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. (consolidated) 29536-23-24 & 29566-23-24

Child's Name:
V.V.

Date of Birth:
[redacted]

Parents:
[redacted]

Pro Se

Local Education Agency:
Wallenpaupack Area School District
500 Academy St., Building C
Hawley, PA 19428

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Hearing Officer:
Brian Jason Ford

Date of Decision:
07/18/2024

Introduction and Procedural History

This special education due process hearing concerns the educational rights of a child with disabilities (the Student).[1] The Student's parents (the Parents) requested this hearing against the Student's public school district (the District). The Parents allege that the District violated the Student's rights under the Individuals with Disabilities Education Act (IDEA).[2]

The Parents and Student moved into the District and enrolled the Student in the District for the 2023-24 school year. The Parents unilaterally placed the Student in a private school (the Private School) in January 2024. The Parents demand tuition reimbursement for the Student's placement at the Private School from January 2024 through June 2024. The Parents also demand that the District place the Student in the Private School's summer program in the summer of 2024. Finally, the Parents demand that the District place the Student in the Private School for the 2024-25 school year.

The Parents filed their due process complaint with the Office for Dispute Resolution (ODR) on April 12, 2024, initiating proceedings at ODR No. 29536-2324. The Parents amended their complaint on April 16, 2024. The amended complaint included a demand to place the Student in an extended school year (ESY) program at the Private School in the summer of 2024. Under Pennsylvania's special education regulations, ESY claims are expedited by default. I bifurcated the ESY claims from the non-expedited claims, and ODR assigned a second file number: 29566-2324.

On April 19, 2024, the District filed a combined answer, sufficiency challenge, and motion to dismiss the expedited ESY claims. On April 22, 2024, I denied the District's sufficiency challenge because sufficiency challenges are not available in expedited cases.[3]

On April 24, 2024, the Parents exercised their option to remove their ESY claims from the expedited track and, shortly thereafter, I reconsolidated the matters.

On May 3, 2024, the District filed an answer and renewed its sufficiency challenge and motion to dismiss. The District's motions were limited to the Parents' ESY claims, which were no longer expedited. The District's motion to dismiss included an argument concerning the Student's residency within the District.

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[1] Except for the cover page of this decision and order, identifying information is omitted to the extent possible.
[2] 20 U.S.C. § 1400 *et seq*.
[3] *See* 61 IDELR 232, 113 LRP 30291 (Question 6-E).

On May 6, 2024, I denied the District's sufficiency challenge, explained that I would take evidence concerning the Student's residency, and ordered the Parents to tell the District the basis of the Student's entitlement to ESY services in the summer of 2024. Sometime after that, the District withdrew all objections and motions predicated on the Student's residency.[4]

On May 28, 2024, I convened a pre-hearing conference to discuss the matter and to ensure that the parties were prepared for the hearing. The hearing then convened in the District on May 31 and June 20, 2024. A third session convened remotely on June 25, 2024. I received post-hearing briefs (also known as written closing statements) from the Parents on July 11 and from the District on July 12, 2024.

As discussed below, the Parents have not presented preponderant evidence in support of their claims. On that basis, the Parents have not established entitlement to the relief that they demand.

Issues

The issues presented for adjudication are:

1. Are the Parents entitled to reimbursement for cost of the Student's tuition at the Private School from January 2024 through June 2024?

2. Must the District place the Student at the Private School in the summer of 2024?

3. Must the District place the Student at the Private School for the 2024-25 school year?

Findings of Fact

I reviewed the record in its entirety but make findings of fact only as necessary to resolve the issues before me. I find as follows:

1. The Parents and Student lived outside of the District prior to the 2023-24 school year. A different school district was the Student's Local

[4] It is not clear if the Parents ever complied with my order to state the basis of the Student's entitlement to ESY services in the summer of 2024 in advance of the hearing.

Educational Agency (LEA) before the 2023-24 school year (the Prior LEA). *Passim*.[5]

2. From the 2020-21 school year through the end of the 2022-23 school year, the Student attended the Private School pursuant to a series of settlement agreements between the Parents and the Prior LEA. NT 439-441.

3. The Private School is located within the Prior LEA. The Private School is a specialized private school for children with language-based learning disabilities. *See generally,* NT 520-553.

4. Sometime before the 2023-24 school year, the Parents and Student moved into the District. *Passim*.

5. In August 2023, the Parents enrolled the Student in the District. As part of the enrollment process, the Parents told the District (via various enrollment forms) that the Student did not have disabilities and did not receive special education. S-14.

6. After enrollment, the Parents and Student met with District personnel to discuss the Student's schedule. The Parents did not disclose the Student's disabilities or the nature of the Student's program at the Private School during these meetings. NT 39-43.

7. The Private School is located within Pennsylvania but over 100 miles (more than two hours) from the District. Collectively, District personnel were not aware of the nature of the Private School's program during the Student's enrollment or when the Student's classes were scheduled. *Passim*.

8. The District developed a regular education schedule for the Student that included honors courses. S-17.

9. From the start of the 2023-24 school year through October 24, 2023, the Student performed well academically in regular education and honors courses. Teachers reported no academic or social/emotional concerns. *See, e.g.* NT 43-47, 115, 120.

[5] References to "NT" or "Notes of Testimony" are to the transcript, "P-#" are to the Parents' exhibits, and "S-#" are to the District's exhibits. References to "*passim*" are to facts that are established at numerous points throughout the entirety of the hearing record.

10. In October 2023, the Parents reached out to District personnel to raise concerns about the Student's social and emotional wellbeing. On October 25, 2023, the Parents and Student met with District personnel to discuss those concerns. During that meeting, the Parents asked the District to place the Student in the District's virtual learning platform. *See, e.g.* NT 43-46.

11. The District's virtual learning platform is available to all students enrolled in the District regardless of disability. Any family can choose for their child to enroll in the virtual program, which features asynchronous instruction with daily homeroom check-ins via video conference. *See, e.g.* NT 106-111.

12. After the meeting on October 25, 2023, District personnel sent information about the virtual learning platform to the Parents. That information was consistent with information shared during the meeting. *See* S-30.

13. Sometime between October 25 and 30, 2023, the Parents enrolled the Student in the District's virtual learning platform. *Passim*.

14. From October 30 to December 10, 2023, the Student participated in the District's virtual learning platform and performed well academically. S-19, S-28.

15. On December 14, 2023, the Parents informed the District that they were enrolling the Student in the Private School and asked the District to share information with the Private School about the Student's classes and grades. *See* S-32.

16. On January 8, 2024, the Parents informed the District that the Student was enrolled in the Private School and was attending there. S-33. At this point, the District began the process of disenrolling the Student. NT 127-128.

17. On January 24, 2024, Parents sent an email to the District and to the Prior LEA. The Parents stated that the Student divided nights between the District and the Prior LEA. The Parents asked which school district was the Student's current LEA, disclosed that the Student had been diagnosed with disabilities, and requested an IEP team meeting. S-34.

18. Upon receiving the Parent's email of January 24, 2024, the District confirmed that it had no prior records indicating that the Student was a child with a disability but then reached out to the Parents and Prior

LEA to request records. The District then received records from the Prior LEA. Those records revealed that the prior LEA identified the Student as a child with a specific learning disability (SLD) and had recommended itinerant learning support through an IEP. S-6, S-8, S-9, S-21.

19. On February 12, 2024, the District issued a Notice of Recommended Educational Placement (NOREP). The District offered to implement the Prior LEA's IEP. That IEP, dated May 9, 2023, placed the Student in itinerant learning support with 30 minutes per day of direct phonics instruction. S-21.

20. The Student's IEP team met after the District issued the NOREP. The purpose of the meeting was to discuss the District's offer and the Parents' concerns. A representative from the Private School also attended the meeting. During the meeting, the District explained that the direct phonics instruction would be provided by an Orton-Gillingham trained instructor.[6] During the same meeting, the Private School's representative stated that the Student was not receiving Wilson Reading at the Private School.[7] During the same meeting, the Parents provided additional records to the District. 183-184, 187, 267-270, 271-273.

21. The District reviewed the additional records and concluded that the information in those records was consistent with information already in the District's possession. S-4, S-6.

22. The District also considered information that the Parents shared during the IEP team meeting and revised the Student's IEP in accordance with that information. The revisions included updated information about the Student's academic performance and social and emotional functioning. The District also added assistive technology to the IEP. S-24.

23. On or about March 22, 2024, the District presented the revised IEP to the Parents.

24. Sometime after disclosing that the Student is a child with a disability, the Parents told the District that they believe the Student is a child with Autism. No prior evaluation reaches this conclusion and an

[6] Generally, Orton-Gillingham describes the research basis for a multisensory, phonics-based methodology of reading instruction. Generally, Orton-Gillingham is not a curriculum in and of itself, but rather forms the foundation of several programs and curricula.
[7] Wilson Reading is a highly structured, Orton-Gillingham based reading program.

independent educational evaluation (IEE) from 2008 concludes that the Student is not a child with Autism. S-4.

25. The Parents asked for an IEE. On the record as a whole, I find that the Parents used the term IEE to request an evaluation – either by the District or by a third party at the District's expense – to evaluate the Student's needs and potential Autism.[8]

26. On March 25, 2024, the District refused the Parents' request to fund an IEE but agreed that an evaluation was necessary and offered to evaluate the Student. *See* S-25.

27. On April 2, 2024, the District sought the Parents' consent to evaluate the Student. S-26.

28. On April 12, 2024, the Parents filed a due process complaint initiating these proceedings.

29. On April 19, 2024, the Parents withheld consent for the District's evaluation.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."[9] One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review.[10]

To the extent that "credibility" is synonymous with truthfulness, all witnesses were equally credible in that all were candid, and none showed any attempt at deceit. Some witnesses' testimony contradicted testimony from other witnesses, but only to a small extent. Moreover, those small contradictions were reflections of each witness' genuine memory of events or understanding of those events.

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[8] Throughout the hearing, the Parents used the terms IEE and evaluation interchangeably.
[9] *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).
[10] *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

On the other hand, to the extent that "credibility" also includes the concept of weight, I do not assign equal weight to all testimony. Both Parents testified, and much of their testimony would have been inadmissible in nearly any other forum. In any form with more formal, codified rules of evidence, large swaths of the Parents' testimony would be excluded as irrelevant or hearsay. The District's objections to such testimony were well-made. That the testimony was not stricken is a function of two things: the absence of strict evidentiary rules in Pennsylvania special education hearings and my abundance of deference to the Parents' *pro se* status.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.[11] The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.[12] In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a free appropriate public education (FAPE) to all students who qualify for special education services.[13] Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'"[14] Substantively, the IEP must be responsive to each child's individual educational needs.[15]

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[11] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).
[12] *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed. Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).
[13] 20 U.S.C. §1412.
[14] *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).
[15] 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*.[16] The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*.[17]

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."[18]

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. In substance, the *Endrew F.* decision in no different.[19]

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity.[20] However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit.[21] It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement.[22] Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'"[23]

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[24] Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances."[25] In terms of

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[16] 137 S. Ct. 988 (2017).
[17] 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).
[18] *Id* at 3015.
[19] *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).
[20] *See, Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988).
[21] *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995).
[22] *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).
[23] *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).
[24] *Endrew F.*, 137 S. Ct. 988, 1001 (2017).
[25] *Id* at 1000.

academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work.[26] Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

LEA Transfers

When a student with a disability transfers from one LEA to another, the IDEA establishes obligations for the receiving school district.[27] If a student transfers "within the same academic year," from one Pennsylvania LEA to another Pennsylvania LEA, the new LEA must provide a FAPE, "including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP."[28] The new LEA must also, "take reasonable steps to promptly obtain the child's records," including special education records, from the old LEA.[29]

Extended School Year (ESY)

Pennsylvania regulations establish seven factors that IEP teams must consider when making an ESY eligibility determination.[30] This is an enhancement of federal ESY regulations.[31] The factors are:

1. Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

2. Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

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[26] *Id*.
[27] There are differences between interstate transfers and intrastate transfers. Analysis here concerns only the IDEA's intrastate transfer rules at 20 U.S.C. § 1414(C)(i)(I).
[28] 20 U.S.C. § 1414(C)(i)(I).
[29] 20 U.S.C. § 1414(C)(ii).
[30] 22 Pa Code § 14.132(a)(2)(i)-(vii).
[31] 34 CFR § 300.106.

3. Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

4. The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

5. The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

6. The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

7. Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, [intellectual disability], degenerative impairments with mental involvement and severe multiple disabilities.

Tuition Reimbursement

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*[32] and *Florence County School District v. Carter*.[33] This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award.[34] The steps are usually taken in sequence, and the analysis may end if any step is not satisfied.

The IDEA also places limitations on reimbursement that relate to the equitable considerations in the *Burlington-Carter* test. Applicable to this case, "the cost of reimbursement … may be reduced or denied – if … at least

[32] 471 U.S. 359 (1985).
[33] 510 U.S. 7 (1993).
[34] *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

ten (10) business days … prior to the removal … did not give written notice to the public agency…"[35] That notice must inform the LEA of the parents' intent to enroll the child in a private school and seek reimbursement.[36]

Prospective Placement

For the 2024-25 school year, the Parents do not seek tuition reimbursement. Rather the Parents demand a prospective private placement. This type of remedy is extremely rare, but not unheard of.[37] Prospective placement was at issue in the *Burlington* case (see above) and is permissible under Third Circuit precedent.[38]

As explained below, prospective placement at public expense is an extraordinary remedy. Special education hearing officers enjoy broad discretion to fashion appropriate remedies under the IDEA, even if those remedies are extraordinary.[39] Case-specific analysis is, therefore, required to determine if it is appropriate for the hearing officer to use discretionary powers to provide extraordinary relief.[40]

The tuition reimbursement test provides guidance for evaluating prospective placement demands. Tuition reimbursement hinges on the three-part *Burlington-Carter* test, described above. Prospective placement in a private school, however, requires something more. Unlike parents in tuition reimbursement cases, parents in prospective placement cases do not face the same risk of financial loss. The risk of financial loss is a factor that courts consider in many of the tuition reimbursement cases cited above. More importantly, there are well-established remedies for denials of FAPE: compensatory education to remedy past denials and IEP changes to stop ongoing denials. Past and ongoing denials of FAPE can be fully remedied without prospective placement. Prospective placement is an extraordinarily remedy for this reason.

To support such an extraordinary remedy, the record must establish that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. This does not mean

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[35] 34 C.F.R. § 300.148(d)(1)(ii).
[36] *See* 34 C.F.R. § 300.148(d)(1)(i)
[37] *See A.D. v. Young Scholars – Kenderton Charter School*, ODR No. 15202-1415KE (2014).
[38] *See D.S. v. Bayonne Bd. of Educ.,* 602 F.3d 553 (3d Cir. 2010).
[39] *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010).
[40] *See, e.g., Burlington, supra* at 370; *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

that the Parents must establish that the LEA cannot "in theory" provide an appropriate program.[41] Such standards are impossible. Rather the nature of prospective placement must be a heavier burden for parents than tuition reimbursement under current case law. Parents seeking prospective placement must prove both that the District has failed to offer a FAPE and that the time it would take for the District to provide a FAPE would compound the harm in a way that requires unique relief.[42]

Discussion and Legal Conclusions

The Parents have not met their burden of proof for any of the issues that they presented for adjudication.

Tuition Reimbursement

Regarding tuition reimbursement, the Parents must prove that the District failed to offer a FAPE, that the Private School is appropriate, and that no equitable factor would reduce or eliminate a tuition reimbursement award.

While the time in question is short, it breaks into smaller periods. The analysis for each period is somewhat different, and I will take them in chronological order.

January 8 to 23, 2024

The Parents did not tell the District that they were seeking tuition reimbursement or placement at the Private School at the District's expense until they requested this hearing. That absence of such notice, by itself, is sufficient to deny tuition reimbursement from January 8 through 23, 2024.[43] For completeness, I consider the other factors applicable during this period.

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[41] *Draper, supra,* at 1285 (quoting Ridgewood, supra, at 248-49).
[42] *See Ferren C., supra* (discussing hearing officers' authority to award unique relief).
[43] There are two exceptions to the notice requirement that, arguably, may apply in this case. First, the Parents are not required to provide a tuition reimbursement notice if the District had not previously provided a procedural safeguards notice to the Parents. There is no preponderant evidence in the record to support a finding that the District did or did not provide procedural safeguards prior to the Student's return to the Private School. At the same time, the Parents concealed information that would have triggered the District's obligation to issue procedural safeguards. It would be inequitable to permit the Parents to benefit from deceiving the District. Second, a tuition reimbursement notice is not required if providing such notice would result in serious emotional harm to the Student. The record includes testimony from the Parents that returning to the District would be traumatic for the Student. That testimony was hearsay but accepting it as true does not change the outcome. The exception does not concern the Student's placement, but rather addresses potential emotional harm to the Student caused by the notice itself. There is nothing in the record to

In most cases, one looks to a student's pre-removal IEP to determine if the school district offered a FAPE (i.e. the IEP that was in place before the Parents placed the Student in the Private School). In this case, there is no pre-removal IEP to examine because the Parents hid the Student's disability status from the District. There is ample evidence in the record about why the Parents made that choice. I make no findings of fact about the Parents' intentions and motivation because the reason for the Parents' choice is not a factor and does not change the result. The District did not know what the Private School was when the Student enrolled or when the Student left. The Parents withheld information about prior evaluations and eligibility determinations by lying on District enrollment forms which seek that information. The District understood that the Student did not have a disability, did not require special education, and had not previously received special education because that is what the Parents said.

Further, nothing that occurred from the start of the 2023-24 school year through the Student's return to the Private School warrants charging the District with knowledge of the Student's disability status. This includes the Parents' decision to place the Student in the District's virtual learning platform. At that time, the Parents expressed concerns about the Student's social and emotional wellbeing. Those concerns were contrary to the District's observations, and the Parents' choice to place the Student in the District's virtual program was beyond surprising to District personnel. Nevertheless, any student in the District may enroll in the District's virtual learning platform for any reason. The Student's enrollment in a program available to all children regardless of disability is insufficient to place the District on notice of what the Parents chose to hide.

The Parents have not proven entitlement to tuition reimbursement from January 8 through 23, 2024. Prior to leaving the District, the Parents actively prevented the District from discovering the Student's disability status, the District had no independent reason to know that the Student was a child with a Disability, and the Parents did not give the District notice of their intention to seek tuition reimbursement.

January 24 to February 11, 2024

The Parents' email of January 24, 2024, in which they requested an IEP from the District and the Prior LEA, was the first signal the District received that the Student is a child with a disability. At that time, the Student's enrollment

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support a conclusion that notifying the District of the Parents' intent to seek reimbursement would have harmed the Student. *See* 34 C.F.R. § 300.148(d).

status in the District was uncertain, and the Parents compounded that uncertainty by simultaneously seeking an IEP from the District and the Prior LEA. There is ample support in the record that the Parents were simply trying their best to get the Student the services that they believed the Student needed. The District's surprise and confusion are equally understandable and equally supported by the record. But, yet again, the parities' intentions and feelings are not factors and are not outcome determinative. What matters is what the District did in response to the Parents' request for an IEP: The District investigated, uncovered what the Parents had hidden, and then offered comparable services.

The chronology of events from January 24 through February 11, 2024, is remarkable for the District's intestine coordination and prompt. In 18 days, the District learned that the Student might be a child with a disability, investigated its own records to see if it missed anything, contacted the Prior LEA and the Private School, obtained prior educational records including evaluations and an IEP, reviewed those documents, determined what services would be comparable, determined that it could provide comparable services, drafted a NOREP to provide comparable services, and scheduled an IEP team meeting that included a representative from the Private School.

In sum, the Parents have not proven entitlement to tuition reimbursement from January 24 through February 11, 2024. During those 18 days, the District acted swiftly and appropriately to develop a special education program for the Student, despite uncertainty about its own LEA status. This is what the IDEA requires.[44] Also, during this time, the District had no notice of the Parents' intent to seek tuition reimbursement.

February 12 to March 21, 2024

The District argues that its initial NOREP and subsequent IEP must be judged against the obligations of an LEA who receives an intrastate transfer student. The District argues that its NOREP and IEP were appropriate because they offered services comparable to those in the Prior LEA's IEP. Under the highly unusual facts of this case, I agree that the District's proposed standard is correct for its NOREP of February 12, 2024. I do not agree that the same analysis applies to the District's IEP of March 22, 2024.

[44] *See, e.g. I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771 (M.D. Pa. 2012). *I.H.* concerns LEAs' obligation to offer special education programming even in the absence of a FAPE obligation when other conditions are satisfied. Applied to this case, *I.H.* illustrates that developing a special education program despite the District's uncertainty about its LEA status is consistent with what the IDEA requires.

In early January 2024, the Parents told the District that the Student was attending the Private School – far away from the District, within the Prior LEA. The District then took steps to disenroll the Student. Then, when the Parents asked for an IEP, the District re-enrolled the Student (or took action indicating that it did so). As such, the Student transferred back into the District "within the same academic year." This triggered the District's obligation to provide comparable services. The District satisfied this obligation on February 12, 2024, by offering a NOREP to implement the Prior LEA's IEP. The District's offer of identical services certainly satisfies its obligation to provide comparable services.

The Parents have not proven entitlement to tuition reimbursement from February 12 to March 21, 2024, because the District's NOREP of February 12, 2024, was appropriate under the IDEA's intrastate transfer rules. The Parents cannot satisfy the first part of the *Burlington-Carter* test because the District's program offer complied with IDEA mandates.

March 22, 2024, to the End of the 2023-24 School Year

The intrastate transfer analysis does not apply to the District's IEP of March 22, 2024. The District had offered comparable services, then convened the IEP team and offered its own IEP. That IEP must be judged against the *Endrew F.* standard, described above. There is no preponderant evidence in the record of this hearing that the District's IEP fell short of that standard at the time it was offered.

By March 22, 2024, the District knew that the Student had SLD identified by the Prior LEA and understood that the Private School provided programming to address language-based learning disabilities.[45] All documentation available to the District at that time either did not concern possible Autism, or affirmatively concluded that the Student was not a person with Autism. The District used the information that it had to craft an IEP that was responsive to the Student's needs as the District understood them. At the same time, the District listened to the Parents' concerns about Autism specifically, and about the Student's social and emotional wellbeing more broadly. When the Parents' concerns did not align with the information in its possession, the District proposed an evaluation – which the Parents rejected. All the District's actions during this period are consistent with what the IDEA requires, both procedurally and in substance.

[45] The District understood the nature of the Private School's program, even if it had well-founded concerns about whether the Private School was providing that program to the Student.

The Parents' rejection of the District's offer to evaluate the Student provides additional safe harbors for the District. The Parents' first written notice of their intent to seek tuition reimbursement came in the form of their due process complaint on April 12, 2024. Prior to that, on April 2, 2024, the District sought the Parent's consent to evaluate the Student. The Parents' refusal to make the Student available for an evaluation (as indicated by their withholding of consent) would result in a reduction or denial of tuition reimbursement even if the Parents presented preponderant *Burlington-Carter* evidence.[46] Taken a step further, the District had no obligation to use the IDEA's consent override procedures to obtain the evaluation and is shielded from liability attributable to the absence of the evaluation.[47]

The Parents have not proven entitlement to tuition reimbursement from March 22, 2024, through the end of the 2023-24 school year. There is no preponderate evidence in the record that the District's IEP was inappropriate at the time it was offered. The absence of notice of the Parents' intent to seek reimbursement and the Parents' withholding of consent for the District to evaluate the Student are mitigating factors as well.

Summer 2024

The Parents presented no evidence that the Student is entitled to ESY under any of the seven factors detailed above. There is some evidence in the record that the Student participated in summer programs at the Private School in prior summers. The Student's prior attendance (either funded by the Parents or through prior settlement agreements) does not prove entitlement to ESY services, let alone entitlement to private ESY programs at public expense.

The District is not required to place the Student in the Private School in the summer of 2024 or reimburse the Parents for any such placement.

The 2024-25 School Year - Prospective Placement

As discussed above, there is no preponderant evidence in the record of this case that the District's IEP was inappropriate at the time it was offered, based on the information available to the District at that time. Since then, the District has learned more. Shortly after it offered an IEP, the District learned that the IEP may not be appropriate regarding the Student's social and emotional needs or the Student's potential Autism. In response to this

[46] 34 C.F.R. 300.148(d)(2).
[47] *See* 34 C.F.R. § 300.300(c)(1)(ii), (iii).

new information, the District did what it was supposed to do: it proposed an evaluation.

Discussed above, the Parents' withholding of consent for the evaluation provides a safe harbor for the District, terminating many of its obligations.[48] As a result, the IEP in question for the Parents' prospective placement claim is the District's IEP of March 22, 2024. Above, I find that IEP was appropriate at the time it was offered. The Parents, therefore, cannot satisfy the first part of the *Burlington-Carter* test. For completeness, were I to assume for the sake of argument that the District's IEP was not appropriate, I find the record devoid of evidence about the District's ability to make timely and reasonable revisions to its offer to correct the FAPE violation.

The Parents have not proven entitlement to prospective placement at the Private School for the 2024-25 school year.

Summary

The Parents placed the Student in the Private School and demand tuition reimbursement for the second half of the 2023-24 school year. The Parents also demand an ESY placement at the Private School at the District's expense. The Parents also demand prospective placement at the Private School for the 2024-25 school year at the District's expense.

The period for which the Parents demand tuition reimbursement breaks into smaller periods, and analysis for each period is somewhat different. From January 8 to 23, 2024, the District did not know, and had no reason to know, that the Student was a child with a disability because the Parents concealed that information. From January 24 to February 11, 2024, the District had reason to know that the Student was (or at least might be) a child with a disability. During this time, the District did everything that the IDEA requires to confirm the Student's disability status and form a plan to promptly start special education services. From February 12 to March 21, 2024, the District offered to implement the Prior LEA's IEP, satisfying its obligation to provide comparable services under the IDEA's intrastate transfer rules. From March 22, 2024, through the end of the 2023-24 school year, the District offered an IEP that was reasonably calculated to provide a FAPE when it was issued. For all these reasons, and also because the Parents gave no notice of their intent to seek tuition reimbursement before filing their complaint on April 12, 2024, the Parents have not satisfied their burden to prove entitlement to tuition reimbursement.

[48] Again, *see* 34 C.F.R. § 300.300(c)(1)(ii),(iii).

The Parents did not present evidence concerning the Student's entitlement to ESY services in the summer of 2024. The Parents' demand for a private ESY placement at the District's expense is denied on this basis.

The Parents also did not prove entitlement to prospective, private placement for the 2024-25 school year. The District's IEP was appropriate when it was offered. Then, as more information came to light, the District sought the Parent's consent to evaluate the Student. The Parents denied that request by withholding consent for the evaluation. The IDEA releases the District from many of its obligations under these circumstances and protects the District for respecting the Parents' choice to withhold consent. The Parents cannot point to the IEP's alleged failure to address the Student's social and emotional needs and potential Autism while simultaneously preventing the District from evaluating those needs. Further, even assuming that the IEP is not appropriate today even if it was appropriate when it was written, the Parents have not proven that the District is not able to make reasonable and timely changes to the IEP so that the Student will receive a FAPE.

In closing, I note that there is a very small amount of information in the record suggesting that the parties recently came to an agreement that the District should evaluate the Student. If so, I applaud that decision because there can be no doubt that a new evaluation is needed. If not, I encourage the District to seek the Parents' consent to evaluate again. I will not, however, require the District to initiate the IDEA's consent override procedures. The District is well within its rights to respect the Parents choice to withhold consent.

An order consistent with the above follows.

ORDER

Now, July 18, 2024, it is hereby **ORDERED** as follows:

1. The Parents' demand for reimbursement for cost of the Student's tuition at the Private School from January 2024 through June 2024 is **DENIED** and **DISMISSED.**

2. The Parent's demand for the District to place the Student at the Private School in the summer of 2024 is **DENIED** and **DISMISSED.**

3. The Parents' demand for the District to place the Student at the Private School for the 2024-25 school year is **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER