

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

ODR No. 28548-23-24

CLOSED HEARING

Child's Name:

[L.S.]¹

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Hearing Officer:

Brian Jason Ford

Date of Decision:

02/02/2024

¹ [redacted]

Introduction

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing and allege that the Student's public school district (the District) violated the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

Beginning in the 2021-22 school year, the Parents educated the Student privately. Towards the end of the 2022-23 school year, the Parents informed the District that the Student would reenroll and required special education. The Parents allege that the District never offered an appropriate Individualized Education Program (IEP) for the Student's return. Without an appropriate IEP in place, the Parents allege that they were compelled to seek appropriate programming elsewhere. Ultimately, the Parents enrolled the Student in a private, residential, out-of-state school (Private School 2).² The Student began attending Private School 2 in May 2023 and continued there through the 2023-24 school year. The Parents now seek reimbursement.

The Parents also demand reimbursement for a private neuropsychological evaluation that they obtained for the Student while the Student was attending an out-of-state wilderness program before Private School 2.

After a careful review of the record, I find in the Parents' favor.

Issue

Two issues were presented for adjudication:

1. Are the Parents entitled to reimbursement for the Student's placement at Private School 2?
2. Are the Parents entitled to reimbursement for a private neuropsychological evaluation that they obtained for the Student?

Findings of Fact

I reviewed the record in its entirety but make findings of fact only as necessary to resolve the issues before me.³ I find as follows:

² Discussed below, the Student attended two private schools and a wilderness program. Private School 2 is the second private school that the Student attended and is the school for which the Parents seek reimbursement.

³ This narrow tailoring is particularly important in this case. A significant portion of the record concerns the Student's gender. The Student's gender informed the Parent's decision-

[Redacted] and [Redacted]

1. In 2013, the Parents and Student lived within the Intermediate Unit (IU) in which the District is located, but within a different school district. The IU determined that the Student was eligible for early intervention services. P-1.
2. In [redacted], the Student aged into school aged services. The other school district found that the Student was entitled to special education as a child with a primary disability of Autism and a secondary disability of Other Health Impairment (OHI). P-1.

District Programming –2016-17 ([redacted]) through 2020-21 ([redacted]) School Years

3. In August 2016, the Parents and Student moved into the District. The District continued to provide special education for the Student. P-1.
4. On May 25, 2018, the District issued a Reevaluation Report (the 2018 RR). The 2018 RR included no new testing but found that the Student remained eligible for special education as a child with Autism and OHI. P-1.
5. After the 2018 RR, the Student continued to receive special education pursuant to an IEP.
6. On May 21, 2020, the Student's IEP team (consisting of the Parents and District personnel) drafted an annual IEP for the Student. At that time, the Student was struggling with inappropriate interactions with peers that would occur during unstructured times of the school day. The Student was prone to making inappropriate comments and perseverated on negative peer interactions. This resulted in difficulty with moving on from upsetting or frustrating situations. P-2.
7. Following the District's ordinary placement track, the Student would move from [redacted] school to [redacted] school at the start of the 2021-22 school year. The IEP team amended the Student's IEP to put a transition plan in place, targeting skills that the Student would need in [redacted] school. P-3.

making and contextualized some the dispute. However, the Parents did not present a gender discrimination claim and, if they had done so, the claim would have fallen well outside of my jurisdiction. This hearing is limited to a special education claim, which arises under the IDEA. While the Student's gender is important, it not relevant to my analysis.

8. During the 2020-21 school year, the Parents perceived that the Student's grades were declining, had difficulty focusing, and experienced gender-based bullying. See NT at 433.⁴

Private School 1 –2021-22 ([redacted] Grade) and 2022-23 ([redacted] Grade) School Years through February 4, 2023

9. Unsatisfied with the Student's experience in the District, the Parents unilaterally chose to enroll the Student in a small, private, college preparatory school in a neighboring state (Private School 1). *Passim* (see, e.g. NT at 121, 124).
10. Private School 1 operates both as a residential boarding school and as a day school. The Student attended the day program. *Passim*.
11. Private School 1 drafted an "Accommodations Plan" for the Student, which documented the Student's "Accommodation Areas," including "sustained attention, organization, grapho-motor skills, social pragmatic language skills, [and] and consistency following directions on independent assignments." Private School 1 provided extended time, consideration for the Student's preferred response mode, "low distraction seating," oral retesting, and other accommodations. S-2.⁵
12. In graded classes, the Student's final grades for the 2021-22 school year were As and Bs except for a C+ in Math. The Student also took several pass/fail classes and passed all of those. S-2.
13. During the 2022-23 school year, the Student received the same Accommodations Plan from Private School 1. S-2.
14. During the 2022-23 school year, the Student's behaviors at Private School 1 became problematic, particularly regarding peer relationships and teacher interactions. *Passim*.

⁴ Hearsay is permissible in Pennsylvania special education due process hearings but cannot form the basis of my decision. This finding concerns only the Parents' contemporaneous perception of the Student's experience in school.

⁵ Private School 1's accommodation plan is nothing analogous to an IEP. Rather, it is a bulleted sketch of accommodations for teachers to consider when instructing the Student. See S-2.

15. The Student's behavioral escalation culminated in a serious violation of Private School 1's rules.⁶ After that incident, Private School 1 reached the conclusion that it was not an appropriate placement for the Student. In the end, the Parents agreed to withdraw the Student from Private School 1 both to avoid disciplinary consequences and because the Parents agreed at that point that Private School 1 was not appropriate for the Student. See *e.g.* NT 118-126.
16. The record does not reveal the exact date of the behavioral incident or the Student's withdraw from Private School 1. The record supports a finding that the Student completed the second quarter of the school year at Private School 1 and did not return after the winter holiday. See, *e.g.* S-2 at 1.
17. Shortly after the Student's withdraw from Private School 1, the Parents retained a private educational consultant (the Consultant). See, *e.g.* NT 442.
18. On January 16, 2023, the Parents wrote an email to the District's Director of Special Education (the Director) to request an IEP team meeting to update the Student's IEP. The email did not inform the District that the Student was no longer attending Private School 1 and gave no indication that the Parents intended or did not intend to reenroll the Student in the District. P-5.
19. On January 17, 2023, the AS Director replied and included the District's Autistic Support Supervisor (the AS Supervisor). The Director asked the Parents to "let [the Supervisor] know of your intent for an updated IEP as our records indicate that [the Student] is no longer attending [the District]." That evening, the AS Supervisor also sent an email to the Parents to say that he would be happy to chat with them by email or phone. The Parents replied within the hour, with copy to the Director, to say that they were comfortable with both formats and asked the Supervisor for his preference. P-5.
20. Neither the Director nor the AS Supervisor nor anybody else from the District replied to the Parent's email of January 17, 2023. See P-5.
21. The District did not convene an IEP team meeting in response to the Parents' request of January 16, 2023. *Passim*.

⁶ I decline to describe the incident in detail. The incident is described in the record and is well known to the parties.

Wilderness Program – February 4, 2023, through May 8, 2023

22. On February 4, 2023, the Parents enrolled the Student in an out-of-state therapeutic wilderness program (the Wilderness Program) that the Consultant had recommended. The Wilderness Program was a residential program and was therapeutic, not educational in nature. There is little to no information about what educational services, if any, the Student received while attending the Wilderness Program. The Wilderness Program is designed to run from 75 to 90 days. See, e.g. NT at 227, 445.
23. Sometime in February 2023, the Parents decided to obtain a private neuropsychological evaluation of the Student. *Passim*.
24. On March 2, 2023, the Parents sent an email to the Director and AS Supervisor. They again asked for an IEP meeting, expressed a desire to re-enroll the Student and, for the first time, told the District that the Student was attending a therapeutic wilderness program (the Parent's did not name the program or tell the District where the program was located). P-5.
25. On March 3, 2023, the AS Supervisor replied, with copy to the Director and the District's Special Education Supervisor for the elementary school that the Student attended before Private School 1 (the Elementary Supervisor). The AS Supervisor asked if the Parents intended to reenroll the Student for the 2022-23 or 2023-24 school year, requested records from the Wilderness Program, and reviewed some of the placement information from the Student's last IEP in the District. P-5.
26. Also on March 3, 2023, the Elementary Supervisor sent an email to the Parents to schedule a phone call. After some back-and-forth scheduling emails, the parties scheduled a call on March 10, 2023. P-6.
27. On March 5, 2023, the Parents replied to the AS Supervisor's question about the timing of the Student's reenrollment. The Parents told the District that they were "looking to possibly re-enroll either in the last spring [of 2023] or for the 2023-24 school year after [the Student's] current placement [the Wilderness Program]." P-5.
28. In the same email, for the first time, the Parents told the District that the Student was in the process of receiving neuropsychological evaluation, shared their expectation that the evaluation would be

complete by the end of March 2023, and offered to share the results with the District. P-5.

29. The AS Supervisor replied to the Parents in the evening of March 5 to ask the Parents for a copy of the neuropsychological evaluation once they had it. The AS Supervisor explained that he and the Elementary Supervisor would review the report "so we can discuss the most appropriate recommendation as to educational programming" for the Student. P-5.
30. On March 6, 2023, the Parents replied, saying that they would forward the evaluation report as soon as they had it, but would like to schedule the IEP team meeting no later than April 7, 2023. The Parents assured the AS Supervisor that they expected to share the report "well in advance" of the IEP team meeting. P-5.
31. On March 8, 2023, the Elementary Supervisor realized that the Student was a [redacted] grade student and would have been attending the District's middle school if enrolled in the District. The Elementary Supervisor sent an email to the Parents to confirm that the Student was a [redacted] grade student. The Parents quickly replied to confirm, and asked the Elementary Supervisor to introduce them to whoever had the same position at the District's middle school. The Elementary Supervisor quickly replied to share the name and email address of the District's Middle School Supervisor. P-6.
32. On March 9, 2023, the Parents sent an email to the Middle School Supervisor to introduce themselves. The Parents again shared that the Student was attending a wilderness program and was receiving a neuropsychological evaluation. They again stated their intent to re-enroll the Student and again requested an IEP team meeting no later than April 7, 2023. P-8.
33. The Middle School Supervisor promptly replied to say that both she and the AS Supervisor oversee middle school programming in the District, that they had coordinated with each other, and that the AS Director would "will be working with you [the Parents] to coordinate [the Student's] transition." P-8.
34. On March 14, 2023, the Parents wrote to the AS Supervisor to confirm that he was the correct contact person within the District. The Parents asked to confirm that an IEP team meeting would be scheduled on or before April 7, 2023. The Parents also asked for guidance in re-enrolling the Student. The AS Supervisor did not reply. P-9.

35. On March 17, 2023, the Parents sent a follow up email to the AS Supervisor, again asking to schedule an IEP team meeting before April 7, 2023. The AS Supervisor replied later the same day, explaining that the District offered different levels of autistic support, and that different teams of District personnel were connected to the different levels. The AS Supervisor expected that the neuropsychological evaluation would include information about the Student's current needs which, in turn, would enable the District to bring the right team to the meeting. Despite this uncertainty, the AS Supervisor offered to schedule an IEP team meeting and asked the Parents for their availability. P-9.
36. The private neuropsychological evaluation (the 2023 Evaluation) was completed between March 7 and 24, 2023. The record does not reveal the exact date that the 2023 Evaluation was finalized and provided to the Parents. P-7.
37. On March 28, 2023, the Parents replied to the AS Supervisor, proposing April 5 or 6 for the IEP team meeting. The Parents had also started the re-enrollment process and shared their expectation that the Student would be re-enrolled in the District that day or the next. The Parents also, for the first time, requested a "complete psychological re-evaluation from [the District] for [the Student]" and asked the AS Supervisor to send a Permission to Evaluate form. P-9.
38. Also on March 28, 2023, the Parents signed an evaluation request form (that is, a form by which they requested an evaluation from the District) and provided written consent for the District to receive records from Private School 1. P-10.
39. Nobody from the District replied to the Parents' emails of March 28, 2023. The District did not schedule an IEP team meeting. *Passim*.⁷
40. On March 29, 2023, the re-enrollment process was complete, and the Student was once again enrolled in the District. P-10.
41. On April 2, 2023, the Parents emailed the District to say that the Student was still attending the Wilderness Program and asked to push

⁷ By law, documentation is part and parcel to IEP team meetings. Had the District scheduled an IEP team meeting, documentation of the District's invitation to that meeting would be part of the Student's records at a minimum. Examples of such documentation are found in this case when the District finally convened an IEP team meeting. The absence of an invitation or similar document is affirmative proof of the District's inaction.

back the Student's start date to the end of April 2023. The Parents expected that the Student would complete the Wilderness Program around that time. The District promptly replied and changed the Student's start date to April 24, 2023. The District assured the Parents that the Student's start date could be delayed again if necessary. See P-10.

42. On April 5, 2023, the Parents sent a copy of the private neuropsychological evaluation report to the AS Supervisor. P-5.
43. While the record does not reveal an exact date, around this time the District contacted the Parent to schedule regular education academic placement testing for the Student. NT 456-457.
44. On April 24, 2023, the Parents wrote to the District, providing notice of their intent to enroll the Student residentially in Private School 2 and seek tuition reimbursement. In the same letter, the Parents told the District that the Student would leave the Wilderness program on May 3, 2023, and would start at Private School 2 on May 3, 2023. The Parents explained that their plan was predicated upon Private School 2 accepting the Student. P-11.
45. Later the same date, the AS Supervisor replied to the Parents. In that reply, the AS Director said that he would schedule an IEP team meeting for the week of May 1, 2023. For the first time, the AS Supervisor also told the Parents that the District received "little educational information other than grades" from Private School 1, but that the District would "create a draft IEP." P-11.
46. The AS Supervisor's response created some confusion about the Parents' request for the District to evaluate the Student. The AS Supervisor asked the Parent to sign a Permission to Evaluate Form. The Parents responded that they had already signed the form, but they were mistakenly referring to the evaluation request form (both forms are versions of a "Permission to Evaluate" form – one used to request evaluations, the other used to provide consent for evaluations). Regardless, the District never issued a Permission to Evaluate (consent) form for the Parents to sign. See P-11.
47. Between April 25 and 27, 2023, the AS Supervisor worked with an Autistic Support Teacher (the AS Teacher) to create a draft IEP for the Student. See P-12; NT 317.

48. On April 27, 2023, the AS Teacher sent an email to the Parents to introduce herself, inform the Parents that the District had prepared a draft IEP, and to schedule an IEP team meeting on May 1, 2023. P-12.
49. The Parents and the AS Teacher emailed back and forth between April 27 and 28, and rescheduled IEP team meeting to May 2, 2023. P-12.
50. On April 28, 2023, as part of the back-and-forth emails, the AT Teacher sent the Draft IEP and an Invitation to the IEP team meeting to the Parents. P-12.
51. On May 2, 2023, the parties met at an IEP team meeting, as planned. *Passim* (see, e.g. NT at 483).
52. The 2023 IEP references the neuropsychological evaluation, summarizing the recommendations in that report. P-13 at 16.
53. The 2023 IEP included two annual goals:
 - a. The first goal concerned the Student's ability to independent complete work throughout a class period. P-13. The neuropsychological evaluation indicated attention and executive functioning deficits. However, nothing in the neuropsychological evaluation or reports from Private School 1 indicated that the Student was unable to do this or had needs in this domain.
 - b. The second goal concerned the Student's social skills and called for a therapist to observe the Student's social interactions during a cooperative group activity and rate those interactions on a rubric. The Student would demonstrate mastery by obtaining a rubric score of 7/9 over "five consecutive twice monthly data collection points." P-13. Social skills deficits were indicated – in fact were a focus – of the neuropsychological evaluation.
54. The two goals in the 2023 IEP closely mirror two of the goals in the 2021 IEP that the Student had in the District before attending Private School 1. *c/f* P-3, P-13.
55. The neuropsychological evaluation recommended direct social skills instruction in a group setting to work on social-cognitive skills, pragmatic language skills and social stores. P-7 at 11. The 2023 IEP included daily direct social skills instruction in those domains, and weekly group social skills instruction provided through a 30-minute,

group Speech/Language Therapy program (focusing on pragmatic language) that would meet roughly weekly. See P-13 at 30.

56. The neuropsychological evaluation recommended several “academic supports and classroom accommodations.” P-7 at 12-13. Those recommendations are broad, proposing services that are commonly associated with the Student’s identified disabilities (e.g. recommending “preferential seating” without saying what seating would be preferential for this Student). Although not copied verbatim, the specially designed instruction (SDI) that would have been provided through the 2023 IEP closely tracks those recommendations. P-13 at 28-29. At the same time, to match the generic recommendations in the neuropsychological evaluation, the District did little more than carry over SDI that were in place in the 2021 IEP. *c/f* P-3, P-13.
57. On May 3, 2023, the District finalized the IEP and sent a copy of the IEP with a Notice of Recommended Educational Placement (NOREP) to the Parents via email (the 2023 IEP). There were no substantive changes between the draft IEP and the final IEP.⁸ P-13, P-14.
58. On May 3, 2023, the Student completed and exited the Wilderness Program. NT at 483.
59. On May 5, 2023, the Parents rejected the IEP, via the NOREP. The Parents wrote on the NOREP that the IEP was not consistent with the recommendations in the 2023 Evaluation, that they were placing the Student in Private School 2, and were seeking reimbursement from the District. P-13.⁹

Private School 2 – May 8, 2023 through Present

60. On May 8, 2023, the Student began attending Private School 2 as a day student. Like Private School 1, Private School 2 operates both a day school and a residential school on the same campus. The Student attended the day school only because there were no beds available in the residential school. See P-19.
61. On July 10, 2023, the Student began to attend Private School 2 as a residential/boarding student. P-19.

⁸ The final IEP included a cursory, bulleted list of parental concerns stated during the IEP team meeting. P-13 at 21. Including that list had no impact on the substance of the District’s proposal.

⁹ The Parents signed the NOREP on May 4, 2023, and sent the NOREP back to the District by email on May 5, 2023. P-13, P-14.

62. On August 10, 2023, the Parents met with Private School 2 personnel to develop a treatment plan for the Student. The treatment plan is formatted like a Pennsylvania IEP, sets treatment goals for the Student, and describes the services that the Student will receive. P-18, P-19.
63. The treatment plan contains 7 executive functioning goals, 2 reading goals, 2 writing goals, 3 math goals, 4 social/emotional goals, and 4 daily living skills/residential goals. P-18.
64. To achieve the goals in the treatment plan, Private School 2 provides direct instruction in math, reading, writing, and executive functioning. Private School 2 also provides individual counseling. P-18.
65. The Student has a weekly (at least, sometimes more) therapy meeting at Private School 2 with a Licensed Social Worker who has a certificate in trauma-focused care, cognitive behavioral therapy, and dialectical behavioral therapy. The same Social Worker provides consultation to other personnel at Private School 2. NT 207, 209-210.
66. Private School 2 also developed a behavior support plan for the Student. Private School 2 employs a behavioralist to implement the Student's behavior support plan. See NT 215-216.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly. To whatever extent that witnesses contradicted each other, the differences are attributable to genuine differences in recollection or opinion.

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. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

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" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

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. 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). In substance, the *Andrew F.* decision is no different.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “de minimis” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Andrew 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.” *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. 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.

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*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. 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. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are almost always taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

The Parents are Entitled to Tuition Reimbursement

The Parents chose to educate the Student privately at the start of the 2021-22 school year. Then, after roughly a school year and a half at Private School 1, the Parents requested an updated IEP from the District on January 16, 2023. Under current case law, even if the District had no FAPE obligation to the Student at that time, the District was required to develop and issue an IEP. *See I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012); *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018).

The District’s initial response to the Parents’ request, sent on January 17, 2023, was reasonable. The District sought information about the Parents’ intent to return the Student to the District. The IEP development process could have started with the sort of informal conversation that the District proposed. The Parents replied that they were amenable to and available for that conversation, and then the District did nothing.

The Parents’ exploration of a broad range of placement options (with the assistance of a consultant) was also understandable. The Parents’ focus was on getting the Student much needed support. To that end, the Parents turned to the District first. After a prompt initial reply, the Parents heard nothing from the District between January 17 and February 4, 2023. The Student could not return to Private School 1, the Wilderness Program looked promising, and the District had gone silent. From the Parents’ perspective, the Wilderness Program appeared to be the only viable option.

In a practical sense, it might have been better if the Parents had shared more information about the Student’s placement in the Wilderness Program

and pressed the District for an IEP in February 2023. But the IDEA placed no obligation on the Parents to do so.

On March 2, 2023, the Parents contacted the District again. At this point, the Student had been in the Wilderness Program for nearly a month, and the private neuropsychological evaluation was underway. The Parents shared this information (although not all the specifics) with the District, again requested an IEP, and placed the District on notice that they would reenroll the Student. This request prompted several back-and-forth emails. The District caused some confusion by directing the Parents to the wrong personnel, but the bigger problem was the District's various inactions. As in January 2023, the District's immediate response to the Parent's request for an IEP was to ask some clarifying questions. The Parents responded to the best of their ability and promised to share the private neuropsychological evaluation once it was complete. All the while, the Parents practically begged the District to set up an IEP team meeting. The District did nothing.

The District's response, or lack thereof, is seemingly pragmatic. The District knew that the Student was attending a wilderness program but had little information about that program. The District also knew that the Student was receiving a neuropsychological evaluation and believed that evaluation would shape who should come to the IEP team meeting and the content of the IEP. At a surface level, these factors suggest that the correct course of action was to hold. But the District also knew that the Student was on the verge of reenrollment, and so the District was obligated to offer an IEP for the Student regardless of the status of the neuropsychological evaluation. See *discussion below*.

This is not to say that the District was in any position to offer an appropriate IEP. In fact, it likely would have been impossible for the District to offer an appropriate IEP on the timeline that the Parents requested. Even so, under current case law, the District's obligation to provide a FAPE and the District's obligation to offer an IEP are separate and distinct. Case law permits parents to request IEPs from school districts when Students are about to enroll and requires school districts to provide such IEPs, even in the absence of a FAPE obligation or access to the child. See *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012); *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018). At the same time, the IDEA provides multiple safe harbors for the District relative to the content of such IEPs. For example, the IDEA's provisions for transfer students require schools to provide comparable services until they can complete their own evaluations and offer their own IEPs. See 20 U.S.C. § 1414(d)(2)(c). The District would have been well within its rights to offer a short-term IEP to establish the Student's special education program until the District completed its own

evaluation and would have been protected while it worked to evaluate the Student. Instead, the District made the only choice that the IDEA does not permit. It did nothing.

On March 29, 2023, the re-enrollment process was complete. From this point forward, the District not only had an obligation to offer an IEP but had a FAPE obligation to the Student as well. By April 5, 2023, the District had a copy of the neuropsychological evaluation and knew that the Student's anticipated return date was April 24, 2023. The District continued to do nothing.

On April 24, 2023, the Student's anticipated return date had arrived. The District had not scheduled an IEP team meeting or offered an IEP. At this point, the Parents notified the District of their intent to place the Student in Private School 2 and seek reimbursement. It is striking that the Parent's threatened demand for reimbursement spurred the District into action. That action did not include sending an evaluation consent form to the Parents or seeking parental input for IEP development. Instead, the AS Supervisor and an AS Teacher worked with each other to draft an IEP.

The District presented the draft IEP to the Parents on May 2, 2023. The next day, the Student left the Wilderness Program, and the District issued the draft IEP as final. Two days later, the Parents rejected the IEP and again placed the District on notice that they would enroll the Student in Private School 2 and seek reimbursement.

The above creates a timeline for the start of the *Burlington-Carter* analysis. After the Parents notified the District of their intent to enroll the Student in Private School 2 and seek reimbursement, the District had 10 days to offer an appropriate IEP. The District offered the 2023 IEP on the 9th day after the Parent's demand. The first part of the *Burlington-Carter* test requires the Parents to prove that the 2023 IEP was inappropriate.

The 2023 IEP was not appropriate at the time it was offered. At that point, the Student had been enrolled in the District for over a month and the District had been in possession of the neuropsychological evaluation for nearly as long. After holding for the neuropsychological evaluation, the District did not use the neuropsychological evaluation to craft an appropriate program for the Student. Rather, the District reduced the report to a small list of recommendations, tacked that list onto the IEP, and parroted portions of the report in the SDI section. More importantly, as discussed below, the District 1) relied on over-broad recommendations in the neuropsychological evaluation without seeking clarification or precision, 2) ignored other aspects of the neuropsychological evaluation that provided valuable insight to the

Student's educational needs, and 3) drafted portions of the IEP that are completely disconnected from the neuropsychological evaluation or any other source of information about the Student's needs.

The District was not obligated to literally incorporate the neuropsychological evaluation into the 2023 IEP. IEPs sometimes include a copy/paste reproduction of evaluation reports. That practice is counterproductive in most instances. Even so, IEPs must include "a statement of the child's present levels of academic achievement and functional performance." See 20 U.S.C. § 1414. The 2023 IEP fell very short of that mark. For the most part, the 2023 IEP reported the Student's performance in 2021. It is true that the most robust information about the Student that was available to the District came from 2021 when the Student attended the District. It is also true that the District received very little information from Private School 1. However, the District had the Parents' consent to communicate with Private School 1, received information from Private School 1 long before it drafted the IEP, and never reached out to Private School 1 for more information.

Similarly, it is true that the recommendations in the neuropsychological evaluation were broad and generic in some ways. If anything, the neuropsychological evaluation illustrated the need to do work to draw more specific conclusions about what special education the Student might need. And the Parents had asked the District to do that work. The Parents signed and submitted an evaluation request form. In response, the District was obligated to either deny the Parents' request or seek their consent to evaluate. See 22 Pa Code § 14.123(c). The District did neither, but instead hastily drafted an IEP based on scant and outdated information – and only in response to a demand for reimbursement. Had the District acted with reasonable speed, the 2023 IEP could have been a legally defensible stopgap to put in place while the District evaluated and collected data. Instead, the District sat on information that the Parents provided, ignored the Parents' request for an evaluation, ignored the Parents' requests to convene a meeting, sought no information on its own, and act only in response to threats. This is contrary to what the IDEA requires.

The Parents argue that the 2023 IEP is a function of the District's predetermination of the Student's placement. There is preponderant evidence in the record to support that argument. The IEP could not have been crafted to address the Student's individual needs because those needs were mostly unknown to the District when the IEP was developed. The District had little in the way of specific recommendations to work from. I reiterate that the IDEA creates both an obligation to offer an IEP and multiple safe harbors for the District, given its lack of information. The District did nothing to avail itself of those safe harbors. Instead, District's

primary use of the neuropsychological evaluation was to determine which of its pre-existing programs the Student would most easily slot into. This is contrary to what the IDEA requires. *See, e.g. Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993).

Further, the District's entirely internal IEP development process violated the Parents' right to meaningfully participate in IEP development. Schools are well within their rights to come to IEP team meetings with draft IEPs. Doing so is best practice in most cases. In this case, the District solicited the Parent's feedback and concerns for the first time during the meeting, reduced that feedback to a cursory list, tacked that list onto the IEP, and changed nothing in substance.

The predetermination and lack of meaningful parental input is enough to render the 2023 inappropriate *per se*. The Parents also argue that the 2023 IEP was substantively inappropriate, and I agree. Assuming for the sake of argument that the neuropsychological evaluation contained sufficient information for IEP development, parts of the 2023 IEP make no sense. For example, the work completion goal seems to be pulled out of thin air. Nothing in the neuropsychological evaluation signaled a need for that goal. The neuropsychological evaluation contained an ADHD diagnosis, but IDEA programming must flow from a child's individual needs, not a child's disability labels. Information from Private School 1 suggested some difficulty with independent work, but there is no way to connect that suggestion to the District's goal as written. The disconnect between the neuropsychological evaluation and information from Private School 1 from portions of the 2023 IEP not only are evidence of substantive inappropriateness, but also give additional credence to the Parents' predetermination argument.

While the neuropsychological evaluation offered little in terms of specific recommendations, it included robust information about the Student's needs. The District ignored broad categories of information provided through the neuropsychological evaluation. For example, the neuropsychological evaluation found deficits in the Student's written expression and executive functioning abilities. While the 2023 IEP offered some accommodations in both domains, it offered no special education to help the Student remediate either deficit.¹⁰ The IDEA requires the District to do more than accommodate

¹⁰ The Parents argument suggests that, to be appropriate, the 2023 IEP should have had a separate goal for each of the Student's relative weaknesses. I do not accept this argument. I do, however, accept the argument that once an educational need is identified, the IDEA requires the school to work to remediate that need, which goes beyond accommodations. Students who require disability accommodations but not SDI are not IDEA-eligible. Rather, they are protected by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C.

the Student's needs. The IDEA requires the District to work to remediate the Student's needs. The 2023 IEP fell short of this mandate.

For all the reasons above, I find that the 2023 IEP was not appropriate at the time it was offered. I now turn to Private School 2's appropriateness. I find that Private School 2 is appropriate for the Student under the *Burlington-Carter* standard.

There is preponderant evidence that Private School 2 is appropriate for the Student. After considering the available information and observing the Student in its day program, Private School 2 worked through a process analogous to IEP development to craft an IEP-esque treatment plan for the Student. The treatment plan is directly responsive to the Student's needs. Assuming faithful implementation of the treatment plan (no evidence suggests otherwise), Private School 2 is making a comprehensive, concerted, data-driven effort both to accommodate the Student and to remediate the Student's needs through special education. Private School 2's treatment plan is appropriate under the *Burlington-Carter* standard.

The *Burlington-Carter* standard for appropriateness at Private School 2 is different from the appropriateness standard by which the District's IEPs are judged. Specialized private placements are, by definition, more restrictive than public schools. The question is not whether Private School 2's treatment plan would be appropriate if the District had offered it. Rather, the question is whether Private School 2's program (as documented by the treatment plan) squares with the Student's needs. I find that it does.

At the same time, the record does not support a finding that the Student requires a residential placement. Nothing in the record suggests, let alone proves, that the Student can only receive a FAPE in a residential setting. Under the applicable standards, however, the Parents need not prove that the Student requires a residential placement to obtain reimbursement.

In some cases, children seek reimbursement for residential placements that have both an educational and therapeutic/medical component. In those cases, hearing officers must determine if the child's educational and therapeutic/medical needs are "inextricably intertwined." If so, and if the families are otherwise entitled to tuition reimbursement, the school must cover the entire cost, not just the educational components. *See, e.g. Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981). This case is not like those cases. For children who do not live near Private School 2, Private

§ 794 (Section 504). A need for SDI is part of the IDEA's eligibility test, and the purpose of SDI for most students is to close educational gaps that flow from disabilities.

School 2 is a boarding school. The Parents and Student live nowhere near Private School 2. The Student attended Private School 2 as a day student for a short time until a bed became available. At that point, the Student became a residential boarding student. As such, there is no question about whether the Student's educational and non-educational needs are so intertwined that the District must fund the non-educational components of Private School 2. Instead, the question is resolved entirely under the *Burlington-Carter* analysis: is Private School 2, a boarding school, appropriate for the Student. I answer that question in the affirmative.

Similarly, the *Burlington-Carter* test does not consider whether a local, non-residential private school could also be appropriate. Nothing in the analysis requires the Parents to prove that they chose the closest or most cost-effective option. To pass the second prong of the *Burlington-Carter* test, the Parents only need to prove that their choice, Private School 2, was appropriate for the Student. The Parents have met that burden.

Having found that the Parents have satisfied the first two elements of the *Burlington-Carter* test, I turn to the equities. I find nothing in the record of this matter that warrants a reduction or elimination of a tuition reimbursement award. The Parents chose to place the Student at Private School 1, starting with the 2021-22 school year. The Parents acknowledge that was an unforced, unilateral decision and do not seek reimbursement for that placement. When Private School 1 proved to be a poor fit for the Student, the Parents asked the District for help. They contacted the District in January 2023, received a preliminary reply, and tried to set up a meeting. Then, the District went silent. At that point, the Parents placed the Student in the Wilderness Program but, like Private School 1, they do not seek reimbursement for that placement. Next, on March 2, 2023, the Parents tried again to establish contact with the District. This was 62 days before the Student left the Wilderness program. For 56 of those days, the District did nothing to prepare for the Student's return. The District ignored the Parents multiple requests to schedule an IEP team meeting. The District ignored the Parents multiple requests for a comprehensive evaluation. The District received documentation from Private School 1, found that documentation lacking, but did nothing to fill in the gaps despite having the Parents' written consent to communicate with Private School 1.

For 22 of those 56 days, the District sat on the neuropsychological evaluation. After repeatedly telling the Parents that it needed the neuropsychological evaluation to do anything, the District did nothing once it had the report in hand until the Parents threatened a reimbursement claim. The Parents' threat resulted in a three-day rush during which time the District drafted an IEP, scheduled an IEP team meeting, convened the IEP

team meeting, finalized the IEP, and issued the IEP with a NOREP. As discussed above, that IEP was inappropriate, and the Parents were well within their rights to reject it. The Parents were also wise to pursue multiple solutions at the same time. The Parents cannot be faulted for exploring all options while the District took no action in response to their multiple requests for meetings and evaluations. Again, the District might have benefited from any of the IDEA's safe harbors had it acted in response to the Parents' communications.¹¹ In this case, the Parents actions must be viewed in the context of the District's inactions. The Parents did nothing to trigger an equitable reduction in tuition reimbursement. The Parents, therefore, have satisfied all three parts of the *Burlington-Carter* test.

The Parents are Entitled to Reimbursement for the Neuropsychological Evaluation

There is a well-developed body of case law concerning parental rights to independent educational evaluations (IEEs) at public expense. Generally, when schools evaluate children, parents may disagree with the school's evaluation and ask the school to fund an IEE. At that point, the school must either fund the IEE or request a due process hearing to defend its own evaluation. See 34 C.F.R. § 300.502(b); *Schaffer v. Weast*, 546 U.S. 49, 60-61, 126 S. Ct. 528, 536 (2005). See also, *W. Chester Area Sch. Dist. v. G.D.*, No. 16-4471, 2017 U.S. Dist. LEXIS 10132 (E.D. Pa. Jan. 25, 2017).

This matter is not a traditional IEE funding case. The Parents have no evaluation from the District to disagree with and, therefore, are unable to satisfy a threshold condition to an IEE funding or reimbursement demand. Rather, the Parents urge me to use my broad, equitable powers to craft an appropriate remedy. The Parents are correct that hearing officers are empowered to craft unique remedies to correct IDEA violations in targeted and sometimes unusual ways. See, e.g. *Ferren C. v. Sch. Dist. of Phila.*, 595 F. Supp. 2d 566 (E.D. Pa. 2009)

The Parents correctly argue that the District's failure to either deny their request for an evaluation or seek their consent to evaluate violates IDEA regulations at 34 C.F.R. §300.503(a). The Parents also argue that the

¹¹ For example, if the District had sought the Parents' consent to evaluate the Student at any point after receiving their request for an evaluation, the District would have had 60 days to complete that evaluation. See 20 U.S.C. § 1414, 22 Pa Code § 14.123(b). Under those facts, the 2023 IEP could be viewed as a preliminary plan – a stopgap intended to last only as long as it would take for the District to complete an evaluation and reconvene the IEP team. But those are not the facts of this case. In this case, the Parents sent a written request for an evaluation on March 28, 2023, triggering the District's obligation to either deny the request or seek the Parents' consent to evaluate. The District did neither.

District cannot rely on the IDEA's 60-day evaluation timeline as a defense because that timeline starts when parents provide consent, and the District never sought the Parents' consent. I agree with that argument as well.

Unlike case law establishing the District's obligation to offer an IEP in the absence of a FAPE obligation, nothing establishes the District's obligation to evaluate a child who is not enrolled. The District had no obligation to evaluate the Student at any point before March 29, 2023. Regardless, the Parents sent a signed evaluation request form to the District simultaneously with the Student's reenrollment. After the Student was enrolled, the District was not permitted to ignore what it had in hand. The District was unambiguously required to either reject the Parents request or start the evaluation process by seeking the Parent's consent. The District did neither even after the Parents sent notice of their intent to seek reimbursement. Rather, District personnel asked the Parents to sign and return a form that it never provided. Like many other aspects of this case, that demonstrates an obvious lack of internal coordination and communication for which the Parents are blameless.

The District relied on the neuropsychological evaluation almost exclusively to develop the 2023 IEP. The way that the District used and did not use the neuropsychological evaluation was flawed, as discussed above. But the fact remains that the District relied on a private evaluation, paid for by the Parents, while ignoring their request to conduct its own evaluation. In these circumstances, it is equitable to require the District to reimburse the Parents for what it used.

I recognize that while my authority to craft equitable remedies is broad, it is not without limits. The District's failure to seek the Parents' consent to evaluate or to reject their request for an evaluation is a procedural violation of the IDEA. I am empowered to correct procedural violations, but I cannot provide further remedies unless the procedural violation impeded the Student's right to a FAPE, significantly impeded the Parent's right to participate in the decision-making process, or caused a deprivation of educational benefits. See 20 U.S.C. § 1415(f)(3)(E)(ii). In this section, the IDEA makes a distinction between the Student's right to a FAPE and the Student's receipt of "educational benefits." The comprehensive evaluation that the Parents requested was an educational benefit, and the District's failure to act in response to the Parents request deprived the Student of that benefit. Equitable relief is, therefore, both warranted and permissible.

Given the foregoing, I find that the Parents are entitled to reimbursement for the neuropsychological evaluation as a form of equitable relief.

Summary and Legal Conclusions

Two issues were presented for adjudication: the Parents' demand for reimbursement for the Student's placement at Private School 2, which is a specialized residential boarding school; and the Parents' demand for reimbursement for the neuropsychological evaluation.

The Parents are entitled to reimbursement for Private School 2 if they satisfy all three parts of the *Burlington-Carter* test.

The Parents satisfied the first part of the *Burlington-Carter* test because they proved that the District did not offer an appropriate IEP before they placed the Student at Private School 2. The District was obligated to offer an IEP. The District also could have availed itself of safe harbors to protect itself from deficiencies in its offer because it had limited information about the Student, had practically no access to the Student, and had no FAPE obligation to the Student for most of the time in question. Instead, the District ignored the Parents' requests to convene an IEP team meeting, ignored the Parents' requests to evaluate the Student, and did not seek information after finding documentation from Private School 1 to be lacking despite having permission to do so. The District did not act until the Parents threatened the very claim that they are pursuing through this hearing. Then, once the District acted (a three-day scramble to complete the entire IEP development process), it excluded the Parents from IEP development, predetermined the Student's placement, overly relied on vague and generic aspects of the neuropsychological evaluation, ignored information about the Student's needs contained within the same, and drafted key components of the Student's program that had no relation to the available information.

The Parents satisfied the second part of the *Burlington-Carter* test because they proved that Private School 2 is appropriate for the Student under the applicable standard. Private School 2 offers a robust program that is well-matched to the Student's needs. Unlike the District, upon enrollment, Private School 2 worked collaboratively with the Parents to develop a robust treatment plan – a document that looks and functions much like an IEP. I reach no conclusions as to whether Private School 2's treatment plan would satisfy the IDEA's appropriateness standard under *Andrew* because that is not the correct measure for the second part of the *Burlington-Carter* test. The treatment plan is comprehensive, data-driven, and more than meets the threshold of appropriateness under the *Burlington-Carter* standard.

The third part of the *Burlington-Carter* test requires a consideration of whether equitable factors warrant a reduction or elimination of any reimbursement award. Discussed above, I find no such factors in this case.

Consequently, the Parents are entitled to reimbursement from the District for the Student's placement at Private School 2.

The Parents also presented a demand for reimbursement for the neuropsychological evaluation. The Parents do not argue in favor of the more common standard for IEEs at public expense – they do not meet that standard. Rather, the Parents argue that they are entitled to reimbursement for the evaluation as a matter of equity. As discussed above, I agree and find that the Parents are entitled to reimbursement for the neuropsychological evaluation.

ORDER

Now, February 2, 2024, it is hereby **ORDERED** as follows:

1. The District shall reimburse the Parents for the cost of the Student's placement at Private School 2.
2. The District shall reimburse the Parents for the cost of the neuropsychological evaluation.
3. Within 14 days of this Order, the District shall send written notice to the Parents of its reimbursement practices and procedures. Such notice shall inform the Parents of any documentation that they must submit, where or to whom that documentation must be submitted, and the District's payment terms if greater than 30 days.
4. The District may either reimburse the Parents through direct payment to them, or by payment to Private School 2 for outstanding invoices, if any.

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

/s/ Brian Jason Ford
HEARING OFFICER