

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

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

CLOSED HEARING

ODR No. 28925-23-24

Child's Name:

A.S.

Date of Birth:

[redacted]

Parent

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

April 26, 2024

Background

The Parents filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The District offered a free appropriate public education (FAPE) at a District-operated Supplemental Autistic Support program at the [redacted] school. The Parents rejected the offer and made a unilateral placement at a private placement. The individual education program (IEP) includes goals, transition services, community-based instruction, and related services. The District seeks a declaratory ruling that its offer of a FAPE is procedurally and substantively appropriate. The Parents respond that the Supplemental Autistic Support classroom fails to offer appropriate curricular materials, the IEP is flawed, and the small classroom is overstimulating. The Parents further argue that the Student requires one-on-one instruction in a quiet setting, *i.e.*, the unilateral placement.

After reviewing the intrinsic and extrinsic evidence, I now find the Parents have met their burden of proof that the District failed to offer the Student a FAPE under either Act. For all the reasons that follow, I now find in favor of the Parents. Finally, I also find that the resolution of the IDEA claims also resolves the Section 504 FAPE claims.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A); 34 CFR § 300.513(d)(2); 34 CFR § 104.1- 104.36). The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) and 22 PA Code Chapter 15. References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. References to duplicative exhibits are not necessarily to all.

Issue

Was the District's May 2023 IEP reasonably calculated to allow the Student to make meaningful progress in light of their circumstances? If not, is the Family entitled to tuition reimbursement?

Findings of Fact

Background

1. On or about the age of three (3), the Student was initially diagnosed with Pervasive Developmental Disorder-Not-Otherwise Specified (PDD NOS). (J-19; P-10).
2. In May 2011, at age [redacted], the Student experienced a sudden regression in language skills, motor skills, and cognitive functioning. After a series of hospitalizations, the Student was diagnosed with [redacted]. [redacted] is a disorder that is characterized by a regression in language functioning and the loss of motor skills following a period of seemingly normal development. After the [redacted] diagnosis, the Student was identified as a person with an Intellectual Disability and Autism. (J-19; P-10; J-8).
3. The Student is also diagnosed with [redacted] (P-10).²

2 [redacted] In younger children, [redacted] can resemble autistic-like regression. McVicar KA, Shinnar S.. Ment Retard Dev Disabil Res Rev. 2004;10(2):144-9. doi: 10.1002/mrdd.20028. PMID: 15362173; [redacted]Trevathan E. [redacted] among children with language regression and autistic spectrum disorders. J Child Neurol. 2004 Aug;19 Suppl 1:S49-57. doi: 10.1177/088307380401900106. PMID: 15526970

4. On or about September 8, 2020, the District and the Parents entered into a Settlement Agreement and Release. On or about June 8, 2021, the Parties extended the Agreement to cover the 2021-2022 school year through the end of the 2022-2023 school year. Each Agreement provides that in exchange for a complete waiver of all liability, the Parents, in their sole discretion, can select the Student's private education provider. Once selected, the District would make monthly payments to the Parents to be used solely for the Students' education. The Parties further agreed that the District could periodically reevaluate the Student. Finally, the Parties agreed that no later than May 2023, the District would again offer the Student a free appropriate public education for the 2023-2024 school year. Notwithstanding the Agreement at all times relevant, the Student continued to be enrolled in the District. (J-16).

The April 2021 Reevaluation and the Parents' Evaluation

5. Pursuant to the Settlement Agreement, the District reevaluated the Student on or about April 30, 2021. The reevaluation team, including the Parents, concluded that the Student was IDEA-eligible and continued to need specially designed instruction. The team also concluded that the Student's disabilities included Autism (primary), Intellectual Disability (I.D.) (secondary), and Other Health Impairment (OHI) –[redacted] as the third IDEA-qualifying disability. The OHI impairment designation is intertwined with the long history of [redacted] (J-1).
6. The 2021 reevaluation report included a variety of assessments measuring cognitive, achievement, speech/language, physical therapy, and occupational therapy needs. Overall, the Student's scores in all

areas of suspected disability fell in the "Very Low" range. The Student earned a full-scale I.Q. of 40. The Student's overall achievement scores in reading, math, writing, spelling, and math calculation all fell in the less than 0.1 percentile level. (J-1 pp. 8-10). The 2021 testing profile is consistent with the Student's earlier 2013 "Very Low" reevaluation profile. The Student's adaptive behavioral skills were also in the low range. Finally, the reevaluation noted that the Student regularly engaged in multiple behaviors that interfered with learning. (J-1 p.10).

7. In April, June, and July 2021, and then again in March 2022, when the Student was [redacted], the Student was evaluated by a private neuropsychologist. The private report documents the Student's extensive history of neuropsychological cognitive/achievement testing, occupational therapy testing, participation in applied behavioral analysis therapy, speech and language testing, and overall family concerns. The Student's standard I.Q. score continued to fall in the "Very Low" range. However, the evaluator ranked the Student's overall functioning in the first (1st) percentile. The Students' composite achievement standard scores fell in the "Very Low" range at the first (1st) percentile. The Student's Word Reading, Reading Comprehension, and Spelling standard scores fell at the first (1st) percentile. The private testing results, using similar measures, are slightly higher than the District's April 2021, less than 0.1 percentile rankings. (J-01 p.10 vs. J-17 p.23).
8. The private evaluator also completed a virtual observation of the Student at the private placement - the "Center." The virtual observation lasted about 45 minutes. (J-17)
9. After reviewing all of the data, the private evaluator concluded that the Student profile was consistent with a primary classification of Autism Spectrum Disorder, a secondary classification of Intellectual Disability,

and a third classification of Other Health Impairment - [redacted]. Because of speech and language problems, including problems with phonics and expressive and receptive language), the examiner concluded that the Student also meets the criteria for a fourth classification as a student with Speech/Language Impairment. The private evaluator's report concluded with a variety of recommendations for academic, behavioral, speech/ language, and social skills programming. (J-17 p.23-34).

10. At the time of the District's and the Parents' reevaluation, the Student attended a private program that offered one-on-one instruction in [redacted]. The private and District reports note that the Student attends classes virtually or in person. [redacted] While at the Center, the Student receives one-on-one instruction for two hours, has lunch, and participates in another round of one-on-one instruction with a different curriculum for another two-hour block of time. (J-8 p.2; S-1; S-2; S-3; S-4; S-4; S-5; S- 6; S-7).
11. The Center is not a licensed private school, and the instructors are not certified teachers. The instructors use two different curricula. During the first two-hour block, they use a curriculum developed by the Center corporate office, and during the second two-hour block, they use a third-party curriculum. The Student is graded on a sliding rubric ranging from "Introduced," "Partially Proficient," "Proficient," to "Next Goal." The Center also uses a "Pass-Fail" rubric for the afternoon classes. The Center-based progress monitoring data reports indicate a slight upward trend line. All Center instructional materials used range from pre-kindergarten to second-grade level. Center-based standardized testing indicates an up-and-down trend line, favoring a slight increase in test scores over the low baseline reports. The Student receives private speech therapy from a different community based

provider not associated with the Center. Other than the summaries found the District's reevaluation(NT pp.680-682;NT pp.789-792; NT pp. ; P-1; P-5; P-7; P-8; P-12; S-1; S-2; S-3; S-4; S-4; S-5; S- 6; S- 7; NT pp. 379-383; NT p.836). The afternoon curriculum used at the Center is also used in the District. (NT p.836; NT p.639; NT p.730).

12. The Student attends school five (5) days a week from 10:00 am to 3:00 pm. The Student also attends the Center during the summer months. (NT pp.462-470).

The District's 2023 Reevaluation

13. On February 15, 2023, the District issued a prior written notice seeking Parental consent to reevaluate the Student. The Parents agreed, and the District psychologist administered a variety of assessments. The reevaluation assessed the Student's cognitive, academic, social-emotional, behavioral, adaptive behavior, fine motor/occupational therapy, speech/language, and gross-motor skills. The reevaluation did not include any measures of the Student's postsecondary interests, preferences, strengths, or needs. (J-8).
14. The Student's April 21, 2023, cognitive, achievement, fine motor, behavioral, and adaptive skill scores yielded similar "Very Low" standard scores like the 2021 testing. (J-8). The reevaluation report, however, notes an overall decrease in agitation, acting out, and interfering behaviors. The Speech therapist concluded that the Student's Speech and language skills remained low. At the same time, the Occupational therapist concluded that the Student's fine motor skills showed signs of regression. (S-8).

15. The Parent input reported that the Student regularly takes [medication].³ [redacted]⁴ (S-8).
16. The District's Occupational Therapist administered two fine and visual motor assessments. The Student scores on all measures were in the low range. The Occupational Therapist concluded that the Student's fine motor skills had regressed. The Occupational Therapist then recommended that the Student learn how to write their name. (J-8).
17. The speech therapist administered the Receptive One-Word Picture Vocabulary Test-4 Edition and the Expressive One-Word Picture Vocabulary Test- 4th Edition virtually. The therapist explained that "due to the testing environment, standardization of the assessments was not met; therefore, the standard scores may not be accurate." The therapists reported all results using standard scores. Relying on the standard scores, the therapist concluded that the Student presented with a moderate to severe speech and language delay. (J-8). The speech and language therapist recommended speech services to improve overall language and communication abilities. (J-8).
18. After completing a physical therapy assessment, the District's physical therapist recommended consultative services to support participation in the physical education class. (J-8).
19. The District's Board Certified Behavior Analyst (BCBA) observed the Student twice. The BCBA's data documented that the Student was on-task for an average of 86.18% of the time. The Student also complied with teacher/staff directives within 30 seconds 88% of the time. The Student was, however, observed to engage in 1 episode of

³ [redacted]

⁴ Supra note 1; R. Abu-Sawwa *et al.* Epidiolex (cannabidiol) primer: frequently asked questions for patients and caregivers *J. Pediatr. Pharmacol. Ther.* (2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6938286/>

noncontextual vocalizations (*i.e.*, laughing at the wrong time) and displayed five (5) episodes of nonperformance of requested tasks across two (2) observations. (J-10). The record is unclear if the change in the Student's behavior is related to learning or was brought on by the combination of [redacted] medications. (J-1; J-8; S-17; S-19). The observation protocol did not distinguish off-task gazing from [redacted] activity. (NT p.526-528).

20. A review of the Student's Center-based educational records indicates that the Student is passing all courses. The record review noted that the Student had sixteen (16) tardies and four (4) absences during the school year; however, the tardies did not negatively impact academic performance, as evidenced by passing grades. (J-8).

The 2023 Private Reevaluation

21. In March and June 2023, now age [redacted], the Student was reevaluated by the same private neuropsychologist. The report documents the Student's extensive history of neuropsychological testing, occupational therapy testing, participation in applied behavioral analysis therapy, speech and language testing, schooling, and overall family concerns. The Student's I.Q. score continued to fall in the "Very Low" range at the first (1st) percentile. The Students' overall achievement standard scores also fell in the "Very Low" range in the first (1st) percentile. (J-01 p.10 vs. J-17 p.23).
22. The private evaluator found that the Students' standard scores on the Wechsler Intelligence Scale for Children Fourth Edition (WISC V) and the Wechsler Individual Achievement Test – Fourth Edition (WIAT 4), like previous testing, all fell in the "Very Low" range. The private evaluator reported that the Student's Word Reading, Reading Comprehension, and Spelling standard scores fell at the first (1st)

- percentile. The private evaluator's results in the above areas were slightly higher than the District's testing. (J-01 p.10 vs. J-17 p.23).
23. Overall, while the Student's "Very Low" profile classification did not change, the Student's behavior, responses to verbal directions, and concentration have improved. The private evaluator agreed that speech/language skills and academics are continuing needs. (J-19 pp.19-20 vs. J-17 p.23). The private evaluator also agreed with the District's psychologist's conclusions that the Student continued to be IDEA eligible as a Student with Autism, an Intellectual Disability, and Other Health Impairments of [redacted]. (J-19).
 24. Like the 2021 testing, the Student's achievement standard scores were slightly higher than the District's April 2023 reevaluation report results of less than 0.1 percentile vs. the private results at the first (1st) percentile. (J-9 pp.19-20 vs. J-17 p.23).
 25. The evaluator ultimately found a primary disability classification of Autism Spectrum Disorder, a secondary classification of Intellectual Disability, and a third classification of Other Health Impairments, noting [redacted] disorders. The private evaluator also concluded that the Student's speech and language deficits, including problems with phonics and expressive and receptive language, met the criteria for a fourth classification of a Speech and Language impairment. Finally, the private report included a variety of recommendations for academic, behavioral, and social programming and specially designed instruction. (J-17 p.23-34).
 26. In April 2023, the private neuropsychologist who completed the first evaluation and observation completed a second 45-minute virtual Center observation. Contrary to the District's psychologist's statements about the lack of progress, the private evaluator concluded that the Student was "making progress in the area of reading and math with the

curriculum that is well known to her." The neuropsychologist opined that "Since consistency is necessary for [redacted] in order to help [redacted] to remain focused and learn, it is advisable to maintain the same type of instruction which [redacted] has been accustomed to over the past years." (J-19 p.19).

The May 2023 Offer Of FAPE

27. On or about May 23, 2023, the Parties met to develop an IEP. The IEP is a 69-page document. For the most part, the present levels repeat the content found in the reevaluation report. (J-10 p.10).
28. The IEP includes goal statements for the following content areas: 1. two Speech and Language goals; 2. A goal to assemble an object with three parts; 3. A goal to identify 10 sight words, 4. A goal to read and follow directions; 5. A goal to correctly complete and write or type sentences when presented with a picture; 6. A multi-step goal to read items from a list, then use a calculator to total the purchase to the nearest dollar amount, and then count out and pay the bill; 7. A goal to answer questions on how to use a calendar; 8. A goal to improve visual motor tracking, and 9. A goal to improve conversational speech. Each goal statement includes short-term instructional objectives. Each goal statement also states that baseline data will be collected during the first two weeks of school. (J-10 pp.38-51).
29. The "Transition Plan" segment of the IEP includes Postsecondary Education and Training goal statements regarding On-the-Job Training, an Employment Statement for supported and/or volunteer work, and an Independent Living Statement. The Independent Living Statement indicated that the Student would continue to reside with the Parents after graduation (J- pp.30-32). The IEP team checked the box on the IEP form that "Measureable Annual Goal(s)" would be documented in

"Section V" of the IEP. Section V of the IEP is where Parents can find the academic measurable annual goal statements. (J-10).

30. The "Transition Plan" segment of the IEP, beginning on page 29, proposes that during the 2022-2023 School Year, the Student would participate in a "Course of Studies" including a "Practical English 10, Practical Math 10, Practical Science/Social Studies 10, Vocational Skills 10, and Behavioral Skills 10 class." The Plan proposes that during the 2023-2024 School Year, the Student should participate in "Practical English 11, Practical Math 11, Practical Science/Social Studies 11, Vocational Skills 11, and Behavioral Skills 11" class. The IEP does not explain how the "Courses of Study" would address the Student's transition needs, interests, or preferences. (J-10 pp.30-33). The Plan omits specially designed instruction, modifications, or accommodations to support the Student in Practical English, Practical Math, Practical Science/Social Studies, Vocational Skills, or Behavioral Skills courses of study. (J-10 pp.52-53). The IEP and the class schedule do not include direct instruction time for any of the "Courses of Study." (J-10).
31. The "Transition Plan" includes three (3) nonspecific goal statements. The goal statements lack objective measures. Each statement includes the same "Courses of Study," "Services/Activity," "Location," "Frequency," "Beginning Date," and "End Date." The Plan lists the "Case Manager" – the special education teacher- as the responsible person for implementing the "Transition Plan." (J-10 pp.30-33). The Transition Plan does not mention specially designed instruction, modifications, or accommodations. (J-10 pp.52-53). The "Services/Activities" segment also includes monthly, subject to change, community-based instruction. The community-based instruction experience is not linked to a particular academic goal or transition statement. Finally, the "Services/Activities" calls for the staff to

administer the Brigance Assessment. The record does not explain how the Brigance relates to the Student's transition needs or why the Brigance was not administered as part of the reevaluation. (J-10; N.T. *passim*).

32. The IEP includes eight (8) forms of specially designed instruction. For example, the IEP calls for one-on-one instruction for 83 minutes each school day in math, problem-solving, reading, and writing. (J-10 pp.52-53). The related services segment of the IEP offers the Student one session per week for 30 minutes of individual occupational therapy and one session of teacher/staff-based consultative occupational therapy for 10 minutes each week. Two times per week for 30 minutes, the Student is scheduled for individual speech therapy. The IEP next includes integrated speech services twice weekly for 30 minutes. (J-10 pp.54-55). The IEP does not identify a time to participate in the "Courses of Study" or the "Services/Activities" in the "Transition Plan." (J-10).
33. The IEP team next decided that the Student was eligible for extended school year (ESY) services. The ESY segment of the IEP includes similar school-year goal statements and occupational therapy and speech therapy service notations. The ESY IEP segment, however, omits the dates, the length of the ESY school day, the frequency of the related services, or the location of the ESY program. (J-10).
34. Although the Student's overall [redacted] disorder is identified as a need, in the 2023 reevaluation report, the IEP omits school-based nursing support and transportation as related services. (J-10).
35. The team discussed, and the District offered to provide one-on-one Supplemental Autistic Support for 80% of the school day and participation with typical peers for 20% of the school day. (J-10 p.59). The IEP explains that the Student is scheduled to spend up to three (3)

hours daily in regular education and 4.20 hours daily in the Supplemental Autistic Support class. The IEP further provides one-on-one support in the Autistic class and one-on-one support in the regular education class. The Autistic Support class is located at the high school. The Autistic support class offers one-on-one support. (J-10 p.69). All students in the class follow the same daily schedule of activities, *i.e.*, reading and math, at the same time each day. On Wednesdays, some students participate in community-based instruction. (J-11 p.2).

36. Finally, the IEP document included a "Future Planning Inventory Parent Guardian Form." (Form). The "Form" collected Parental input about the Student's expected transition to postsecondary life. The "Form" is not a transition assessment. The IEP and the reevaluation report state that although a transition planning interview was attempted, the results were not included due to the "Student's level of difficulty engaging in conversation." Neither the reevaluation report nor the "Form" assessed the Student's transition needs, strengths, preferences, or interests. The IDEA does not require using the "Form." (J-10 pp.64-69). (J-10 p.39).
37. The Special Education Supervisor, not the teacher, drafted all segments and sections of the IEP. Even though she would not implement the IEP or act as the case manager, the IEP team included an upper-grade Supplemental Support teacher. Neither party invited Center staff to participate in the IEP meeting. (J-10; NT *passim*).
38. On May 23, 2024, the District emailed the Parents a Prior Written Notice and a Notice of Educational Placement (NOREP). The NOREP proposed implementing the IEP in a particular Supplemental Autistic Support Class at the [redacted] school. (J-11). Rather than reject the IEP and proceed to a hearing, the Parents requested mediation. When mediation did not resolve the dispute, the Parents continued the Student's placement at the Center. The Parties agreed that the Parents

would observe the proposed Autistic Support classroom at the beginning of the 2023-2024 school year. The NOREP states that no other class or arrangement was considered. (J-11; NT pp. 532-533; NT p.711 J-13).

The Classroom Observations

39. In September 2024, the Father and the Supervisor of Special Education observed the class. The Father reports that the classroom was loud and not well organized. (NT pp.530-560). The District's Special Education Supervisor reports the opposite. (N.T. pp.820-824).
40. On September 13, 2023, the Parents' Autistic Support expert and the Special Education Director observed the Autistic Support classroom. Before the observation, the expert reviewed the proposed IEP, the Notice of Recommended Placement/Prior Written Notice, the District's Functional Behavioral Assessment, and the Parent's June 2023 private Neuropsychological Consultation. (J-20).
41. Over the span of about 17 minutes, the expert observed the Autistic Support classroom. The expert then followed the students to a variety of other instructional situations. All in all, the observation lasted less than 60 minutes. The expert concluded that the Student would not do well in a class with what she perceived as "disruptive and intimidating outbursts," episodes of "self-injurious behavior," and "elopement." (NT p.282; NT p.289; NT 239; P-14). Finally, the expert also expressed misgivings about the lack of structure and individualized instruction. (J-20 pp.10-12; NT p.282; NT p.289; NT 239; P-14)).
42. On October 13, 2023, the Autism expert observed the Student at the Center. The Center observation lasted for about 60 minutes. The expert observed the Student during lunch, an exercise program, and the afternoon academic instruction. The expert reports that the Student was engaged and participated in the structured activities. The expert

confirmed the BCBA data that, contrary to earlier school records, the Student did not display any behaviors that interfered with learning. The expert further opined that although the Student was off balance and lagged behind the pace of the videotape, the Student seemed to enjoy the peer interactions during the group exercise class. (J-20 pp.11-12; J-21).

43. In October 2023, the private evaluator who evaluated the Student in 2021, 2022, and 2023 completed a second virtual observation of the Student at the Center. The virtual observation lasted about 45 minutes. (J-21). After the observation, the evaluator issued a supplemental report. The report summarized the observation and repeated the earlier recommendations. (J-21). The Supplemental report supported the unilateral placement over the District's program. (J-21).

General Legal Principles and Conclusions of Law

Burden of Proof

Generally, the burden of proof consists of two elements: the burden of production and persuasion. At the outset of the discussion, the burden of persuasion lies with the party seeking relief. Accordingly, in this case, the burden of persuasion must rest with the Parents who requested this administrative hearing. The overall outcome of the dispute is determined by applying a preponderance of the evidence standard. Hearing officers, as fact-finders, are responsible for determining the credibility and persuasiveness of the witnesses.

I now find that each witness testified to the best of their recollection about the actions taken or not taken by the team in evaluating, instructing, and designing the Student's program. However, not all witnesses were cogent or persuasive. Therefore, as explained herein, I will give more weight to some and less weight to others when the witness fails to explain or describe their

role in distributing the procedural safeguards, evaluating, instructing, observing, recording data, designing the IEP, or progress monitoring the Student's needs and circumstances.

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, my direct observations of the witnesses, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of the following four types of IDEA violations: 1 identification violation, 2. an evaluation violation, 3. a placement violation, or 4. a failure to provide a free and appropriate public education 20 USC §1415(b)(6)(A); 34 CFR § §300.507(a); 22 Pa. Code § 14.162.
2. The United States Supreme Court has developed a two-part test for determining whether a school district has offered a FAPE. There must be (1) a determination as to whether a school district has complied with the procedural safeguards as outlined in IDEA and (2) an analysis of whether the individualized educational program, when offered, is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. *Endrew F by Joseph F v. Douglass County School District RE1*, 580 U.S. ____, 137 S. Ct. 988, 69 IDELR 174 (2017); *K.D. by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).
3. The offered IEP must be reasonable, not ideal. *K.D. by Dunn v. Downingtown Area School District*, supra; *L.B. by R.B. and M.B. v Radnor Twp School Dist*, 78 IDELR 186 (ED Penna 2021).
4. The appropriateness of an IEP in terms of whether it has offered a free appropriate public education must be determined at the time that it was offered to the Parent. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible

education; instead, it requires an educational program that provides the basic floor of educational opportunity. *Ridley School District v. M.R. and J.R. ex rel. E.R.*, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

5. When a school district is unable to offer or provide a free appropriate public education to a child, but a private school can provide that education, the district must, subject to notice, reimburse the child's parents for the private school costs. To receive reimbursement of tuition resulting from the unilateral private school placement, a parent must prove three elements: 1) that the school district failed to offer a FAPE or committed another substantive violation of IDEA; 2) that the parents' private school placement is appropriate; and 3) that the equitable factors in the particular case do not preclude the relief. *School Committee Town of Burlington v. Department of Education*, 471 U.S. 359, 103 LRP 37667 (1985); *Florence County School District #4 v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Forest Grove School District v. TA*, 557 U.S. 230, 52 IDELR 151 (2009).

6. Parents need not show that the private placement furnishes every special service necessary to maximize potential. *Frank G. v. Board of Education. of Hyde Park Cent. Sch. Dist.*, 46 IDELR 33 (2d Cir. 2006), *cert. denied*, 109 LRP 29770, 552 U.S. 985 (2007); and *C.B. v. Garden Grove Unified Sch. Dist.*, 56 IDELR 121 (9th Cir. 2011), *cert. denied*, 111 LRP 68912, 132 S. Ct. 500 (2011). Additionally, the private placement does not need to meet state educational standards in order for the placement to be proper. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993). The private placement need not meet the IDEA's least restrictive educational requirement to be proper. However, Parents must show that the unilateral placement is proper. A proper private placement "provides significant

learning and confers meaningful benefit." *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 242 (3d Cir. 2009 (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007; *Anthony B. v. Colonial Sch. Dist.*, 123 LRP 24591 (3d Cir. 07/06/23, unpublished)). While a proper placement need not be "perfect," it must, however, provide services allowing the student to "make progress in reaching [his or] her academic, social, and behavioral goals," *Lauren W.*, 480 F.3d at 277.

8. For a procedural violation to rise to the level of a substantive violation under IDEA, the Parent must show that 1. the violation results in a loss of educational opportunity, or 2. it seriously deprives the Parent of their participation rights or 3. causes the student a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E); 34 CFR § 300.513(a)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

9. IDEA does not require a school district or a private placement to guarantee a particular result or to close the gap between children with disabilities and their nondisabled peers. *J.N. and J.N. ex rel J.N. v. Southwest School District*, 66 IDELR102 (M.D. Penna. 2015); *Kline Independent School District v. Hovem*, 690 F. 3d 390, 59 IDELR 121 (5th Cir. 2012).

10. Meaningful progress is measured according to the unique individual circumstances and the student's potential and not in comparison to other students. *Chambers v. Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004); *James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 827 (N.D. Ill. 2009) (citing *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995) ("[T]he mere fact that a student's IEP goals are continued does not necessarily mean that the similar IEPs were not reasonably calculated to confer educational benefit."))

11. A school district must provide extended school year services to a child with a disability only when necessary to provide a free appropriate public education. 34 CFR § 300.106; *L.G. and E.G. ex rel. E.G. v. Wissahickon School District*, 55 IDELR 280 n.3 (E.D. Penna. 2011); *MM v. School District of Greenville County*, 37 IDELR 183 (4th Cir. 2002).

12. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall, solely by reason of their disability, be excluded from participation and/or denied the benefits of or be subject to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 CFR § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove: 1) that the Student is disabled; 2) that the Student was otherwise qualified to participate in school activities; 3) that the school district receives federal funds; and 4) that the Student was excluded from participation in and denied the benefits of or subject to discrimination at the school. The offer of appropriate education under Section 504 requires districts to reasonably accommodate the needs of disabled children to ensure meaningful participation in educational activities and access to educational benefits. Under Section 504, school districts must provide education and related aids or services that are designed to meet the individual needs of disabled students as adequately as the needs of non-handicapped students are met. *Ridley School District v. M.R. and J.R. ex rel. E.R.*, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); *M.P. by V.C. v Parkland School Dist*, 79 IDELR 126 (E.D. Penna. 2021);

13. Beginning not later than the first IEP to be in effect when the child turns sixteen (16) or younger if determined appropriate by the IEP team and updated annually, the IEP must include: 1. Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and 2. The transition services, including courses of

study, otherwise needed to assist the child in reaching those goals. 34 CFR § 300.320 (b); 20 U.S.C. § 1414(d)(1)(A)(VIII). 22 P.A. Code § 14.131(a) requires that "in addition to the requirements incorporated by reference, the IEP of each student with a disability must include: For students who are 14 years of age or older, a transition plan that includes appropriate measurable postsecondary goals related to training, education, employment and, when appropriate, independent living skills." 34 CFR §§300.320-§300.324.

15. The "Services/ Activity" statements in the Student's "Transition Plan" do not identify the specific actions that will be taken within the duration of this IEP to advance the Student's postsecondary outcomes and results. The "Services/ Activity" statements like the Student will "improve" are not results-oriented. Generalized statements like those found in this "Transition" Plan do not sufficiently describe how the "Courses" or the "Services/Activities" will assist the Student in reaching a results-oriented postsecondary goal. *Perkiomen Valley Sch. Dist. v. R.B.*, 78 IDELR 222 (E.D. Pa. 2021)(parents could recover the cost of the unilateral placement when none of the postsecondary transition programs offered to an adult student with an intellectual disability would have met the student's unique needs).

16. The District's 2021 and 2023 reevaluation reports failed to include an assessment of the Student's postsecondary "strengths, preferences, and interests." Postsecondary transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests." 20 U.S.C. § 1401(34); *See, e.g., Mason City Cmty. Sch. Dist.*, 21 IDELR 248 (SEA IA 1994) (criticizing a district's use of a checklist rather than a specific transition assessment or plan); *Pasadena Indep. Sch. Dist.*, 21 IDELR 482 (SEA TX 1994) (describing the transition plan as "woefully inadequate"); *Central Bucks School District*, 114 LRP 38149 (SEA PA 08/06/14)(inadequate transition assessment and vague goals denied the student a FAPE).

17. The Parents have proven that the District's 2023-2024 free appropriate public education offer was not reasonably calculated to provide meaningful benefit. The IEP lacks present levels, personalized ambitious goals, challenging objectives, results-oriented transition services, and related services.

18. The Parents have proven that the private placement meets the Student's needs. The Center provides one-on-one support. The Center offers in-person and virtual instruction when the Student's [redacted] impairment is not otherwise controlled. Although the Student's rate of learning, by all accounts, is "maddeningly" slow, the record is preponderant that: 1. the Student can now stay on task for more extended periods; 2. the Student's basic academic skills have improved; and, 3. the Student no longer acts out and is learning to self-regulate. When all of the circumstances are viewed as a whole, the Student is making slow, sometimes mixed, progress. The gains, for the most part, are above the initial present levels. *E.G. v. Great Valley Sch. Dist.*, 70 IDELR 3 (E.D. Pa. 2017)(although the reading progress was "maddeningly slow," it nonetheless *provided meaningful benefit*).

19. When I compare and contrast the Student's overall change in behavior, social skills, academic, and adaptive behavior with the Student's reported potential, I now conclude that the academic activities and rate of progress at the Center are reasonably calculated to confer meaningful benefit. *K.S. by P.S. and M.S. v. Fremont Unified Sch. Dist.*, 109 LRP 80008 (N.D. Cal. 12/29/09); *Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018) (holding that while the linguistic progress might have been characterized as "slow" by the District Court, that didn't mean the program wasn't appropriate); and *G.D. v. Swampscott Pub. Schs.*, 80 IDELR 149 (1st Cir. 2022) (ruling that because the second-grader did not receive special education in kindergarten or first grade, "informal evidence" of [redacted]

slow gains in reading and writing established that the IEP was reasonably calculated to provide FAPE).

20. The Parents have proven that equities fall in their favor. Consistent with the terms of the Settlement Agreement, the Student has attended the Center and is involved in private speech services. The Parents have placed the Student on several community-based transition waiting lists. The Parents have attended all IEP meetings and consented to all requests for testing and observations. The Parents, at the District's invitation, visited the proposed classroom. The Parents have also shared the private testing results and ongoing [redacted]-related health concerns. On the other hand, the procedural and substantive errors found herein indicate that the District has unclean hands. Accordingly, equities favor the Parents and do not favor the District.

21. The record is preponderant that the Parents are now entitled to a limited award of tuition reimbursement for their out-of-pocket costs, including transportation to and from the unilateral placement.

22. The Parents have also proven that the District denied the Student a FAPE by failing to offer appropriate extended school-year services. The 2023-2024 ESY IEP failed to include reasonably calculated goal statements or identify the length, duration, and frequency of ESY services. 22 Pa. Code §14.132; 34 CFR §300.106.

Discussion, Analysis, and Explanation

The Parents alleged multiple procedural and substantive FAPE errors. The District responds with four intertwined arguments. First, they contend that the 2023 reevaluation is a comprehensive assessment in all areas of suspected disability and educational need. Second, they assert that the May 2023 IEP is appropriate. Third, they argue that based on the results of the reevaluation report, the private placement is inappropriate, and the Student

is not making progress. Fourth, and finally, they contend that the equities favor the District.

The Reevaluation Is Insufficient and Incomplete

The District reevaluation included multiple assessments of the Student's intellectual disability and Autism. However, as a threshold matter, I now find that the reevaluation report fails to adequately describe or explain how the Student's Other Health Impairments –[redacted] impairments - adversely affect the Student's education. None of the District's witnesses could cogently explain how the Student's [impairment] activity interfere with learning, speech/language development, and fine /gross motor skills. The failure to have a member of the team with knowledge or particular expertise regarding the Student's [redacted] disorders - was a procedural violation. Assuming the assessments did describe the Student's [redacted] disorders, the team failed to interpret or explain the day-to-day instructional implications of the assessment results. Without knowledge of how the different [redacted] disorders impact teaching or learning, the team failed to ensure that the student was provided meaningful access to specially designed instruction and significant learning.

This same lack of understanding caused the team to miscalculate the Student's overall functional present levels. For example, although the BCBA observed five (5) instances of fixed starrng off, she could not distinguish off-task behavior from [redacted] activity. The failure to distinguish and understand the difference between inattention and [redacted] activity caused the team to misstate or exaggerate the Student's skill set, functional behavior, attention, and language performance levels.

The IEP Team Was Fundamentally Flawed

Following an assessment, a team that includes, at a minimum, the parents of the child, one regular-education teacher of the child, one special-

education teacher of the child, and a representative of the local educational agency must develop the IEP. A special education or regular teacher satisfies the "teacher of the child" requirement if she/he is or will be responsible for implementing the Student's IEP.⁵ In this instance, the Supervisor of the Autistic program, who never observed the Student or worked with the Student, drafted the IEP. The special education teacher at the IEP meeting never taught the Student and, by all accounts, would not be responsible for implementing the IEP. The record also preponderates that neither the regular education nor special education teacher had any knowledge or expertise about the Student's disabilities, needs, or present levels. Therefore, I conclude that the failure to include a special education teacher/provider of the child – the Center staff – at the IEP meeting was a procedural violation. This error could have been corrected if the District invited the Center staff.

The IEP Fails to Include Present Levels of Performance, and the Autistic Support Class Lacks a Curriculum

The IEP present-level statements repeat the "Very Low" test scores in the reevaluation report. Absent the test maker's manual, the description of the Student's present levels as "Very Low" cannot be used to determine what the Student can do or what the Student needs to learn in the curriculum. Absent an objective understanding of what the Student can do, the IEP team cannot offer result-oriented measurable goal statements. Oddly, the goal statements state that the teacher will take baseline data during the first two weeks of school. Taking baseline data after setting the goal statement undercuts the requirement that the annual goal statements be ambitious. Simply put, absent an objective starting point – present levels - the team cannot set ambitious end-point goal statements.

⁵ 71 Fed. Reg. 46,670 (2006).

The District's argument that the IDEA does not require a baseline is misplaced. IEPs that lack objective starting points do not fully consider the child's unique needs. Flawed present levels undermine the accuracy of the progress monitoring. Lacking baseline performance data, grades, and objective progress monitoring data, the team cannot determine meaningful educational benefits.⁶ The faulty present levels here substantially interfered with Parental participation in the IEP process.⁷

Unlike other classes in the District, the proposed Autistic support classroom teacher does not use the District's regular education curriculum or a research-based special education curriculum to plan, organize, and deliver services. Absent an organized, sequential curriculum and present levels, the IEP does not offer the Student an equally effective opportunity to be involved in and make progress. These twin flaws – flawed present levels and no curriculum - denied the Student meaningful access to learning.

The IEP Goals are Insufficient and Inadequate

The IEP includes multiple goal statements. For all the following reasons, I now find that each goal statement is procedurally and substantively flawed. Absent present levels, the goal statements are procedurally flawed. Under these circumstances, the selection of the goals and how they are written are substantively inappropriate. For example, the math goal is a collection of five (5) standalone tasks far beyond the Student's reported executive functioning and academic profile.⁸ The goal goes beyond ambitious to

⁶ *K.D. v. Downingtown Area Sch. Dist.*, 72 IDELR 261 (3d Cir. 2018) (ruling that because the baseline performance of a grade schooler with ADHD and specific learning disabilities improved while [student] received services under two successive IEPs, the repetition of the child's annual goals in those IEPs did not amount to a denial of FAPE).

⁷ *Beer v. USD 512 Shawnee Mission*, 82 IDELR 223 (D. Kan. 2023); *J.L.N. v. Grossmont Union High Sch. Dist.*, 75 IDELR 101 (S.D. Cal. 2019).

⁸ J-1- Reevaluation Report - "In terms of executive functioning skills, there were elevated scores regarding problem-solving index and emotional control index." J-1 p.36; J-1- 2023 Reevaluation Report "... teacher input form and shared that [reacted] social-emotional-

unrealistic. Given this student's "Very Low" profile, I suggest that in one year, the student will be able to do the following: 1. locate and record the price for each item; 2. read from a list of purchased items; 3. then use a calculator to add up the total cost of the purchase; 4. then round the calculated sum up to the nearest dollar; and 5. then count out the money. This sequence of planning, reading, operating a device, calculating the sum, and paying out the funds far exceeds the Student's known skill set.⁹ The math goal statement ignores the reevaluation and Center data that the Student is working on adding single digits up to four (4) with manipulates.¹⁰

Given the lack of present levels, the absence of a curriculum, and the shoddy goal statement, the staff's opinion about the math goal is not persuasive.

The Pre-Vocational Assembly Goal is Inappropriate

Moving on to the Students' transition needs, absent a comprehensive transition assessment, the IEP team suggested tasks like assembling, sorting, filing, or shredding items. Absent present levels of performance, tasks like these are not challenging, individualized, or reasonably calculated to meet the Student's postsecondary lifestyle. The evidence instead suggests that the "assembly" goal is linked to what the class is doing and not what the Student needs. Neither the testimony nor the exhibits cogently explain

behavioral functioning performance was below grade level regarding executive functioning skills;" J-1 p.26; and, J-8 p.26).

⁹ The Math goal statement reads as follows: "When presented with a list of items to buy, [redacted] will locate and record the price for each item, use a calculator to find the total cost of the items, round the total cost up to the nearest dollar, and count the correct bills to 'pay' (emphasis is original) for the items with 80% accuracy across 3 consecutive trials every other week from a baseline to be determined within 2 weeks of [redacted] returning to a school building."

¹⁰ In August 2023, the Student was practicing addition facts up to 3. Counting to 20 and writing numbers and numerals within 20. The Center report states that the Student should advance to addition to 4 and reintroduce the number line to 30. S-6 p.5. By December 2023 the Student began to work with manipulatives and continued to work on counting up and down the number line by 1s, 2s 5s and 10s. At best the Student can perform two step problems. S-6 p.7.

how or why the "assembly" goal is ambitious or otherwise appropriate for this particular [redacted] year-old's postsecondary life.

Even assuming the "assembly" goal is appropriate, the goal statement fails to include an objective measure of the expected outcome. The failure to include an objective measure makes progress monitoring impossible. This omission substantially interfered with Parents' IEP participation rights. Rather than use an objective measure, the IEP inserts the phrase "task analysis" in the IEP progress monitoring box. Task analysis is a teaching technique where teachers break down skills into smaller units. Breaking skills into smaller parts does not offer objective, results-oriented, measurable annual goal statements.

The Elements of the Transition Plan are Inadequate

The remaining elements of the proposed "Transition Plan" are equally lacking. Although the team checked the box to write transition goals, they failed to develop and insert measurable goals in segment "V" of the IEP as promised. Although labeled as goals, the employment, independent living, and postsecondary training statements fail to include objective measurements of success; therefore, they are deficient. Absent objective measures, the transition statements are vague and otherwise immeasurable.¹¹ The proposed "Transition Plan" goal statements also lack enabling specially designed instruction.

Next, the "Transition Plan Courses of Study" statements fail to describe what the Student will learn and how, when engaged in the "Courses," or how the Student achieves any result-oriented outcomes. "Courses of Study" should enable the Student to meet postsecondary goals related to the Student's

¹¹ *Minneapolis Special Sch. Dist. #001*, 62 IDELR 276 (SEA MN 2013) (The IEP failed to describe and explain for the staff responsible for implementing the IEP their specific responsibilities and duties in regard to the student's modified curriculum and required accommodations.); *North Middlesex Reg'l Sch. Dist.*, 120 LRP 3638 (SEA MA 01/29/20)(IEPs must contain precise and measurable goals to provide students with disabilities FAPE).

transition service needs; these do not. Strangely, the "Courses of Study" here includes statements like "Practical Science/Social Studies" and "Behavioral Skills," yet neither "Course" aligns with a recognized need or appears in the Student's proposed classroom schedule.

Finally, the "Services/Activities" segment of the "Transition Plan" also includes overly broad, vague statements like the Student will "improve reading," "improve math," or "complete portions of the Brigance Transition Skills Inventory." Absent an organized transition-related curriculum, neither the "Courses of Study" nor the "Services/Activities" meet *Rowley's* procedural or substantive standard that IEP services are "reasonably calculated to provide meaningful benefit."¹²

[redacted] Related Specially Designed Instruction is Missing

I next conclude that the IEP fails to offer specially designed instruction targeting the intertwined effect of the [redacted] disorders of [redacted] on learning. When asked, the District's witnesses could not cogently explain how the [redacted] disorder or the [redacted] disorder impacts the Student's cognitive testing, motor skills, or rate of learning. Lacking an understanding of how either [redacted] impairments adversely affect learning fine motor skills, the Occupational Therapist proposed a goal that the Student learn how to write their name in one year. To expect the now [redacted] year-old Student with several [redacted] diagnoses, Autism, and Intellectual Deficits

¹² 71 Fed. Reg. 46,662 (2006); *Perkiomen Valley Sch. Dist. v. R.B.*, 78 IDELR 222 (E.D. Pa. 2021)(district denied FAPE to an adult student with an intellectual disability and a speech and language impairment by offering inadequate postsecondary transition services); *Jefferson County Sch. Dist. R1*, 110 LRP 22618 (SEA CO 12/01/09)(finding that the student's postsecondary goal, which called for [student] to "explore careers that involve physical movements, such as construction, delivering, sorting, etc.," was neither measurable nor based on age-appropriate transition assessments); *Jefferson County Bd. of Educ. v. Lolita S.*, 64 IDELR 34 (11th Cir. 2014, *unpublished*)(district's transition plan didn't meet the IDEA's FAPE standard); *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11)(Question F-1).

who cannot copy the letters of their to learn how to write their name in one (1) year is unreasonable and otherwise inappropriate.

The Speech therapist overlooked the language-based regression and developmental delays caused by the [redacted] diagnoses when she proposed the two speech goals. The speech assessment was conducted virtually. The therapist observed the Student during the testing. The therapist administered the Receptive One-Word Picture Vocabulary Test-4 Edition and the Expressive One-Word Picture Vocabulary Test-4th Edition. The reevaluation report includes 2014 and 2021 data using the same two instruments. The earlier speech data is reported as raw scores, while the 2023 data is reported as "standard scores." In the reevaluation report, the therapist stated that the "standard scores" were "inaccurate," yet she relied on those single scores as a starting point when she proposed the goal statement.

Contrary to IDEA assessment requirements, the therapist made two fundamental procedural errors. First, she failed to use a variety of assessments – one measure of expressive and one measure of receptive language. Second, she failed to administer the testing according to the standardization instructions provided by the producer of the assessments and then relied on the "inaccurate" data to offer services. 34 CFR § 300.304(b) (i)-(ii); 34 CFR § 304(c)(1)(v). Therefore, these twin procedural violations substantially interfered with the offer of the Student's FAPE.

Assuming the evaluation is sufficient, the first speech goal purports to target both "expressive" and "receptive" speech in one combined speech goal. The second goal focuses on teaching the Student to respond to a greeting and say goodbye during a social interaction. The 2023 reevaluation report includes 2021 data from the Student's private therapist. The private therapist in 2021 worked on similar goal statements. The 2021 private speech report notes that the Student was working on 11 receptive and

expressive speech and language goals. Bearing in mind that the Student's speech needs are severe, the therapist did not explain the wide disparity in the number of goals between 2021 and 2023 services. Even more curious, the private 2021 speech data reports that the student either mastered the proposed 2023 goal statements or was close to mastery.¹³ Yet, neither the therapist nor the exhibits explain why the 2023 mastery levels are below the 2021 accomplishments. Accordingly, I now find that each therapist failed to offer reasonably calculated ambitious goals and challenging objectives.

The IEP Overlooks Necessary Related Services

The IEP omits necessary school health services and transportation to and from school. Although the IEP team was aware of the Student's [redacted] disorder, the team failed to discuss how the school nurse would support the Student during the school day or during community-based instructional time. Relying on the Special Education Supervisor's testimony, the District counters this omission, stating that the nurse would provide a regular education "Health Plan" once the Student is enrolled. The Supervisor's testimony, on this point, appeared to be an afterthought. Even if accepted, the offer of a FAPE is judged when made; therefore, the testimony falls far outside the four (4) corners of the FAPE offer. The Supervisor failed to cogently explain how contrary to the reevaluation report that found [redacted] is a "need," he unilaterally decided that school nurse services would not be included or discussed as a necessary related service.

The IEP also omitted consideration of transportation to and from school. While the absence of transportation services may have been a harmless procedural oversight that would have been easily corrected, the absence of a [redacted] management action plan during transportation is not.

¹³ S-10 pp.17-24.

Accordingly, for all of the above reasons, I now find that the IEP, "Transition Plan," and related services, when offered, were not reasonably calculated to provide significant learning or meaningful benefit.

Tuition Reimbursement is Appropriate Relief

Although the Center is not licensed and the instructors are not certified teachers, the staff have supported the Student's learning for the past three years. The Center staff have first-hand knowledge that explains and describes the Student's present levels and learning.¹⁴ The Center offers one-on-one instruction. The Center also accommodates what appears to be the Student's [redacted] need for a late start time. The Center's instructors use the Center's in-house curriculum in the morning sessions and the third-party curriculum in the afternoon. The staff collects data and regularly reports the results to the parents. Once the data is reviewed, the Center staff meet with the Parents and revise the Student's plan.

As the Center staff interacts daily with the student, I will give the testimony from the Center director, and the Center records more weight than the District staff's opinion testimony. The Center's running record progress monitoring data and notes document slight changes in the Student's present levels and slow incremental changes in ability. The Center's sliding scale rubric and teaching materials paint a real-time picture of what the Student is learning and how progress is monitored. The Center's records include notes that quantify the Students' overall learning, progress, and expectations for the future. The Center's reading data sheets, unlike the IEP statements, are structured so that a person unfamiliar with the Student's instruction could implement the instruction, with some training, assess the progress, and determine whether the Student's progress was satisfactory. The "Comments"

¹⁴ *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways, staff who are more familiar with the student and the curriculum, can be better qualified than third parties to gauge needs, individual circumstances, and progress).

are personalized and aligned to the Student's present levels and circumstances. Statements like the Student is now "Proficient" at putting together "3 part picture stories in sequence independently" connote meaningful benefit. Finally, the "Comments" provide real-time data not otherwise found in the District's standard scores, raw scores, or percentile ranking provided in the May IEP present levels.¹⁵ Under these unique circumstances, understanding the Student's overall potential, I now find that while progress is "maddeningly" slow and mixed, the progress is meaningful.¹⁶

However, the District makes a good point that the "Center" based academic program has not kept pace with the Student's postsecondary transition needs. The Parents respond that despite their best efforts, they could not move the Student up on the community based postsecondary providers' "waitlist." While troubling, absent a transition assessment and clarity on the Student's transition needs, neither side can cogently explain what unique needs were known and unmet at the time of the unilateral placement. Therefore, absent notice of what need was going unmet, I now find the Parent's omission of the transition services, at the Center or elsewhere, is a harmless non-prejudicial error. The Center placement and program are proper.

The Equities Favor the Parent

¹⁵ In weighing the evidence of meaningful progress, I give importance to the fact that the Student's intellectual potential during the relevant period was "Very Low"; therefore, based on the Student's cognitive limitations, small increments of progress are more meaningful for this Student than they would be for children with higher cognitive potential. The record as a whole supports the inference that the slower growth or progress was not proven to be due to inappropriate programming, but could have been due to numerous disability-related circumstances. S-5; S-6; P-1; P-5.

¹⁶ *E.G. v. Great Valley Sch. Dist.*, 70 IDELR 3 (E.D. Pa. 2017)(although the reading progress a fifth-grader achieved under [the] IEP was "maddeningly slow," the court nonetheless concluded that the IEP was specifically tailored to the student's severe learning disability).

I disagree with the District's contention that the equities favor the District. Consistent with the Settlement Agreement, the Student attended the Center, was involved in private speech, and the Parents transported the Student to and from the Center. The Parents have attended all IEP meetings, consented to all requests for testing, and participated in all reevaluation meetings. At the District's invitation, the Parents visited the proposed classroom, and the Parties engaged in mediation. The Parents have shared the results of the private testing and health concerns. The Parents gave the District the requisite notice before making the placement. When viewed as a whole, the record reflects that the Parents, at all times relevant, acted in good faith. After balancing the Parents' actions against the District's reevaluation, IEP, and "Transition Plan" violations, I now find that the equities favor the Parent.

Summary

Prospectively, the District is directed to complete the following.

First, the District is Ordered to complete a transition assessment in all areas of unique needs, interests, strengths, and preferences. Second, the District is Ordered to use a variety of assessments and repeat the speech and language assessments. Third, the District is Ordered to use a variety of assessments and repeat the occupational therapy assessment. Fourth, the District is Ordered to identify, consult with, and include a person who has knowledge about how the Student's [redacted] disorders affect learning as a member of the evaluation and IEP team. Assuming the individual is not a District employee, the District is directed to reimburse the individual for all services provided. Fifth, once the assessments and reevaluation are completed, the Parties and a group of knowledgeable people, including a person with knowledge of [disorder], should meet to review the data, create an IEP, and discuss how to support the Student's FAPE and postsecondary goals. Sixth, the Parents are directed to cooperate with all assessments, including sharing all third-party records with the District when necessary.

Seventh, the District is directed to reimburse the Parents for all out-of-pocket costs, including transportation to and from the Center. Accordingly, I now find in favor of the Parents for all of the above reasons.

FINAL ORDER

AND NOW, this April 30, 2024, the District is now **ORDERED** as follows:

1. The Student's IDEA and Section 504 denial of FAPE claims are **GRANTED**.
2. The Parents' unilateral placement is appropriate, and the equities favor the Parents.
3. The Parents' request for tuition reimbursement is **GRANTED**.
4. The Parents' request for reimbursement for travel costs to and from the unilateral placement is also **GRANTED**. Within 20 days of this Order, the Parents must submit an invoice documenting the mileage to and from the placement. Using the District's standard mileage rate within 20 days of receipt of the invoice, the District shall reimburse the Parents for all transportation costs for the 2023-2024 school year.
5. The District is directed to complete a transition assessment.
6. The District is directed to reevaluate the Student's speech and language and occupational therapy needs.
7. The District is directed to identify, consult with, and include a person who has knowledge about how the Student's [redacted] disorders affect learning as a member of the evaluation and IEP team.
8. The Parents are directed to cooperate with all assessments, including sharing all third-party records with the District when necessary.
9. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed with prejudice.

Date: April 30, 2024

s/ Charles W. Jelley, Esq. LL.M.
Hearing Officer
ODR FILE #28925-23-24