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
ODR No. 21067-18-19KE
CLOSED HEARING

Child's Name:
E.G.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
12/21/2018

Introduction

This matter concerns the educational rights of an older teenage student (the Student).[1] The Student's parents (the Parents) live within the School District (the District). The parties agree that the Student has significant academic and behavioral needs as a result of several disabilities. For the past several years, the Student's educational placement has been controlled by a series of settlement agreements between the Parents and the District. Pursuant to those agreements, the Student attended a series of out-of-state residential treatment facilities (RTFs). Those agreements have come to an end, and the parties are at an impasse concerning the Student's placement.

The Parents believe that the Student continues to require an RTF placement, and have selected an out-of-state RTF for the Student called [reacted] Academy (RTF Academy).[2] The Parents ask me to find that RTF Academy is appropriate, and order the District to fund that placement by reimbursing the Parents for tuition and necessary costs.

The District views RTF Academy as the continuation of a series of RTFs that have failed the Student. There is little dispute many of the prior RTFs were not successful. The District is unwilling to fund what it views as more of the same.

For its part, the District has proposed placement at [redacted], a licensed private academic school in a therapeutic environment. The District seeks a finding that [this licensed private academic school], specifically [its] Autism Academy, is appropriate for the Student.

For reasons discussed below, I find that the program offered by the District is not appropriate, RTF Academy is appropriate, and the District must reimburse the Parents.

Issue

The only issue in this case is whether the District must reimburse the Parents for the Student's attendance at RTF Academy.

Findings of Fact

I commend both attorneys in this case for their efficient presentation of evidence. Even so, I make findings of fact only as necessary to resolve the issues before me and, consequently, not all evidence is referenced in the findings below.

I find as follows:

1. There is no dispute concerning the history of the Student's placements, which is presented most clearly in a chart embedded in the Parent's closing brief. The Student has attended out-of-state RTFs since the 2015-16 school year which, chronologically was the Student's 8th grade year.

[1] Except for the cover page, identifying information is omitted from this decision to the extent possible.
[2] The sheer number of educational agencies and schools involved in this case require me to name some of the schools. To do otherwise would yield a confusing, difficult-to-read decision.

2. There is no dispute that the Student attended multiple RTFs between the start of the 2015-16 school year and the Student's enrollment in RTF Academy. The Student has consistently resided within RTFs from July 2015 through the present except for scheduled breaks, and a period from May 26, 2017 through August 10, 2017. The Student resided at home during those breaks and that gap.

3. There is no dispute that the number of RTF placements that the Student has gone through is a function of those RTFs failing to meet the Student's needs.

4. There is no dispute that the Student's needs are intensive, and there is no dispute about the Students various medical and educational diagnoses. Most pertinent to this matter, the Student has been diagnosed with Autism Spectrum Disorder, ADHD, and OCD. The Student's impulsive, disruptive, and maladaptive behaviors are significant to the point where diagnoses of impulse control and conduct disorder are warranted. P-3, P-6, P-8, P-11, P-15, P-17, P-23, P-43, P-66, P-69, P-71, P-94.

5. There is no dispute that the Student's placement immediately before RTF Academy was another RTF called [redacted]. The [redacted] program was funded by a settlement agreement between the Parents and the District. The Student attended the [redacted] program from October 20, 2017 through May 11, 2018.

6. The Student is obsessed with and perseverates about video games and electronics. Electronics are a preferred activity for the Student. Historically, removing electronics from the Student triggers significant behavioral outbursts. NT *passim*.[3] All attempts to place reasonable restrictions on the Student's access to electronics outside of RTF placements have failed - sometimes catastrophically. *See, e.g.* NT at 189-190, 743-755.

7. Providing access to electronics will mollify the Student's behaviors, but removing them again, even temporarily, to switch to a non-preferred activity restarts the cycle. This yields aggressive outbursts. P-11, P-42, P-64.

8. Even while attending RTFs, the Student's aggressive outbursts have resulted in restraints. NT 214.

9. The Student has a history of elopement. P-32, P-33, P-35, P-36.

10. The First RTF that the Student attended could not handle the Student's aggressive, physical outbursts and elopements. It recommended a more intensive program. P-36.

11. The Second RTF was also unable to address the Student's physical aggression, non-compliance with the program, and refusal to take medication. The Second RTF recommended an even more intensive program. P-42.

12. The Third RTF was unable to safely separate the Student from electronics (its efforts to do so and to otherwise make the Student available for therapeutic programs resulted in serious

[3] It is not clear if there is a dispute about this fact, but it is overwhelmingly supported by multiple witnesses throughout the transcript and multiple documents in evidence as well.

behavioral incidents). The Parents and the Third RTF ultimately agreed that the Third RTF could not help the Student, and so the Student withdrew. *See e.g.* P-61, P-62.

13. After the third RTF, the Student stayed at home from May 26, 2017 through August 10, 2017. During this time, the Parents managed the Student's behavior by providing access to electronics and placing minimal demands on the Student (i.e. not forcing the Student to engage in non-preferred activities).

14. The Student attended the Fourth RTF, called [redacted], for only four days. The Student came to [the Fourth RTF] with electronics and refused to relinquish them. [The Fourth RTF] staff could not safely remove the electronics, and dismissed the Student for that reason. Daniel's recommended the Fifth RTF upon dismissal. P-64.

15. The Fifth RTF was a wilderness therapy program. The Student remained in the wilderness therapy program for 66 days, but that did not break the Student's perseveration on electronics. The Student continued to exhibit maladaptive and non-compliant behaviors, rigidity, and anxiety. All of this resulted in the termination of the wilderness program before its completion, with the wilderness program recommending an intensive residential placement. P-65.

16. After the Fifth RTF, the Student reapplied to [the Fourth RTF] and was rejected. The Student needed a level of support that was beyond [the Fourth RTF's] program. NT 706-707, 717.

17. Ultimately the Parents found [redacted], the Sixth RTF, and the Student was accepted there. The Student remained at [the Sixth RTF] for roughly seven months, excluding planned breaks, from October 18, 2017 through May 11, 2018. Upon intake at [the Sixth RTF], the Student was seen by a psychiatrist and a master treatment plan was developed.[4] P-66, P-67.

18. The Student was dysregulated and physically aggressive at the time of admission to [the Sixth RTF], and attempted elopement twice. Eventually, the dysregulation subsided, but the Student still was complex and challenging, with an apparent inability (or outright refusal) to engage in activities of daily living and self-care (hygiene, dressing, participating in routine activities). All transitions (including from the Student's bedroom to the hallway) could prove difficult. The Student was also extremely rigid and fixed in beliefs, even relative to other individuals with Autism. NT 294-295, 727, 725.

19. Despite extreme difficulties, the Student made some progress at [the Sixth RTF]. By the end of the Student's time at [the Sixth RTF], the Student was no longer dysregulated, could tolerate exposure to some of [the Sixth RTF]'s therapeutic and academic programs, and had shown improvement in some life skills. NT at 320, 726. Even so, the Student's behavioral and academic difficulties continued to persist. *See* P-71. The Student's progress at [the Sixth RTF] can best be described as stabilization.

20. The Parents retained a private neuropsychologist, who evaluated the Student and wrote a report. In the report, the private neuropsychologist concluded that the Student could not be successful outside of a residential setting, and recommended transfer from [the Sixth RTF]

[4] Master treatment plans were developed at the other RTFs as well.

to a highly-structured, intensive, residential program that focuses on the development of life skills and provides therapies intended to make students like the Student in this case available for instruction. P-94.

21. The private neuropsychologist views placement in a day program or outpatient therapeutic program as a long term goal for the Student. P-681.

22. The Student left [the Sixth RTF] and enrolled in [RTF Academy – the Seventh RTF] upon the recommendation of the private neuropsychologist. The Student started at RTF Academy on May 14, 2018. Consistent with [the Sixth RTF]'s and the neuropsychologist's report, the staff at [RTF Academy] have seen, and are programming for, significant deficits in the Student's adaptive behaviors, daily living skills, self care skills, communication skills, self-regulation, and safety skills. NT at 391-397.

23. [RTF Academy] provides year-round residential treatment and education through a school licensed by the state in which it is located. At [RTF Academy], the Student receives intensive, around-the-clock supports with a focus on independent living skills, and therapies to decrease the Student's rigidity. Treatment at [RTF Academy] initially focused on the Student's medication compliance, urinary frequency (an escape behavior), sleep schedule, and general compliance. The Student has made some progress in all of those domains, and has started participating in the academic program as well. Of equal importance, at [RTF Academy], the Student accepts limited and controlled access to electronics. P-39; NT at 533, 583, 634.

24. The District reevaluated Student, and issued a reevaluation report on June 1, 2018 (2018 RR). P-74. The Parents brought the Student home to be available for the evaluation.

25. The District's psychologist, who conducted the revaluation and authored the 2018 RR, agrees that the Student's behaviors are maladaptive and that the Student is averse to school. NT at 47-48. The 2018 RR itself is generally consistent with the private neuropsychological report, and the District's psychologist agreed with the private neuropsychologist's diagnostic findings. NT at 49.

26. The 2018 RR does not say anything about the Student's needs for a residential placement. The District's psychologist testified that she does not believe that the Student requires a residential placement to receive an appropriate education, but also testified that she could not recall any particular or specific disagreements with the private neuropsychological report. NT at 49.

27. After the 2018 RR, the Student returned to [RTF Academy]. The District convened the Student's IEP team and recommended placement at [Autism Academy], a licensed private academic school in a therapeutic environment. NT at 746. [Autism Academy] is a day program.

28. The Parents toured [Autism Academy] and met with [Autism Academy]'s director of admission. During the tour, the Parents became concerned about the intensity of therapies that the Student would receive at [Autism Academy]. *See, e.g.* NT at 226.

29. Based on information provided by a transportation company, it takes one hour and 30 minutes to transport the Student to [Autism Academy] in the morning and 1 hour and eight minutes to transport the Student back home in the afternoon. P-86.

30. When asked how the Student's behaviors would be managed during transportation to and from [Autism Academy], the director of admissions suggested that the Student could use electronics (video games or music players). NT 485, 503.

31. The Parents gave consent for the District to share information about the Student with [Autism Academy]. The Parents requested to tour [Autism Academy] again, but were denied. NT at 226, 255.

32. The District recommended [Autism Academy] through a NOREP on July 25, 2018. S-51, S-55.

33. The Student has never been admitted to [Autism Academy]. NT at 145, 493.

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, all witnesses testified credibly in the sense that none give any indication of an effort to obscure facts or hide the truth. This does not mean that I assign equal weight to all testimony. Two points about weight are worth noting:

First, the Parents argue that I should give added weight to the private neuropsychologist's report and testimony because RTF Academy competes with his own programs. I reject that argument. Private evaluators do not typically sell the services that they recommend. I do not give extra weight to the private neuropsychologist in this case simply because he is in the same position as most private evaluators in most cases.

Second, the District psychologist's testimony concerning the Student's need for residential placement is given reduced weight. The District psychologist's report and testimony are consistent with the reports and testimony from other evaluators, and the psychologist explicitly agreed with the private neuropsychological evaluation report (except for its conclusion about RTF placement). The District's psychologist's explanation about how she reached a different

conclusion about the Student's need for an RTF placement based on nearly identical data was scant, not-well supported, and does not withstand scrutiny.

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 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 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, including school districts, 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 Educatio*n, 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).

Under the historical meaningful benefit standard, 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 required 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).

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 — as is clearly evident in this case.

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

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. That is, did the LEA offer a FAPE. The second step is to determine whether the program obtained by the parents is appropriate for the child. As discussed below, the appropriateness of the parentally-selected placement is not the same as the FAPE standard. 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

As described above, the three-part *Burlington-Carter* test is used to determine whether the District must reimburse the Parents for the Student's RTF placement. I find that the District did not offer a FAPE to the Student, the RTF placement is appropriate under the *Burlington-Carter* standard, and that no equitable considerations warrant a reduction in tuition reimbursement.

I. The District's Offer is Not Appropriate

The Parents disagree with the District's conclusion that the Student does not require a residential placement. The District's conclusion, stated through the NOREP and testimony even if not explicit in the District's own evaluation is the heart of the dispute. Even so, it is not necessary for me to resolve the Student's need for a residential placement to complete the first prong of the *Burlington-Carter* analysis. There is preponderant evidence that the District's offer is not appropriate for the Student regardless of the Student's need for a residential placement.

First, it is not clear exactly what program the District offered. On paper, the District clearly offered [Autism Academy]. In reality, the District had not applied for the Student's admission to [Autism Academy] at the time [Autism Academy] was offered. Moreover, the Student has never been accepted to [Autism Academy]. As such, the District offered the Student a placement that, at that time, may or may not have accepted the Student. This ambiguity renders the District's offer inappropriate in and of itself. NOREPs must offer a placement - not a potential placement.

Ignoring the ambiguity that renders the NOREP inappropriate, [Autism Academy]'s director of admission generally testified that the Student is a good match with [Autism Academy]'s program, but her foundation for that opinion is suspect. The director of admission revealed through her testimony that she does not have a clear picture of the Student's needs. For the most part, the director of admissions testified to the Student's needs, [Autism Academy]'s programs, and the match between the two, only in broad generalities. When the director of admissions testified more specifically, that testimony revealed a lack of knowledge about the Student's needs. One significant example of this is her testimony concerning the Student's transportation needs. [Autism Academy]'s director of admissions did not understand that providing electronics to the Student during transportation and then taking the electronics away from the Student upon arrival would be triggering, and therapeutically contraindicated.

The District offered [Autism Academy] before knowing whether [Autism Academy] would accept the Student, never secured admission to [Autism Academy], and then provided only very shaky evidence about the match between [Autism Academy]'s program and the Student's needs. Under these circumstances, I find that the District determined to offer [Autism Academy] first, and then resolve the particulars of the Student's program. This is the opposite of what the IDEA requires. An appropriate placement determination can be made only after the Student's needs are assessed and the IEP team determines what services the Student needs. It is inappropriate to make a placement determination first, and then craft an IEP around the services available at the placement.

Second, even if there was a perfect match between the Student's needs and [Autism Academy]'s program, the District offered no plan for getting the Student to and from [Autism Academy]. It would take one hour and 30 minutes to transport the Student to [Autism Academy] in the morning and 1 hour and eight minutes to transport the Student back home in the afternoon. The Parents have established with preponderant evidence that it is simply unrealistic to expect the Student to endure travel of that duration on a daily basis if that time is not carefully structured. The District proposes no plan to structure that time; no Student-specific support plan for transportation. [Autism Academy]'s suggestion to occupy the Student with electronics during transportation is not appropriate under the facts of this case, and shows a gross misunderstanding of the Student's needs. Removing electronics from the Student at the same time a non-preferred

task is introduced has been consistently disastrous both for the Student and the personnel who work with the Student.

In conclusion, there is very little evidence matching [Autism Academy]'s program with the Student's specific needs, the District selected [Autism Academy] first and considered programming second, the District did not know if [Autism Academy] would accept the Student at the time the District offered [Autism Academy], and [Autism Academy] had not reviewed information about the Student at the time of the placement offer. Neither the District nor [Autism Academy] could offer a comprehensive, logical explanation of how [Autism Academy] would address this Student's individual needs — or how the Student could get to and from [Autism Academy] every day. I find that the District failed to offer an appropriate placement for these reasons.

II. [RTF Academy] is Appropriate

A preponderance of evidence establishes that [RTF Academy] is appropriate for the Student. For this second part of the *Burlington-Carter* analysis, I cannot make the same assumptions concerning the parties' disagreement over the Student's need for a residential placement. However, at this stage, I consider the appropriateness of [RTF Academy] on its own merits, not relative to the District's placement offer. The inappropriateness of the District's offer says nothing about the appropriateness of the Parents' choice.

The Parents must establish that [RTF Academy] is appropriate, it is not the District's obligation to establish the opposite. Even so, it is striking that none of the District's evidence, including its own evaluation, explicitly concludes that residential programming in general, or [RTF Academy] specifically, is inappropriate for the Student.

Evidence of [RTF Academy]'s appropriateness is preponderant. The private neuropsychological evaluation was comprehensive and included direct observations of the Student. Analyzing the information from the evaluation, the private neuropsychologist concluded that the Student continued to require a residential placement. That conclusion was well-supported by the evaluation itself, which reveals a need for intensive, around-the-clock programming to provide immediate behavioral feedback. This conclusion was echoed in the testimony from every witness who has provided services to the Student in recent memory. The District's own psychologist agreed with diagnostic findings in the private neuropsychological report except for its conclusion that the Student required a residential setting — but could not explain the basis of that disagreement. A preponderance of evidence, therefore, establishes the Student's educational need for an RTF. There is no preponderant evidence to the contrary.

I recognize that establishing the need for an RTF and establishing the appropriateness of [RTF Academy] specifically are different things, particularly because prior RTFs have failed the Student. In this case, preponderant evidence establishes that [RTF Academy] is appropriate for the Student. [RTF Academy] is a community-based therapeutic residential treatment center with its own school, which is licensed through the department of education of the state in which it is located. The Student receives a structured, intensive program with therapies and therapeutic feedback provided throughout the day. [RTF Academy] is different from prior placements not in terms of the amount of time per day that the Student is in a therapeutic program, but rather in

terms of the intensity, structure, and focus of the program. It is not a wilderness exposure program, or a program designed to simply stabilize the Student. Rather, it is a structured, intensive, around-the-clock therapeutic and academic placement. In many ways, [RTF Academy] is a natural progression from the [Sixth RTF] placement. The [RTF Academy] program is aligned with every evaluation of the Student's needs. Those evaluations would also include the District's own evaluation, but for its conclusion about residential placement. I find that [RTF Academy] is an appropriate placement for the Student.

In reaching this conclusion, I must acknowledge the District's arguments about the restrictiveness of residential placements, and the history of failed residential placements in this case. Although the District's arguments are well-reasoned, they ultimately fail.

Regarding restrictiveness, there is no doubt that the [RTF Academy] is a highly-restrictive placement. However, the appropriateness of parentally-selected placements is not judged to the same standard as LEA FAPE offers in the second prong of the *Burlington-Carter* test. *See Warren G. v. Cumberland County School District*, 190 F. 3d 80 (3d Cir. 1999). This lower standard is particularly applicable to assessments of the restiveness of the parentally-selected placement. Nearly any parentally-selected placement will be more restrictive than an LEA placement by definition. If restrictiveness were conclusive, tuition reimbursement would cease to function as an IDEA remedy.

Regarding the District's argument about past failures, I take the District's point but respectfully disagree. It is true that RTFs have failed the Student in the past, but that says little about the program that the Student received in each of the past RTFs. The evidence in this case establishes that the program the Student receives at [RTF Academy] is different from what prior RTFs provided. Even if the issue was before me, proving the inappropriateness of prior RTFs would not also prove that [RTF Academy] is inappropriate because the program at [RTF Academy] is different.

III. Equitable Considerations

Tuition reimbursement awards must be reduced or eliminated if equitable considerations so require. The District argues that the Parents sabotaged its efforts in providing an appropriate placement at [Autism Academy], and should not be rewarded for that action. The District is correct that tuition reimbursement is not equitable if the Parents prevented the District from offering a FAPE.[5] I find, however, that the Parents did not hinder the District's efforts to provide a FAPE to the Student. The Parents made the Student available to the District for evaluations, participated in IEP team meetings, and toured [Autism Academy].

I agree with the District that the Parents came to the IEP development process with a strong preference for a residential placement. In fact, it is more likely than not that the Parents would

[5] The District makes this argument by citing to *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 683 (4th Cir. 2004); and *Bobby v. School Board of City of Norfolk*, Civ. A. 2:13-0714, 2014 WL 3101927 (E.D. Va. July 7, 2014). While these cases come from other jurisdictions, they are well reasoned. *Bobby v. School Board* is the most on point. I will not endeavor to square these cases with Pennsylvania and Third Circuit jurisprudence, however, because I find that the Parents did not sabotage the District.

have rejected any non-residential placement that the District offered. It is fair to say that the Parents' attitude has been something akin to 'RTF or bust' for years.

The concept of parental pre-determination is not well-developed in IDEA jurisprudence. But even if parental pre-determination was grounds to reduce or eliminate tuition reimbursement, I would not do so in this case for two reasons. First, whatever the Parents' preferences were, they did not prohibit the District from offering a FAPE to the Student. Second, for reasons discussed above, the Student requires an RTF placement.

I reject the argument that the Parents' somehow exercised a veto during IEP development. I find that the Parents did not prohibit the District from offering a placement because the District offered a placement. It is true that the placement offer was problematic for all of the reasons discussed above, but the District did offer a NOREP and stands by that NOREP. More importantly, the Student's need for an RTF outweighs any argument about sabotage. There is some evidence that the Parent's vocal disapproval of [Autism Academy] contributed to [Autism Academy] not formally offering a placement. Even if there was enough evidence to conclude that [Autism Academy] would have accepted the Student but for the Parents' actions, that conclusion is irrelevant. At best, that would establish that the Parents took action to hinder the Student's placement in an inappropriate setting. If [Autism Academy] could have been appropriate, the District would have a very strong argument. Under the facts of this case, I must reject the District's argument.

The District also urges me to consider the Student's wishes. The Student will soon enter adulthood, and has expressed a desire to come home. For IDEA decision-making purposes, the Student has not yet reached the age of majority in Pennsylvania. Children of all ages should have a voice in educational decision-making, but I am unaware of any case in which tuition reimbursement has been reduced or eliminated because a child disliked the school that the parents selected.[6]

Finally, the District argues that the Parents have not exhausted available interventions provided by other agencies. The District highlights that the Student is still eligible for BHRS services, funded through Medical Access, that may include residential placements. I agree with the District that the Student and Parents may be entitled to a host of services from other agencies, and that the Parents have not taken full advantage of those services. The Parents' decision to forego other available services and seek help from the District alone is unfortunate, especially considering the considerable efforts that have resulted in an intensive interagency process in Pennsylvania. *See Cordero v. Pa. Dep't of Educ.*, 795 F. Supp. 1352 (M.D. Pa. 1992). Even so, I am unaware of any case holding that the potential availability of services from third party agencies reduces an LEA's obligations under the IDEA. Consequently, I reject the District's argument concerning the availability of support from other agencies.

[6] I caution the Parents to take the Student's wishes seriously - especially as the Student reaches the age of majority for educational and mental health purposes. Laws about the transfer of rights upon reaching the age of majority for educational and mental health purposes are not always consistent with each other, and are not always consistent state-to-state.

ORDER

Now, December 21, 2018, it is hereby **ORDERED** that the District shall reimburse the Parents for the cost of tuition and any other services required for participation at [RTF Academy]. Other services includes transportation to and from [RTF Academy] on days when [RTF Academy] has scheduled breaks. Other services does not include transportation to and from [RTF Academy] to accommodate parental preferences. Transportation costs are limited to lowest market-rate coach transportation for the Student and for no other person.

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

/s/ Brian Jason Ford
HEARING OFFICER