

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision And Order

Closed Hearing

ODR No. 28390-23-24

Child's Name:

C.D.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

November 17, 2023

INTRODUCTION AND PROCEDURAL HISTORY

C.D. (hereafter, the Student),¹ resides with Parents and two siblings within the boundaries of the Council Rock School District (hereafter, the District). The Student attended a District elementary school from [redacted] through March 2020 when the COVID pandemic resulted in school closures. For [redacted] grade, the Parents unenrolled and opted to home-school the Student. In 2021, the Parents planned to return the Student to the District, then the day before the IEP meeting, informed the District that they had opted to enroll the Student in a Private School. The Student has attended that Private School for the [redacted] and [redacted] grades. On January 31, 2023, the Parents reached out to the District asking for an Individualized Education Plan (IEP) and information about what program the Student would receive should they decide to re-enroll the Student in the District for the [redacted] grade. Ultimately, the Parents decided to keep the Student in the Private School after rejecting the IEP offered by the District on June 26, 2023.

The Parents filed a Due Process Complaint on August 4, 2023 pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*, claiming that the District failed to offer the Student a Free Appropriate Public Education (FAPE) and seeking as relief Private School tuition reimbursement for the 2023-2024 school year.

¹ In the interest of confidentiality and privacy, the Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

The Complaint proceeded to a one-day, closed, due process hearing convened in person at the District's administrative offices on September 19, 2023.²

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the Hearing Officer. The only findings of fact cited herein are those needed by the Hearing Officer to explain the ruling. All exhibits and aspects of each witness's testimony are not explicitly referenced below.

For the reasons set forth below, the Parent's claims are denied.

ISSUES

1. Was the 2023-2024 IEP offered by the District reasonably calculated to provide the Student a FAPE?
2. If not, are the Parents entitled to Private School tuition for the 2023-2024 school year?

FINDINGS OF FACT

1. The District is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. The Student resides with Parents and two siblings within the boundaries of the District (NT, 305). The Student attended school in the District from [redacted] through March of [redacted] grade. In May 2019, the Student was found to be eligible for special education services as a student with a Specific Learning Disability (P-1, 8). The Student resisted going to

² References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number.

school, “floundered,” and became frustrated trying to do homework (NT, 349; 372-373).

3. Since January 2020, the Student has been working with a tutor who specializes in language-based learning disabilities and has had a level one Wilson Reading program certification since 1994 (NT, 248-252; 284). When the pandemic school closures began in March 2020, the Student did not do well with virtual learning. On September 4, 2020, the Parents withdrew the Student to be home-schooled by the tutor (P-1, 1). They worked together multiple hours a day, four days per week until the Student enrolled in the Private School in the Fall of 2021. The Student and the tutor still meet weekly (NT, 253-258).
4. In 2021, the Parents re-registered the Student in the District for [redacted] grade (P-1, 1). The District conducted a new evaluation and developed the July 13, 2021 Evaluation Report (P-1; S-4). Then on August 11, 2021, the Parents emailed the District to cancel the IEP meeting scheduled for the next day, and to inform the District that the Parents had enrolled the Student in a Private School (S-4, 3).
5. On January 31, 2023, the Parents emailed the District asking for an IEP to help them understand the services the Student would receive should they decide to re-enroll the Student in the District for the [redacted] grade (S-1, 9-10).
6. The Parent’s email was forwarded to the new Special Education Supervisor who started that position in February 2023. She replied to the Parents asking to schedule a telephone conversation (S-1, 8).
7. The conversation resulted in miscommunication over whether or not the Student needed to be enrolled in the District before a new IEP would be developed (NT, 170). The Mother believed that was what the Special Education Supervisor told her (NT, 316-317, 364-367). The Special

Education Supervisor recalled that she said the Student needed to be dual-enrolled (NT, 173).

8. Following the telephone conversation, the Mother emailed the School on February 13, 2023 stating that they would not be comfortable re-enrolling the Student in the District until they understood what program would be available to the Student. The Parents offered to provide information from the Private School where the Student was currently enrolled (S-1, 5).
9. The Special Education Supervisor held another telephone call with Mother to address the misunderstanding regarding re-enrollment that Mother had expressed in her February 13, 2023 email (NT, 120, 169-177; S-1, 2-5).
10. After the second telephone conversation, on February 28, 2023, the Special Education Supervisor sent the Parents the August 2021 IEP, which was the last District evaluation of the Student on file. She did this because the Mother said during the February 13, 2023 conversation that she did not have it (NT, 177, 382-383; P-3, 1). The Mother testified that this was a new document (NT, 312). The Parents did have the 2021 RR when they chose to enroll the Student in the Private School (NT, 370). This 2021 IEP indicated that the Student had met the criteria for a Special Learning Disability (P-3, 9) and provided for supplemental learning support (P-3, 20), and Extended School Year (ESY) with curb-to-curb transportation (P-3, 19).
11. Thereafter, another misunderstanding ensued. The Parents thought that the 2021 IEP was the program that would be offered if the Student was enrolled in the District for [redacted] grade and they believed that it would not offer sufficient supports (NT, 314-316).
12. There was no documented communication between the parties from February 28 until June 16, 2023 after the school year had ended (NT, 179-180).

13. On June 16, 2023, the Parents emailed and hand-delivered a letter (dated June 14, 2023) to the Special Education Supervisor stating that the program offered by the District was inappropriate and provided notice that they would be enrolling the Student in a Private School and seeking tuition reimbursement (NT, 126; P-4, 2; S-2). The Special Education Supervisor requested a meeting with the Parents to discuss the Student's needs so that the District could provide an appropriate program based on the Student's changing needs (NT, 128; P-4, 1).
14. The team met on June 22, 2023 (P-4, 1). On June 23, 2023, the Parents signed a Permission to Reevaluate the Student (P-6, 1-2) and forwarded to the District the Student's most recent Private School report card and Individual Review Plan (IRP) which is the Private School's version of an IEP (NT, 131-132, 185, 333-339; P-6, 3).
15. On June 26, 2023, after reviewing the Private School documents, the Special Education Supervisor developed and sent the Parents a draft IEP for the 2023-2024 school year (P-7, 1; P-8). The 2023-2024 IEP offered a plan to transition the Student from the Private School to the District elementary school (P-8, 9). There were goals for Reading (i.e., decoding, encoding, vocabulary, fluency, Reading Comprehension, Written Expression) and Math concepts and applications. Each goal noted that it was based on the 2021 tests conducted by the District and that new baselines and/or goals would be determined in Fall 2023 upon re-enrollment (P-8, 14-21). The IEP offers about 80 minutes per day of learning support for English Language Arts outside of the regular classroom (P-8, 25-26). Math instruction would be offered one hour per day in a co-taught, regular education classroom (regular education teacher and special education/"inclusion" teacher) (P-8, 26). Various accommodations and modifications for the Student in both the regular

education and special education classrooms were included in the IEP (P-8, 22-23).

16. On July 12, 2023, the parties met to discuss the June 26, 2023 IEP.

The Special Education Supervisor, a regular education teacher, and a special education resource room teacher represented the District at the meeting where they described what the Parents could expect at the District elementary school where the Student would attend [redacted] grade if reenrolled. The Student would have the opportunity to learn with children who are not disabled in an average class size of 24. The daily schedule would include two hours of literacy and one hour of math (NT, p 188-190). The Special Education Supervisor informed the Parents that the 2021 District data was not in line with the data from the Private School. The results of the standardized tests demonstrated that the Student was testing in the "average" range for reading, which may indicate the Student no longer has a significant discrepancy between ability and achievement qualifying for an SLD under the IDEA. So the District wanted to reevaluate the Student to get updated standardized data (NT, 193-195). The District explained that the IEP would continue to support the Student's needs as reported in 2021 until new baseline data could be collected (NT, 201).

17. Another miscommunication occurred over the Parent rating scales, which the Special Education Supervisor claimed were not received by the District (NT, 219). On August 17, 2023, the Special Education Supervisor emailed the Parent requesting "the parental forms" be submitted. The email does not clarify whether the District was requesting the parent rating scales or the parental authorization. The Mother returned the Parental Authorization for the Private School to send the District the Student's special education and school records (J-1, 3). The Mother

claimed she turned them in when she brought the Student for the final day of the evaluation (NT, 322).

18. The Special Education Supervisor claimed that the Private School has also not completed the teacher input and teacher rating scales (NT, 219). The Mother's understanding was that the Private School only received the documents three days ago when the Special Education Supervisor went to the Private School to observe (NT, 331-332).
19. As of the day of the due process hearing, the District had not completed the Reevaluation Report (RR) without the missing information (NT, 219) and had not been sent to the Parents (NT, 159-164). The RR was due on October 27, 2023.
20. On August 4, 2023, the Parents filed the due process Complaint indicating that it had enrolled the Student in the Private School.
21. The representative from the out-of-state Private School (P-9), which had been in existence since 2012, painted a full picture of the school environment and the Student's experience there. The Private School has 20 students enrolled in the third through seventh grades. The average class size is five to eight students. The Private School serves students with language-based learning differences such as dyslexia, dyscalculia, and dysgraphia. It offers multiple sensory programming, and science-based, evidence-based instruction in reading, writing, math, and language arts. The Student received Orton-Gillingham (for math) and Wilson Reading in small groups. Each for one hour, five days a week. (NT, 39-43; 75-76). Each student has their own Chromebook (NT, 48).
22. The Student has an IRP for Reading, Language Arts Literacy and Mathematics indicating the Core Standard and Instructional Objectives based on the Student's grade levels (NT, 84), and for mathematics what appears to be baseline proficiency. The Student was on the fifth-grade level for all of the mathematics objectives and most of the reading

literacy goals except for a few foundational skills (P-5, 7) which appear to be on the second and third grade levels (P-5, 4-14). Progress monitoring was done throughout the school year (NT, 84-85).

23. The Student has made significant growth at the Private School (NT, 92, 104-105). The Student was reading at the Book 4 (of 12) of Wilson when the Student started at the Private School and at the end of two years was in Book 7 (NT, 97). The Student was reading in the average range at the Student's grade level (NT, 96-98; P-5, 16).
24. During the 2022-2023 school year, the Student's [redacted] grade year, the Academic Progress Report indicates that the Student was absent for a total of 27 school days (P-5, 15; NT, 86-88). The Student received small-group instruction using the Wilson Reading System. The Academic Progress Report does not use the typical public school system (i.e., A, B, C, D, F) grades, but rather a scale rating the student's proficiency: Independent; Approaching Independence, Moderate Support, Significant Support; and Dependent. The teachers write detailed comments outlining the student's strengths, challenges, progress and assessments. For the third marking period, the Student's report showed in Reading – nine Independent, six Approaching Independence, and two Moderate Support ratings; in Language Arts – six Independent, 19 Approaching Independence, and six Moderate Support ratings; in Mathematics – 12 Independent, 12 Approaching Independence, and two Moderate Support ratings; in Science – 11 Independent and four Approaching Independence ratings; in Social Studies – seven Independent ratings; and in Special Subjects (Art, Music, Theater, technology, photography, and Gym) – 24 Independent ratings. The teachers' comments were all generally explanatory and praiseful (e.g., increased confidence, working more independently, engaging, noticeable improvement, responds well to help and direction, inquisitive,

enthusiastic, eager, funny, kind, thoughtful, helpful). Challenges were commented in the comments for only two classes: Reading and Math (e.g., didn't meet threshold of benchmark competency, feels the pressure of the timer, and struggled with multiple step word problems and pre-algebra concepts) (P-5, 15-24).

25. Since December, 2022, the Student's Mother has worked at the Private School, currently as the Director of Admissions. The family does not receive discounted tuition (NT, 81, 341, 354-357, 359).

Parents Claims

The Parents claim that the District failed to create a reasonably calculated IEP which would allow the Student to make meaningful progress in the 2023-2024 school year.

The Parents contend that despite the District's claims to the contrary, when it reached out to the District in February 2023 informing it of their intent to enroll the Student in the District for [redacted] grade at the beginning of the 2023-2024 school year, the Mother was told that they would need to enroll the Student in the District before a new IEP could be developed, then that the District would "work from" the 2021 IEP, which was forwarded to them, and that they believed the 2021 IEP would be the program offered to the Student upon reenrollment in the Fall of 2023.

The Parents argue that without updated data to create an individualized IEP and by not conducting necessary assessments to determine the Student's current levels before issuing the IEP, the proposed IEP was fatally flawed and did not offer the Student FAPE. The Parents aver that the IEP was vague and based on stale data.

The Parents maintain that the Private School is appropriate despite being located in a neighboring state. It specializes in serving students with

dyslexia and learning differences. Students learn in small groups based on their abilities with others who have similar needs. The Student's progress reports show improvement across all areas, specifically in reading fluency and comprehension. Therefore, the Private School offers an appropriate program.

The Parents claim that they have acted reasonably and in good faith by participating in an IEP team meeting and providing consent for the District's proposed reevaluation, meeting the equities prong of the Burlington-Carter Test. Therefore, the Parents ask the Hearing Officer to award tuition reimbursement for the 2023-2024 school year.

District's Claims

The District claims that the 2023-2024 IEP offered on June 26, 2023 was reasonably calculated to meet the Student's needs, based on the information it had at the time, in the least restrictive environment (LRE).

The District contends that the Special Education Supervisor's testimony should be deemed credible as an expert in school psychology and special education because she has experience as a school psychologist, as a Supervisor of Special Education, and as a parent of a child, now an adult, with dyslexia (NT, 112-115). Therefore, the District asks the Hearing Officer to find that her testimony is more credible than the Mother's testimony where there were disputes of alleged facts and certain "misunderstandings" by Mother.

The District argues that the Parents probably always intended to keep the Student enrolled at the Private School, and did not give the District a chance to program for the Student. The Parents, as is required by the regulations to the IDEA, did not indicate what their concerns were at the IEP team meeting.

The District purports that it never offered the 2021 draft IEP to Parents as the IEP for the 2023-2024 school year and that the Mother was

attempting to misconstrue what the Special Education Supervisor had conveyed in their telephone conversation.

The District argues that the Parents fraudulently backdated their ten-day tuition notice letter to June 14, 2023 in an attempt to assert the District's June 26, 2023 IEP was offered late, beyond the ten days from the notice, to make every effort to seek tuition reimbursement. The District avers that this is an example of the Parents' lack of credibility and weighs the equities in the favor of the District and denying tuition reimbursement (S-2, P-4, 3, 4).

The District contends that the Private School is not the LRE, that it does not follow any Pennsylvania state educational standards or any mandates of the IDEA, but rather, the IRP for its students is based on out-of-state regular education standards. The District also maintains that it is impossible to attribute the Student's progress to the Private School because the Student still receives one-on-one private tutoring.

The District avers that the evidence demonstrates that the IEP offered by the District was appropriate and that the equities weigh in favor of no tuition reimbursement.

Based on the above, the District asks the Hearing Officer to deny the Parents' claim for tuition reimbursement.

GENERAL LEGAL PRINCIPLES

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production (i.e., the party that bears the obligation to come forward with the evidence) and the burden of persuasion (i.e., the party that loses if the evidence is closely balanced). Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parents.

Schaffer v. Weast, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

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

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who filed the Complaint. In essence, the Parents must prove by a preponderance of the evidence that the District violated its obligation to offer the Student a FAPE and that they meet the criteria for tuition reimbursement as a remedy.

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 they need in the event of judicial review. [See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014). “[Courts] must accept the state agency's credibility

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

This case is fraught with miscommunications that took place during undocumented telephone conversations between the Special Education Supervisor and the Mother and a variety of misunderstandings that resulted in disputed facts and conflicting testimony. Misunderstandings included: (1) re-enrollment versus dual enrollment; (2) whether or not reevaluating the Student was discussed during the February 13, 2023 conversation between and Mother and the Special Education Supervisor; (3) the amount of time the Student would have special education in light of an inclusion classroom (co-taught) and the resource room; (4) whether or not the Parents received the 2021 IEP in 2021 or not until 2023; (5) whether or not parent rating scales and teacher input forms were returned as requested; and (6) whether a draft IEP for the 2023-2024 school year was given to the Parents at the June 22, 2023 meeting or emailed on June 26, 2023. The witnesses’ recollections were spotty and discrepant. The documentary evidence was helpful in resolving those issues that were documented, but much of the conflicting testimony is the result of conversations between the Mother and the Special Education Supervisor. Therefore, credibility determinations are crucial in this case.

Fortunately, the testimony of the Private School representative and the tutor were straightforward and credible.

The Private School representative spoke clearly and painted a credible picture of the school environment and how the Student was achieving within it.

The tutor spoke passionately about the Student, the progress made using the Wilson Reading Program, and how the Student has transitioned from a Student who had no confidence in 2020 to one who enjoys learning and using new strategies to meet the challenges of dyslexia.

On the other hand, neither the testimony of the Mother nor the Special Education Supervisor were straightforward and believable. Both of them contradicted themselves on various facts, demonstrated confusion, and appeared evasive.

The Special Education Supervisor spoke hesitatingly and with uncertainty, making it seem as though she was afraid of saying something wrong. Her tentativeness obscured her testimony.

Throughout her testimony the Mother voiced concerns about returning the Student to the elementary school where, from her perspective, the Student's experience resulted in anxiety and school avoidance. Her recollection of dates and details was fuzzy, raising confusion over whether her intent was, as she stated repeatedly, was to return the Student to the District (NT, 310-311, 342, 344, 349, 365, 367), or if the Mother's fears about returning the Student to the District elementary school where the Student had struggled are insurmountable.

Free Appropriate Public Education

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176

(1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." IDEA, supra. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29).

A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

Parents who believe the District has failed to offer FAPE to a student can unilaterally enroll that student in a Private School and seek tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(ii). Reimbursement is appropriate where "the public placement violated IDEA and . . . the Private School placement was proper under the Act." *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993).

Individualized Education Plan

Local Educational Agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an IEP." *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by their educational program. *Endrew*, *supra*, 137 S. Ct. at 999.

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i).

To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

From a procedural standpoint, the family plays "a significant role in the IEP process." *Schaffer*, *supra*, at 53. The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007).

Full participation in the IEP process does not mean, however, that parents have the right to control it. See, e.g., *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of the IDEA); see also *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002) (explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision).

The U.S. Department of Education explains,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 48 at 12472 (1999) (same).

Individualization of the IEP is the central consideration. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Choices of methodologies are generally left to the discretion of the LEA. *Lachman v. Illinois Board of Education*, 852 F.2d 290, 297 (7th Cir.

1988); *J.G. v. New Hope-Solebury School District*, 323 F. Supp. 3d 716, 723 (E.D. Pa. 2018).

Furthermore, an assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same)

Evaluations

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

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

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

Least Restrictive Environment

The LEA must place students with disabilities in the LRE within which the student can receive a FAPE. See 34 C.F.R. § 300.114. The IDEA mandates that eligible students are to be educated in the LRE that provides meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 *U.S.C.S.* § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

The IDEA further requires the LEA 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).

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 the LEA must determine whether a student can receive a FAPE by adding supplementary aids and services to the LRE. 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 nondisabled peers as possible. *Id.* at 1215-1218.

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 the LEA 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.

Also crucial to the LRE analysis is a recognition that its principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti*, *supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)).

Tuition Reimbursement

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

Long-standing case law and the IDEA provide the potential for private school placement with tuition if a school district has failed in its obligation to provide FAPE to a child with a disability (*Florence County District Four v. Carter*, 510 U.S. 7 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

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

LEA Obligation for Students Not Enrolled

If an eligible child is not currently enrolled in the school district of residence when the parents ask that school district develop a special education program for the student, it is incumbent upon the district to comply. *A. B. v. Abington School District*, 440 F. Supp. 3d 428, 435 (E.D. Pa. 2020); see also *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from their residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an

evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district's motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018)(applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged).

"Because the IDEA imposes no obligation on school districts to *sua sponte* evaluate and develop IEPs for students unilaterally placed in private schools, 'the first question' a court must answer in determining whether a district violated its FAPE obligations by failing to propose a special education program for such a student is whether the parent made a 'request' pursuant to the IDEA." *A.B.*, supra, 440 F. Supp. 3d at 435 (citations omitted). In other words, the trigger is that the "parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE." *I.H.*, supra, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073). Nevertheless, "it is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to *offer* a FAPE unless the parents make clear their intent to keep the student enrolled in the private school." *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 at *41 (M.D. Pa. Sep. 28, 2017)(emphasis added). That Court also explained that, "it is not the secret desire of the parent that matters, but the objective manifestation of those desires that dictate whether or not the public school must offer a FAPE." *Id.* at *41; accord, *A.B.*, supra, 440 F. Supp. 3d at 437-38.

DISCUSSION

The IEP

On January 31, 2023, the Parents properly emailed their request for an IEP because they were considering returning the Student to the neighborhood school. This email triggered the District's obligation to provide an appropriate IEP for the 2023-2024 school year. Due to a series of misunderstandings and a long hiatus between February 28, 2023 and June 16, 2023 with no communication between the Parents and the District, a RR of the Student did not get underway until the summer after the school year had ended.

On June 16, 2023, the Parents provided written notice to the District that the proposed program failed to offer FAPE, that they planned to enroll the Student to the Private School, and intended to seek tuition reimbursement. The 2021 IEP, considered by the Parents to be the proposed program, was never intended to be the IEP for the 2023-2024 school year. It was sent to the Parents only because the Mother claimed during a telephone conversation with the Special Education Supervisor that the Parents did not have a copy of that 2021 IEP.

In any case, once the District received the June 16, 2023 letter, things started moving quickly. The parties met on June 22. The Parents signed the Permission to Evaluate June 23, 2023 and provided the Private School information requested by the District. Based on the federal timelines, the evaluation would be due in 60 days, not including summer vacation, or October 27, 2023.

In light of the Parents' actions, the District believed that the Parents might still re-enroll the Student in the District for [redacted] grade so they proceeded on that basis in keeping with its obligation to offer an appropriate IEP.

As soon as the Private School information was received on June 23, the District developed the IEP based on the information it had at the time, which included the 2021 IEP, the last one it had developed for the Student, and the Student's Private School IRP and academic record. At that time the District did not have the benefit of a new RR.

The IEP Team met again on June 26 to discuss the 2023-2024 IEP. The District provided the Parents with an opportunity to participate, but at the meeting the Parents only asked about the Wilson Reading Program, which the District told the Parents was available. The Parents never demanded more information or fully engaged in the IEP meeting.

It is the school's obligation to offer a FAPE unless the parents make clear their intent to keep the student enrolled in the private school. In this case, the Parents clearly indicated that they planned to keep the Student at the Private School on June 16, 2023, then moved forward with the IEP meetings on June 22 and June 26, proceeded to send information and made the Student available for the re-evaluation process.

However, the District was not given the opportunity to complete an appropriate assessment because the Parents filed the due process Complaint on August 4, 2023 alleging that the District denied the Student access to FAPE and indicated that they had *already* enrolled the Student at the Private School for the 2023-2024 school year.

The Complaint fails to identify specific concerns. It merely alleges that while the IEP provided clarity as to the supports, it was vague as to the type of intervention that would be used during the time in supplemental learning. The Parent's written closing statement claims the IEP has holes in it and is based on stale data.

Not mentioning in the IEP what intervention would be used does not make an IEP inappropriate. The District is not obligated to incorporate every program requested by the Student's Parents; choices regarding methodology

are generally left to the discretion of the LEA. And, at the IEP meeting, the District did inform that Parents that their preferred intervention, the Wilson Reading Program, is available at the District and the Parents did not ask additional questions about it.

The Parents also allege that the 2023-2034 IEP had “holes” in it. The Student had not been enrolled in the District for more than two years. The District was unable to establish valid baselines during the summer break when school is not in session, and clearly indicated in the IEP that new baselines and/or goals would be determined in the Fall of 2023 following re-enrollment when the Student was in school. Short of inventing data, the blanks on the goal for Oral Reading Fluency are understandable because the District had no way of knowing that information until the evaluation was complete and/or the Student was in class and available to the District to assess the Student’s fluency or the reevaluation had been completed. The data in the IRP from the Private School was helpful in many respects, but the most recent reading fluency data was from the Fall of 2022 (P-5, 16).

Assessing whether a proposed IEP meets the IDEA standards must be based on information the District had at the time the IEP was developed. At the time it was developed, the most recent District information that it had was from 2021 and the Student’s Private School report card and IRP. While not perfect, the 2023-2024 IEP contains the Student’s present levels of academic achievement as reported by the Private School, a statement of goals based on the Student’s needs at the time the District last evaluated the Student, and the special education and related services that would be provided if the Student returned to the District.

The IDEA requires the LEA to place students in the least restrictive of all potentially appropriate placements. To the fullest extent appropriate, students with disabilities should be educated with students who are not disabled. It is only appropriate to do otherwise if the nature or severity of

the disability of the Student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. In this case, there was no evidence that the nature or severity of the Student's learning differences cannot be educated satisfactorily in a regular education environment with the appropriate supports, aids and services. Therefore, the District IEP properly offered an educational program with as much access to nondisabled peers as possible and with the necessary supplementary aids and services to meet the needs of the Student.

Based on the above, the Hearing Officer finds that the District met its obligation to develop an IEP reasonably calculated to provide FAPE, based on the information it had at the time, which would have provided the Student with an opportunity for significant learning and meaningful benefit under the IDEA. Therefore, the Parents failed to prove by a preponderance of evidence that the 2023-2023 IEP is inappropriate.

Tuition Reimbursement

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

Step one requires the Hearing Officer to examine the educational program offered by the District and determine whether or not the IEP appropriately conforms with the FAPE requirements that it is reasonably

calculated to enable the Student to receive meaningful educational benefit based on the information it had at the time. As discussed above, the IEP offered by the District would have provided FAPE in the LRE.

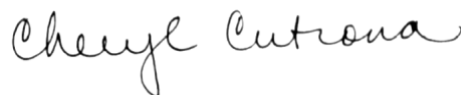
Because the Parents failed to prove the first prong of the Burlington-Carter Test, there is no need for the Hearing Officer to address the remaining two prongs of the Burlington-Carter Test, and Parents' claim for tuition reimbursement is denied.

CONCLUSION

1. The District did not violate its obligation to provide the Student with an IEP that would offer FAPE.
2. The Parent's claim for tuition reimbursement is denied.
3. No legal or equitable relief or remedy is appropriate.

ORDER

AND NOW, this 17th day of November 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are DENIED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.



Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision: November 17, 2023
ODR 28390-23-24