

By Order dated September 12, 2022, by the Honorable Mark A. Kearney, ODR File Number 24978-20-21 was remanded. This is the remanded hearing officer decision.

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

ODR No. 27061-22-23

CLOSED HEARING

Child's Name:

Q.M.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

05/20/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, Q.M. (Student),¹ is a late teenaged student whose Parents reside in the Central Bucks School District (District). A decision was previously issued by this hearing officer addressing claims related to the programs over the 2019-20 through 2021-22 school year, and tuition reimbursement for a residential placement was awarded for the 2021-22 school year.² This matter is now before this hearing officer on remand by the Federal District Court³ following the Parents' newly raised claim for the current 2022-23 school year.

Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)⁴ and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973⁵ and the Americans with Disabilities Act (ADA).⁶ Student currently remains in a residential placement out of state (Private Placement) at the option of the Parents. The issue presented here is the same as that in the prior decision relating to the 2021-22 school year, with the Parents claiming that Student requires a residential placement in order to receive an appropriate education, and the District contending such a restrictive

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

² *Q.M. v. Central Bucks School District*, No. 24978-2021 (Skidmore, January 15, 2022).

³ *Central Bucks School District v. Q.M.*, 2022 U.S. Dist. LEXIS 163652, 2022 WL 4134730 (E.D. Pa. 2022). The order of remand followed by agreement of the parties.

⁴ 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

⁵ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁶ 42 U.S.C. §§ 12101-12213.

placement is not necessary. Following review of the record and for all of the reasons set forth below, the claims of the Parents cannot be sustained and must be denied.

ISSUES

1. Whether the District's proposed program for the 2022-23 school year was appropriate for Student;
2. If the District's proposed program for the 2022-23 school year was not appropriate for Student, is the private placement appropriate and do the equities favor reimbursement for tuition and related expenses?

RELEVANT FINDINGS OF FACT FROM PRIOR DECISION⁷

1. Student is [late teenaged] and has been identified as a child with a disability based on Other Health Impairment. The Parents reside in the District but Student is in a residential placement out of state. (P-25 at 1; S-24 at 1, 55-58.)
2. Student began attending school in the District in kindergarten and has been eligible for, and provided with, special education services since that time. (P-1 – P-9; P-11 – P-13; P-15 – P-17.)

⁷ The record in the prior matter at ODR No. 24978-2021 was incorporated into this hearing on remand by agreement of the parties (N.T. 8, 30), and the numbered findings in this section are taken directly from that decision including the citation to the transcript and exhibits in the prior record.

3. Student has been diagnosed with [redacted] Syndrome, a genetic condition that impacts Student's entire life (medical condition). The medical condition is a rare disorder with a major characteristic that the individual is constantly hungry and seeking food; there are additional manifestations, as with Student, within the individual's cognitive, physical, and emotional/behavioral domains. Individuals with the syndrome generally fall somewhere along a continuum, with Student at the more severe end. (N.T. 129-32, 233-240 242-44, 247, 249, 260, 307-08, 310, 423-24, 429, 452-53, 459, 470-71, 484, 486-89.)
4. [A Functional Behavior Assessment (FBA)] was conducted [by the District] in April 2021, with a number of direct observations including on- and off-task data. This FBA identified verbal noncompliance, verbal aggression and/or physical aggression toward objects, and physical aggression toward others as behaviors of concern. (N.T. 647-48; S-23.)
5. The April 2021 FBA identified antecedents to the behavior of concern and consequences. The hypothesis developed in this FBA was the same as that in 2019: Student engaged in verbal or physical aggression or refused to comply with directives to complete a non-preferred or difficult task, in order to avoid or escape that task. (S-23.)
6. The District conducted another evaluation and issued [a Reevaluation Report (RR)] in April 2021 with the consent of the Parents. That RR provided extensive information based on Student's records. The school psychologist also conducted an observation in the classroom. (S-24 at 1-23, 63-65.)
7. Cognitive assessment could not be completed for the April 2021 RR because Student refused to participate. Assessment of academic

achievement reflected very low scores on the Reading, Written Expression, and Mathematics Composites. (S-24 at 23-27.)

8. Assessment of social/emotional/behavioral functioning through rating scales was also conducted for the April 2021 RR. The Parents' ratings on the Behavior Assessment System for Children – Third Edition reflected clinically significant concerns with hyperactivity, aggression, and withdrawal; and at-risk concerns with anxiety, depression, somatization, atypicality, and attention problems. The teacher ratings, by contrast, reflected clinically significant concerns only with withdrawal and social skills; and at-risk concerns with depression, adaptability, leadership, and functional communication. (S-24 at 27-30.)
9. Assessment of executive functioning for the April 2021 RR was overall significantly concerning for both the Parents and teacher, with the latter's scales indicating greater concerns on all scales. Behavioral and Emotional Regulation were significant for both raters. (S-24 at 31-34.)
10. Student's social skills assessed for the April 2021 RR reflected below average or lower functioning in all areas except self-awareness for both raters. (S-24 at 34-37.)
11. Student's adaptive behavior functioning was also assessed for the April 2021 RR. Both raters reported areas of concern with adaptive skills, with the Parents' scales indicating lower performance overall than that of the teacher. The teacher's ratings were in the average range for social and practical skills, whereas none of the ratings by the Parents were in the average range. (S-24 at 37-40.)

12. Speech/language assessment for the April 2021 RR reflected a continued need for therapy at school for speech intelligibility and verbal language comprehension. (S-24 at 40-43.)
13. Assessment of occupational therapy skills for the April 2021 RR revealed visual motor skill deficits as well as sensory sensitivity and avoidance. One of the instruments was not completed. Continued services were recommended. (S-24 at 43-49.)
14. The April 2021 RR concluded that Student remained eligible for special education on the basis of an Other Health Impairment. Needs identified were for improved reading comprehension, written expression, and functional mathematics skills; independent self-regulation; language comprehension; speech intelligibility; and gross motor skills. (S-24 at 55-56.)
15. Student began the program at Private Placement in May 2021. (N.T. 283-84, 292-93, 394-95.)
16. Student did experience a difficult transition to Private Placement, as is typical for students who have difficulty with transitions and entering that environment where demands are maintained. At times during that period of transition, physical restraint was required. (N.T. 269, 272, 285-86, 430-33, 437-38.)
17. Private Placement is a food secure environment across the campus that is strictly enforced. (N.T. 158-59, 397.)

FINDINGS OF FACT⁸

⁸ Citations to the findings in the numbered paragraphs in this section are to the current record unless otherwise noted.

18. A meeting of Student's IEP team convened in the spring of 2022 attended by the Parents. The District had attempted to schedule the meeting in February but did not receive a response from the Parents. (N.T. 36, 219; S-4.)
19. The District requested that the Parents execute a release of medical records. The Parents did not sign a release but agreed to having District representatives convene a separate, remote meeting with Private Placement staff. When the Parents asked the District to identify the specific records it sought, it did so. (N.T. 42-43, 65, 73-74, 220-22; S-5.)
20. The Parents provided an Individualized Education Program (IEP) from Student's Private Placement in advance of the IEP meeting, but not its FBA, behavior plan, or other identified documents. They did agree that the FBA and behavior plan could be reviewed during the later meeting with Private Placement. (N.T. 73-74, 224-26; S-5 at 5-9, 14.)
21. The Private Placement IEP, undated and labeled as a draft, is comprised of three pages. This document reflects Student's post-school goals of employment possibly as a paramedic, and better-developed life skills. (S-5 at 11-13.)
22. The Private Placement IEP reported that Student's reading level was independent at early to mid-fourth grade, with listening comprehension a relative strength; a goal for reading comprehension specified answering literal questions, identifying supporting details, and summarizing text by identifying characters/main events/problems/solutions. In the area of written expression, Student was exhibiting skills in writing paragraphs with supports but grammar and spelling were relative weaknesses; a goal for completing a writing

piece specified brainstorming activities, composing up to three paragraphs, and editing with a checklist for grammar and spelling. In mathematics, Student was reportedly at an early fourth grade level with some functional skills (telling time, using a calendar and currency), and was completing addition and subtraction problems up to two digits; a goal for solving real-life and multistep word problems specified word problems with four operations, adding and subtracting money, and adding and subtracting three digits without a calculator. (S-5 at 11-13.)

23. The Private Placement IEP also summarized Student's social/emotional skills. Student was reportedly participating in class and self-advocating, but was working on self-regulation and coping skills. A goal in this area was for independent use of coping skills. (S-5 at 13.)
24. The IEP team discussed food security to include full-time supervision and management of/restriction on Student's access to food. A classroom near a kitchen was determined to not be appropriate. For community-based activities and instruction, the team discussed the need for home-school communications prior to each event, so that the specific circumstances of the location could be addressed and, as necessary, Student would not participate when food security could not be maintained. (N.T. 227-35, 242-43.)
25. The remote meeting of District representatives and Private Placement staff convened after the IEP meeting. Private Placement staff answered District questions presented by the District about Student's then-present academic levels and curricula, employment and independent living services, and behavior support needs; its staff did not volunteer information. The FBA and behavior plan were also reviewed at that time, but no other documents were explicitly requested by the District. (N.T. 72-73, 247-52, 275, 292-93, 319-21.)

26. After both meetings, the Parents provided Student's Private Placement behavior support plan, its FBA, and an update on Student's progress on IEP goals.⁹ At that time, Student was reportedly making gains toward the social/emotional goal with decreased need for prompting and reminders. In the area of reading, Student's objectives were included with Student exhibiting growth in identifying main ideas and details and in answering comprehension questions; Student performed markedly better with supports. Student had reportedly met the written expression goal and objectives. In the area of mathematics, Student had met objectives for answering time and calendar questions and for adding and subtracting money; Student made slight gains on the objectives for solving multi-step word problems, and performed markedly better with supports. (P-4; S-5 at 19-22.)
27. The Private Placement update also included information on Student's progress in related service areas. Student reportedly had physical therapy goals (completing strength and flexibility exercises, ascending/descending stairs, and navigating curbs); occupational therapy goals (typing, handwriting, problem-solving, and self-calming); and speech/language goals (self-monitoring volume, tone, clarity, and listener comprehension). (S-5 at 22.)
28. The Private Placement FBA was conducted in November 2021 to address noncompliant and aggressive behaviors. The hypothesized function of these behaviors was to escape demands and to access tangible items; and were more likely when demands were increased, when routines were not consistent, and when preferences were not available. (P-3; S-5 at 25-34.)

⁹ Many of the goals and objectives in this update do not match those in the Draft IEP.

29. Student's Private Placement behavior support plan provided for positive reinforcement of appropriate behaviors, visual cues and warnings before transitions, use of choices throughout the day, alternating new tasks with learned tasks, frequent breaks after periods of compliance, and honoring requests for breaks. Consequences for noncompliance included reminder of expectations and redirection; consequences for aggression included blocking techniques, restraint if necessary, and redirection. (S-5 at 23-24.)

District's March 2022 Proposed IEP

30. The District's proposed IEP developed in March 2022 incorporated information from Private Placement in the present levels sections, including a summary of its FBA and the behavior support plan. Post-secondary transition information from the 2020-21 school year in the District was also included. (S-6 at 7-21.)
31. Parent input into the March 2022 IEP reflected their anticipation that Student would ultimately obtain full-time supported employment. They reported that Student was not independent with many activities of daily living including personal hygiene, safety awareness, transportation, using a budget and a bank account, and time and household management. However, they also conveyed that Student no longer engaged in difficult behavior. Their main concern was food security in the school environment, and they expressed a preference for Student to remain at Private Placement. (S-6 at 22-23.)
32. Needs identified in the March 2022 were reading comprehension, language comprehension, functional mathematics, and written expression skills; speech intelligibility; self-regulation and coping skills; visual motor and gross motor skills including coordination; and life and employability skills. (S-6 at 24.)

33. Annual goals in the March 2022 IEP addressed reading comprehension (passage comprehension, identifying main ideas/supporting details); mathematics (solving two-step word problems using addition and subtraction as well as answering questions on calendar, time, and money concepts); written expression (paragraph writing with supports); gross motor skills (strengthening and flexibility exercises, ascending and descending stairs, negotiation curbs); fine motor skills (bilateral coordination, coping skills); speech/language (self-monitoring volume, tone, clarity, listener comprehension); vocational skills (completing a task analysis); independent use of coping skills; and self-regulation/problem solving. All of the goals contained baselines. (S-6 at 36-49.)
34. Transition services in the March 2022 IEP identified a post-secondary goal to attend a training program for public safety or a related field, an employment goal of supported employment, and an independent living goal of supported living. (S-6 at 29-31.)
35. Program modifications and items of specially designed instruction in the March 2022 IEP were for direct functional reading and writing instruction; pre-reading activities; direct instruction in functional mathematics along with additional supports; direct instruction in and practice with social skills; direct instruction in executive functioning skills; opportunities for implicit and higher-level questions; community-based instruction; clear questioning; supports for auditory input; opportunities for narrative language; consistent classroom routines; preparation for changes to routine or schedule; eye contact before giving instructions or new materials; reminders for articulation; opportunities for movement and high-interest materials for learning engagement; access to sensory input; a visual schedule; visual cues for calming strategies; assistive technology for writing tasks in

addition to typing instruction; a food-secure environment across all classroom settings; scheduled snack times and lunchtime monitoring with all food sent from home; parent-school discussion of strategies for managing food security in community-based activities; and instruction in hygiene and personal care. (S-6 at 55-60.)

36. The March 2022 IEP contained a Positive Behavior Support Plan (PBSP) addressing non-compliance and aggression based on the Private Placement FBA. Antecedent strategies provided for choices throughout the day; modifications to the environment or task for non-preferred tasks; a visual schedule; preparation for changes to routine and transitions; first-then statements; alternating preferred and non-preferred tasks; blueprints for coping with difficult situations; positive affirmations; earned breaks at defined intervals of compliance. Replacement behaviors were also identified (coping skills, functional communication, developing flexibility, social skills including self-advocacy) as well as consequences for problematic and replacement behaviors. Positive reinforcement, reinforcers, and breaks were specified for engaging in replacement behaviors. (S-6 at 25-27, 51-54.)
37. Related services in the March 2022 IEP were for individual and consultative occupational, physical, and speech/language services in addition to full time paraprofessional support. Training by an organization for people with Student's medical condition would be provided to the members of the IEP team was one element of the supports for school staff. (S-6 at 61-63.)
38. The March 2022 IEP provided for a program of full-time learning and life skills support, with Student's participation in general education for physical education, lunch, and community-based instruction. The

remainder of Student's instruction would be provided in a special education setting. (S-6 at 67-68.)

39. The Parents did not agree to the one-on-one paraprofessional, stating that Student did not need that supervision at school. (N.T. 230-31.)
40. The District provided a Notice of Recommended Educational Placement (NOREP) on March 25, 2022 with the proposed IEP. (S-7 at 1.)
41. The Parents provided additional Private Placement records, specifically Student's February 2022 Comprehensive Treatment Plan, when they returned the NOREP as disapproved. (N.T. 256, 265-68, 275.)
42. A student with the medical condition that Student has can be successful in a local school if access to food is managed and restricted, and the student is not a danger to self or others when dysregulated. Supervision is also necessary. (N.T. 133-34, 198-99, 201.)
43. Student's endocrinologist conducted an evaluation of Student in March 2023, the first appointment since sometime in 2019 or early 2020. The physician rarely lets more than two years elapse between examinations.¹⁰ (N.T. 170-72, 190.)
44. Student's medical condition has become more serious as Student has gone through adolescence, as is typical for that condition. Student has had more significant medical consequences; and the family including Student report an increase in behavioral manifestations (anxiety, obsessive tendencies, and rigidity) in addition to increasingly uncontrollable appetite. (N.T. 168-70, 172-73, 191-94.)

¹⁰ It merits mention that this witness' testimony was permitted over objection of the District (N.T. 150-54), despite a lengthy delay beyond the control of the parties, in an effort to be thorough, particularly in light of the remand status.

Private Placement

45. From May 2021 through September 2021, Student was physically restrained on nine occasions at Private Placement. (S-11.)
46. Student's Comprehensive Treatment Plan as reviewed in February 2022, a nine-page document, reflected two behavioral incidents relating to security, and no physical restraints. Goals in that plan were for a healthy weight and lifestyle; a decrease in impulsive, disruptive, and aggressive behaviors while maintaining safety; and appropriate peer engagement. Student was reportedly making progress on the goals, and successful visits with family including overnight were noted. There was no discharge planning made at that time, or at any prior date while at Private Placement. (P-2; P-6; S-7 at 1-11; S-8.)
47. Student returned to the family home for a ten-day period in approximately late May 2022. Prior to the visit, the Parents communicated with Private Placement staff so that Student's typical routine including caloric intake could be maintained at home. With few unverified potential exceptions when Student may have been able to access food that was not planned, Student managed well over that visit home with continuous oversight by the Parents. Unlike in previous visits by family to the other state, Student did not go to and dine in restaurants. (N.T. 46-52, 142-49; N.T. ODR No. 24978-20-21 at 266-67.)
48. In the fall of 2022, Student moved to a different residential suite with more independence, and began attending a different classroom with increased expectations. Student struggled with these changes and required occasional restraints but, after several months, began to adapt to them. As of December 2022, Private Placement intended to

return Student back to the prior residential suite but not to the former classroom. (N.T. 52-56, 59, 107, 134-35.)

49. Student has exhibited social and emotional growth at Private Placement. (N.T. 110.)
50. Student is able to go on community outings near Private Placement with advance planning and arrangements provided by the venues to ensure food security. (N.T. 115-16.)
51. Private Placement staff anticipate that Student will demonstrate success in vocational opportunities in the community there. (N.T. 117.)
52. Student has worked on daily living skills at Private Placement, including personal hygiene. (S-1; S-3.)
53. Into March of 2022, Student had occasionally obtained food at Private Placement that was not specifically provided by staff or had access outside of designated times. Student also at times engaged in verbal and physical aggression against residential staff. (S-10.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally viewed as comprising two elements: the burden of production and the burden of persuasion. 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). Thus, the burden of persuasion in this case must rest with the Parents who raised the current issue presented in this administrative forum. Nevertheless, application of this principle determines which party prevails

only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume role of fact-finders, are also responsible for making credibility determinations of the witnesses who testify. *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses who testified to be overall credible as to the facts as they recalled them, rather than attempting to mislead. The weight accorded the evidence, however, was not equally placed. The testimony of the District representative as to what the District knew in March 2022 and what was discussed at the IEP meeting at that time was credible and persuasive in light of the minimal information provided to the District by the Parents. The testimony of the endocrinologist, while credible, was of limited value on the precise issue presented relating to the March 2022 IEP.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties’ closing statements.¹¹

¹¹ The Parents cite extensively in their closing to the record filed in the U.S. District Court for the Eastern District of Pennsylvania, such as a Joint Appendix that is very likely under seal. This decision must be based on the record in this administrative forum, and documents that were not introduced and admitted, or incorporated by agreement, cannot be considered.

General IDEA Principles: Substantive FAPE

The IDEA requires each of the states to provide 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. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The various states, through its local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, 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). Rather, the law demands services that are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F., supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard

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). “The IEP *must aim* to enable the child to make progress,” but progress is not measured by what may be ideal. *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original).

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies 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).

LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education

classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

Residential placement is one option on the continuum, and is appropriate if “is necessary to provide special education and related services to a child with a disability.” 34 C.F.R. § 30.104. The question of whether a residential placement must be provided at public expense requires an assessment of whether that full-time placement is “necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 243-44 (3d Cir. 2009, (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981)). In other words, if the medical, social, and emotional components of the residential program are “part and parcel of a specially designed instruction to meet the unique needs of a handicapped child,” the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694).

General IDEA Principles: Parental Placements

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242.

Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.* Nonetheless, “[t]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations. *C.H., supra*, 606 F.3d at 72 (finding in the alternative that denial of reimbursement was warranted where the parents did not cooperate and assist in IEP development) (citation omitted).

General Section 504 and ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D.

Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parents' Claims

Before turning to the merit of the Parents' claims, it is important to recognize what this case is and is not about. The issue presented is whether the District's proposed program in March 2022 was reasonably calculated to provide FAPE to Student based on information known at the time. The issue is not whether Student may need Private Placement as of the spring of 2023.

The Parents' citation to extraneous documents in their closing, n.11, *supra*, should be briefly mentioned here. They provide a definition of food security as "a system in which food is present only during meal times and food is locked up and out of sight at all other times and where, in a school setting, there is no food during instruction, special events or anywhere in the school building except during meal times in the cafeteria." Parents' closing at 3. They then go on to contend that even compliance with this definition is insufficient for Student. *Id.* Once again citing to documents not of record in this case, they suggest that the District's apparent subsequent receipt of records pursuant to a federal court subpoena must be considered in evaluating its knowledge at the time of the March 2022 IEP. This hearing officer cannot, and will not, begin to guess what documents may and may not have been produced in response to such a subpoena or what information may have been contained therein. The Parents bear the burden of establishing their right to relief by a preponderance of the evidence. They also had an obligation to cooperate with the District in program development, as was pointed out in this hearing officer's January 2022 decision, "[g]iving due consideration to the complexities of this case, as well

as the Parents' own private understanding of Student's medical condition guided by Student's endocrinologist."¹² Their continued failure to share freely even after a reduction in tuition reimbursement at that time, while perhaps understandable from a parental perspective, is perplexing in this context.

The District's March 2022 IEP identified Student's areas of educational and functional need, and provided goals, specially designed instruction, and related services targeting each of those known areas of deficit. The March 2022 IEP utilized present level information from Private Placement and developed goals based on Student's then-current performance that were extremely similar to those in the Private Placement IEP, with the addition of post-secondary transition services based on Student's interests and the Parents' goals. Even though the Parents reported that behavior was no longer a concern, a factor that is not corroborated by Private Placement records, a PBSP was included that is based on known information and essentially mirrored that at Private Placement. The specially designed instruction is extensive and individualized to Student and is overall appropriate under the law. Finally, the proposed IEP is for a public high school setting where Student would not only participate in general education with typical peers but also receive special education in a separate setting in those identified areas where the needs are most significant. The proposal is the least restrictive environment for Student that public schools are mandated to observe.

The parties have a serious disagreement over the level of food security in the District high school. The District's proposal even adequately meets the definition of food security provided in the Parents' closing quoted above, and further provides for specific training to the IEP team on Student's

¹² *Q.M., supra* n.2, at 31. The District Court affirmed this conclusion. *Central Bucks School District v. Q.M., supra* n. 3, 2022 U.S. Dist. Lexis 1633652, **67-68.

medical condition as well as a full-time paraprofessional for Student to ensure that Student had access only to food sent from home and only at specified times. The evidence available to the District in March 2022 also supports a conclusion that it was reasonable for the District to propose exposing Student to both school- and community-based activities with safeguards employed when food security could not be maintained. The absence of any discharge planning at Private Placement, or even consideration thereof, was and remains unexplained, and cannot overcome the District's rational approach to compliance with LRE requirements.

The Parents testified to concerns with the IEP proposing grocery shopping, a classroom environment with a kitchen, grocery shopping as part of community-based instruction, and vocational opportunities with access to food (N.T. 36-37). While one could understand such reservations in this case, those elements were discussed at the IEP team meeting and were omitted from the final IEP that was sent along with the March 2022 NOREP. The Parents, also understandably, wanted what was best for Student in March 2022. Nonetheless, the law does not demand that public schools provide the ideal program. Based on what information the District knew from the Parents and Private Placement as well as through its own records, the Parents have failed to establish that the District's March 2022 proposal was inadequate under the applicable legal standards.

The Parents suggest that the District's success in obtaining additional information through a federal court subpoena should have led to further revisions to the proposed IEP. The District met its obligation to propose a program for the 2022-23 school year, and this hearing officer is unaware of any requirement that a residential school district revise already rejected programs on an ongoing basis for a student enrolled by parents in a private placement. *See generally A.B. v. Abington School District*, 841 Fed. App'x 392 (3d Cir. 2021); *James v. Upper Arlington City School District*, 228 F.3d

764 (6th Cir. 2000); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018). Furthermore, this contention supports the contention of the District, rather than their own, on the adequacy of their disclosing relevant information in March 2022.

Even assuming, *arguendo*, that the District's proposed program did not meet its legal requirements, the Parents' limited cooperation in sharing information would operate to bar reimbursement for Private Placement. The Parents point to the District's opportunity to speak with Private Placement representatives as indicative of their cooperation, and fault the District for not asking the right questions.

There are many circumstances where a parent's lack of full cooperation may lead to denial of reimbursement. For example, "[a] parents' single-minded refusal to consider any placement other than a residential one" may preclude reimbursement as "an unreasonable approach to the collaborative process envisioned by the IDEA." *C.G. v. Five Town Community School District*, 513 F.3d 279, 288 (1st Cir. 2008). As another example, a public school's inability to communicate directly with a student's medical providers because of a lack of parental permission may impede a collaborative IEP process. *See, e.g., Oconee County School District*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015). Here, the Parents refused to execute a release as requested by the District, and clearly participated in the IEP process with the aim to maintain Student at Private Placement. Although they suggest that the District likewise was determined to propose a program in its own schools rather than consider Private Placement, the District had other mandates in the law that begin with consideration of the least restrictive environment, not the most restrictive on the continuum. The Parents' preference for the level of food security that Private Placement provides was inadequate to alert the District to how its proposal may have been deficient in their view. Moreover, even the Private

Placement representative opined at the hearing that a student with Student's medical condition can be successful in a local school when access to food is managed and restricted and the student is not a danger to self or others; Student's endocrinologist agreed with this conclusion while adding in supervision as an element (N.T. 133-34, 198-99, 201).¹³ This opinion is consistent with the District's March 2022 proposal based on the information that the District had at that time. Accordingly, this hearing officer would conclude that the Parents' limitation on the District's access to relevant information about Student in this case in the spring of 2022 was a sufficient impediment to justify denial of reimbursement.

This hearing officer is not unsympathetic to the Parents, nor did she perceive that anyone in the District has been. However, the decision must be based on the applicable law. The attached order is also limited to the 2022-23 school year, which was the scope of the remand. The parties may wish to engage the services of a facilitator as they continue to work collaboratively on programming going forward.

CONCLUSION OF LAW

The District's proposed program for Student in March 2022 complied with all mandates in the applicable law.

¹³ The endocrinologist testified similarly in the prior proceeding in the fall of 2021 (N.T. 482-525).

ORDER

AND NOW, this 20th day of May, 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.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 27061-22-23