Parent's] written request)). Thus, while the District had notice that [Student] was in [Private School], there appears to have been no notice that

[6] IDEA regulations define business days and school days differently. 34 C.F.R. § 300.11.

> [Parent] would be seeking tuition reimbursement for at least a year. *See Forest Grove*, 557 U.S. at 246 (indicating that notice to the public school is an important consideration).

[Student] v. Carbondale Area Sch. Dist., No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683, at *53 (M.D. Pa. Sep. 28, 2017).

Separate and apart from the 10-day notice requirement, tuition reimbursement may be denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III). The exception when LEAs fail to give prior written notice applies only to the 10-day notice requirement, not to the "finding of unreasonableness" sub-section. The Parent did not violate the 10-day notice requirement because the District did not send procedural safeguards. The Parent did, however, act unreasonably, and that merits a reduction in tuition reimbursement.

The record establishes that the Parent's actions were unreasonable. As the court noted, the Parent was knowledgeable enough about the Student's rights to initiate the IEP process when the Student attended a charter school. Then, the Parent enrolled the Student in the District, ostensibly wanting a placement in the District. Then, 657 days went by. During that time, the Parent never requested an IEP or asked the District to evaluate the Student. More generally, during those 657 days, the Parent never asked the District for a placement or services of any kind. As the court discussed, the Parent's failure to ask for services from the District did not diminish the Student's right to a FAPE.[7] That same inaction, however, is a factor when balancing the equities in this case. I find that if the Parent truly was seeking a placement, an evaluation, or services of any kind from the District at the time of enrollment, it was unreasonable for the Parent to wait in silence for 657 days while a tuition bill accrued.

It is critical to not conflate the IDEA's statute of limitations, as interpreted by *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) and the codification of equitable considerations in tuition reimbursement cases at 20 U.S.C. § 1412(c). A claim for tuition reimbursement is timely if filed within two years of the date that the parents knew or should have known of the actions giving rise to their claims. *See G.L.* The third prong of the *Burlington-Carter* test, codified within 20 U.S.C. § 1412(c), requires consideration of what actions the parents took before requesting a hearing, regardless of the timeliness of the complaint itself. As applied in this case, the timeliness of the Parent's complaint is not in dispute. The Parent's actions, however, were unreasonable.

In sum, equitable factors favoring a reduction of tuition reimbursement are as follows: The Parent missed a ten-business day notice requirement by 459 business days. The IDEA excuses that failure because the Parent did not receive a procedural safeguards notice from the District. Separate and apart from the ten-business day notice requirement, I must assess the reasonableness of the Parent's actions. Remanding this matter to me, the court pointed out that the Parent knew how to initiate the IEP process. The Parent's failure to take that action did not diminish the *Student's right* to a FAPE. That same inaction, however, must be considered in an analysis of the *Parent's right* to tuition reimbursement. I find that the Parent's inaction was

[7] That right is considered in the first part of the *Burlington-Carter* test.

unreasonable. The Parent could have taken action at any time during the 657 days between the Student's enrollment and the demand for reimbursement to either request services from the District, or to alert the District that the Parent would seek reimbursement. The Parent's inaction is tantamount to an unreasonable failure to mitigate damages.

I balance the equitable factors favoring a reduction of tuition reimbursement against the District's inactions. The District knew that a child residing in its boundaries was a student with a disability, enrolled in a specialized private school, and receiving IU services at the District's expense. Personnel changes may explain why the District never offered an evaluation or IEP to the Student. Although that explanation is not an excuse, the Parent's inactions exacerbated the problem. Yet the District's inaction cannot be fully explained or excused by the Parent's inaction. A significant reduction in tuition reimbursement is warranted, but a denial of tuition reimbursement is not warranted.

The above factors change after July 15, 2015. Although the complaint did not explicitly include a demand for tuition reimbursement for the 2015-16 school year, the parties understood that the Parent was seeking tuition reimbursement until the District offered an appropriate program and placement. NT at 21. On July 15, 2015, the District sought the Parent's consent to evaluate the Student to start the IEP development process. ODR No. 16540-1516KE at FF #19. The IDEA contemplates this situation at 20 U.S.C. § 1412(a)(10)(C)(iii)(III). Parental refusal to make a child available for an evaluation is grounds to deny reimbursement. *Id*. In this case, the Parent faulted the District for failing to propose an evaluation. Then, when the District sought parental consent to evaluate, the Parent refused. This merits denial of tuition reimbursement from July 15, 2015 onward.

Summary and Conclusions

The court reversed my determination that the District had no obligation to offer a FAPE to the Student. Since the District had an obligation to offer a FAPE, and also had actual knowledge that the Student was a child with a disability residing in its boundaries, the District's failure to propose an evaluation and offer an IEP constitutes a substantive denial of FAPE. This satisfies the first part of the *Burlington-Carter* test.

The Private School was appropriate for purposes of the *Burlington-Carter* test. For the period of time during which the Parent demands reimbursement in the complaint, evidence of the Student's actual progress in the Private School is scant. But that scant evidence is not contradicted by anything reliable. Moreover, regardless of the Student's actual progress, the Private School was reasonably calculated to be appropriate (at least from the Parent's perspective) both when the initial placement decision was made, and when the Student enrolled in the District.

Equitable factors in this case require a reduction in tuition reimbursement. As discussed above, the Parent's inactions were unreasonable. Reduction is warranted under 20 U.S.C. §

1412(a)(10)(C)(iii)(III). Under all of the factors discussed above, I find it equitable to reduce the award of tuition reimbursement by 51%.[8]

ORDER

Now, March 21, 2018, it is hereby **ORDERED** that that the District shall reimburse the Parent forty-nine percent (49%) of the Parent's actual cost of tuition at the Private School during the 2013-14 and 2014-15 school years through July 15, 2015. The Parent's actual cost of tuition is the tuition charged by the Private School, including base tuition costs and mandatory fees, less any discounts, scholarship, or financial aid. The District may require the Parent to comply with its own policies regarding the submission of invoices, receipts and the like. The District shall reimburse the Parent in accordance with this Order, regardless of whether the Parent has actually paid the Private School or has incurred unpaid debts to the Private School.

/s/ Brian Jason Ford
HEARING OFFICER

[8] I am unaware of any formula to calculate the amount by which tuition reimbursement should be reduced when a reduction is warranted based on equitable factors. I come to a 51% reduction (a 49% award) by comparing the significance and duration of the Parent's unreasonable inactions, the District's violation of basic IDEA principles, and the way that the Parent's inactions exacerbated the District's failures.