

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

CLOSED HEARING

ODR No. 29849-23-24

Child's Name:

D.M.

Date of Birth:

[redacted]

Parent:

[redacted]

Local Education Agency:

Downingtown Area School District
540 Trestle Place,
Downingtown, PA 19335

Counsel for the LEA:

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331 E. Butler Avenue,
New Britain, PA 18901

Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

August 21, 2024

OVERVIEW

The Parents have initiated a Due Process Hearing Complaint, alleging non-compliance with the Individuals with Disabilities Education Act (IDEA) and corresponding state standards. They assert that the District failed to provide a free appropriate public education (FAPE) when their child transferred into the District.¹ As a remedy, the Parents seek prospective tuition reimbursement to maintain their child's placement in a private school. Conversely, the District is requesting a declaratory ruling affirming that its proposed comparable services and individualized programming/placement at the [redacted] school were appropriate both procedurally and substantively. Upon applying the IDEA preponderance of evidence standard and after thoroughly examining both intrinsic and extrinsic evidence, I find that the Parents have not substantiated their claim that the District failed to provide "comparable services." Furthermore, the Parents did not demonstrate that tuition reimbursement is an appropriate form of relief. Consequently, for the reasons detailed herein, the decision is rendered partially in favor of the District. An appropriate Order will follow.

STATEMENT OF THE ISSUE

Did the District offer the Student comparable services during the 2023-2024 school year? If not, are the Parents entitled to tuition reimbursement?

¹ In the interest of confidentiality and privacy, the Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A); 34 C.F.R. § 300.513(d)(2). The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. References to duplicative exhibits are not necessarily to all.

Did the District offer the Student a free appropriate public education program for the start of the 2024-2025 school year? If not, are the Parents entitled to tuition reimbursement?

Did the District offer the Student a free, appropriate public education extended school year summer program prior to the start of the 2024-2025 school year? If not, are the Parents entitled to tuition reimbursement?

FINDINGS OF FACT

THE STUDENT'S CIRCUMSTANCES BEFORE ENROLLING

1. The Student has a documented history of behavioral health impairments (S-5 pp.1-2).
2. In January 2022, the Student underwent a comprehensive IDEA reevaluation, which included various assessments measuring ability, and achievement, along with measures of social, emotional, and behavioral skills (S-5).
3. The reevaluation indicated that the Student has average ability and achievement but identified unique educational needs in language arts, mathematics problem-solving, written expression, executive functioning/organization skills, and behavioral, social, and emotional areas. The reevaluation report recommended a positive behavioral program and included a functional behavioral assessment (FBA) (S-5).
4. On February 10, 2022, the Student's then-current District developed an Individualized Education Program (IEP), which included results from the reevaluation report, the FBA, a safety plan, post-secondary education goals, a behavioral goal, a math computation goal, and a written expression goal. The IEP also included specially designed

instruction in written expression, mathematics, and reading comprehension (S-5 pp.28-29).

5. The IEP provided testing accommodations, a year-long Algebra 1 class, as-needed meeting accommodations, graduation credits for each successfully completed semester of Algebra 1, a modified science curriculum, auditory processing modifications, sensory breaks, executive functioning accommodations, extended time for assignments, self-advocacy support, and cross-references to the positive behavior plan (S-5 pp.28-32).
6. The team decided against offering extended school services (S-5 p.33).
7. The team recommended, and the Parent agreed to, the Student's placement in a full-time Learning Support and Emotional Support class at the local neighborhood [redacted] school (S-5 Section VII, A. Questions for IEP Team, Section A, and Section B Type of Support p.35, line 1 and Subsection 2, lines 3 and 4; Section C Location of Student's Program line 2 and checked "Yes" box p.35).
8. According to the Penn Data calculation, the Student was to spend 30 minutes per day in a regular classroom and 6.75 hours per day in the special education classroom (S-5 p.36).
9. The Student finished the 2020-2021 in the full-time class. The Student began the 2021-2022 school year at the [redacted] school in the full-time class. On November 11, 2022, the former district issued a Notice of Recommended Educational Placement (NOREP), changing the Student's placement from the [redacted] school to "Instruction in the Home" and virtual instruction for regular education on the District's platform. The NOREP next states that the IEP met and determined that the Student will need an out-of-district placement. The virtual

placement also included "up to five (5) hours a week of "Instruction in the Home." The NOREP notes that the family had considered and rejected three private placements. The Superintendent signed the NOREP on November 4, 2022. The Mother returned the NOREP on November 14, 2022, and requested a due process hearing. The record includes a signed December 1, 2022, NOREP from the former district's Superintendent agreeing to place the Student at the current private school in dispute. Although the Parents never signed the December 2022 NOREP, the Student attended the private school (P-19).

10. The record includes a November 17, 2022, annual tuition contract between the former district and the private school funding the private placement. (P-21).
11. The Student attended the private school from November 17, 2022, through April 2024. The private school does not offer emotional support or learning support classes. The private school did not implement the February 2022 IEP or collect any IEP-related data. The record includes the private school's "Student Learning Profile." The Profile notes that the staff offers what looks like regular education instructional strategies, like more time to respond to directions, more time to complete assignments, chunking of materials, access to a punching bag, access to a licensed counselor, outdoor breaks, and morning check-in. (P-12). The Profile further notes that the staff provides one-on-one instruction, a student-staff ratio of four (4) students to one (1) adult, and access to a quiet space for breaks. (P-12). The Student earned passing grades and was promoted to [redacted] grade.
12. The Student's [redacted] grade end-of-the-year report card states that the Student earned two (2) grades of "A," three (3) grades of "A-," one (1) "A-," and one (1) "B-." (P-16). The course titles include United

States History, Biology II, Environmental Science 1, 3D printing, Basic Math, Literature, Portfolio, and Game Design. While attending the private school, the Student regularly participated in private community-based behavioral health services. While the Student was scheduled to earn seven (7) graduation credits, the report card states that the Student earned 6.75 credits. The record does not explain why the Student did not earn full credit for the Portfolio class. The record does not include a [redacted] grade report card. (P-16).

13. The summary of graduation credits from the former school states that the Student earned 6.5 credits for graduation in [redacted] grade. (P-14).

THE DISTRICT'S OFFER OF COMPARABLE SERVICES

14. The Student transferred to the current District and enrolled on April 1, 2024 (S-1 p.2).
15. The District's IEP team met on April 4, 2024, and reviewed the Student's January 2022 Reevaluation Report and the February 2022 IEP from the previous district. After meeting with the family, the District subsequently sent the Parents a Notice of Recommended Educational Placement (NOREP) proposing the following comparable services:
 - a. A two-and-a-half-day transition plan for orientation to the [redacted] school. (S-1 p.2).
 - b. Implementation of the previous district's February 10, 2022, IEP. (S-1 p.2).
 - c. Placement in a Full-time Emotional and Learning Support classroom pending reevaluation to determine continued eligibility, the need for specially designed instruction, and academic and functional baselines (S-1 p.2).

- d. Participation in regular education 23% of the time each school day. (S-1 p.2).
16. The April 2024 NOREP included a six-day cycle Monday through Friday class schedule. The schedule included the following classes:
- a. Period 1: 9th grade Biology in a co-taught regular education class.
 - b. Period 2: Writing Foundation in a special education classroom for three days and Organizational Lab B for three days.
 - c. Period 3: Social Studies in a special education class.
 - d. Period 4: English in a special education class.
 - e. Period 5: Organizational Strategies in a special education classroom three days and Organizational Lab B three days.
 - f. Period 6: Essentials of Algebra in a special education classroom.
 - g. Period 7: Lunch.
 - h. Period 8: Math Skills in a special education classroom for three days and Organizational Lab B for three days (S-1 p.2).
17. The District member of the team considered and ruled out continued placement at the Student's then-current private school (S-1).
18. The Student remained at the private school for the remainder of the school year. (S-1; S-2; S-3; NT p.80).

THE MAY AND JUNE 2024 IEP MEETINGS

19. On or about May 28, 2024, the District and the Parents participated in an IEP meeting. The May 2024 IEP team included a regular education teacher, a special education teacher, the LEA representative, the school psychologist, and the school counselor. Neither the District nor the Parents invited the private school staff to the meeting. The IEP team decided to copy and paste the content of the February 2022 IEP

onto a District IEP form. Pages 8, 9, and 10 of the May 2024 IEP repeated the offer of comparable services described in the April 2022 NOREP. The IEP also included 19 forms of specially designed instruction targeting written expression, mathematics, behavior, auditory processing, executive functioning, assignment completion, self-advocacy, and a five-point positive behavior support plan. The IEP provided to the Parents was 40 pages long (P-5 pp.32-35, NT pp.155-159).

20. The May 2024 IEP team determined that the Student was not eligible for school services (P-5 p.36).
21. The May 2024 IEP team decided to implement the IEP at the [redacted] school in the full-time Emotional Support-Learning Support classroom (P-5 p.39).
22. The May 2024 IEP Penn Datasheet indicated the Student would have a seven-hour school day, with the Student participating in regular education for 1.60 hours per day (23% of the school day) and spending 5.4 hours per day in the special education classroom (77% of the school day) (P-5 p.40).
23. On May 28, 2024, the District, relying on the 2022 Reevaluation and IEP, issued a new NOREP. The new NOREP repeated the class schedule and services offered in the April 2022 NOREP. The Parents did not respond to the NOREP. (S-3 p.2).

THE RESOLUTION SESSION – IEP MEETING

24. On June 18, 2024, the parties participated in a Resolution Session/IEP meeting. The participants included the Mother, the Supervisor of Special Education, acting as the LEA, and the Director of Pupil Services revised the May 2024 IEP. The Supervisor and Director made changes to the present levels of education, added three new goals, modified

the description of the special education services, the specially designed instruction, the Positive Behavior Support Plan, and the schedule of progress reporting. The Supervisor and Director also reversed the May 2024 IEP team's decision denying eligibility for Extended School Year (ESY) services. The Supervisor and the Director unilaterally decided that the Student qualified for ESY based on their conclusion that "successive interruptions" in education were the qualifying factor. The staff made this decision without the benefit of regression, recoupment, or goal mastery data. (S-5 pp.50-53).

25. The Supervisor and Director next decided that the ESY program should address the Student's behavior, math, and written expression goals. The Supervisor and the Director then decided to add three new behavioral goals that were not part of the former district's February 2022 IEP. The new goal statements were not discussed at the May 2024 IEP. The new goal statements included language that the staff would collect baseline data during the ESY summer sessions. (S-5 pp.50-53; NT pp.190-210). The record indicates that the new goal statements would also be part of the Student's 2024-2025 school year IEP experience. (NT pp.192-210).
26. The Director and the Supervisor then decided that the Student should receive 3.5 hours per week of Social Skills, one (1) day a week beginning on June 24, 2024, and ending on July 25, 2024. Finally, they decided the Student should receive English and Language instruction twice a week for 3.5 hours and Math instruction one (1) day a week for 3.5 hours beginning on June 24, 2024, and ending on July 25, 2024. The IEP changes did not schedule a standalone time for instruction on the three new goals or schedule time for the counseling services mentioned in the May and June IEPs (S-5 pp.51-53; NT pp.190-210).

27. After the Resolution Session /IEP meeting, the District sent the Parents a revised IEP document. The District did not reissue prior written notice or a new NOREP or provide procedural safeguards explaining its proposed actions (S-5; NT p.202).
28. The Parents rejected the June 2024 IEP and instead repeated their request to continue the placement at the private school and filed a request for a hearing. (NT *passim*).

APPLICABLE LEGAL PRINCIPLES

IDEA'S SUBSTANTIVE REQUIREMENTS

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 US 176 (1982), the Supreme Court held that districts violate the IDEA's FAPE mandate when they fail to follow the Act's procedural and substantive requirements. Substantively, *Rowley* requires that IEPs must be reasonably calculated to enable the child to make meaningful progress. IEPs are crafted annually by a team that includes a representative of the local educational agency (LEA), the child's regular and special education teacher(s), the parents, and, in appropriate cases, the child. 20 U.S.C. § 1414(a)(5). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential."² Meaningful benefit" means that an eligible child's individualized program affords him or her the opportunity for "significant learning."³ An eligible student is denied FAPE if his or her program is not likely to produce progress or if the program affords the child only a "trivial" or "*de minimis*" educational benefit.⁴

² *Shore Reg'l High Sch. Bd. of Ed. v. P.S.* 381 F.3d 194, 198 (3rd Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3rd Cir. 1988).

³ *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

⁴ *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996).

The *Andrew* court later held that "educational [IEP] program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives."⁵ In *Andrew* applying *Rowley*, the court further held that each "educational [IEP] program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000. The *Andrew* court's explanation of *Rowley* did not change the Third Circuit's application of *Rowley*.⁶ Therefore, consistent with *Rowley*, *Andrew*, and *Dunn*, a "free appropriate public education," as understood in the Third Circuit, requires "ambitious goals" and "challenging objectives" that are "reasonably calculated" to offer "significant learning" and "meaningful benefit." *Id.*

IDEA'S PROCEDURAL STANDARD

An IDEA procedural violation occurs when a district fails to abide by the IDEA's or state-specific procedural standards and safeguards. Procedural violations cause a denial of a FAPE when any of the following situations occur: 1. the violation results in the loss of an educational opportunity, 2. the violation infringes on the parents' opportunity to participate in the IEP formulation, or 3. when the violation causes a deprivation of educational benefits.⁷ Therefore, not all procedural violations amount to a denial of a FAPE. *Id.*

INTRASTATE TRANSFER STUDENTS AND FAPE RIGHTS

The IDEA regulations provide specific procedural safeguards outlining how school districts should prepare IEPs when students transfer from one district

⁵ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (US 2017).

⁶ *K.D. by & through Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248 (3d Cir. 2018) (finding *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017) did not modify existing precedent); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted); *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) ("[A] satisfactory IEP must provide significant learning and confer meaningful benefit." (internal quotation marks omitted)).

⁷ 34 C.F.R. § 300.513; *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

to another during the same school year or over the summer. Under these regulations, the new school district must first gather the student's records. Second, the district must gather a group of knowledgeable people to review the records. Third, after reviewing the records, the district must offer "comparable services" like those described in the student's IEP developed by the prior district. Fourth, following the offer of comparable services, the district can either conduct an evaluation pursuant to 34 C.F.R. §§300.304-300.306 and then develop a new IEP and/or implement the transfer IEP as is, if appropriate, consistent with 34 C.F.R. §300.323 and 20 U.S.C. §1414(d)(2)(C)(i)(2).

The IDEA regulations do not define the phrase "comparable services." The U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS), in guidance documents, explained that the term "comparable" otherwise means "similar" or "equivalent."⁸ The Office of Special Education Programs (OSEP) has also opined that the requirement to provide "comparable services" can include a duty to provide "temporary goals aligned with the annual goals in the student's prior IEP." *Letter to Finch*, 56 IDELR 174 (OSEP August 5, 2010).

PRIOR WRITTEN NOTICE STANDARDS

Districts must issue Prior Written Notice (PWN) when a district acts to initiate, refuse, or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child. 34 C.F.R. 300.503(a). The PWN must include the following components: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take action; (3) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action; (4) if the notice is

⁸ Fed. Reg. Vol. 71, No. 156 at 46681 (Aug. 14, 2006).

not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained. Districts must also issue PWN when they refuse to act. *Id.*

IDEA APPROPRIATE RELIEF INCLUDES TUITION REIMBURSEMENT

The IDEA allows hearing officers to award appropriate equitable relief to the prevailing party. Appropriate relief can take many forms, including compensatory education, tuition reimbursement, or reimbursement for out-of-pocket costs.⁹ Furthermore, the plain language of the Act provides that the hearing officer may order purely prospective relief.¹⁰

Courts and hearing officers apply a three-part test to determine tuition reimbursement claims.¹¹ Under what is known as the *Burlington-Carter* test, the party seeking reimbursement relief must show that (1) The public school did not offer a FAPE; (2) That placement in a private school was proper; and (3) The equities weigh in favor of reimbursement. If parents fail to establish any of the three prongs, *i.e.*, a denial of a FAPE, the private placement was appropriate, or the equities, the analysis ends at that prong.¹² With these fixed principles in mind, I will now analyze the claims and affirmative defense defenses found in the testimony, as well as the non-testimonial extrinsic evidence.

⁹ Zirkel, P.A. 2013. "Adjudicative Remedies for Denials of FAPE under the IDEA." *Journal of the National Association of Administrative Law Judiciary* 33 (1): 214-241, Zirkel, Perry A. "The Remedial Authority of Hearing and Review Officers Under The Individuals With Disabilities Act," *Administrative Law Review*, vol. 58, no. 2, 2006, pp. 401-427. *JSTOR*, www.jstor.org/stable/40711960.

¹⁰ 20 U.S.C. § 1415(f)(3)(E)(ii) (2017) ("Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." Zirkel, P. (2023). *Adjudication under the Individuals with Disabilities Education Act: Explicitly...plentiful rights But inequitably paltry remedies*. *Connecticut Law Review*, 56(1), 201-224.

¹¹ *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993)

¹² *Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist.*, No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at *15 (E.D. Pa. Aug. 14, 2017) (*Burlington-Carter* analysis stops once hearing officer concludes the district offered a FAPE); *N.M. v. Central Bucks Sch. Dist.*, 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014)(same).

CONCLUSIONS OF LAW AND APPLICATION OF LEGAL PRINCIPLES

BURDEN OF PROOF STANDARDS

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case, the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party.¹³ In this case, the Parents asked for the hearing and thus bore the burden of proof. There were instances of conflicting testimony where credibility and persuasiveness determinations were made to establish a fact. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

THE CREDIBILITY AND PERSUASIVENESS OF THE TESTIMONY

In evaluating the testimony presented during this due process hearing, it is the responsibility of the hearing officer to assess the credibility and persuasiveness of the witnesses, weigh the evidence, and render a decision based on findings of fact and conclusions of law. This requires a thorough and careful review of the transcripts, exhibits, and the direct observation of witnesses. While some evidence presented was circumstantial, the hearing officer is tasked with drawing inferences of fact from the testimony, documents, and the record as a whole. Despite some inconsistencies, the hearing officer found that the witnesses' testimony generally reflected their complete recollection and understanding of the events.

However, the persuasiveness of the testimony varied among the witnesses. For example, although the Mother and the representative from the private

¹³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).

school were credible, their testimony was less persuasive on the appropriateness of the private school. The private school representative, who lacks special education credentials, did not implement the IEP and was unfamiliar with the District's [redacted] school and the proposed supports. Consequently, apart from describing the Student's overall experience, grades, and demeanor, this witness's testimony contributed little to the analysis under *Rowley*, *Endrew*, or *Burlington-Carter*.

The Mother's testimony, while detailed and credible, did not sufficiently demonstrate that the comparable services offered differed significantly from those outlined in the February 2022 IEP. Accordingly, her testimony on the point is given reduced weight. Her statement that the Student was no longer experiencing overt behavioral health difficulties, corroborated by the private school representative, is given greater weight. Finally, the Mother's testimony persuasively identified a series of procedural violations, which will be discussed further below.

The District's program supervisor provided well-organized and clear testimony, particularly regarding the comparable services offered. However, her testimony concerning the May and June 2024 IEP meetings lacked clarity and persuasiveness. The supervisor's assertion that the former district offered an IEP with services it could not provide is contradicted by the Student's educational records. The IEP and the NOREPs indicate that the Student received full-time support at the [redacted] school from February to November 2022. Therefore, on this essential point, I do not find her testimony persuasive. Finally, I find that the District's witnesses' lack of firsthand knowledge about the Student's circumstances and needs undercuts their opinion testimony regarding the appropriateness of the IEPs.

THE COMPARABLE SERVICES OFFER AND NOREP

The Parents did not provide any persuasive testimony describing how the private school offered comparable services or was otherwise appropriate. Although the school is small, the Student is basically in a regular education classroom with regular education support. The modifications at the private school did not modify the pace of instruction, content, methodology, or delivery of instruction. While the record is clear, the private school helped to stabilize the Students' behavior. The Mother's testimony alone does not persuasively establish that the private school provides the Student with a proper placement or appropriate program within the meaning of the IDEA.

I find the testimony of the District's witnesses explaining how they procedurally and substantively offered "equivalent" or "similar" forms of specially designed instruction persuasive. Within days of the Students' enrollment, the District staff acted in a timely fashion in securing the Students' records and scheduling the comparable services team meeting. The contents of the April 2024 NOREP included a class schedule and a clear description of similar services offered. The NOREP fully described the District's commitment of resources that would enable the Student to transition to the [redacted] school. The proposed class schedule for [redacted] grade, when combined with the specially designed instruction, offered the Student an equally effective benefit. Therefore, I now conclude that the District's initial offer of comparable services was procedurally and substantively proper.

THE MAY 2024 IEP IS FLAWED

Based on the evidence presented, I find that the FAPE offer made at the May 2024 IEP meeting was not clear, understandable, or appropriate.

The IEP team's decision to reoffer and repackage the content of the February 2022 IEP, despite its known ineffectiveness, undermines a factual finding that the offered IEP was reasonably calculated to provide a meaningful benefit. The wholesale repetition of the two-year-old goals and objectives across multiple IEPs indicates an ongoing failure to respond to the Student's needs, circumstances, and difficulties.¹⁴ Neither the IEP team nor the witnesses cogently explained the discrepancy between the outdated present levels, the stale reevaluation report data, and the need for a full-time placement. The testimony is preponderant that since enrolling at the private school, the Student's misbehaviors have declined, yet the District administrators proposed new ESY behavioral goals.¹⁵ I find the decision to offer full-time emotional support counterintuitive when the Student earned passing grades without specially designed instruction in regular education for the better part of [redacted] and all of [redacted] grade. The District's witnesses did not offer cogent reasons why placement in a full-time special education class, under these well-developed facts, meets the IDEA's least restrictive environment requirements.¹⁶ Although the team had the Student's

¹⁴ See *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) ("Academic success is an important factor in determining whether an IEP is reasonably calculated to provide education benefits."); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE 1*, 290 F. Supp. 3d 1175, 1184 (D. Colo. 2018) (finding an IEP to be unambitious where it "was clearly just a continuation of the District's educational plan that had previously only resulted in minimal academic and functional progress").

¹⁵ *Methacton Sch. Dist. v. D.W. ex rel. G.W.*, No. CV 16-2582, 2017 WL 4518765, at *7 (E.D. Pa. Oct. 6, 2017) (finding that the "failure to obtain any baseline data meant that the [IEP] goals themselves were insufficient to provide guidance to teachers regarding Student's specific instructional needs and the expected progress at the district high school"); *S.B. v. N.Y.C. Dep't of Educ.*, No. 15-CV-1869, 2017 WL 4326502, at *14-15 (E.D.N.Y. Sept. 28, 2017) (finding that an IEP lacking in "thoughtful analysis" of a student's documented "present levels of performance" led to deficient IEP goals).

¹⁶ 34 C.F.R. 300.114 (a); and OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994).

records, the witnesses did not know how many credits the Student had earned or needed to graduate in [redacted]. No one seemed to know if the Student was a rising [redacted] or repeating [redacted] grade. The graduation and transition information gap here leads me to conclude that the team failed to properly review the records and consider what appropriate transition services, goals, and graduation planning supports were needed. The absence of updated transition data significantly undermines the witnesses' conclusion that the May 2024 IEP for a Student who may be a rising [redacted] was a good-faith offer of FAPE 20 U.S.C. § 1414(d)(4)(B)(a) team must review and revise the IEP). The above omissions and errors could have been mitigated had the District pursued a reevaluation and included the private school teacher as a member of the IEP team.¹⁷

Therefore, to remedy the above violations, I now conclude that without a thorough reassessment, the team will remain unaware of the Student's needs, circumstances, and requirements. Accordingly, the District is directed to conduct a comprehensive evaluation in all areas of suspected disability.

THE JUNE 2024 RESOLUTION SESSION AND THE AMENDED OFFER OF A FAPE

According to 20 U.S.C. § 1415(f)(1)(B) and 34 C.F.R. § 300.510(a), upon the filing of a due process complaint, the school district must arrange a

¹⁷ *Shapiro v. Paradise Valley Unified School District No. 69*, 38 IDELR 91 (9th Cir. 2003)(court found a denial of a FAPE when the district (1) failed to include the child's private school teacher on the IEP team; and (2) failed to make sufficient efforts to have the child's parents participate at the IEP team meeting); *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 940 (9th Cir.2007) (interpreting the language "teacher of the child" to require the IEP Team to include a special education teacher who actually taught the child in question); *L.R. v. Manheim Twp. Sch. Dist.*, 540 F. Supp. 2d 603 (E.D. Pa. 2008)(holding that composition of IEP team meeting that included general education teacher who had never taught the child constituted procedural violation of IDEA); *Dirocco v. Bd. of Educ. of Beacon City Sch. Dist.*, 2013 U.S. Dist. LEXIS 434 at *52-53 (S.D.N.Y. 2013)(interpreting § 300.321(a) as requiring general education teacher to be a teacher who is or may be responsible for implementing portions of IEP and noting issue was whether subject teacher could have been responsible for implementation); *R.G. v. N.Y. City Dep't of Educ.*, 980 F. Supp. 2d 345 (E.D.N.Y. 2013)(holding that failure to include general education teacher who is or may be responsible for implementing a portion of the child's IEP impeded child's right to FAPE).

Resolution Session within fifteen days. The meeting participants should include the parents and relevant members of the IEP team who are knowledgeable about the facts pertaining to the complaint. The parents and the district must jointly determine the relevant members of the IEP team to attend the meeting.¹⁸ The purpose of this meeting is to allow the parties to discuss the due process complaint and provide the parties with an opportunity to resolve the dispute.

In this instance, the District did not consult with the Parents or include all relevant IEP team members in the meeting; instead, the District staff unilaterally decided who would attend, thereby violating the parental participation and resolution session requirements outlined in the IDEA.¹⁹ Then, at the resolution session, the District administrators made multiple substantive revisions to the May 2024 IEP. The changes to the IEP included adjustments to present levels, three (3) new ESY behavioral goals, changes in the school year goal statements, and a proposed ESY schedule of classes. The meeting failed to include individuals with the requisite knowledge of the Student's unique circumstances, including the current teacher of the child at the private school or any of the proposed teachers of the child from the District. Uncertain about what grade the Student was in, the June IEP included two different class schedules, one for [redacted] grade and one for [redacted] grade, which in turn left unanswered the Student's transition and graduation planning requirements. Later in the day, after the resolution

¹⁸ 34 C.F.R. 300.510 (a)(4); and 71 Fed. Reg. 46,701 (2006). Parents and school districts are encouraged to "act cooperatively in determining who will attend the resolution meeting, as a resolution meeting is unlikely to result in any resolution of the dispute if the parties cannot even agree on who should attend." 71 Fed. Reg. 46701 (August 14, 2006). "The core of the [IDEA] ... is the cooperative process that it establishes between parents and schools." See also, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982))(the IDEA requires that "the parent and the district determine the relevant members of the IEP Team to attend the meeting.").

¹⁹ *Foxborough Reg'l Charter Sch.*, 106 LRP 34379 (SEA MA 5/30/06)("IDEA 2004 makes clear that the informal resolution session is not intended to be nor may it take the place of an IEP team meeting."); Compare and contrast 20 U.S.C. 1414(b)(4)(A) governing IEP meetings with 20 U.S.C. 1415(f)(1)(B).

meeting was over, the staff emailed the IEP amendments/changes to the Mother. The email to the Parents failed to include procedural safeguards, prior written notice, or a NOREP.

While the failure to provide prior notice with the IEP amendments was a standalone procedural violation, the violations also impacted the Student's FAPE. In particular, the manner in which the IEP amendments were made violated the IDEA's resolution session requirements. Substantively, as established in *Board of Education for the Yorktown Central School District v. C.S.*, 78 IDELR 91 (2021), a school district cannot unilaterally amend a student's IEP during the IDEA's 30-day resolution period. The C.S. court emphasized that parents have the right to rely on the written IEP when determining whether to accept a district's offer of services. In this case, the District staff, without input from the Student's current private school teacher or data on regression, recoupment, or mastery, reversed the May 2024 IEP team's decision regarding ESY eligibility. The specific procedures for amending an IEP do not permit unilateral amendments by a school district during the resolution period 20 U.S.C. § 1414(d)(3)(F). The unilateral IEP changes here caused multiple procedural errors that contributed to substantive FAPE violations. The cumulative effect of these errors prevented the District from having a legally compliant IEP "in effect" at the start of the 2024-2025 school year.²⁰

Assuming *arguendo*, the above procedural violations are harmless, the June 2024 IEP, on its face, is fatally flawed. As the fact finder, I now conclude that the email printout of the June 2024 IEP provided to the Parents and included in the record at Exhibit S-6 does not comply with the requirements of 34 C.F.R. §300.503(c)(1), namely that IEPs and NOREPs are "written in language understandable to the general public." I found the IEP document,

²⁰ 34 C.F.R. § 300.323 (IEP must be in effect at the start of the school year)

as a whole, difficult to read, disorganized, and hard to fully comprehend the District's commitment of resources. The goal statements were separated from the progress monitoring statements; both topics were scattered across different pages, making it challenging to understand the commitment of resources fully (NT pp.194-204). Given these overlapping violations, I am compelled to order prospective appropriate relief.

PURELY PROSPECTIVE RELIEF IS APPROPRIATE

The IDEA's appropriate relief requirements require me to Order purely prospective procedural relief. I now conclude that the District failed to offer the Student a FAPE for the 2024-2025 school year. Moving forward, the District is directed to complete the following remedial measures to cure the above violations.

In accordance with the transfer student comparable services requirements, the District must assemble a knowledgeable team. With input from the "teacher of the child," the Parents, and the Student, the comparable services team will review the Student's graduation credit requirements, select appropriate grade-level classes, determine the role of the Student's private counselor (if any), and adjust the specially designed instruction to align with the comparable services goal statements. The District is further directed to provide these comparable services for a period of 90 days. Also, during these 90 days, the District is further ordered to conduct a complete, full, and comprehensive assessment of the Student's abilities, achievements, behavioral, social, emotional, and transition needs. Following this reassessment, the District must prepare a reevaluation report and schedule a timely IEP team meeting.

After reviewing all relevant data, the District, in combination with the family, is directed to develop, design, and offer a new IEP. Along with the new IEP,

the District must provide prior written notice, a Notice of Recommended Educational Placement (NOREP), and procedural safeguards.

SUMMARY

In deciding if prospective tuition reimbursement is appropriate relief, the Parents must demonstrate that the District's offer of a FAPE was inadequate, the proposed private placement was appropriate, and the equities favor the moving party. Although the conclusions of law on the first *Burlington-Carter* prong support the Parents' view, the second prong remains unsatisfied. Therefore, once the Parents failed to muster preponderant proof that the private school was otherwise appropriate, the *Burlington-Carter* analysis ended. Lacking preponderant evidence on all three prongs, the Parents' prospective tuition claim is denied.

Applying the snapshot rule, the District's assertion that it offered comparable services is accepted. On the other hand, its assertion that the May and June 2024 IEPs offered a FAPE is rejected. These legal conclusions do not, however, bar prospective relief. The District is ordered to revise the offer of comparable services, complete a comprehensive reevaluation in all areas of suspected disability, and make another offer of a FAPE.

With the understanding that the following is dicta, after meeting the Parties, I am confident that the Parties can and will set aside their differences and collaborate to create a clear path forward for an exciting school year. I understand that the Student is reluctant or even fears the changes to the [redacted] school; therefore, the Parties might want to consider rehabilitation counseling or some other related services to enable learning at the [redacted] school 34 C.F.R. §300.34 (c)(12).²¹

²¹ "Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a

FINAL ORDER

AND NOW, this 21st day of August 2024, based on the above Findings of Fact and Conclusion of Law herein, I find appropriate relief includes the following:

1. The Parents' request for tuition reimbursement is Denied.
2. The District's request for declaratory relief is Denied in part and Granted in part.
3. The District offered the Student comparable services.
4. The District failed to offer the Student a FAPE for the 2024-2025 school year.
5. To remedy the denial of a FAPE, the District is Ordered to do the following:
 - a. The District is directed to convene a meeting to redesign and offer comparable services.
 - b. The District is directed to complete a comprehensive reevaluation in all areas of unique need, including ability, achievement, behavior, emotional, social, and transition needs. The reevaluation should be completed by District staff.
 - c. The District is further directed to review the testing data and prepare a reevaluation report within 30 days after completing all assessments.
 - d. Once the reevaluation is completed, the District must provide a copy of the report to the Parents, hold an IEP

student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq." 71 Fed. Reg. 46,761 (2006).

team meeting, and offer a FAPE within 30 days of providing the reevaluation report to the Parents.

- e. Once the IEP is completed, the District is directed to provide the Parents with a NOREP, prior written notice, and procedural safeguards describing its proposed action. After that, the Parents have 10 days to either accept or reject the offer of a FAPE.

6. All other claims, defenses, and counterclaims are dismissed with prejudice.

Date August 21, 2024

/s/ Charles W. Jelley, Esq.
Special Education Hearing Officer
ODR FILE # 29849-23-24