

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

Pennsylvania Special Education Hearing Officer Final Decision And Order

Closed Hearing

ODR File Number:

26697-21-22

Child's Name:

T.P.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

January 23, 2023

INTRODUCTION AND PROCEDURAL HISTORY

The Student,¹ a middle-school-aged student, has attended school in the Nazareth School District (hereinafter "District") since the beginning of fourth grade. The Student entered the District with a Section 504 plan developed in the district where the Student had previously attended a private school. The Student [self-harmed] on October 18, 2021, was hospitalized, and was subsequently placed in an out-of-state therapeutic boarding school. The Parents filed a due process complaint claiming that the Student had been denied a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")², Section 504 of the Rehabilitation Act of 1973 ("Section 504")³, and Chapters 14 and 15 of the Pennsylvania Public School Code.⁴ The Parents are requesting compensatory education and tuition reimbursement for the out-of-state therapeutic boarding school.

The complaint proceeded to a four-day, closed, due process hearing that was convened via video conference on October 13, 2022; October 20, 2022; November 17, 2022; and December 13, 2022. The attorneys submitted written closing statements on January 6, 2023.

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the Hearing Officer. The only

¹ In the interest of confidentiality and privacy, the Student's name, gender, and other potentially identifiable information are not used in the body of this decision. Gender neutral pronouns are used here in the singular to refer to the Student (they/them/their). 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).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818.

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

findings of fact cited herein are those needed to address the issues resolved. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Following a review of the record and for all of the reasons set forth below, the Parent's claims are denied.

ISSUES

- 1. Whether the District denied the Student FAPE under Section 504, IDEA, and Pennsylvania Chapters 14 and 15.**
- 2. Whether the District violated its IDEA and Chapter 14 child find obligations.**
- 3. Whether compensatory education from the first day of the Student's [redacted] grade school year, 2020-2021, until October 18, 2021, the date of the Student's [redacted] hospitalization, should be awarded.**
- 4. Whether tuition reimbursement should be awarded for the out-of-state, therapeutic boarding school where the Student is currently enrolled for the 2021-2022 and 2022-2023 school years.**

FINDINGS OF FACT

1. On September 21, 2018, the Student entered the District as a rising [redacted] grader near the beginning of the 2018-2019 school year when the Mother moved into the District (S-5; NT 644).
2. Prior to enrolling in the District, the Student attended a private school where they exhibited behavioral difficulties. That district conducted an evaluation on August 26, 2018 (S-4) and found the Student eligible for a Section 504 Service Plan based on data that the Student had "shown or displayed signs and or symptoms of ADHD" (S-1 at 1).⁵ A Functional Behavioral Assessment was not conducted (S-4).
3. On September 10, 2018, the Parent provided a pediatric neurological evaluation of the Student to the District that included diagnoses of ADHD, ODD, Anxiety, Dyspraxia, and Disorder of Autonomic Nervous System (P-1; S-6, 9; NT 645). The evaluation noted a difficult family dynamic following the Parents' divorce (P-1, 1). The evaluator recommended accommodations to address the Student's needs (P-1, 5-6). The evaluation also included a medication regimen (P-1, 7).
4. On October 15, 2018, the Mother received a voice mail from the science and math teacher reporting that the Student used inappropriate language in class several times (P-2; NT 647).
5. On November 20, 2018, as a result of the pediatric neurological evaluation, the District created a Section 504 Service Plan for ADHD, ODD, Sensory Processing and Dyspraxia (S-6, 1). The Section 504 Service Plan does not mention anxiety; however, it does list some of the accommodations to address the Student's anxiety that were recommended in the pediatric neurological evaluation report (P-1, 6).

⁵ References to the record throughout this decision will be to the Notes of Testimony (NT) followed by the page number(s), Parents Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number and page number(s). Citations to duplicative exhibits may not be to all.

6. On November 28, 2018, the Student was hospitalized for one week because [the student] was being aggressive towards [the student's] peers in an incident that occurred outside of school (NT 648). Mother notified the District of the hospitalization (S-6, 19).
7. On December 11, 2018, Mother received a voice mail from the science and math teacher reporting that the Student used inappropriate language in class and that the School Counselor would be doing morning check-ins with the Student (P-3; NT 649; NT 74-77).
8. On February 26, 2019, the Student received a one-day suspension for making offensive gestures toward peers. The matter was reported to the police. A reinstatement conference was held on February 28, 2019 (S-23, 2).
9. In a series of voice mails received by Mother starting on February 29, 2019, the social studies and language arts teacher reported that the Student failed to turn in homework (P-4; NT 641).
10. On March 13, 2019, Mother received a voice mail from the assistant principal who reported that the Student received a one-day, in school suspension for hitting/poking another student (P-5; NT 652; S-23, 1, 3).
11. On March 25, 2019, Mother received a voice mail from the school counselor returning her call. The counselor reported that he had a discussion with the Student about an incident on the playground over the weekend and outlets for handling emotions (P-6; NT 653).
12. The School Counselor testified that the Student's [redacted] grade report card demonstrated that the Student was meeting or exceeding expectations despite their disciplinary record and that there did not appear to be a reason to conduct an IDEA evaluation at that time (NT 123-124; S-22).

13. On September 23, 2019, a Risk Assessment was created after a peer reported that the Student said that they have anxiety and they [self-harmed] to relieve stress (S-7, 1; NT 81-82; 654-655). The school counselor, the art therapist, and the Student created a Personal Safety Agreement listing things for the Student to do and who to ask for help if they feel like hurting themselves (S-7, 2). The Student was added to the School Child Study Team agenda for monitoring (S-7, 4).
14. On November 25, 2019, a revised Section 504 Service Plan was presented to the Parents at a Parent-Teacher Conference (S-7). The Parents and teachers did not add any additional accommodations and the Parents approved the plan (S-8, 4-5).
15. During the COVID shutdown from mid-March through June 2020 and a hybrid schedule during the 2020-2021 school year the Student participated in asynchronous learning. Due to [the student's] Parents' work schedules, the Student and a sibling traveled to the home of a former teacher who oversaw their asynchronous learning (NT 660-661).
16. For the 2019-2020 school year, the Student met all the [redacted]-grade level expectations in all academic areas (S-22, 6).
17. On September 21, 2020, Mother received an email from the language arts teacher stating that the Student failed to turn in an assignment online (P-9, NT 661) and that there were similar issues in October 2020 (P-10; NT 662).
18. On November 24, 2020, a continuation of the Section 504 Plan was sent to the Parents (S-10, NT 663). The only changes were to remove the alternative lunch location because the students were eating lunch in their classrooms in accordance with a COVID-19 protocol, the addition of a calculator for math, and a note indicating that the accommodations would only be available during in-school learning days (S-10, 2-3). The

Parents approved the November 24, 2020 Section 504 Plan, by electronic signature (S-10, 4).

19. On January 29, 2021, the September 23, 2019 Personal Safety Agreement was amended the day after it was reported that the Student had self-administered [over the counter medication] at home (S-11; NT 664-665).
20. On February 27, 2021, the Student was removed from the Child Study Team agenda (S-14, 3).
21. On April 20, 2021, Mother emailed the school counselor and the math teacher requesting a meeting to discuss the Student's rough transition from the hybrid schedule back to a regular school schedule. The math teacher responded by sending Mother a list of tutors (P-14).
22. The evidence includes a series of emails between teachers and Mother chronicling the Student's difficulties turning in schoolwork and problematic behaviors at school (P-13; P-15; P-16; P-17; P-18; P-21; P-22; P-23; P-26) and a voice mail from the school counselor (P-19). The behaviors include things like not sanitizing hands, running down the hallway, throwing [food] in the lunchroom, inappropriate use of the computer, and [inappropriate language.]
23. The Student received a two-day, in-school suspension (May 11-12, 2021) for posting inappropriate comments on a Google-based art activity (S-14, 6; S-23, 1).
24. The Student was suspended for three days (May 13-15, 2021) for posting inappropriate comments on a Google-based art activity (S-14, 6; S-23, 1, 5).
25. On May 13, 2021, the Student expressed frustration and indicated that they "can't take it anymore" and wanted "to give up" (NT 675).
26. The January 29, 2021 Personal Safety Agreement was amended on May 19, 2021 when Student returned from the out of school suspension

- (S-13, 2); the risk assessment was not new. The Mother reported that the School told the Parents to take the Student to the emergency room (NT 675).
27. On May 20, 2021, the Student was put back on the School Child Study Team agenda (S-14, 6).
 28. In late May, the Mother asked the School Counselor for an evaluation of the Student (NT 103-104, 677). On June 3, 2021, the School Psychologist sent the Mother a letter regarding a PTE (P-20). Mother testified that she gave the Student the paperwork to return to the school (NT 629). The PTE never reached its destination.
 29. For the 2020-2021 school year, the Student met all [redacted]-grade level expectation for all academic classes (S-22, 7).
 30. For [redacted] grade, the Student transitioned from the upper elementary building, [redacted], to the middle school (NT, 180).
 31. On September 22, 2021, the Parents submitted the PTE received in June. They denied consent to evaluate the Student because they were waiting for the outcome of an appointment scheduled for September 29, 2021 at a children's hospital (P-15).
 32. On October 14, 2021, Mother emailed the school to update them about the Student's medical visit to a children's hospital and alert them to the fact that the Student would be on new medication. She also followed up on her request to have the Student evaluated (NT 683-684).
 33. On October 15, 2021, the Middle School Psychologist responded to Mother's request for the school to conduct an evaluation (P-24).
 34. On October 15, 2021, the Student's [redacted] grade School Counselor and Section 504 case manager (NT 175) emailed Mother about placing the Student in a counseling program administered by a local hospital (P-25, NT 192-193).

35. On October 18, 2021, following a disciplinary meeting with the school counselor and the Student, the Student went home. Subsequently, Mother received a phone call from her “significant other” who told her the Student used an [attempted self-harm]. The Mother and her friend took the Student to the Emergency Room where they waited for a week before finding an inpatient bed at a Philadelphia behavioral hospital. Mother informed the school about the incident (NT 684-687).
36. The Student was admitted to the behavioral hospital on October 21, 2021 and discharged on November 16, 2021. The behavioral hospital’s Aftercare Plan lists an aftercare appointment at an out-of-state, wilderness-based residential treatment program to which the Student was admitted on November 17, 2021 (P-54, 1).
37. On December 31, 2021, a comprehensive neuropsychological evaluation of the Student was conducted at the wilderness program by an out-of-state Clinical Psychologist. The clinical evaluation included a review of records, a face-to-face mental health examination, and the administration of a standard battery of tests, rating scales and other assessments. No educational records from the District were reviewed nor was there any contact with the home District’s teachers or counselors (NT, 530-536). The Report, dated February 9, 2022 (S-17, 27), indicates that the Student presented with a significant amount of impulsivity, inhibitory control and inappropriate behavior. The Student demonstrated considerable difficulty with frustration, distress tolerance, and emotional reactivity (NT, 508). The Clinical Psychologist noted that the Student had begun identifying as transgender and preferred to be called by a different name (NT 520-521). The Clinical Psychologist also reported that the Student’s therapist did not consider gender dysphoria to be a prominent therapeutic concern for the Student (S-17, 6). While the Clinical Psychologist determined that there was not enough

evidence for a diagnosis of gender dysphoria, the Student should continue to be monitored to rule it out (NT 520). The primary foci of the Student's treatment were improving emotional regulatory skills and behavior control, reducing impulsivity, and rehearsing strategies to have their needs met adaptively (S-17, 6). Based on extensive diagnostic testing, the specific treatment recommendations were that the Student "continue in a highly structured, supportive, residential setting with psychosocial treatment, such as a therapeutic boarding school or residential treatment center ... without the disruption of overnight, weekend or extensive summer hiatuses" (S-17, 22). The Clinical Psychologist stated that outside of a structured, nurturing, therapeutic residential "consistent container," the Student was not going to be able to maintain the progress made at the wilderness program or continue to make progress, and, likely, to have significant regression in the Student's behavior and functioning (NT, 521-522). For an intervention to be successful, it needs to be consistent, "well-boundaried," structured, and "24/7" (NT, 523). Furthermore, the Clinical Psychologist concluded that the Student's academic needs cannot be separated from their therapeutic needs (S-17, 23; NT, 523-524). The comprehensive report also recommends psychiatric oversight of medications, social skills groups, individual therapy, and family treatment. The Student's academic needs included a small class size, extended time for testing, and that the accommodations be documented, for example, in a Section 504 Accommodation Plan (S-17, 25-26). The Clinical Psychologist concluded that the Student had the cognitive capacity to succeed if placed in an appropriate setting such as a therapeutic boarding school or a residential treatment center (S-17, 27).

38. On February 3, 2022, the Mother opened a GoFundMe page on the fundraising platform, requesting donations for the "Continuum Care" for her child (S-26, 6). The Mother's update on February 14, 2022 indicates that they had made the "tough decision" to send the Student to a therapeutic boarding school (TBS) (S-26, 11).
39. On February 18, 2022, the Parents participated in a remote meeting with the School Counselor and the School Psychologist to discuss bringing the Student back into the District (P-29). Various placement options were discussed, with the primary focus on a school-based partial hospitalization program (P-29, 31; 44). During the meeting the Parents did not divulge information about the decision to place the Student at the out-of-state TBS (NT, 712-713).
40. On February 18, 2022, in an email, the Parents notified the District of their intent to place the Student at an out-of-state therapeutic boarding school and that they would be seeking tuition reimbursement (P-30, 8).
41. On February 22, 2022, the Father signed (S-16, 3) the PTE giving consent for an evaluation which was sent by the District to the Parents on October 19, 2021 (S-16, 1). By then the Student was attending the first out-of-state therapeutic placement in a wilderness setting so once again the District had to conduct an evaluation based on a review of records rather than conducting a face-to-face evaluation of the Student.
42. On February 24, 2022, the District sent the Parents a NOREP offering a school-based partial hospitalization program and a cover letter indicating that the District did not agree to pay the costs of the Parent's "unilateral placement" of the Student in the TBS (S-18).
43. On February 24, 2022 at 2:03 p.m., the Parents executed an agreement with an out-of-state, single-sex therapeutic boarding school (TBS) to enroll the Student there. At that point, the Mother had read

the comprehensive neuropsychological evaluation dated February 14, 2022 (S-17) which indicated that the Student was questioning their gender identity, yet they made the decision to send the Student to a single-sex wilderness TBS (NT, 715).

44. On March 2, 2022, the Student was discharged from the first out-of-state wilderness program. The discharge summary lists these diagnoses: ODD, other specified trauma related disorder, ADHD, parent-child relational disorder, developmental coordination disorder, suspected child psychological abuse, and continue to monitor/rule out gender dysphoria (P-33, 1). The aftercare recommendations and treatment include continuing the Student in a "supported, structure, therapeutic type of boarding school" and a "continued focus on identity development," and family therapy (P-33, 2).
45. On March 3, 2022, based on the recommendation of an educational consultant, the Student was transferred to a single-sex TBS in another state (P-48).
46. On March 16, 2022, following receipt of the comprehensive neuropsychological report, the District issued a draft Evaluation Report (ER) based on a review of records finding the Student eligible for special education under the IDEA category of Other Health Impaired (OHI) (P-34, 15). The ER contemplated the Student returning to the District middle school (P-34, 16).
47. On April 14, 2022, the District provided the Parents with a final Evaluation Report (ER) based on a review of records because the Student was not made available to the District (S-19, 2). The Student was found eligible for an IEP based on a eligibility finding of Other Health Impairment (OHI) based on diagnosis of ODD, other specified trauma, and ADHD (S-19, 16). The evaluator ruled out an Emotional

Disturbance (ED) classification (NT, 312) and concluded that the Student did not need 24/7 services (NT, 323-324).

48. Subsequently, the District created an IEP dated May 12, 2022 recommending that the Student be placed in an Intermediate Unit (IU) full-time therapeutic emotional support (TES) program (NT, 291-292), which the District concluded would be appropriate for meeting the Student's needs as identified in the April 14, 2022 ER (NT, 324). The IEP included three preliminary goals (P-44, 18-20) and a full complement of Program Modifications and Specially Designed Instruction (P-44, 21-26). The IEP noted that the School Counselor's request to meet virtually with the Student was denied by the Mother based on the Student's therapeutic team's belief that it would be "counterproductive to the clinical process" at that time (P-44, 6).
49. Ultimately, the Parents did not agree with the IEP citing the comprehensive neurological evaluation and the treatment team's recommendations that the Student needed to be placed in a therapeutic residential placement (P-44, 9). On June 13, 2022, the Parents rejected the IEP/NOREP offered by the District because they believed the placement offered by the District was not appropriate and that the Student needed more intensive services (S-20, 36).
50. The IU TES is an academic program, with the mental health support and counseling pushed in (NT, 770-771). TES classrooms, which have no more than 15 students (NT, 755), are operated by a special education teacher, a mental health worker, and an associate teacher (NT, 377-378), are supported by three psychologists (NT, 763), and have access to a certified Behavioral Analyst (NT, 765-766). The TES administration and staff have participated in training on LGBTQ+ awareness and acceptance of a student's preference (NT, 769-770), and students are accepted as they choose to identify (NT, 772). TES

has on-going communication with the families (NT, 772) and parental supports (NT, 862-863).

51. The Parents filed a due process Complaint on June 26, 2022. At the time of the due process hearing, the Student remained at the out-of-state therapeutic boarding school (TBS) where the Parents placed the Student on March 3, 2022.

52. The Parents placed the Student at the TBS without visiting it first (NT, 733). The TBS, which is located about 11 hours away from the Student's Parents' homes (NT, 316, 730-731), is licensed and accredited (NT, 566), and has a maximum class size of ten (NT, 571). It does not permit the Student to use their chosen name and pronouns (NT, 316-317, 439- 440, 444), and the staff has no training in gender dysphoria (NT, 438). The Student has an Individual Academic Plan and accommodations, but there is no IEP, ISP or 504 plan (P-49, 1). The accommodations include something called a "gender identity disorder of childhood" for each classroom (P-49). The Student's core academic instruction is provided from 9:00 a.m. to 12:00 p.m. (NT, 573, 597; S-30, 1), including a "character education" program that all students transition through during their time at the school (NT 576), and there is no specially designed instruction for the Student (S-30, 1). The Student receives individual therapy once a week for one hour and group therapy twice a week for one hour (S-30, 1). There is no school psychologist on staff (NT, 437). The Student has an assigned "Primary Mentor" who is responsible for helping them throughout the day and serves as the liaison between the Student and their Parents (NT, 591-592).

Parent's Claims

Claim for Compensatory Education for a denial of FAPE under Section 504 and IDEA

The Parents claim that the District failed to offer the Student a FAPE under IDEA and Section 504.

The Parents contend that the District never conducted a 504 evaluation of the Student, relying instead on a flawed evaluation conducted by the district where the Student attended [redacted] grade. The Parents point out that the previous 504 evaluation missed the anxiety diagnosis, and there was no analysis of which “major life activities” were impaired, and no analysis of which related aids, services, or accommodations were needed for Student. Therefore, they allege that the District violated 34 C.F.R. 104.35(a) which requires that “A school district shall conduct an evaluation in accordance with the requirements of the Section 504 regulations before initial placement in regular or special education.”

Furthermore, in light of the pandemic’s impact on schools, the District failed to revise the Student’s Section 504 Plan to accommodate for asynchronous learning.

The Parents claim that by failing to identify the red flags demonstrating the Student’s need for specially designed instruction in task completion, social skills, coping skills, and organization as early as the Student’s enrollment in the District and failing to timely evaluate Student for special education or conduct a FBA, the District denied the Student a FAPE under the IDEA. The Parents allege that the District failed its Child Find obligation because it “knew or should have known” that the Student was in need of special education, because of the serious behavioral issues including incidents of self-harm. The Parents contend that the evidence demonstrates that the District was on notice that the Student’s disabilities, which were documented and recognized by the District, required the District to act, evaluate, and provide Student specially designed instruction.

The Parents argue that the District's flawed process and procedural violations resulted in substantive denials of FAPE from June 2020 until October 18, 2021, as Student was denied individualized aids, services, and modifications. Therefore, the Parents claim, compensatory education is an appropriate remedy.

Claim for Tuition Reimbursement

The Parents claim that the District failed to offer the Student a FAPE under both the IDEA and Section 504. Therefore, the Parents placed Student at a therapeutic boarding school as recommended by the comprehensive neuropsychological evaluation and they are requesting tuition reimbursement pursuant to 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); 34 C.F.R. § 104.33(c)(3).

The Parents rely on *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), a decision wherein the 3rd Circuit held that where a student's educational needs are inseparable from social, emotional, and mental health needs and the student will not be able to benefit academically without the therapeutic aspects of a residential program, such a placement is considered to be intrinsic to the student's education. In such a case, the school district is responsible for funding the entire cost of the placement, including residential, therapeutic, and educational costs.

The Parents allege that they have met the three prongs of the Burlington-Carter test for tuition reimbursement and the need for residential placement under Section 504 and IDEA as the offered IEP as well as the existing Section 504 Plan were inappropriate.

First, the Parents argue that the District's offer of the IU TES which does not offer 24/7 services, falls short of a residential therapeutic treatment program which was recommended by the Clinical Psychologist who conducted the comprehensive neuropsychological evaluation. The

Parents allege that there is no evidence that the Student would be able to receive meaningful educational benefit from the TES placement which is in a large public middle school.

The Parents argue that the TBS provides the Student with meaningful educational benefit and significant learning. The TBS is an environment that integrates academics, therapeutics, extra-curriculum, and socialization opportunities in a nurturing environment. The Parents believe that the TBS is also working on the Student's identity issues which are not confined to gender. Therefore, they assert that the TBS is an appropriate placement.

In regard to equitable considerations, the Parents claim they were transparent about their concerns for the Student and cooperated with the District at all times. Therefore, the Parents argue that there are no equitable considerations to reduce or deny tuition reimbursement.

The Parents conclude that the District has failed to offer a FAPE, the TBS is appropriate as Student requires a structured 24-hour setting, and there are no equitable considerations to reduce tuition, and as such, tuition reimbursement for the Student's placement at TBS from March 3, 2022 through the end of the 2022-2023 school year is appropriate.

In terms of remedies, for the 2020-2021 school year, Parents are requesting full days of compensatory education for each asynchronous instruction day and two hours a day for each in person day for the lack of related aids, services and accommodations and specially designed instruction related to coping skills, behavioral regulation; social skills, and organization skills. For the 2021-2022 school year, Parents are requesting full days of compensatory education for the Section 504 violation from the first day of school until October 18, 2021.

The Parents are also seeking tuition reimbursement from the Student's date of enrollment at the TBS, March 3, 2022 through the conclusion of the 2022-2023 school year.

Additionally, the Parents request that the Hearing Officer order that the District staff receive training in Section 504 procedures as well as IDEA child find obligations.

District's Claims

The District argues that the Parents have not met their burden of proving that the District failed to provide FAPE under Section 504 or its IDEA child find obligations. Furthermore, the TBS is not an appropriate placement for the Student and the equitable considerations weigh heavily against the Parents. Therefore, the District urges the Hearing Officer to deny the Parents' claims for compensatory education and tuition reimbursement.

The District contends that there were no concerns that rose to the level of requiring the issuance of a PTE prior to the June of 2021 and there is no evidence that the District failed its child find duties.

The District points to the fact that the Student had been evaluated shortly before enrolling in the District for the 2018-2019 school year and arrived at the District with an appropriate 504 Service Plan and that the 504 Service Plans built upon it appropriately met the Student's needs and provided the accommodations necessary to meet academic standards. The District claims that there was no evidence provided that additional accommodations were needed for the Student to access the curriculum while at the District. The Student met the behavioral and academic standards at the end of each school year while in the District. Therefore, the District asserts that the Parents' claim for compensatory education fails.

In regard to tuition reimbursement, the District argues that it should not be required to fund a residential placement because it is not necessary

for educational purposes. [*Mary T. v. Philadelphia School District*, 575 F. 3d 235 (3d Cir. 2009); *Munir v. Pottsville Area School District*, 723 F. 3d 423 (3d Cir. 2013); *Clovis Unified Sch. Dist., v. Office of Administrative Hearings*, 903 F.2d. 635 (9th Cir. 1990); *Ashland School District v. R.J.* 588 F.3d 1004 (9th Cir. 2009); *In re: -36- Student with a Disability*, 110 LRP 67594 (SEA N.Y. 2010); and *Placer County Mental Health Department*, 110 LRP 41039 (SEA Cal. 2010)]

The District concludes that its offer of the IU TES placement is reasonably calculated to enable the Student to receive educational benefits because it provides the Student with individual and group therapy, social skills instruction, on grade level academic instruction, access to like peers and opportunities for inclusion in the general education classroom with non-disabled peers in the least restrictive environment, and that deference must be given to an IEP created by educational professionals.

The District argues that the Parents have failed to support their assertion that a more restrictive setting is needed to provide educational benefits or prove that the TBS, which provides a limited academic program and does not support the Student's choice in terms of gender identity, is an appropriate placement.

The District believes that the equitable considerations weigh heavily against the Parents because they failed to offer proper notice of their intent to place the Student at TBS, they never raised any concerns about the IEP offered by the District, and the Mother's testimony is simply not credible in regard to a number of issues. Therefore, the District concludes that the Parents' request for tuition reimbursement must be denied.

LEGAL PRINCIPLES

Burden of Proof

In general, the burden of proof essentially consists of 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 must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipoise.” On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, the burden of persuasion rests on the Parents who filed the complaint that initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of its claims, or if the evidence is in “equipoise,” the Parents cannot prevail.

Credibility Determinations

Special education hearing officers, in the role of fact-finders, are 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).

This Hearing Officer found most of the witnesses to be generally credible, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented.

While the School Psychologist and the Clinical Psychologist came to very different conclusions regarding whether or not the Student needed a 24/7 program, their evaluations of the Student were conducted in silos. The School Counselor had access to the Student's educational records but no access to the Student to conduct a face-to-face mental health examination or assessments [redacted]. On the other hand, the Clinical Psychologist had post-crisis access to the Student to conduct a mental health examination and information about the Student's home situation and family conflict, but no access to the Student's pre-crisis educational records. Both of the experts who evaluated the Student presented credible evidence based on their perspective and the information to which they had access.

The Hearing Officer did not find the Mother's testimony to be totally credible in light of conflicting evidence regarding when the decision was made to send the Student to the TBS and her allegation that she sent her signed PTE and rating scales to the school with the Student who had a history of being disorganized. The Mother's February 14, 2022 update to the GoFundMe page indicates that the "tough decision" had been made to send the Student to the TBS. At the hearing she testified that the decision to send the Student to the TBS had not been made when they met with the District on February 18, 2022; that it was merely a "consideration" at that point. Albeit, the agreement with the TBS was not executed until February 24, 2022, the Hearing Officer finds that the Mother had predetermined what the Student's placement would be and was less than forthcoming when she failed to disclose that information with the District. That inconsistency and

her incredible allegation about the PTE impinge on the credibility of her testimony.

FAPE under Section 504

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1). Section 504 and Chapter 15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1. The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

FAPE under IDEA

The IDEA requires the provision of 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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set

forth in the Act are followed. 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).

Evaluations

The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained, including the use of a variety of assessment tools for gathering relevant data about the child’s functional, developmental, and academic strengths and weaknesses. 34 C.F.R. §§ 300.304(b); see also 34 C.F.R. § 303(a). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services’ needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parents of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]”

34 C.F.R. § 300.306(a)(1). The U.S. Department of Education has explained that, although “[t]he eligibility group should work toward consensus, under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability.” 71 *Fed. Reg.* 46661 (August 14, 2006).

Compensatory Relief

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knew, or should have known, that a child's special education program is not appropriate or that they are receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

Tuition Reimbursement

Under IDEA, parents who unilaterally place their child at a private school can seek private school tuition reimbursement from the school district. In most cases, parents seeking reimbursement for private school tuition must notify their school district prior to removing their child from the district of their intent to enroll the child in a private school and request that the school district fund the placement.

Long-standing case law and the IDEA provide the potential for private school placement with tuition if a school district has failed in its obligation to provide FAPE to a child with a disability (*Florence County District Four v. Carter*, 510 U.S. 7 (1993); *School Committee of Burlington v. Department of*

Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

Hearing officers typically rely upon the three-prong *Burlington-Carter* test when determining whether to grant tuition reimbursement awards after a parent has unilaterally placed a child in a private school. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Florence County School District v. Carter*, 510 U.S. 7 (1993).

DISCUSSION

FAPE under Section 504 and IDEA

The Student entered the District as a[n] [elementary-aged student] with a 504 Service Plan developed in the former district where they attended private school. During that school year, the Student experienced many transitions. The Student transitioned from a small private school to a new public school, and started a new grade with new teachers and new peers. At the same time, the Parents were in the throes of a contentious divorce rife with conflict. The Student faced a changing family dynamic, and the reality of conforming to a parenting schedule that required the Student to transit between the Mother's new home and the Father's new home. The next year, the pandemic brought even more transitions and challenges, including asynchronous education, hybrid schedules, and related health concerns.

The Student's behaviors were problematic both in school and outside of school. The inappropriate behaviors in school resulted in discipline. The District appropriately responded to every incident, including discussing the Student at Child Study Team meetings.

Outside of the school, the Student was hospitalized for instances of aggressive behavior and self-harm. The Parents notified the District each

time, and the District notified the Parents each time the Student's behavior was inappropriate for the school setting. The District conducted threat assessments according to their protocol. The evidence demonstrates that everyone was concerned about the Student and, at that point, communication between the home and the school seemed to be working.

To the Student's credit, despite the behavioral incidents, discipline, and self-harm, the Student was meeting grade expectations. There was no evidence presented that additional accommodations were needed. The Parents approved several reissued Section 504 Service Plans that had little to no changes, even during the pandemic schedule. The evidence demonstrates that the District offered FAPE under Section 504 and at no time was the Student discriminated against or denied access to school activities.

IDEA Child Find Obligations

There is also no evidence that the District failed to meet its IDEA child find obligations. Several times, the Mother requested that the District conduct an evaluation. The District never denied her request. So why didn't the District conduct an evaluation? The District issued a Permission to Evaluate (PTE) every time the evidence showed the Mother requested an evaluation. According to the evidence, one signed PTE was "lost" because the Mother allegedly gave the PTE to the Student who failed to return it to the school, and several times the Parents did not consent to testing for a variety of reasons. As a result, the District's hands were tied and were never able to conduct more than a review of records rather than a comprehensive evaluation. The Hearing Officer finds that the District properly responded the Parent's requests for an IDEA evaluation of the Student and that the Parents thwarted their efforts to conduct the evaluation so they cannot now complain that the District failed to meet its IDEA child find obligation.

The Comprehensive Neuropsychological Evaluation commissioned and paid for by the Parents was released in February 2022. The Parents shared the report with the District. The Clinical Psychologist concluded that the Student's academic needs cannot be separated from their therapeutic needs. The Parents rely on *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), a decision wherein the 3rd Circuit held that where a student's educational needs are inseparable from social, emotional, and mental health needs and the student will not be able to benefit academically without the therapeutic aspects of a residential program, such a placement is considered to be intrinsic to the student's education. The Hearing Officer is not convinced that the Student's academic needs are intrinsically linked to the Student's mental health needs because the Student's report cards and educational records show that they were able to meet their academic requirements despite the behavioral incidents and self-harm.

Following the District's review of the neuropsychological evaluation, it created an IEP based on a review of records in May of 2022. By then, the Student had already been placed in an out-of-state TBS and the Mother refused to provide the District with remote access to the Student because the treatment team at the TBS suggested that would be detrimental. The IEP offered by the District was based on the information at hand, with no confirmation of if or when the Student would return to the District. The proffered placement in the IU full-time therapeutic emotional support (TES) program would have provided a FAPE for the Student's educational and emotional needs if there had been an opportunity to implement it. Unlike the TBS, the TES provides an on-grade academic program. It would also, unlike the TBS, allow the Student, who would be supported by LGBTQ+ trained staff, the unfettered freedom to explore gender identity. However, the Parents rejected the placement because they believed that there was no evidence that the Student would be able to receive meaningful benefit from

the TES placement located in a large public middle school. The Parents insist that the Student needs more intensive services offered by a residential placement.

One obvious difference between the two placements is that the private TBS is a residential setting providing 24/7 services, whereas the IU's TES is a school-day placement requiring the Student to be at home in the evenings and on weekends.

Neither the School Psychologist nor the Clinical Psychologist were operating with all of the information needed to assess the Student in all areas related to the suspected disability, including, as would have been appropriate here social and emotional status, general intelligence, academic performance, communicative status, and motor abilities therefore the two experts reached different conclusions regarding the need for 24/7 services based on the information to which they had access. Both experts operated at a disadvantage. Their access to information was based on the Parents prerogative to grant it or withhold it.

The District believes that the Student could derive meaningful benefit without 24/7 services. The Clinical Psychologist strongly recommends 24/7 services in a consistent, structured, nurturing residential setting believing that without that the Student's behavior may regress. The Clinical Psychologist also recommends that the placement be "without the disruption of overnight, weekend or extensive summer hiatuses."

The Hearing Officer concludes that without additional evidence that the Student needs a 24/7 residential setting to achieve meaningful educational benefits, the least restrictive environment offered in the District's IEP, which offers FAPE, should be given an opportunity.

Another difference between the two placements is in regard to the ability to monitor/rule out gender dysphoria, one of the diagnoses listed in

the Student's discharge notes and clinical evaluation. The TES placement has staff that is well trained in LGBTQ+ issues, whereas the same-sex TBS academic plan includes "accommodations" titled "gender identity disorder of childhood." While the Clinical Psychologist explains that the identity issues faced by the Student are broader than gender, the Hearing Officer is concerned about a placement that considers gender identity a "disorder." At TES, the students are accepted as they choose to identify; at TBS, where all the students are considered to be the same sex, the Student was denied the opportunity to choose because it went beyond the school's only choice.

The Hearing Officer concurs with the District's assertion that the placement would not properly support the Student's choice in gender identity. As the District points out, the current administration has recognized that Title IX, which prohibits discrimination on the basis of sex, extends to gender identity. An order affirming the TBS placement would encumber federal funds to support a placement that on its face is discriminating against the Student on the basis of gender identity in violation of Title IX.

The Hearing Officer finds that the TES placement, which offers FAPE, should be implemented because the TBS placement where the Parents unilaterally placed the Student would not be appropriate.

Compensatory Relief

The Hearing Officer finds that the Parents did not meet its burden of proving by a preponderance of the evidence that the District failed to provide FAPE under Section 504 or violated its child find obligation under IDEA. Therefore, there can be no award of compensatory education.

Additionally, the Hearing Officer denies the Parents' request to order that the District staff receive training in Section 504 procedures as well as IDEA child find obligations. The school witnesses who testified at this due

process hearing appeared to be well versed in the District's obligations to identify students in need of special education as well as in Section 504 procedures.

Tuition Reimbursement

The Parents must establish all three prongs of the Burlington-Carter Test to meet the burden of proving that tuition reimbursement should be awarded: (1) the District's proposed IEP is inappropriate for the child; (2) the placement chosen by the Parents for the child is appropriate; and (3) the equities weigh on the side of the Parents for full tuition. *Lauren v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). Only if it is determined that the district failed to offer FAPE, does the hearing officer need to decide whether the private school placement is appropriate for the child. And then, only if the first two prongs are met, is an examination of the equitable considerations required.

Step one requires the Hearing Officer to examine the educational program offered by the District and determine whether or not the IEP appropriately conforms with the FAPE requirements that it is reasonably calculated to enable the Student to receive *meaningful* educational benefit based on their unique needs. As discussed above, the IEP offered to the Parents would provide FAPE.

Because the Parents failed to prove the first prong of the Burlington-Carter test, there is no need for the Hearing Officer to address the remaining two prongs of the Burlington-Carter test, and Parents' claim for tuition reimbursement is denied.

LEGAL CONCLUSIONS

- 1. The District provided the Student a FAPE under Section 504, IDEA, and Pennsylvania Chapters 14 and 15.**
- 2. The District met its child find obligations under IDEA and Chapter 14 child find obligations.**
- 3. The Parent's claim for Compensatory Education is denied because the District provided the Student with a FAPE under Section 504 and met its IDEA and Chapter 14 child find duties.**
- 4. The Parent's demand for tuition reimbursement is denied because the IEP proposed by the District is appropriate and would have provided the Student with a FAPE.**

ORDER

AND NOW, this 23th day of January 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are denied and any claims not specifically addressed by

this decision and order are **DENIED** and **DISMISSED**. Jurisdiction is relinquished.

Cheryl Cutrona

Cheryl Cutrona, J.D.
Special Education Hearing Officer

Date of Decision
January 23, 2023
ODR 26697-21-22AS