

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

## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

**ODR File Number:**

26148-21-22

**CLOSED HEARING**

**Child's Name:**

R.C.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

07/15/2022

## **Introduction and Background**

This special education due process hearing concerns the rights of a student with disabilities (the Student). The Student's parents (the Parents) initiated this hearing by filing a complaint against the Student's public school district (the District). This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

During the 2015-16 school year, [redacted] the Parents came to believe that the District was failing to provide a free appropriate public education (FAPE) to the Student and unilaterally placed the Student in a private, parochial school (Private School 1). Then, with the help of attorneys, the Parents and the District entered into a settlement agreement. Under the terms of the settlement agreement, the District paid for the Student's tuition at Private School 1 and related expenses. The parties extended the settlement agreement several times. As a result, the Student remained at Private School 1 at the District's expense through the 2020-21 school year, [redacted].

Under the terms of the settlement, the parties agreed that the District would evaluate the Student and offer an Individualized Education Plan (IEP) to the Student for the 2021-22 school year. The District evaluated the Student and offered an IEP. The Parents disagreed with both the evaluation and the IEP.

Private School 1 goes up to [redacted] grade. A different private, parochial school starts at [redacted] grade and goes through [redacted] grade (Private School 2). After providing notice to the District, the Parents enrolled the Student in Private School 2 and asked the District for tuition reimbursement. The District refused. The Parents then requested this hearing, seeking tuition reimbursement for the Student's placement in Private School 2. The Parents demand is ongoing, starting with the Student's enrollment in Private School 2 and extending until the District offers an appropriate IEP.

Under the standard that I must apply in this case, I find below that the Parents are not entitled to tuition reimbursement.

### **Issue**

The issue presented in this case is: Must the District reimburse the Parents for the Student's tuition at Private School 2 from the start of the 2021-22 school year until the District offers an appropriate IEP to the Student.

### **Findings of Fact**

As is typical in special education cases, the material facts of this case are not in dispute. I commend both parties' attorneys for acknowledging this, and for proceeding as efficiently as possible.

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

1. Before the Student was kindergarten age, the Student was found eligible for Early Intervention speech and language services. NT 26. In preparation for the Student's transfer to school-age programming, the District evaluated the Student and found that the Student was eligible for special education due to a speech articulation delay (the 2012 RR).<sup>1</sup>
2. The Student was enrolled in and attended school in the District from the 2012-13 school year [redacted] through roughly the first half of the 2015-16 school year [redacted] P-5, P-6.
3. By the middle of the 2015-16 school year, the Parents concluded that the District was not meeting the Student's needs. The Parents' impression was formed by their understanding of the Student's in-school behaviors. P-5, P-13; NT 36-37.
4. The Parents removed the Student from the District and placed the Student in Private School 1 roughly at the start of the second half of the 2015-16 school year [redacted] This started a negotiation process during which the Parents obtained legal counsel. *Passim*.
5. The parties resolved their dispute through a settlement agreement. Under the terms of the agreement, the District funded the Student's tuition at Private School 1 along with a full-time aide, speech therapy, and behavioral therapy. *See, e.g.* P-6, NT 26, 36-39, 237.
6. The settlement agreement was extended so that the District funded the Student's tuition at Private School 1 through the end of the 2020-21 school year. Under the terms of the agreement, the District would evaluate the Student and offer an IEP for the 2021-22 school year. *Passim – see, e.g.* NT 26, 237.

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<sup>1</sup> The Parents contend that the District's exclusive focus on the Student's speech needs left a host of other needs unaddressed and, as a result, the Student did not receive a FAPE while attending the District. The appropriateness of the District's 2012 evaluation or the programming that the Student received in the District [redacted] are not before me.

7. On March 2, 2021, the District sought the Parents' consent to evaluate the Student. The District used a standard Permission to Reevaluate Consent form (PTRE) to do this. P-1.
8. On March 10, 2021, the Parents provided consent for the evaluation using the PTRE form. That form likely crossed in the mail with the District's re-issuance of the PTRE on March 11, 2021. P-1, P-2.
9. On March 17, 2021, the District sent another PTRE. At this point, the District had reviewed the Student's educational history and was seeking consent for testing to "explore characteristics of Autism Spectrum Disorder based on a previous educational classification of Autism." P-3. With no immediate response from the Parents, the District re-issued this PTRE on March 25, 2021. P-3. Thereafter, the Parents provided consent for the Autism Spectrum Disorder (ASD) evaluations.<sup>2</sup>
10. On April 7, 2021, the District sent a third PTRE. At this point, the District concluded that there was a need to evaluate the Student [redacted]. The Parents provided consent on April 14, 2021. P-4.
11. All PTREs included a statement from the District that testing conditions may not conform to the test publishers' standardized criteria because of COVID-19 safety protocols in place at the time. See P-1, P-2, P-3, P-4.
12. On April 10, 2021, the Parents completed a Developmental History Form and a Parental Report Form used by the District to collect background information and a Parental Report Form. The Parents completed an additional input form on April 14, 2021, as part of the [redacted] assessment. P-5, P-6.
13. On April 27, 2021, the District concluded its evaluation and issued a Reevaluation Report (the 2021 RR). Through the 2021 RR, the District concluded that the Student continued to be a child with a disability who needs special education. The District found that the Student's primary qualifying disability was Autism and that the Student's

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<sup>2</sup> The Parent's signature on the March 17, 2021, PTRE is dated March 18, 2021. It is not clear when the District received the signed document, but there is no dispute that the Parent provided consent.

secondary qualifying disabilities are Other Health Impairment (OHI) and a Speech or Language Impairment (S/LI). [redacted]. See P-6.

14. The 2021 RR included:
- a. Summaries of information provided by the Parents through the various input forms. P-6 at 1-3.
  - b. A summary of all prior evaluations conducted by the District. P-6 at 3-5.
  - c. Summaries of the Student's grades, standardized academic test scores, and attendance at Private School 1 [redacted] P-6 at 5-7.
  - d. Input and recommendations from one of the Student's teachers at Private School 1 (the District solicited this input both as part of the special education evaluation [redacted]). The teacher noted behavioral concerns and academic strengths and needs. P-6 at 7-8. The teacher opined that "[Student] seems to need someone to work with [Student] one on one to keep [Student] on track and hold [Student] accountable for what [Student] needs to complete. [Student] can act a bit immature at times and may need to be redirected."
  - e. A statement about how COVID-19 safety protocols were used during testing. P-6 at 9.
  - f. A short summary of the evaluator's clinical interview with the Student and the behaviors that the evaluator observed during testing. P-6 at 9.
  - g. The results and analysis of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), which is widely accepted as a standardized, normative assessment of cognitive ability. P-6 at 10-11.<sup>3</sup>
  - h. The results and analysis of the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4), which is widely accepted as a standardized, normative assessment of academic skills. P-6 at 11-13.<sup>4</sup> The WISC-V and WIAT-4 can be compared to each other

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<sup>3</sup> The results of the WISC-V are discussed *infra*.

<sup>4</sup> The results of the WIAT-4 are discussed *infra*.

to determine if a student's academic abilities are in line with expectations set by the student's cognitive abilities. P-6 at 11-13

- i. The results and analysis of a reading assessment that included the Woodcock Reading Mastery Test, Third Edition (WRMT-III), which is widely accepted as a standardized, normative assessment of reading skills. The reading evaluator concluded that the Student was able to read and interact with grade-level texts. P-6 at 13-14.
- j. The results and analysis of a Speech/Language evaluation that included formal and informal assessments. The Speech-Language Pathologist who conducted this evaluation concluded that the Student continued to require Speech Therapy for articulation issues, but that expressive and receptive language were strengths for the Student. P-6 at 14-19.
- k. [redacted] P-6 at 19-20, 30.<sup>5</sup>
- l. The results and analysis of a Behavioral/Emotional Assessment, which included a non-standardized administration of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), the Behavior Assessment System for Children, Third Edition (BASC-3), the Behavior Rating Inventory of Executive Functioning, Second Edition (BRIEF-2), and the Autism Spectrum Rating Scales (ASRS). P-6 at 20-27. These assessments are discussed below.
- m. The results and analysis of a Functional Behavioral Assessment (FBA), which included two observations of the Student at Private School 1. The FBA concluded that the Student showed some problems with off-task behaviors and not engaging with peers at time when doing so would be appropriate. The evaluator hypothesized that the Student engaged in these behaviors both to avoid difficult or non-preferred tasks and as a method of automatic reinforcement. P-6 at 27-30,

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<sup>5</sup> [redacted].

15. Regarding the WISC-V, the Student's Full Scale IQ was found to be 130, which is in the "Extremely High" range. The various sub-test scores that make up the Full Scale IQ were all in the High Average to Extremely High ranges, except for the Student's Processing Speed Index. That score was exactly average (100; 50<sup>th</sup> percentile) relative to the normative sample but, for this Student, is a comparative weakness. P-6 at 10-11.
16. Regarding the WIAT-4, the Student's Total Achievement Composite was found to be 109, which is in the "Average" range. The Total Achievement Composite Score is a function of several sub-tests. The Student's overall Reading score was found to be in the Average range. The Student's overall Math score was found to be in the Very High range. The Student's overall Writing score was found to be in the High Average range. P-6 at 12-13.
17. Regarding the ADOS-2, the assessment is designed to gain information about the presence of behaviors typically associated with Autism Spectrum Disorder. The test is highly regarded, and the evaluator has a doctorate in the field. The evaluator's compliance with COVID-19 safety protocols required deviation from the standardized ADOS-2 protocol. The evaluator explained the deviations, and the impact of those deviations on how the test was used, as follows (P-6 at 20):

Due to the COVID-19 pandemic, several health and safety precautions were taken for the test session. Both [Student] and the examiner wore masks covering both the mouth and nose and efforts to remain socially distant were made. In addition to that, the materials used during test administration were cleaned before being used, and a reduced number of materials were used, based on their ability to be easily disinfected. As a result, observations of [Student's] social communication skills were impacted. The health and safety measures taken do not align to the standardized practices of this assessment and would have an impact on [Student's] obtained scores. Due to that, the assessment was not scored. Rather, the anecdotal observations made during the ADOS-2 administration will be used in conjunction with the other assessment measures used for this reevaluation to determine the presence of behaviors

typically associated with the educational classification of Autism.

18. The evaluator did not score the non-standardized ADOS-2, but did present conclusions based on observations of the Student during the administration. The evaluator observed many behaviors typically associated with Autism, including difficulty with reciprocal language, flexible thinking, imaginative play, understanding emotional responses, forming and maintaining social relationships, behavioral rigidity, and repetitive behaviors. P-6 at 22.
19. Regarding the ASRS, as with the BASC-3 and BRIEF-2, the Parent and Private School 1 teacher rated the Student in domains associated with Autism. Across all sub-ratings, the Parent's ratings placed the Student in the Average range except for Unusual Behaviors, Behavioral Rigidity, and Sensory Sensitivity, all of which were in the Slightly Elevated range. The teacher's scores were variable, ranging from Average to Very Elevated across sub-ratings. When compiled to a Total Score, the Parent rated the Student in the Average range while the teacher rated the Student in the Slightly Elevated range. P-6 at 25-27.
20. Regarding the BASC-3, the assessment is a standardized rating system that calls for Parents and teachers to rate the Student on a Likert scale across a broad range of behaviors. For the 2021 RR, the Student's mother and the Private School 1 teacher rated the Student. The Student's mother's ratings placed the Student in the Average range across all domains. In contrast, the teacher reported "Clinically Significant concerns about Atypicality ... [and] Withdrawal, as well as At-Risk concerns about Social Skills ... , Leadership ... and Functional Communication... ." P-6 at 22. The evaluator hypothesized several reasons that the Student's behaviors could be different between home and school, but concluded that the BASC-3 revealed some in-school behaviors that require "immediate intervention" and others that require "ongoing monitoring." P-6 at 22-23.<sup>6</sup>
21. Regarding the BRIEF-2, this assessment calls for Parents and teachers to rate the Student's executive functioning skills. In this case, the

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<sup>6</sup> The 2021 RR does not include an F score for either the Parent or the teacher. F scores can trigger warnings in the BASC-3 to interpret overly negative results with caution. Elevated F scores are often seen in cases where ratings from different people are not reconcilable. Nothing in the record of this case suggests that the teacher's ratings triggered F score warnings.

Parent and teacher ratings on the BRIEF-2 were more in line with each other, although the teacher's ratings were more significant for executive functioning problems than the Parent's ratings. Compiling the various sub-tests, the Parent's scores placed the Student in the Average range while the teacher's scores placed the Student in the High Average range. P-6 at 24-25.

22. The 2021 RR concluded that, when taken together, the Behavioral/Emotional Assessment and FBA painted a picture of a student who meets criteria for the IDEA's educational definition of Autism. More specifically, the evaluator concluded that – at least while in school – the Student exhibits difficulties with “atypicality, withdrawal, social skills, leadership, executive functioning, [and] functional commendation,” and that the unscored ADOS-2 results were consistent with these findings. P-6 at 30.
23. The 2021 RR provided information about the Student's strengths and needs and made recommendations for the IEP team to consider. P-6 at 31-35.
24. On May 25, 2021, the parties met at an IEP team meeting. The District brought a draft IEP to the meeting, and the team discussed the draft. S-6, P-8.
25. The draft IEP included:
  - a. A statement of the Student's present education levels as derived from the 2021 RR, records from Private School 1, and the Student's responses to a post-secondary transition survey that the Parents returned to the District shortly before the IEP team meeting. P-8 at 8-15.
  - b. Two post-secondary transition goals tied to the Student's desire to attend a four-year university after graduation. P-8 at 15-19.
  - c. Accommodations for statewide academic testing (Keystone exams). P-8 at 20-21.
  - d. An annual goal to increase the Student's on-task behavior (discussed below). P-8 at 25.
  - e. An annual goal to improve the Student's social skills (discussed below). P-8 at 26.

- f. An annual goal to improve the Student's speech articulation, targeting the /r/ sound. The goal called for the Student to correctly articulate the /r/ sound in all positions with 90% accuracy over three data collection periods. The Student's baseline levels ranged from 100% to 80%, depending on what the Student was doing when making the /r/ sound. P-8 at 27.
  - g. [redacted]. P-8 at 28.
  - h. Several program modifications and Specially Designed Instruction (SDI), discussed below. P-8 at 29-32.
  - i. 60 sessions of individual Speech/Language Therapy per year, 15 minutes per session. P-8 at 32.
  - j. A Positive Behavior Support Plan (PBSP). P-8 at 41-50.
26. Regarding the goal to improve on-task behavior, the goal called for teachers to observe and report on the Student's engagement during independent and small group work. Using data from the FBA, the District determined that the Student was on-task 17.5% of the time, and used that number as a baseline. The goal called for the Student to improve to 75% on task during four out of five observations with three consecutive data collection points. Each data collection point is a 10-minute observation.<sup>7</sup>
27. Regarding the social skills goal, the goal called for teachers to observe specific behaviors during the Student's social interactions. The goal is tied to the Student's receipt of direct instruction in social interaction and communication. Mastery is demonstrated if the Student demonstrates the targeted behaviors in nine out of ten social interactions during planned observations.
28. Regarding the modifications and SDI, the IEP included several items. Some of those items are the type of generic accommodations seen in nearly every IEP.<sup>8</sup> Many of the SDIs and modifications are directly

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<sup>7</sup> As written, this means that a teacher would observe the Student for 10 minutes and determine the percentage of that time that the Student was on task. The Student masters the goal by being on-task 75% of the time during four observations, but three of those observations must be consecutive.

<sup>8</sup> Examples include "preferential seating" and a "visual timer" without any indication of what those items mean in this context or why they are necessary.

targeted to the Student, and flow from the 2021 RR and IEP goals.<sup>9</sup> The most contentions of these is direct instruction in social skills for 90 minutes, every other day, provided in a special education classroom.

29. As a result of the time spent in special education classrooms, the IEP offered an itinerant level of Autistic Support and an itinerant level of Speech and Language Support. P-8 at 34-35. In this context, "itinerant" means less than 20% of the school day. Under the IEP, the Student would spend 90% of instructional time in regular education classes ([redacted]). P-8 at 36-37.
30. On June 14, 2021, the District finalized the draft IEP without changes and issued it with a Notice of Recommended Educational Placement (NOREP). In this context, the NOREP is both a document representing the District's offer of the IEP and a form by which the Parents can accept or reject the offer. P-9.
31. On June 21, 2021, the Parents used the NOREP to reject the IEP. The Parents wrote "we do not believe this meets [Student's] needs" but did not specify why that was their belief. P-9 at 10.
32. On August 12, 2021, the Parents sent an email to the District restating their belief that the District had not offered appropriate special education for the Student, informing the District of their decision to send the Student to Private School 2, and seeking tuition reimbursement. In special education law parlance, this is known as a Ten Day Notice. P-10.
33. The District replied to the Ten Day Notice the same day, stating its belief that the proposed IEP was appropriate, but also expressing a willingness to reconvene the IEP team. P-11.
34. On August 24, 2021, the District invited the Parents to an IEP team meeting to discuss potential revisions to the IEP and transition planning.
35. On August 27, 2021 the IEP team reconvened. During the meeting, the Parents expressed their believe that the District's high school is simply too large for the Student, that a smaller school setting is better for the Student, that the Student attended Private School 1 with an

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<sup>9</sup> Examples include what sort of "attention breaks" the Student requires, how teachers should call for the Student's participation, and what sort of redirection techniques are most likely to be both effective and not embarrassing for the Student.

aide, and that a conflict with another student in the District that occurred in the 2015-16 school year [redacted] would cause problems for the Student if the two were to encounter each other in school. The District explained that the services offered through the IEP – direct instruction in social skills in particular – were responsive to these concerns. P-12 at 16.

36. Although the record is ambiguous about the exact date, I find that sometime prior to the August 27, 2021 IEP team meeting, the Parents retained a private Certified School Psychologist (the Private CSP). The Parents made no mention of this during the IEP team meeting. *Passim*.
37. On August 28, 2021, the Private CSP began to evaluate the Student. S-5.
38. The Student enrolled in Private School 2 and began attending Private School 2 at the start of the 2021-22 school year [redacted]). *Passim*.
39. On October 27, 2021, the Private CSP concluded her evaluation of the Student. The Private CSP then drafted a Psychoeducational Evaluation Report. S-5. The report is undated and testimony on this point is not conclusive, but I find that the Private CSP completed the report within a month of concluding the evaluation (the Private Evaluation). This places the Parents' receipt of the Private Evaluation in late November 2021 at the latest.
40. The Private Evaluation included a battery of standardized, normative, tests of intellectual ability and academic achievement. Those were not the same tests administered by the District as part of the 2021 RR, but are highly correlated to those tests (the Woodcock-Johnson IV Tests of Cognitive Abilities, Oral Language, and Achievement). S-5.
41. The Private Evaluation also included behavioral, emotional, and Autism ratings, including re-administrations of the BASC and BRIEF, this time collecting ratings from the Student's mother and Private School 2 teachers. This also included a re-administration of the ADOS-2. During this re-administration, the only deviation from the standardized protocol was that both the Student and the Private Evaluator wore masks. S-5.
42. The Private Evaluation also included interviews with the Parents and the Student, and two observations of the Student in Private School 2. S-5.

43. Based on the evaluation data, the Private Evaluator concluded that the Student did not meet diagnostic criteria for Autism. Other than that, the testing completed as part of the Private Evaluation produced results that are strikingly similar to the results of the testing conducted for the 2021 RR. S-5, P-6.
44. The Private Evaluation included several educational recommendations. Those reconditions included an opinion that the Student benefits from a small school. S-5 at 40. Other recommendations were similar in substance to the reconditions in the 2021 RR and the services provided in the IEP. See S-5 at 39-44.
45. A striking similarity between the recommendations in the Private Evaluation and the services offered through the IEP is the Private Evaluator's statement that it is, "strongly recommended that [Student] be part of a social skills group that meets weekly. This can occur at school or outside of school. This will give [Student] the chance to be part of a group that addresses feelings and challenges that [Student] and [Student's] peers experience." S-5 at 40.
46. The biggest difference between the recommendations in the Private Evaluation and the services offered in the IEP is a recommendation that the Student receive direct instruction in executive functioning skills (organization and work completion) two to three times per week. S-5 at 40. The IEP provides no direct instruction in these skills. P-6.
47. On December 23, 2021, the Parents transmitted a copy of the Private Evaluation to the District. P-13 at 1. The Parents did not request any action from the District when transmitting the Private Evaluation, saying only "Attached is a recent evaluation completed on [Student] by [Private CSP] for your records. Please let us know if you have any question." *Id.*
48. The record reveals no direct communication between the parties after December 23, 2021, through February 28, 2022. However, on February 17, 2022, the Parents' attorney contacted the District's attorney to discuss the matter, providing a draft complaint that the Parents intended to file. P-14.
49. On February 28, 2021, the Parents filed their due process complaint, initiating these proceedings.
50. The same day, the District sent an email to the Parents, expressing their willingness to convene an IEP team meeting, but saying their

understanding that the Parents had transmitted the Private Evaluation only for the District's records. P-15.

51. On March 15, 2022, the parties met at an IEP team meeting. During that meeting, the parties discussed the Private Evaluation, and the District revised the IEP to reflect the Discussion. The District did not, however, make substantive changes to the IEP. S-6.<sup>10</sup>
52. At Private School 2, the Student has an "Academic Accommodation and Support Plan." This two-page document is not like an IEP in many important ways but does list the services and accommodations that Private School 2 provides for the Student. These include a focus on consistent scheduling and advanced warning of changes, learning support "2 times per cycle," and "peer modeling of flexibility." The peer modeling is not social skills instruction or a structured, planned intervention. Rather it is an expression of hope that the Student will cue to sifts in peers' behavior during group work. P-17 at 2-3.
53. By the end of the first semester of the 2021-22 school year, the Student earned grades ranging from C+ to A in academic classes and "Excellent" marks in non-graded classes. The Student's cumulative GPA was 3.625, placing the Student in Private School 2's "Second Honors." P-17 at 1.

### **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.*

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<sup>10</sup> The March 15, 2022 revisions to the IEP include three references to "SDI added 3/15/22." In substance, these are explanations about how existing SDI would be implemented in accordance with the Private Evaluation as opposed to new or different SDI. Additionally, the IEP team referred to the Private Evaluation as an IEE (Independent Educational Evaluation). Calling the Private Evaluation an IEE is technically correct. I use the term Private Evaluation so that there will be no confusion about the issue I am resolving. In special education due process decisions, IEEs typically come into play with a demand that an LEA fund the IEE. That issue is not presented.

*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 in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

### **Applicable Legal Principles**

#### ***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 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 *Endrew 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 *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew 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. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

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.

### ***Evaluation Criteria***

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

Evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the schools are obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

## **Tuition Reimbursement**

A three-part test is used to determine whether parents are entitled to tuition reimbursement. 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 taken in sequence, and the analysis ends if any step is not satisfied.

## **Discussion**

The Parents believe that the Student benefits from placement in a small school. They take umbrage at the District's classification of the Student as a child with Autism and object to the Student spending any amount of time in an Autistic Support classroom. They argue that the 2021 RR is fundamentally flawed and, since the IEP flows from the 2021 RR, it cannot be appropriate. Alternatively, they argue that even if the 2021 RR is appropriate, the IEP still does not meet the Student's needs.<sup>11</sup>

I agree with the Parent that the *Burlington-Carter* test must start here. If the IEP is the fruit of the poisonous tree (or inappropriate for some other reason), the Parents will meet their burden in the first prong of the test.

## **The 2021 RR**

Procedurally, the ADOS-2 administration that was part of the 2021 RR did not comply with 20 U.S.C. § 1414(b)(3)(A)(v) because it was not administered in accordance with instructions provided by the ADOS-2 producer. This is the only procedural violation in the 2021 RR supported by the record. I must determine if that procedural violation gives rise to a substantive violation that renders the 2021 RR inappropriate.

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<sup>11</sup> The Parents also argue that a negative peer interaction occurring 5 years and three school buildings ago renders placement in the District's schools inappropriate. I reject that argument. There is little in the record to make findings about the nature of that interaction, and nothing in the record to support the Parents' assertion of how that interaction impacts upon the Student today.

In substance, I agree with the Parents that evidence supporting an Autism classification was weak when the 2021 RR was completed. The ADOS-2 was administered in a non-standardized way and was not scored. On the ASRS, which was scored, the Parent's rating was not consistent with Autism, and the teacher's rating reach only the "slightly elevated" range. Those were the only two assessments that specifically target autism-related behaviors. There was, however, other information from assessments that examine similar behaviors – even if those assessments are not Autism assessments *per se*.

While evidence supporting an Autism classification was weak, that weak evidence was also the best information that the District could gather at the time. The evaluator acknowledged that the COVID-19 safety protocols diminished the value of some tests and used that caution while applying her professional judgement. Under the circumstances, it was not unreasonable for the evaluator to conclude that the Student should be classified as a child with Autism at the time of the 2021 RR.

I find that the procedural violation of not administering the ADOS-2 in strict compliance with the publisher's instructions did not result in a substantive violation for the same reason. Given the choice between a procedural violation and omitting the "gold standard" assessment for Autism, the evaluator chose to gather as much information as possible, provide appropriate warnings, and use professional judgment when assessing test results.<sup>12</sup>

There is a strong argument that the Private Evaluation cannot be considered when assessing the appropriateness of the 2021 RR. Using the Private Evaluation in this way invites the sort of "Monday morning quarterbacking" that is not permitted. In this case, however, both parties rely upon the Private Evaluation to make arguments. Under the unique facts of this case, comparing the two evaluations is useful.

At least six months after the 2021 RR, the Private Evaluator's concluded that the Student does not meet diagnostic criteria for Autism. That conclusion was also based in large part on an ADOS-2 administration, and the Private Evaluator's ADOS-2 administration was more closely aligned with the

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<sup>12</sup> The Pennsylvania Department of Education and the United States Department of Education (now under two administrations) have been consistent that COVID-19 school closures and safety measures do not abrogate any child's right to a FAPE. Under that guidance, COVID-19 safety measures cannot be used as a defense against an inappropriate evaluation. Had the District's evaluator relied only upon non-standardized testing, the result may be different. Instead, the evaluator relied upon multiple measures and assessments, most of which were not altered in any way.

standardized testing protocol. I find no problems with the Private Evaluator's methods or conclusions, but those conclusions do not mean that the that the District's evaluation was wrong at the time it was conducted. For both medical and educational purposes, "Autism" describes a wide spectrum of disability. See, e.g. 34 C.F.R. § 300.8(c)(1). Any child's presentation may change over time. A high-functioning child who satisfies diagnostic criteria for Autism at one point in time may not satisfy the same criteria at a different point in time. In fact, the IDEA contemplates that a child's needs and circumstances will change over time. The 2021 RR and the Private Evaluation do not invalidate each other.

More importantly, even if the District misidentified the Student as a child with Autism, that error would have been procedural – not substantive – in nature. It is very well established that the IDEA's disability categories are used only for purposes of determining a child's eligibility for special education. Once a child is found to be a "child with a disability" as defined by the IDEA, the LEA is obligated to address all the child's special education needs.<sup>13</sup> For example, if a child may have a specific learning disability in math and no other disability for IDEA purposes. If that child also has a diminished ability to maintain attention in such a way that requires SDI, the LEA must address the child's attention needs even though the child's disability is not specifically related to attention.

In this case, the District's evaluator and the Private Evaluator reached different conclusions about whether the Student is properly classified as a child with Autism for educational purposes. However, the 2021 RR and the Private Evaluation conclude that the Student requires intervention and direct instruction to address social skills needs and provide nearly identical recommendations in this regard. The District proposed to provide that intervention in a classroom that happens to be an Autistic Support classroom. A generous reading of the record as a whole supports a finding that the Parents are concerned about the population of other children who will receive services with the Student in that classroom. There is no preponderant evidence in the record to validate that concern.<sup>14</sup> A less generous reading of the record as a whole supports a finding that the

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<sup>13</sup> It is notable that, in their closing brief, the Parents describe this as a "a statement for which we would typically agree." *Parents' Closing* at 18.

<sup>14</sup> The Private Evaluator testified that it was not appropriate to place the Student in an Autistic Support classroom because the Student does not have Autism. NT at 195-196. As noted above, I find no credibility issues with this statement. However, I cannot give weight to that statement, given the lack of evidence concerning the Private Evaluator's knowledge of the District's programs, the population of students who would be with the Student in that classroom, what instruction would be delivered in that classroom, and how that instruction would be delivered.

Parents take a pejorative view (perhaps subconsciously) of anything with an Autism label.

I find no substantive or procedural violations in the 2021 RR. I go on to determine if the IEP was appropriate at the time it was offered.

### ***The IEP***

Having found that the IEP is not the fruit of the poisonous tree, I go on to determine if the IEP was inappropriate for any other reason. The Parents raise three challenges to the IEP: 1) instruction in an Autistic Support classroom regardless of the 2021 RR's appropriateness, 2) the Student's need for a small school and small class size, and 3) the Student's needs for academic support. See *Parents' Closing Brief*. I will address these in sequence.

### ***Autistic Support***

The Parents argue that, under Pennsylvania regulations, it is not appropriate to educate the Student in an Autistic Support classroom for any portion of the school day. State regulations at 22 Pa. Code § 14.131(a)(1)(i) define Autistic Support as:

Services for students with the disability of autism who require services to address needs primarily in the areas of communication, social skills or behaviors consistent with those of autism spectrum disorders. The IEP for these students must address needs as identified by the team which may include, as appropriate, the verbal and nonverbal communication needs of the child; social interaction skills and proficiencies; the child's response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions.

Nothing in the definition of Autistic Support precludes non-Autistic students from receiving similar services. Regardless of the name of the service, both the 2021 RR and the Private Evaluation found that the Student requires intervention and direct instruction in the areas of social skills, social interaction skills and proficiencies, changes in the environment, daily routine and schedules, and the need for positive behavior supports. The record preponderantly supports *both* evaluator's conclusions, and, in this regard, their conclusions are nearly identical. The difference between the evaluations is what these services are called and, as applied in this case, that difference is even more trivial. Both the 2021 RR, the Private Evaluation, and the IEP

call these services "social skills instruction." This reveals that the true nature of the dispute is about the name of the classroom in which necessary services are delivered. The IDEA does not elevate this type of semantic debate into a cause of action.

### ***School Size***

The record preponderantly supports a finding that the Student has attended a small school with a small class size and has thrived in that environment with supports and accommodations. The Student's success in a small school does not automatically prove that the Student cannot be successful in a large school. There is some evidence (mostly a few lines in Private Evaluation) that a small school is better for the Student than a large school, but better is not the standard. The Parents argument that the Student cannot be successful in the District's large high school is not supported by preponderant evidence.

I have no doubt that transferring to the District's high school will be a very significant change for the Student, and the Parents and District must handle that change with care. The Parents argue that the IEP failed to appropriately accommodate the Student's transition from Private School 1 to the District's high school. The Parents are correct that the IEP does nothing to assist the Student's transition to the District's high school. Under the record of this case, that omission does not render the IEP inappropriate. It is the Parents' burden to prove what transition services the Student required to move from Private School 1 to the District's high school. No evidence was presented to establish what would have been necessary.

### ***Academic Supports***

The Private Evaluation recommended Learning Support and direct instruction in executive functioning skills. The Student receives something akin to Learning Support at Private School 2. The Student is obviously successful with that support in place. However, I must judge the IEP at the time it was written. At that time, the Student was not receiving Learning Support or direct instruction in executive functioning skills at Private School 1. Despite this, the District administered a BRIEF, which targets executive functioning needs. The Private School 1 teacher's ratings were more elevated than the Parent's ratings on the BRIEF, but the teacher's ratings placed the Student only in the "high average" range.

The 2021 RR found that the Student is extraordinarily intelligent, and that the Student's average academic performance (as measured by standardized tests) would have been higher but for the Student's behaviors. Even were I

to discount the evaluator's conclusion about what the Student's scores might have been, there is no evidence that the Student required direct instruction in executive functioning skills to derive a meaningful benefit from the academic part of education. Both evaluations concluded that the Student required intervention for the non-academic part of education and, above, I found that the District offered services that were responsive to that need.

While the 2021 RR does not evidence a need for direct instruction in executive functioning skills, it does show that the Student had some executive functioning needs. The IEP included many modifications and SDI to address those needs by providing organizational tools for the Student, testing accommodations, and modifications to assignments and classwork. I find that these modifications and SDI were appropriate at the time they were offered.<sup>15</sup>

### **Summary and Legal Conclusions**

There may be many good reasons for the Parents to prefer Private School 2 to the District's high school. I make no conclusions as to whether Private School 2 is better or worse for the Student than the District's high school. My task is not to compare those programs and decide which program is superior. Rather, my task is to determine whether the District's IEP was appropriate at the time it was offered. That is the first step in the *Burlington-Carter* analysis.

The Parents are correct that I must determine if the District's 2021 RR was appropriate as part of that analysis. The ADOS-2 administration that was part of the 2021 RR did not conform to the publisher's standardized protocol. This deviation was necessary to administer the assessment safely. But under USDOE and PDE guidance, that necessity does not excuse the procedural error. The 2021 RR was otherwise procedurally appropriate.

At the same time, the way that the evaluator used the ADOS-2 in conjunction with other information ensured that the procedural error did not result in substantive harm. I find that the 2021 RR was substantively appropriate. This includes the determination that the Student was a child with Autism for educational purposes at that time.

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<sup>15</sup> I make no determination about the appropriateness of IEP revisions made after the Parents sent the Private Evaluation to the District. I am concerned that those revisions are more about what the District can do than any offer of what the District will do. I am also concerned that the revisions treat the social skills instruction provided in the Autistic Support classroom as something of a panacea. But those issues are not before me – I agree with the Parents that the IEP offered prior to the Student starting Private School 2 controls for the *Burlington-Carter* test.

The District used the 2021 RR to draft the IEP. I find that the IEP was substantively and procedurally appropriate; it was reasonably calculated to provide a FAPE under the *Endrew* standard at the time it was offered. Consequently, the first portion of the *Burlington-Carter* test must be resolved in favor of the District. For the same reason, my analysis ends with a conclusion that the Parents are not entitled to tuition reimbursement.

### **ORDER**

Now, July 15, 2022, it is hereby **ORDERED** that the Parents' demand for tuition reimbursement is **DENIED** and **DISMISSED**.

Nothing herein is intended to prohibit the Parents from privately educating the Student at their own expense. Nothing herein is intended to limit the Parents or Student's right to equitable participation in the District's programs. Nothing herein is intended to limit the Parent or Student's right to seek additional evaluations from the District as permitted by the IDEA.

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

/s/ Brian Jason Ford  
HEARING OFFICER