

*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. 28559-23-24**

**Child's Name:**

M.M.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

Law Office of David G.C. Arnold  
David Arnold, Esq.  
Suite 270, 2200 Renaissance Blvd.  
King of Prussia, PA 19406

**Local Education Agency:**

Wissahickon School District  
601 Knight Road  
Ambler, PA 19002

**Counsel for LEA:**

Beth Shore, Esq.  
Fox Rothschild, LLP  
980 Jolly Road, Suite 110  
Blue Bell, PA 19422-3001

**Hearing Officer:**

Joy Waters Fleming, Esq.

**Date of Decision:**

June 24, 2024

## **INFORMATION AND PROCEDURAL HISTORY**

The Student<sup>1</sup> is currently [redacted] years of age, a resident of the District, and unilaterally placed by the Parents in the [redacted] grade at an out-of-state residential, therapeutic boarding school (Private School). The Student has never attended school in the District. The Student is currently identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> based on Other Health Impairment (OHI) and has a disability entitling the Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup>

In late September 2023, the Parents filed a Due Process Complaint against the District, challenging its offered programming for the Student. As remedies, the Parents sought reimbursement for tuition and related expenses for the summer 2023 extended school year (ESY) and programming through the 2023-2024 school year. The parties explored an amicable resolution, as required by the IDEA, that was ultimately unsuccessful, and this case proceeded to a due process hearing.<sup>4</sup> The Parents contended that the District's failure to offer the Student ESY for the summer of 2023 and appropriate programming for the 2023-2024 school year resulted in a denial of free appropriate public education (FAPE). They

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<sup>1</sup> In the interest of confidentiality and privacy, 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) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14)

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. 29 U.S.C. § 794. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510.

seek reimbursement for tuition and related expenses. The District maintained that its special education program, as offered, was appropriate for the Student and that no remedy is due.

Following review of the record and for the reasons set forth below, the Parents' claims are granted.

## **ISSUES**

- 1) Was the District's educational program proposed from the summer of 2023 through the 2023-2024 school year appropriate for the Student?
- 2) If the District's proposed program was not appropriate, is the Private School appropriate?
- 3) If the District's proposed program from the summer of 2023 and through the 2023-2024 school year was not appropriate and the private school is appropriate, are there any equitable considerations that would operate to reduce or deny an award of tuition reimbursement?

## **FINDINGS OF FACT**

1. Student is a [redacted] school-aged student residing with the Parents within the boundaries of the District. The Student is currently enrolled in a private school (Private School) at the option of the Parents. (J-75)
2. Student is eligible for special education under the IDEA. (J-63)

## **Early Education**

3. From [redacted] through the [redacted] grade, the Student attended a non-residential private school funded by the Parents. (J-1, J-3, J-4, J-21, J-63, p. 3)
4. Since [redacted], the Student received outpatient psychotherapy with treatment modalities that included cognitive behavioral therapy, dialectical behavior therapy, relaxation and mindfulness training. (J-1, J-3, J-4, J-21, J-63, p. 3)
5. Since [redacted], the Student has received care from multiple psychologists and psychiatrists. (J-1, J-4, J-14, J-15, J-98)
6. In the [redacted] grade, the Student received diagnoses of ADHD, combined type and Oppositional Defiant Disorder (ODD). (J-1; N.T. 52)
7. In the [redacted] grade, a private neuropsychologist evaluated the Student because of reported concerns of emotional dysregulation characterized by impulsivity, emotional reactivity, explosive outbursts, verbal aggression and property destruction in the home. The behaviors were not present in school. The neuropsychologist determined that test results were consistent with ICD-10 diagnoses of ADHD-combined and intermittent explosive behavior disorder. (J-4; N.T. 2)

8. Throughout [redacted] school, the Student received action plans that provided strategies to address needs in executive functioning, attention, organization, time management, writing, and working with others. The Student received modifications to the learning environment and an accommodation of extended time on assessments and standardized tests as needed. (P-35, p, 13-14, J-9, J-31, p. 33)
9. From [redacted] grade onward, the Student was prescribed psychiatric medications that included [redacted]. (J-14)

### **2020-2021 School Year – [redacted] Grade**

10. By the end of the [redacted] grade, the Student had diagnoses that included ADHD, intermittent explosive disorder, disruptive mood dysregulation disorder, generalized anxiety disorder, nonverbal learning disorder, and executive function deficits. (J-21, J-63)
11. During [redacted] grade, the Student demonstrated school-avoidant behaviors, refused to get up for school, get dressed for school, get in the car to go to school, and do homework. (N.T. 56)
12. The Student needed assistance to transition to the school building. In school, the Student attended all classes and was regarded as kind, intelligent, compliant, and without academic concerns but overly dependent on technology. (N.T. 294, 333)
13. By the end of the [redacted] grade, the Student's behaviors in the home and therapeutic sessions included "rage episodes" that included severe cognitive rigidity, screaming, damaging property,

- manipulation, refusal, verbal abuse and physical abuse toward Parents, and technology addiction. In one episode, the police transported the Student to a hospital for a crisis intervention. (J-4, J-6, J-14, J-15, J-63)
14. In February 2021, the Parents retained an educational consultant who recommended the Student's placement in a wilderness program. The consultant also searched for a post-discharge residential placement. (J-14, p. 4; N.T. 72, 227-229, 240)
  15. In March 2021, the Parents contacted the District, requested a special education evaluation of the Student and indicated an interest in registration for the Fall of 2021. In April, the Parent submitted the Student's registration to the District. The District completed the evaluation, but the Parents did not enroll the Student. (J-12 at p. 3, J-31)

## **Summer 2021**

16. In June of 2021, [Student] was taken by trained professional escorts to a, [redacted] for intense therapy and care. In the application, the Parents indicated the Student's ADHD difficulties, school avoidance, screen addiction, tantrums, and anxiety as issues of concern. (J-22; Stipulation No. 6; N.T. 73)
17. After an evaluation at the [redacted] program, the clinical psychologist diagnosed the Student with disruptive mood dysregulation disorder, generalized anxiety disorder, unspecified

neurodevelopmental disorder (nonverbal learning disorder) and executive function deficits. (J-21)

18. The evaluator concluded the Student's full Scale IQ score fell within the high average range of ability with no evidence of specific learning disabilities in reading, mathematics, or written language. (J-21, p. 15-16)
19. After completing the [redacted] program, the evaluator recommended the Student's immediate placement in a full-time, fully integrated therapeutic program and school. The program referenced the Student's violent, prolonged, extremely difficult, volatile and explosive behavior. (J-17, J-21, p. 16-17)
20. [The Student] left [redacted] on August 26, 2021, and [] was subsequently placed by [the] parents, [ ], at the [Private School]. (Stipulation No.7 )
21. The Private School is a [redacted] school in [redacted]. (Stipulation No. 10 )

### **2021-2022 School Year- [redacted] Grade**

22. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the Private School partially funded by the District. (J-24, J-31, Stipulation no. 9)

23. The Private School has a behavioral system of five levels, with level one the lowest and level five the highest. All students start at level one. (N.T. 315-316, 822-823)
24. At the Private School, the Student received social, behavioral and academic goals through an individual service plan. (J-24)
25. In the Fall of 2021, the District's school psychologist, a BCBA, and occupational therapist (OT) evaluated the Student at the Private School. (J-31)
26. For inclusion in the RR, the District administered aptitude and achievement testing, the BASC-3, the D-REF, conducted an FBA, reviewed previous evaluative data, interviewed and observed the Student at the Private School in a variety of settings, received input from the Parents, former teachers, and the Private School staff. The District also conducted OT and Speech assessments. (J-29, J-31; N.T. 293-295, 330-332, 743-745)
27. Through cognitive testing, the Student was determined to have intellectual ability in the superior range. On achievement testing, the Student's scores in reading, writing and math were in the superior-to-average range. (J-31)
28. The RR records review indicated the Student's historical diagnoses as ADHD, ODD, explosive behavior disorder, disruptive mood dysregulation disorder, generalized anxiety disorder, unspecified



- neurodevelopmental disorder (nonverbal learning disorder) and executive functioning deficits. (J-31, p. 33)
29. For inclusion in the RR, the District conducted a functional behavioral assessment (FBA). The FBA identified behaviors of concern as aggression, psychological inflexibility and loss of emotional control. (J-31; N.T. 389)
  30. The RR concluded that the Student was eligible for and met the criteria for other health impairment (OHI) and was eligible for special education support. (J-31, p. 33)
  31. In May 2022, the District updated the RR with feedback from holiday visits with the family and updates from the Private School. The Parents reported that Thanksgiving and Christmas visits went well without physical aggression. The Private School reported that the Student was not working the program as much as needed, got rigid and defensive when asked about hygiene, ate very little, did not take feedback well, and had some peer conflict (J-39)
  32. The District issued its reevaluation report to Parents on or about May 18, 2022. (J-39)
  33. On June 9, 2022, the IEP team developed educational programming for the Student. The team concluded that the Student required a therapeutic environment that could not be provided by the neighborhood school. Through an IEP, the District offered a pending alternative school placement. The team determined that the Student did not qualify for ESY. (J-41, J-42)

34. The District referred the Student to non-residential, therapeutic private schools. Two schools refused admission because the Private School had not recommended discharge. One of the schools learned this information from the Parent. When contacted by one of the potential placements, the Private School indicated that the Student's discharge was not pending. (J-47; N.T. 954-966)
35. On August 24, 2022, the Parents rejected the special education programming offered by the District for the 2022-2023 school year. (J-49, J-50)

### **2022-2023 School Year- [redacted] Grade**

36. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the Private School partially funded by the District. (J-24, J-31, Stipulation no. 9)
37. During the 2022-2023 school year, the Student was enrolled in PE, Math, U.S. History, Earth Science, Language Arts, Art, and Riding. (J-56)
38. On October 21, 2022, the Private School prepared a first-quarter progress report regarding the Student. The report indicated a significant incident when the Student exited the gym with high energy and got on the hood of a staff member's car. (J-55, J-63, p. 7, 9)

39. On January 20, 2023, the Private School prepared a second quarter progress report. The Private School reported no significant incidents or discipline problems. The Parent input indicated that during Thanksgiving and Christmas, the Student was oppositional and chaffed against maintaining a schedule, showering or doing what was asked without prolonged debate. (J-18, p. 9, J-55, p. 3, J-63, p. 9: N.T. 306, 938 )
40. After the Parents reported the Student's behavior to the Private School, they received a response that the Student would need another year. (J-18, p. 9)
41. On March 17, 2023, the Parent re-enrolled the Student in the Private School for the 2023-2024 school year. (J-59; N.T. 104-105, 1163-1164)
42. On May 10, 2023, the District completed a reevaluation (RR) of the Student.
43. For inclusion in the RR, the Private School indicated that behaviorally, the Student flies under the radar but can become tearful, verbally angry, defensive and rigid. At the time of the RR, the Student achieved level 3 at the Private school. As of May 2023, the Student demonstrated no incidents of aggression at home or school. (J-63, 9-10; N.T. 836-838)

44. The RR recommendations included the development of a positive behavior support plan; group speech-language therapy; occupational therapy consultation; access to a school mental health professional; a plan for possible school avoidance; home-school communication; reduced homework; social skills group; executive functioning support through an evidence-based curriculum; chunking of assignments, brainstorming; use of graphic organizer; and possible assistance with creative writing. (J-63 at p. 18).
45. Additional RR recommendations included access to the emotional support resource room, school team collaboration with the home therapy team, a schedule and monitoring of technology use, hard copies of assignments notes, and a transition plan to adjust back to a traditional school. (J-63, p. 18; N.T. 365-366)
46. The RR concluded that the Student was eligible for special education services under the disability category of Other Health Impairment (OHI). (J-60, J-63; N.T. 1166)
47. In preparation for the 2023-2024 school year, the District referred the Student to the same therapeutic, non-residential school considered in 2022. The therapeutic school replied with the same letter from 2022 that it could not consider the Student for enrollment until discharged from the Private School. (J-47; N.T. 957)
48. On June 6, 2023, the IEP team met to develop educational programming for the Student's [redacted] grade year. (J-66)

49. The IEP contained parental input and concerns, including class sizes and co-teaching availability in higher-level classes. Two days after the IEP meeting, the Parent provided an updated list of concerns. (J-66, p. 22, 49, 58)
50. The June 2023 IEP indicated the Student had communication needs and behaviors that impeded learning. (J-66)
51. The 2023 IEP offered goals to address pragmatic social skills (speech), written expression, executive functioning, psychological flexibility, task and behavior, and emotional control. (J-66, p. 32-36, 46-47; N.T. 430-432)
52. The June 2023 IEP offered SDI that included math and ELA push-in in three days per six-day cycle, speech therapy, study skills and resource support for four days per six-day cycle, schoolwork reduction, chunking, graphic organizers, small group testing, technology training, self-regulation strategies, Parent-team check in, a transition plan, and a psychiatric evaluation. All recommendations from the RR were incorporated into the IEP. (J-66, p. 35-38)
53. Related services offered in the IEP included a 1:1 assistant, 25 group speech/language therapy sessions for thirty minutes, individual mental health services for 30 minutes three times a week, 30 minutes of individual psychology services, counseling (twice a day), 25 sessions of group social skills instruction, 30

- minutes, two times a week of group mental health services. (J-66, p. 39)
54. The Parents participated in the meeting and asked questions about workload reductions, class sizes, co-teaching options, and class scheduling. (N.T. 360-362, 438-439)
  55. The June 2023 IEP offered supplemental emotional support with education 62% of the time in the regular classroom. (J-66, p. 44-45)
  56. On June 6, 2023, the District issued a NOREP that proposed special education through supplemental emotional support. The team determined the Student was ineligible for ESY. (J-66, J-73)

### **Summer 2023**

57. The Student attended summer programming at the Private School and made slow, steady improvement. (J-80, J-94; N.T. 814)
58. The Private School's summer program has an academic component with classes in science, technology, engineering, art, math, and language arts. Recreationally, the Student had access to swimming, soccer and other sports. Clinically, the Student had routine therapy visits and access to the 24/7 counselors. (N.T. 87)
59. The Private School's summer program provides academic and residential wrap around supports designed to maintain progress and

- prevent regression. Regression for the Student could involve the destabilization of moods, compromised judgement and impulsivity that could lead to harm. (N.T. 827, 845, 907)
60. The Private School's psychiatrist offered an opinion that the Student needed summer programming to prevent skill regression and the need for recoupment of lost ground. (N.T. 814, 847)
  61. The Private School has observed that for the Student, breaks or changes in services come with risks. In a short period of time, when away from the program, the Student regressed to functional levels. (J-78 p. 2; N.T. 473, 827, 907)
  62. The Director of Academic Services at the Private School expressed concern that a gap in services would set back the Student's progress. (N.T. 907)
  63. On June 13, 2023, the District issued consent for an independent psychiatric evaluation of the Student. (J-81; N.T. 1216-1218)
  64. In June, the family planned on attending an out of state family event. The Student refused to board the flight, and a Parent stayed behind. That Parent advised the Student they would return to the Private School. En route, the Student ran from the car in traffic but eventually agreed to board an airplane to attend the family event. (N.T. 1116-1121, 1124-1125)
  65. On June 23, 2023, the Parents rejected the District's offered programming and placement for the 2023-2024 school year and

- requested reimbursement of expenses related to the Student's continued enrollment at the residential Private School. (J-65, J-73, J-75)
66. On June 28, 2023, the District denied the Parents' request for tuition reimbursement. (J-76)
  67. On July 3, 2023, the treating psychiatrist at the Private School advised the Parents that the Student needed a residential therapeutic school with an integrated psychiatrist. The letter referenced multiple comorbid conditions that included significant mood issues, consistent with both depression and excessive anxiety, impulsivity, concerns that over time a more complex mood issue, potentially bipolar disorder, would emerge, elements of ADHD, a complex cognitive profile and social deficits that align with an autism spectrum disorder. (J-78; N.T. 793-796, 802-803)
  68. The Private School director, a licensed clinical psychologist concluded the Student's learning profile was rather complex with a good font of information but with less well-developed reasoning ability. The director observed the Student's thinking and functioning was compromised by anxiety and vulnerability. The director concluded the Student needed thorough immersion in a therapeutic community. (N.T. 462-463, 465)
  69. The Private School observed that the Student's mental health detrimentally impacted academics through difficulties that stem from executive functioning challenges related to ADHD and mood symptoms of anxiety and depression. In class, the Student had



- difficulty with task initiation, shifting focus from one task to another, sustaining focus and attention during a lesson, and tracking during a group discussion. (N.T. 897-899)
70. In July, at the end of a home visit, the Student absconded from the home with a backpack containing tools, including a [redacted]. When a Parent intervened, the Student lunged and cut the Parent on the hand with the [redacted]. (J-23; N.T. 1093-106)
71. On July 26, 2023, the Parents consented to the psychiatric evaluation of the Student by the District. On August 1, 2023, an independent child and adolescent psychiatrist retained by the District evaluated the Student through Zoom. (J-81, J-85, J-93; N.T. 618, 624)<sup>5</sup>
72. For inclusion in the evaluation, the psychiatrist reviewed the Student's academic history, Private School and family functioning, parental concerns and input, medical, developmental, treatment and services history and previous evaluations. (J-93; N.T. 626)
73. The independent psychiatrist interviewed the Parents, the Student, the former educational advocate, and current and former treating psychiatrists. (J-93, p. 15; N.T. 625)

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<sup>5</sup> On November 6, 2023, the psychiatrist re-issued the evaluation with a correction of clerical errors. (J-93; N.T. 632)

## **2023-2024 School Year – [redacted] Grade**

74. During the 2023-2024 school year, the Student was enrolled in the [redacted] grade in the Private School. (J-85)
75. On September 28, 2023, an independent psychiatrist-consultant for the District issued an evaluation of the Student. The psychiatrist concluded the Student was academically capable of attending the District's high school, but complex psychiatric issues required treatment typically provided by the medical and/or behavioral health system in a therapeutic setting. The evaluation suggested a school similar to the programs explored in 2022 that previously rejected the Student. (J-85, J-93; N.T 661-665)
76. The psychiatrist diagnosed the Student with disruptive mood dysregulation disorder, an unspecified mood disorder, avoidant restrictive food intake disorder, and a possible unspecified neurodevelopmental disorder. (J-93, p. p. 18; N.T. 655)
77. On September 29, 2023, the Parents filed a due process complaint. (J-84)

## **The Private School**

78. The Private School is a [redacted] boarding school licensed by the [redacted] Department of Education and the [redacted] Department of Behavioral Health and Developmental Services and accredited by the [redacted] Association of Independent Specialized Education Facilities (Stipulations Nos. 8-11)

79. The Private School serves [redacted] students in [redacted] grades who at enrollment have a complex set of challenges, with four to six diagnoses that highlight various challenges, including ADHD, autism, mood disorders and specific learning disabilities. (N.T. 966)
80. The Private School considers students with low average to superior cognitive performance, the ability to access the program, and a committed parent or family unit that participates in treatment. (N.T. 967)
81. The Private School provides a very structured routine. The students are taught by state, licensed special education teachers in classes with seven students and two instructors. Academic classes taught include English, Math, Science, History, Art, and Health. (J-90; N.T. 969)
82. At the Private School, the Student has a mental health team that consists of a doctoral-level licensed clinical psychologist, a double board-certified licensed psychiatrist, and staff trained to support students with behavioral issues. Mental Health professionals are available to the Student twenty-four hours a day, seven days a week while on or off campus. (N.T. 970-971)
83. At the Private School, the Student is educated through an individualized service plan with instruction by special education teachers. While enrolled the Student has made both academic and behavioral progress. (J-79; N.T. 474, 469-482, 814-815, 905-907)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

The burden of proof is viewed as comprising two elements: the burden of production and the burden of persuasion. 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 burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *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).

Fifteen witnesses testified at this due process hearing. They included the Parents, an educational consultant, and the Student's former treating psychologist. From the Private School, the Parents offered testimony from the Student's treating psychiatrist, the admissions and academic services directors, and the clinical director/psychologist. The District offered testimony from a school psychologist, a speech-language pathologist, a behavior analyst, a behavior specialist, a referral non-residential therapeutic

program, [redacted]-grade learning support teacher, and an independent evaluating psychiatrist. This hearing officer found each of the witnesses who testified to be credible as to the facts. The weight accorded the evidence, however, was not equally placed. More specific credibility determinations are made below.

## **General IDEA Principles**

The IDEA requires each of the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local educational agencies (LEAs) meet the obligation of providing FAPE to an eligible student through the development and implementation of an IEP, which is "'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). Supreme Court has confirmed an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands reasonable and appropriate services in light of a child’s unique circumstances, not necessarily those that their “loving parents” might desire. *Andrew F., supra*. A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). “The IEP must aim to enable the child to make progress,” but progress is not measured by what may be ideal. *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original).

### **General IDEA Principles: Least Restrictive Environment**

The IDEA contains a crucial mandate that eligible students be educated in the “least restrictive environment” (LRE) that satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

### **General IDEA Principles: ESY Programming**

The FAPE requirement extends to the provision of ESY services as necessary for the child. 34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth several criteria that IEP teams must consider to determine whether a student is eligible for ESY. A determination must be made on whether ESY services are “required as part of a Student’s program.” 22 Pa. Code § 14.132(a). Eligibility is established if the factors in Section 14.132(a)(2) “make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives.” Pennsylvania Department of Education, Basic Education Circular, Extended School Year Eligibility (April 15, 2013). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1).

In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied, since ESY services must be provided in accordance with the child’s IEP. 34 C.F.R. § 106(b). The fundamental premise for ESY services has generally been described as preserving skills that the child has gained over the school year rather than as a means for maximizing growth. “An ESY program continues the goals and objectives of the IEP during the summer months after the school year has concluded, so the student does not regress from one school year to the next.” *L.G. v. Wissahickon School District*, 2011 U.S. Dist. LEXIS 476 \*16 n.3, 2011 WL 13572 (E.D. Pa. 2011). As noted, FAPE does not require the maximization of programs or services, and ESY services are no exception to that general principle.

## **General IDEA Principles: Parental Placements**

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice); *Carter, supra*. In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating a parent's unilateral placement. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

## **General Section 504 and ADA Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. §



104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, at 235. In this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE will be addressed together.

### **The Parents' Claims**

This Student is undeniably complex, demonstrating impressive academic abilities and profound, sometimes violent emotional propensities. The former is apparent in all settings, the latter primarily in the home with the Parents serving as the recipients of the worst of the Student's behaviors. This Student has received numerous evaluations, has a panoply of diagnoses, a history of therapeutic interventions and is prescribed a multitude of medications. Just after [redacted] grade, the Student's in-home behaviors escalated to a point where the Parents engaged a transport company to take their child away to a [redacted] program to address the issues of concern. After that program ended, the Student received educational and behavioral services for the next three school years in an out-of-state, therapeutic residential school (Private School). The Parents now seek tuition reimbursement for the Student's attendance at the Private School during the summer of 2023 and the 2023-2024 school year.

The first issue to be addressed is whether the District's proposed program in June 2023 was reasonably calculated to provide FAPE to Student.

The District's determination of the Student's programming needs emanated from multiple evaluations and a review of historical records that comprehensively documented this Student's educational and behavioral needs. That data persuasively established that this Student had multifaceted

needs that included a complex psychiatric profile with multiple diagnoses that impacted the entirety of the Student's school day.

The District's last offered IEP of June 2023 determined the Student ineligible for ESY. The Parents assert that this summer programming was necessary to prevent the Student's regression. As noted, a fundamental premise for ESY services has generally been described as serving as a vehicle for preserving skills that the child has gained over the school year rather than as a means for maximizing growth. The evidence was preponderant that the Student needed therapeutic and academic wraparound ESY services during the summer of 2023, which the District did not offer. The testimony from the Student's treatment team at the Private School was persuasive that summer programming was necessary to maintain progress and prevent regression. The Student's psychologist and Private School Director observed that after very little time away from the program, the Student regressed to functional levels. This concern was corroborated by the Student's treating psychiatrist, who credibly stressed that the complexity of the Student's mental health profile and compromised functionality necessitated summer programming. The Parents have met their burden of establishing a denial of FAPE for the summer of 2023. For reasons discussed in more detail below, the Parents are entitled reimbursement for that summer programming.

The last offered IEP that preceded the 2023-2024 school year offered goals, specially designed instruction, and related services that appeared to target known areas of deficit. However, based on the Student's needs, it failed to offer adequate special education programming. The June IEP unrealistically expected the Student to transition from the small, full-time special education, therapeutic private school to the District [redacted] school with programming at a supplemental level of emotional support. Through the offered IEP, the Student would receive regular education sixty-two percent

(62%) of the school day in classrooms with seventeen to twenty-five other students. Although the offered programming had some attributes, it was not appropriately responsive to the needs identified through the District's RR, treating clinicians, and ultimately, the District's independent psychiatrist retained to evaluate the Student.

Those evaluations unequivocally concluded that the Student's complicated psychiatric profile affected academic needs throughout the school day. This Student needed far more special education programming than was contemplated by the District. Additionally, for the last two school years, the Student received education in a highly structured, small, therapeutic residential school with wraparound, in-the-moment clinical support. The Student's acclimation to the [redacted] school environment was expected to be difficult and in anticipation of this transition, the District wisely proposed a plan to support these expected needs. However, a move from the highly structured therapeutic residential private school to the District's public [redacted] school with minimal special education programming was not reasonable or appropriate in light of the Student's unique circumstances.

The testimony of the staff affiliated with the Private School who had consistent interaction with the Student provided persuasive testimony about observed special educational needs before the 2023-2024 school year. The clinical psychologist and director at the Private School credibly testified that the Student's complex educational and mental health profile resulted in much less well-developed reasoning ability and flexibility. Thinking and functioning were compromised by the levels of anxiety and vulnerability felt both internally and socially. Similarly, the Student's mental health profile was also multifaceted with overlays of mood, anxiety, and developmental issues that "fed on each other." The Student's mental functioning impacted education and affected the Student's thinking, the ability to shift and permit

learning and compromised social interactions. This therapist's conclusion that the Student required placement and immersion 24/7 in a therapeutic community was solidified by the testimony of the Student's treating psychiatrist at the Private School.

The consulting psychiatrist at the Private School provided credible testimony about the impact of this Student's mental health on academic functioning and the necessity of a therapeutic residential program. This psychiatrist was persuasive that although intellectually capable, the Student's mental health needs had elements of significant mood issues consistent with both depression and anxiety and concerns that, over time, a bipolar disorder could emerge. Although the Student demonstrated significant aspects of ADHD, observed social deficits aligned with an autism spectrum disorder. Each of those things, opined the treating psychiatrist, served to amplify and worsen the rest. The impact of the identified functioning deficits on academics was inseparable. Again, through the testimony of the treating psychiatrist, the evidence was clear that the Student's ability to focus and concentrate was significantly impacted by ADHD, anxiety, depression and mood, all contributing in a negative way that would compromise the Student's functioning in a typical classroom environment and impact the safety of others.

Likewise, the director of academic services at the private school explained the nexus of the Student's mental health to academics with the difficulties that stemmed from executive functioning challenges related to ADHD, mood, anxiety and depression. These diagnoses manifested through classroom behaviors that included disrespect to peers and staff, rigid thinking, impulsivity, trouble initiating a task, and shifting focus from one task to another.

Finally, the District's outside evaluator, a psychiatrist engaged to evaluate the Student, also concluded that the Student might be able to function in the District; however, significant psychiatric issues required the kind of treatment typically provided by the medical and/or behavioral health system in a therapeutic setting.

Overall, the evidence was preponderant; the District's offered programming for the 2023-2024 school year was inadequate and did not constitute FAPE. Based on the needs known, the programming offered was not calculated to afford this Student meaningful educational benefit. This Student needed a therapeutic, small school environment with full-time special education instruction and access to mental and behavioral health services for the entirety of the school day. However, that was not what the District recommended or offered for the 2023-2024 school year. For those reasons, the District failed to offer the Student a FAPE for the 2023-2024 school year. The Parents have satisfied step one of the *Burlington-Carter* test.

Step two of the *Burlington-Carter* test requires a determination of whether the private school selected by the Parents was appropriate. The residential nature of this placement also requires an examination of its necessity as a placement option. The federal regulations implementing the IDEA provide for residential placement if it "is necessary to provide special education and related services to a child with a disability." 34 C.F.R. § 30.104. Whether a residential placement must be at public expense requires examining whether that full-time placement is "necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." *Mary Courtney T., supra*, 575 F.3d at 243-44 (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981)). In other words, if the residential program's medical, social, and emotional components are

"part and parcel of a specially designed instruction to meet the unique needs of a handicapped child," the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694). The evidence on this hearing record has established that this Student's "social, emotional, medical and educational problems . . . [are] so intertwined that realistically it is not possible...to perform the Solomon-like task of separating them." *Id.* at 694 (internal quotation and citation omitted). Although the IDEA does not define "therapeutic placement," that term has evolved to mean a setting that consists of small classes with emotional and/or behavioral support provided either in a day or residential setting. *M.H. and J.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 51 IDELR 91 (2d Cir. 2008, unpublished), cert. denied, 110 LRP 792, 556 U.S. 1105 (2009); *Avjian v. Weast*, 48 IDELR 61 (4th Cir. 2007, unpublished); and *Burbank Unified Sch. Dist.*, 64 IDELR 320 (SEA CA 2014). Even accepting the District's argument that some of Student's emotional difficulties were related to family dynamics and parental interactions, the connection between the Student's mental health and behavioral needs and Student's ability to function in an academic environment were fully established on this hearing record.

Overall, the Private School attended by the Student was appropriate. The Private School is a licensed, therapeutic boarding school serving [redacted] students in [redacted] grades. At enrollment, these students have a complex set of challenges, with four to six diagnoses that include ADHD, autism, mood disorders and specific learning disabilities. The Private School provides a very structured routine with classes taught by state, licensed special education teachers. Class sizes are small, generally seven students and two instructors. A mental health team that consisted of a doctoral-level licensed clinical psychologist, a double board-certified licensed psychiatrist, and staff trained to support students with behavioral issues. Mental Health professionals are available to the Student twenty-four hours a day, seven

days a week, on or off campus. The Student received education through an individualized service plan. While enrolled the Student has made academic and behavioral progress. The summer program the Student attended was identically structured and provided academic and mental health services throughout the school day. The Private School was appropriate with its intensive and structured programming that directly addressed the Student's educational and behavioral needs.

The last prong of the tuition reimbursement test is a balancing of the equities. Courts have denied or reduced reimbursement when the parents failed to satisfy their "obligation to cooperate and assist in the formulation of an IEP and failed to timely notify the District of [their] intent to seek private school tuition reimbursement." *Id.*; see also, *L.M. v. Downingtown Area Sch. Dist.*, No. 12-CV-5547, 2015 WL 1725091 at \*23 (E.D. Pa. Apr. 15, 2015) (finding that equitable considerations weighed against reimbursing parents because "there is no evidence in the record that [parents] seriously entertained accepting [District's] proposed program and placement"); *W.D. v. Watchung Hills Reg'l High Sch. Bd. of Educ.*, 6-2 F. App'x 563, 568 (3d Cir. 2015) (concluding that the district court did not err in dismissing parent's reimbursement claim in part because parent had signed an enrollment agreement and paid tuition to the private school weeks before the IEP meeting).

The District cites a few reasons why the equities weigh against the Parents' claim for tuition reimbursement. First, the District cites the timing of Parents' re-enrollment decision. The evidence is clear that the Parents decided to re-enroll the Student in the Private School well before the evaluative process concluded and did not disclose this decision to the District until late June 2023. Despite this decision, they participated in the evaluation, attended IEP development meetings, provided input, and made

the Student available for a psychiatric assessment, even after the RR was issued. Their decision to secure enrollment or risk losing this Student's placement in the therapeutic Private School was understandable and did not compromise their participation in the development of the District's final FAPE offer. The District also points to a Parent's alleged interference with referrals to therapeutic day schools within or proximate to the District. In May 2022, the District agreed that therapeutic placement was appropriate. However, after speaking with a Parent, the therapeutic schools under consideration were under the impression that the Student was not "discharged" from the Private School and, upon learning this, expressed admission was no longer appropriate. In 2023, at least one of the programs again rejected the Student, although, at that point, the District no longer recommended a therapeutic placement. It is unclear how the Parents' actions in 2022 affected the District's program development in 2023 and its determination that a therapeutic placement was unneeded. An equitable reduction of tuition reimbursement is unwarranted.

The evidence presented was preponderant that during the summer of 2023 and for the 2023-2024 school year, the Student needed a therapeutic, residential educational setting. The District did not offer appropriate programming and denied the Student a FAPE.

## **ORDER**

AND NOW, this 24<sup>th</sup> day of June 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.



1. The District failed to offer the Student FAPE for the summer of 2023.
2. The District failed to offer the Student FAPE for the 2023-2024 school year.
  - a. The District is ordered to reimburse the Parents for the Student's tuition and related costs, including residential costs, for the summer 2023 programming year at the Private school.
  - b. The District is ordered to reimburse the Parents for the Student's tuition and related costs, including residential costs, for the 2023-2024 school year at the Private school.
  - c. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all current invoices and receipts for tuition and related expenses for Student from the summer 2023 programming and the 2023-2024 school year.
  - d. Within thirty calendar days of receipt of such documentation, the District shall reimburse the Parents for one hundred percent (100%) of the total amount of invoices and receipts provided, less any awarded financial aid.

3. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.  
Special Education Hearing Officer

June 24, 2024