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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number
22920-1920

Child's Name
M.S.

Date of Birth
[redacted]

Parent(s)/Guardian(s)
[redacted]

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Hearing Officer
Brian Jason Ford, JD, CHO

Date of Decision
07/15/2020

Introduction

This special education due process hearing concerns the educational rights of a student (the Student).[1] The hearing was requested by the Student's parents (the Parents) against the Student's school district (the District). There is no dispute the Student is a child with disabilities or that the District is the Student's local educational agency (LEA) as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

As described in greater detail below, the Student received early intervention (IE) services from two Intermediate Units (IUs) before enrolling in the District for kindergarten. District evaluated the Student in order to develop an Individualized Education Plan (IEP) for the Student. The Parents had the Student evaluated by a private school and attend a trial placement at the private school (the Private School). Ultimately, the District offered special education and related services for the Student's kindergarten year through an IEP. The Parents rejected the IEP and requested tuition reimbursement for the Private School. The District declined and the Parents requested this due process hearing ensued.

For reasons set forth below, I find in favor of the District.

[1] Except for the cover page, I have omitted information that could identify the Student to the extent possible.

Issues Presented

While the parties parse the issues differently, the issue(s) presented for adjudication in this matter are:[2]

1. Are the Parents entitled to tuition reimbursement for the Student's placement at the Private School during the 2019-20 school year?
2. In the alternative, if the Parents are not entitled to tuition reimbursement, is the Student entitled to compensatory education to remedy a denial of FAPE during the 2019-20 school year?
3. Are the Parents owed reimbursement for a private motor speech evaluation?

Findings of Fact

I carefully considered all evidence and testimony. I make findings of fact, however, only as necessary to resolve the issue(s) presented. Consequently, all evidence and all aspects of each witnesses' testimony is not explicitly referenced below. I find as follows:

[2] The Parents demand a finding that the Student was denied a FAPE during the 2019-20 school year. That is an element of their tuition reimbursement demand. The Parents also demand reimbursement for expert testimony under Section 504 and reimbursement for attorney's fees and costs. I do not have authority to order either of those forms of relief and, consequently, I view those demands as a reservation of the Parents' rights to seek such relief in an appropriate forum. The Parents also demand "any further relief, including compensatory education which the Hearing Officer deems just and proper." *Complaint* at 8. In context, I accept this as a demand for compensatory education as an alternative to tuition reimbursement should I find that the District denied the Student a FAPE but that the Parents are not entitled to tuition reimbursement.

Early Intervention

1. The family lived in a different school district that is located within a different IU (the Prior IU).
2. The Parents became concerned with the Student did not meet developmental milestones. The Parents requested an assessment from the Prior IU. The Prior IU determined that the Student was eligible for EI services under the Multiple Disabilities eligibility criteria. The Student was one year and 10 months old at the time. P-6.
3. The Prior IU provided specialized instruction, speech and language support, occupational therapy, and physical therapy. P-6.
4. Around the same time, the Parents obtained private speech and language services for the Student. In sum, during the 2015-16 school year, the Student received one hour of speech and language services per week from the Prior IU and two hours of speech and language services per week from the private provider. P-8.
5. During the 2016-17 school year, the Student attended a general (not specialized) private parochial preschool and received services from the Prior IU. In additional, the Student also attended a private language enrichment facility two days per week for three hours per day. P-8.
6. In May 2018 the family moved into the District.
7. During the 2018-19 school year, the Student attended a different private, parochial, general preschool and received services from the IU in which the District is located (the IU). The IU continued to provide the services provided by the Prior IU, pending its own evaluation (see below).

8. During the 2018-19 school year, the Student also began to receive private speech therapy using a branded, proprietary motor speech methodology known as the PROMPT method.[3] At first, the Student received one hour-long session per week. That increased to three hour-long sessions per week. NT at 611-620.

9. The use of a motor speech methodology was consistent with recommendations from the Student's developmental pediatrician. The Parents perceived benefits to the Student from the motor speech sessions. *See, e.g.* NT 621-622.

10. On November 7, 2018, the IU sought the Parents' consent to evaluate the Student. The Parents provided consent on November 14, 2018. The IU evaluated the Student and completed an Evaluation Report on January 11, 2019 (the 2019 IU ER). S-2.

11. Through the 2019 IU ER, the IU found that the Student had delays in cognitive development, communication, social and emotional development, and physical development. S-2.

12. Following the 2019 IU ER, the IU recommended placement for the Student in a developmental delay classroom. The Parents declined the IU's offer and continued services at the private, parochial preschool. S-5 at 4.

13. In December 2018 or January 2019 (either while the 2019 IU ER was pending or just after it was complete), the private therapists providing PROMPT recommended that the Parents investigate a private school for children with autism and speech/language disorders (the Private School). *See* NT 625-6.

[3] PROMPT is an acronym for Prompts for Restructuring Oral Muscular Phonetic Targets.

14. Acting on that recommendation, the Parents reached out to the Private School in February 2019. *See, e.g.* NT 632. The Parents did not inform the IU or the District that they were investigating the Private School but rather indicated that they intended to place the Student in the District for kindergarten in the 2019-20 school year. *See, e.g.* P-8.

15. In preparation for the Student's transition to the District's kindergarten program, the District proposed its own reevaluation. The record is somewhat ambiguous as to when the District proposed the reevaluation, but there is no dispute that the Parents consented to the reevaluation and the District completed the reevaluation report on April 26, 2019 (the 2019 District RR). S-5.

16. On March 25, 2019, with the District's reevaluation pending, the Parents took the Student to the Private School for a screening that is a required part of the Private School's admission process. The Private School charged a fee for the screening and the Parents paid that fee. P-10; NT 677, 696.

17. From April 29 through May 3, 2019, (after the 2019 District RR was complete but before that document was sent to the Parents) the Student attended a trial placement at the Private School. The Private School charged a fee for the trial placement and the Parents paid that fee. P-10; NT 677, 696.

18. Shortly after the trial placement, the Private School issued a "Placement Evaluation Report" (Placement Report) to the Parents. The Placement Report is co-signed by a special education teacher, an occupational therapist, a speech-language pathologist, and the Private School's executive director – all of whom work for or are associated with the Private School. P-10.

19. The Private School concluded that the Student would benefit from placement in the Private School. P-10.

20. Within the Placement Report, the Private School described its own approach to speech and language development as, "the Association Method, which is phonics based, multi-sensory, structured, and incremental." P-10 at 23.

21. The Private School also recommended five sessions of speech therapy per week with an emphasis on "motor learning to address suspected Childhood Apraxia of Speech" (CAS). P-10 at 23. In context, this refers to the Private School's finding that the Student would benefit from "intense, Integral Stimulation therapy, which is rooted in Motor Learning Theory, as well as PROMPT tactile cues." P-10 at 13.

22. The Private School also recommended three to four hours per week of occupational therapy for sensory integration. P-10.

23. The Private School also recommended a medical study to assess the risk of aspiration when the Student is eating. P-10.

24. Sometime before May 23, 2019, the Parents retained an attorney to assist them in special education matters. NT at 490.

25. The District scheduled an IEP team meeting for May 23, 2019. The Parents asked to participate by phone, and the District accommodated that request. The day before the meeting, the District sent the 2019 District RR and a draft IEP to the Parents via email. NT at 639; P-16.[4]

[4] The parties did not identify where in the 756 pages of emails that were made part of the record of this case the 2019 District RR was transmitted. In my review of the compound document containing emails and attachments (P-16), I was able to locate the transmission of a draft IEP from the District to the family on May 22, 2019 – but not the 2019 District RR. The draft IEP included a summary of the 2019 District RR. The absence of documentation

26. Given the short amount of time that passed between the 2019 IU ER and the 2019 District RR, the District incorporated the results of the 2019 IU ER into its own evaluation. The District also completed observations and testing of its own. *See* S-5.

27. The District adopted the IU's administration of the Communication Matrix, which found significant communications delays. S-2, S-5.

28. The District adopted the IU's finding that Student's receptive and expressive language were impaired, and that the Student's disability presentation made it impossible to administer standardized assessments of speech articulation and oral motor planning. S-2, S-5. Ultimately, this inability to test is part of what prompted the District to include a motor speech goal in the Student's IEP (see below).

29. The District adopted the IU's finding that the Student's adaptive skills were significantly below age-based expectations. S-2, S-5.

30. The District adopted the IU's finding that, despite significant speech/language and adaptive skills impairments, the Student enjoyed interacting with other children. For example, in the 2019 IU ER, the Student's regular pre-school stated that the Student was friendly and affectionate, initiated interactions with peers and adults, smiled in response to others, enjoyed interactive games, and would attempt to join others in a group. S-2.

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about the 2019 District RR's transmission is frustrating because both parties stress the importance of the chronology of the District's IEP development relative to the Private School admission process. The best evidence of transmission should have been something more than the Parent's recollection. The limited record on this point yields a conclusion that the District held its RR for about a month before sending it to the Parents.

31. As part of the 2019 District RR, the Parents completed a child profile questionnaire. The Parents indicated that the Student's needs included language development, peer communication, fine motor skills, self-care skills, gross-motor skills, and motor planning skills. S-4 at 1.

32. As part of the 2019 District RR, a district-employed certified school psychologist with a doctorate in school psychology with a concentration in neuropsychology observed the Student on two occasions in different locations. S-5.

33. As part of the 2019 District RR, the District had adults (Parents and teachers) complete several standardized rating scales in which the raters do or do not endorse the Student's observable behaviors. These included the Behavioral Assessment System for Children – Third Edition (BASC- 3), the Autism Spectrum Rating Scale (ASRS) and the Adaptive Behavior Assessment System – Third Edition (ABAS-3). S-5.

34. The ABAS-3 indicated that the Student's adaptive behaviors were a consistent concern at home and in school. S-5.

35. There was a discrepancy between Parent and teacher ratings on the ASRS. Consequently, the District could not find that the Student is a child with Autism for educational purposes based on that assessment alone. This prompted the District to recommend further assessment once school started. The inconclusiveness of this single assessment did not alter the Student's eligibility for special education or the District's program offer. S-5, NT at 559, 561.

36. The Student's IEP team convened by phone on May 23, 2019 and discussed the 2019 District RR and the draft IEP. *See, e.g.* P-16 at 125.

37. On May 24, 2019, the Parents shared the Private School's Placement Report and notes from the private PROMPT therapy provider with the District. P-16 at 125. The Parents had not shared that the Student was receiving private PROMPT therapy or had a trial placement at the Private School with the District at any time prior. *Passim; see, e.g.* NT at 691.

38. The Student's IEP team reconvened on May 30, 2019, in person. At this point, the District had the PROMPT and Private School documents for a few days. The team continued to review the Student's IEP. *See* S-6. The Parents shared their positive impressions of PROMPT therapy and stated that they had retained an expert to confirm the suspected CAS diagnosis indicated in the Private School's Placement Report. NT 652-55.

39. After the May 30, 2019 meeting, the District finalized the IEP and attempted to send a Notice of Recommended Educational Placement (NOREP) to the Parents via email. P-16 at 213-14. The NOREP is a form document that Pennsylvania LEAs use to obtain parental consent for special education placements. NOREPs also serve as prior written notice, describing the placement offered in the IEP and other placements that were considered and rejected.

40. On June 3, 2019, the Parents reported that they did not receive the NOREP attachment. The District replied promptly with an email that included the NOREP as an attachment. P-16 at 2013.

41. Through the NOREP, the District proposed placing the Student in a Life Skills program with specially designed instruction as indicated in the IEP. Under the IEP, the Student would receive (P-16 at 98, 216; S-6 at 90):

a. Individual speech and language therapy, five sessions per six-day cycle for 30 minutes per session;

b. Group speech and language therapy, one session per six-day cycle for 30 minutes;

c. Individual consultation speech and language with an IU speech and language pathologist (a service by which IU personnel observe and provide guidance and advice to District personnel), one session per six-day cycle for 30 minutes;

d. Additional speech and language consultation (a service by the District to coordinate District personnel working with the Student) for 60 minutes per week (S-6 at 92);

e. Individual physical therapy, two sessions per week for 30 minutes;

f. Individual occupational therapy, one session per week for 30 minutes;

g. Consultative occupational therapy (a service by the District to coordinate District personnel working with the Student), 1 session per month for 30 minutes per session;

h. Additional consultative occupational therapy for all IEP members, up to 30 minutes per month;

i. Small group adaptive physical education, one session per six-day cycle for 30 minutes per session; and

j. Specialized, curb-to-curb transportation with bus aide and safety seat.

42. Under the IEP, the Student would have an assigned personal care assistant (PCA). S-6 at 89-90. The PCA would be allotted time to consult with the special education teacher, regular education teacher and speech therapist, to ensure appropriate carryover of skill practice and generalization. NT at 134-35.

43. Under the IEP, the Student would spend 45 minutes per day in a general education kindergarten classroom but would receive the bulk of programming in a Life Skills classroom. P-16.

44. The District also offered to start an assistive technology evaluation framework known as the SETT process within the first 60-90 days of school. P-16 at 216.

45. The District also offered to complete an assessment of the Student's language skills using an assessment associated with Applied Behavioral Analysis (ABA) known as the VB-MAPP within the first 60 to 90 days of school. P-16 at 216.

46. The District also offered to re-administer the communication matrix first completed as part of the 2019 IU ER within the first 60 to 90 days of school. P-16 at 216.

47. The District offered placement in a school building that was not the Student's neighborhood school because that is where the Life Skills classroom and program were located. *Passim; see, e.g.* P-16 at 217.

48. The District considered three levels of special education support that could be implemented in the Student's neighborhood school and rejected each of those as insufficient to meet the Student's needs. P-16 at 217.

49. The District considered placement in a multiple disabilities support classroom located in the same building as the District's life skills program. The District rejected that placement as too restrictive. P-16 at 217.

50. The NOREP also indicates that the District considered and rejected the very placement proposed in the NOREP. *See* P-16 at 217. This is an obvious error, as is referring to the Student using another student's name. *Id*.[5]

51. The Parents observed the District's Life Skills classroom and had concerns. The Parents and District personnel discussed those concerns via email and a telephone call. N.T. at 446-47, 49, P-16 at 120-21.

52. Five to six children are assigned to the Life Skills classroom offered by the District. Those children all qualify for special education under several IDEA eligibility categories. Some, but not all of those children have intellectual disabilities. The classroom is staffed by one teacher and three program assistants (not including the Student's assigned PCA). NT at 48, 60, 145-46.

53. The Life Skills program is supported by a speech and language pathologist (in addition to the speech and language therapy provided through the Student's IEP) and the IU. NT at 48.

[5] While this is an obvious and unintended error that does not, by itself, amount to a substantive denial of FAPE, the District is cautioned against such sloppiness. This is precisely the type of mistake that builds mistrust and, in different circumstances, may be evidence of predetermination.

54. While the Life Skills classroom is not limited to autistic support, the classroom receives assistance and consultation from the Pennsylvania Training and Technical Assistance Network (PaTTAN) to provide ABA-based instruction and progress monitoring using the VB-MAPP. *See* NT at 48.

55. On June 5, 2019, the Parents brought the Student to the first of three sessions with a private evaluator to obtain the private motor speech evaluation. P-3. This was the private evaluation to confirm the suspected CAS diagnosis referenced by the Parents during the IEP team meeting.

56. On June 12, 2019, the Parents sent what is commonly referred to as a "10 day letter" to the District. Therein, the Parents informed the District that 1) they believed that the District's offered special education program was insufficient to meet the Student's needs, 2) they were placing the Student at the Private School, and 3) they were seeking reimbursement from the District. P-13.

57. The District confirmed receipt of the Parents' 10 day letter the same day (June 12, 2019). P-16 at 237.

58. The District did not respond in substance to the Parents' 10 day letter at any time before June 22, 2019. *Passim*.

59. On June 25 and July 5, 2019, the Parents brought the Student to the second and third of three sessions for the private motor speech evaluation. P-3.

60. On August 1, 2019, the private motor speech evaluator issued a report confirming the CAS diagnosis and making several recommendations (the 2019 Private Evaluation). P-3.

61. In the 2019 Private Evaluation, the evaluator found that the Student would benefit from intensive speech and language therapy, including daily direct speech instruction with speech supports integrated throughout the school day. P-3.

62. In the 2019 Private Evaluation, the evaluator also found that the Student would benefit from Dynamic Temporal Tactile Cueing (DTTC) therapy. The evaluator described DTTC as "an integral stimulation approach [that] has the strongest evidence, base, with replicated evidence of efficacy" for treating children with CAS. P-3.[6]

63. In addition to language therapy, the evaluator recommended intensive individual motor speech therapy working from 15 minutes per session up to 30 minutes per session 4-5 times per week. P-3.

64. On August 5, 2019, the Parents enrolled the Student in the Private School. Under the terms of the enrollment contract, the Parents could terminate the Student's enrollment without financial penalty with 30 days' notice to the Private school. NT at 721-23.[7]

65. On August 12, 2019, the Parents sent the 2019 Private Evaluation to the District. P-16 at 243.

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[6] The research basis and efficacy of DTTC is also supported by the testimony of multiple witnesses and an article appearing at S-16.

[7] Similar to a prior footnote, the absence of an enrollment contract in the record of this case is striking. While the testimony concerning the nature (if not the timing) of the contract is uncontested, surely there is better evidence of the contract's terms than the recollections of lay witnesses.

66. On August 20, 2019, the District sent an email to the Parent, inviting them to an IEP team meeting scheduled for August 22, 2019. The Parents asked to participate by phone, and the District obliged. *See* P-16 at 239, 258.

67. During the August 22, 2019 IEP team meeting, the District agreed start the Student with 15-minute speech and language therapy sessions working up to 30 minutes, as recommended in the 2019 Private Evaluation. NT at 466-67, 478-79; S-6.

68. During the August 22, 2019 IEP team meeting, the District also proposed increasing the amount of time that the Student would be included with outside of the Life Skills classroom. S-6.

69. The District sent a finalized IEP with a NOREP by mail to the Parents shortly after the August 22, 2019 IEP team meeting. NT at 107, 115, 126-28, 469-70, 479-80.

70. The Parents shared the finalized IEP with the private evaluator. The Parents asked the private evaluator to draft an addendum to the 2019 Private Evaluation to clarify the recommendation for speech/language therapy. The private evaluator drafted an addendum and the Parents sent the addendum to the District on September 7, 2019.

71. After the August 22, 2019 IEP team meeting, the Parents also questioned the District about its personnel's experience with DTTC and treating children with CAS. The responses from District personnel indicated that they were familiar with DTTC, were able to implement DTTC, but had limited experience doing so. *See* P-16 at 262.

72. The addendum restated the recommendation in the 2019 Private evaluation: "In addition to language therapy; intensive individual motor speech therapy (working from 15 minutes per session up to 30-minute sessions 4-5 times per week) is recommended to focus upon developing [Student's] motor speech skills." P-14 at 1.[8]

73. In sum, in the addendum, the private evaluator recommended 255 to 285 minutes of speech and language therapy per week and 60 minutes per month of consultation. P-14. This is consistent with the amount of time that the District offered. S-6.

74. On September 11, 2019, the Parents sent a second 10 day letter. The second 10 day letter is similar to the first in that it rejects the District's offer, notifies the District that the Parents were placing the Student at the Private School, and demands tuition reimbursement.

75. On October 28, 2019, the Parents filed their complaint initiating these proceedings. *Parents' Complaint*.

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

[8] In the original, the quoted text is in bold and italics.

would justify a contrary conclusion."). S*ee also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find no issue with any witnesses' credibility as all witnesses testified honestly and to the best of his or her ability. To the very small extent any witnesses' testimony conflicts with another's, those witness either recall events differently or have different opinions. To the extent that my findings of fact depend on accepting one witnesses testimony over another's, I have accorded more weight to the witness based on the witnesses' testimony and the other evidence presented.

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 particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

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

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

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

Before *Endrew*, the Third Circuit interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit must be 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 holding in *Endrew F.* 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 minimus*" 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 minimus*" 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 is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and

through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); *see also* 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. *See* 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id*.

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id at* 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a restorative placement offer:

"First, the court should look at the steps that the school has taken to try to include the child in a regular classroom." Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1216 (3d Cir. 1993)

"A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison

between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts." The court cautioned, however, that the expectation of a child making grater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

"A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." The court explained that a child's disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child's own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that

compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D.

Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Tuition Reimbursement

Hearing Officers use a three-part test to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Evaluation Criteria

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

In substance, 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 LEAs 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).

Discussion

The Parents are Not Entitled to Tuition Reimbursement

The gravamen of this case is a methodology dispute. However, I will address that dispute only as one aspect of the Parents' contention that the District's offer fell short of its FAPE obligation.

The Parents argue that the Student requires a very high level of speech and language support embedded through the Student's school day, including DTTC and the PROMPT method, in order to be successful. Although not detailed explicitly above, the Parents unequivocally believe that PROMPT and the level of speech and language support embedded in the Private School have enabled the Student to be successful. I have no reason to doubt that. In fact, for purposes of analysis, I will assume that the Student has made meaningful progress as a result of the therapies provided at the Private School.

The Student's progress at the Private School, however, is not relevant to the first prong of the *Burlington-Carter* analysis. At the first step of the analysis, the Parents need not prove that their preferred program is appropriate. Rather, it is the Parents burden to prove that the District's offered program was not reasonably calculated to provide a FAPE to the Student. To do this, throughout the hearing the Parents took aim at the District's methodology for speech and language therapy.

The Parents are correct that District personnel were, at a minimum, dismissive of the PROMPT method. Some of the District's employees made inaccurate assumptions and derisive remarks about the PROMPT method.[9] For the same reasons stated immediately above, those factors are not relevant to the first prong of the *Burlington-Carter* test. The Parents need not prove that PROMPT works for the Student. Rather, the Parents must prove by preponderant evidence that the District's offer fell short of the FAPE standard. I find that the Parents have not met this burden.

Under current case law, LEAs have broad discretion to make methodology determinations. LEAs are "not required to provide a specific program or employ a specific methodology requested by the parent." *Parker C. v. West Chester Area School District*, 2017 WL 2888573. *See also T.M. v. Quakertown*, 251 F. Supp. 3d 792 (2017). Once an IEP team determines that a student requires a particular kind of service in order to receive a FAPE (i.e. Speech/Language Therapy), the methodology used to deliver that service is up to the LEA in most instances.

[9] Some District personnel assumed that the PROMPT method created a choking risk and that it involves the therapist placing fingers inside the Student's mouth. Credible testimony indicates those assumptions are false.

An LEA's discretion to choose a methodology is broad, but not beyond reproach. If a particular methodology has proven ineffective for a student after faithful implementation, blindly continuing that methodology for its own sake is very likely a denial of FAPE. The same is true when evaluations indicate that a particular methodology is contraindicated for a Student. Even so, to prevail in a methodology dispute, parents must prove by a preponderance of evidence that the LEA's offered methodology is contrary to the student's right to a FAPE. Establishing that the parents' preferred methodology is effective – or superior – does not satisfy the standard. Proving that a particular methodology works for a student does not prove that a different mythology will not work for the same student.[10]

There is no preponderant evidence in the record that the District's methodologies would not be effective, let alone are contraindicated, for the Student. Consequently, there is no preponderant evidence in the record that the District's methodologies are inconsistent with its FAPE obligations to the Student.[11]

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[10] I appreciate that this sets an exceedingly high bar for parents in methodology disputes. Throughout the hearing, I attempted to clarify the nature of the dispute in an effort to confirm the gravamen of the case. I also note that the broad discretion courts have given to LEAs to make methodology determinations is consistent with decisions holding that judges and hearing officers cannot substitute their own preferences for the considered opinions of professional educators.

[11] The Parents also challenge goals in the offered IEPs. The Parents argument about the goals also comes down to a methodology dispute. For example, the Parents present no argument about what the District was trying to accomplish as measured by the goals, but rather argue that the method selected by the District to enable the Student to achieve the goals was inappropriate. That argument is not consistent with the record of this case. The Parents' argument that the goals were "vague and general" is also not supported by the record of this case.

Beyond choosing the methodology, it is obviously inappropriate for the District to offer an IEP that it cannot implement. Contemporaneously written comments by District personnel about their ability to implement DTTC are concerning. However, I find no preponderance of evidence in the record that the District was incapable of implementing what it offered. Even assuming that the particular District employees who wrote the IEP and testified at the hearing would not be able to implement the IEP themselves does not change this conclusion. The Student never received services from the District.[12] I cannot assume that the District would have failed to implement the IEP had the Parents accepted it.

The same cases cited above concerning methodology disputes also establish that LEAs must consider but need not adopt recommendations made by private evaluators in private evaluation reports. This is not to suggest that LEAs have carte blanche to disregard recommendations in private or independent evaluations. LEAs disregard information about students' needs at their peril. Regardless, I find that the amount of Speech/Language support offered through the IEP is consistent with the recommendations in the 2019 Private Evaluation.

In addition to the above analysis concerning the District's methodology choices and the amount of services offered, I find no preponderant evidence that the District's offer to place the Student in a Life Skills program violated the Student's right to be educated in the LRE.

[12] Receiving services from the District is not a prerequisite to a tuition reimbursement claim. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009). Reaching conclusions about what would have happened had the Student received services from the District, however, requires significant speculation given the record of this case.

Despite a very unfortunate but obvious error in the initial NOREP, undisputed evidence establishes that the District considered less restrictive placements before offering Life Skills. Nothing in the LRE requirement forces children to fail in inappropriate placements simply because an inappropriate placement is less restrictive on some absolute scale. In this case, preponderant evidence establishes that the Life Skills offer was entirely consistent with the Student's needs.[13] The Student's needs were assessed through multiple evaluations, all of which revealed that the Student has needs beyond speech and language.[14] The record of this case establishes that the Student would receive programming in response to the Student's broad needs across multiple domains, including adaptive skills and activities of daily living, through the Life Skills placement.

I appreciate the Parents' concern about what they saw during their observation of the Life Skills classroom. It is worth noting that Life Skills is not a place. It is a program for children with board-based needs that are similar to the Student's needs as established by the record of this case. The record of this case establishes that the District's determination to place the Student in life skills was not based on assumptions about the Student's intelligence. Rather, the determination was in response to the Student's board-based needs.

[13] While it is not the District's burden to prove the appropriateness of the Life Skills offer, the District did so in this case.

[14] The exceptions are, of course, those evaluations that *only* considered the Student's speech and language needs.

For all of these reasons, I find that the Parents have not proven by preponderant evidence that the District's special education offer was not reasonably calculated to provide a FAPE.[15] The *Burlington-Carter* analysis therefore ends, and the Parents are not entitled to tuition reimbursement.

The Parents are Not Entitled to Reimbursement for the 2019 Private Evaluation

As described above, disagreement with an LEA's evaluation is a necessary threshold condition to support a claim for an IEE at public expense. In this case, the Parents never lodged a disagreement with the District's evaluation prior to obtaining the 2019 Private Evaluation. More importantly, the 2019 Private Evaluation was never intended to be the type of second opinion contemplated in the regulations. The Parents did not obtain the 2019 Private Evaluation because the disagreed with the District's RR. The 2019 Private Evaluation was already in the works when the Parents first obtained the 2019 District RR on May 22, 2019.

The Private School's Placement Evaluation Report included a statement that the Private School suspected that the Student had CAS. The Parents informed the District that they were obtaining a private evaluation to confirm the CAS diagnosis during the May 2019 IEP team meetings. The Parents' desire to confirm that diagnosis through a private evaluation is completely understandable. That purpose – and the timing – indicates that the 2019

[15] The same is true for each of the District's offers. Typically, the inquiry focuses on the LEA's last offer up to ten days after the "10 day letter." In this case, the Parents had the option to withdraw from the Private School without financial risk and sent two 10 day letters months apart. Setting aside that financial risk is usually considered a prerequisite to a tuition reimbursement claim, my analysis is the same for any of the IEPs offered by the District.

Private Evaluation was not obtained to resolve a disagreement about the District's own evaluations.

While there is no preponderant evidence establishes that the 2019 District RR fell short of any of the standards stated above, I deny the Parents' demand for reimbursement for the 2019 Private Evaluation because they have failed to satisfy a threshold condition to raise such a claim.

The Student is Not Entitled to Compensatory Education

Compensatory education is an appropriate remedy when a student does not receive a FAPE. I am aware of no theory under which a student can be entitled to compensatory education accruing during a period of time during which the student was unilaterally placed by parents in a private school. Despite their alternative pleading, the Parents advance no such argument. In fact, the Parents contend that the Student received an appropriate education during the period of time in question at the Private School.

The Student is not owed compensatory education.

ORDER

Now, July 15, 2020, it is hereby **ORDERED** that the Parents' claims are **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER