

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

**PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER  
FINAL DECISION AND ORDER**

**Closed Hearing**

**ODR File Number:**

24950-20-21

**Child's Name:**

M.F.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

October 1, 2021

## **INTRODUCTION**

M.F. (hereafter "Student"),<sup>1</sup> [an elementary aged] student residing in the Upper Darby School District (hereafter "District"), has attended private schools since Kindergarten. A 2018 District Evaluation Report (ER) identified the Student as a child with Specific Learning Disabilities (SLD) in need of special education services. The District offered the family a proposed Individualized Educational Program (IEP). The Parents, believing that the IEP was not reasonably calculated to support the Student's needs, enrolled the Student in a private school for the 2019-2020 school year. In October 2020, the Parents reached out to the District by email several times to inquire about how to enroll the Student in the District. The District responded and heard nothing further from the Parents. On May 20, 2021, the Parents filed a due process complaint claiming that the Student had been denied a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")<sup>2</sup>, Section 504 of the Rehabilitation Act of 1973 ("Section 504")<sup>3</sup>, and Chapters 14 and 15 of the Pennsylvania Public School Code, and requesting three years of tuition reimbursement.

The case proceeded to a closed, due process hearing held in two sessions: June 28, 2021 and August 18, 2021. The sessions were convened virtually due to the COVID-19 pandemic.

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<sup>1</sup> 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 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).

<sup>2</sup> 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).

<sup>3</sup> 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).

## **ISSUES**

1. Did the District fail to provide the Student with a Free Appropriate Public Education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act ("Section 504")?
2. If so, are the Parents entitled to tuition reimbursement and related costs for the Student's placement at a private school for the 2019-2020, 2020-2021, and 2021-2022 school years and until such time as the District offers the Student a FAPE?

## **PROCEDURAL HISTORY AND FINDINGS OF FACT**

All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' written closing statements was considered. The only findings of fact cited in this Decision are those needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student, who resides within the District's boundaries (N.T. 37)<sup>4</sup>, has attended private schools since Kindergarten (S-10).
2. During the Student's first grade year, the Parents requested an evaluation by the District because they had concerns about their child's struggles to read and retain information (S-1; N.T. at 42-43).
3. A District School Psychologist conducted a comprehensive evaluation of the Student that included standardized assessments, classroom observations in the private school, data from the private school, and

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<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.-), School Exhibits (S-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, Joint Exhibits (J-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

teacher, and parental input (N.T. at 94). The following instruments, including various subtests, were administered: the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to assess cognitive ability; the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to assess academic functioning; and the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) to assess social/emotional/behavioral functioning (S-2 at 6-9).

4. The December 20, 2018 Evaluation Report (2018 ER) identified the Student as a child with Specific Learning Disabilities (SLD) in need of special education services to address aspects of phonological awareness, automatic decoding, fluency and automaticity text and comprehension (N.T. at 116-17). The 2018 ER noted a severe discrepancy between the Student's intellectual ability (FSIQ = 100) and achievement (below average to low) in the areas of basic reading, reading fluency skills, reading comprehension, and written expression skills (spelling) (S-2 at 10, 13; N.T. at 102).
5. The IEP Team convened on January 15, 2019, whereupon the District offered the Parents a proposed IEP (2019 IEP) that included two goals to improve the Student's ability to identify correct letter sounds, whole words, and rhyming words (S-4 at 12-13); ten program modifications and specially designed instruction (SDI) (S-4 at 14); and 60 minutes per day of itinerant reading learning support (S-4 at 16). The IEP goal for nonsense words was related to phonemes and decoding (N.T. at 127-28). The IEP rhyming goal was related to phonological processing, phonological awareness, and the ability to manipulate sounds with words (N.T. at 128). The SDIs and modifications included breaking assignments into small manageable chunks, frequent checks for understanding during independent work, multi-sensory approach to instruction, offering positive reinforcement, including verbal praise and

a reward system, using a highlighter to mark key words, paired verbal/visual presentation of new concepts and skills, multi-modal instructional strategies, simplifying and chunking verbal instructions at a slower pace, adapted homework, and a whisper phone (S-4 at 14).

6. The Parents believed that the January 2019 IEP was similar to the what the Student was receiving at the private school (N.T. at 58). They inferred that the Student would not be successful in the District school with a similar program because the Student was not flourishing in a general education classroom with a large number of students and pull-out learning support. The Parents did not sign the NOREP (S-5; N.T. at 51-52), register the Student at a District School, or notify the District that they were seeking an alternative private school placement.
7. On January 17, 2019, two days following the IEP meeting, the Parents electronically applied to a private school that specializes in students with learning disabilities, where they unilaterally placed the Student for the 2019-2020 school year for second grade (S-6 at 27; N.T. at 51-57).
8. Between October and December 2020, the Parents reached out to the District by email several times inquiring about how to transition the Student to a District elementary school (S-7 at 1-3; N.T. at 65). The District informed them that, once enrolled, the Student would begin receiving regular education and special education based on the 2019 IEP until a new evaluation using curriculum-based measures could be conducted (N.T. at 138-39). The District heard nothing further from the Parents.
9. The private school classroom where the Student was unilaterally placed had nine students and two full-time teachers (N.T. at 58). The Student received direct instruction in reading, writing and math, and

support for executive functioning (N.T. 60-61). Learning support was embedded in every subject (N.T. at 53) so the Student was not pulled out for learning support services (N.T. at 53). The Student attended this private school for second grade (S-6 at 83-87) and third grade (S-6 at 71-74), and was enrolled to continue there for fourth grade during the 2021-2022 school year (S-6 at 75-82).

### **Parents' Claim**

The Parents claimed that the District failed to offer an IEP reasonably calculated to enable the Student to make meaningful educational progress commensurate with the Student's abilities. The Parents alleged that the 2019 IEP did not offer an educational program that was substantially different from the unsuccessful curriculum being used at the private school where the Student was attending first grade, so they started looking for alternative placements and decided upon a school that specializes in educating students with reading challenges.

The Parents alleged that the 2018 Evaluation was insufficient because it (1) did not comprehensively assess the Student's reading and word recognition fluency (N.T. at 103-04), written expression (N.T. 109), and attention-related abilities (N.T. at 110); (2) included no direct instruction in a research-based reading intervention, written expression, or executive functioning; (3) did not include one-to-one supports as recommended by the District; and (4) the SDI outlined in the IEP were comprised entirely of accommodations (N.T. at 133).

### **District's Claim**

The District argued that its 2019 IEP was an offer of FAPE after a comprehensive evaluation was completed. The Parents never requested the District to evaluate Student or began the enrollment process for the 2020-

2021 or the 2021-2022 school years. Therefore, the District contends that the Parents are not entitled to tuition reimbursement or any other relief.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden of Proof**

In general, the burden of proof essentially consists of 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).

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 – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “ equipoise.” When the evidence is in “equipoise,” the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

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 Parent, who filed the complaint initiating the due process hearing.

## **Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); See *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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented.

## **FAPE under IDEA**

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).

## **FAPE under Section 504**

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1).<sup>9</sup>

Section 504 and Chapter 15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1

The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

## **The Evaluation**

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).

The IDEA and its implementing regulations sets out procedural requirements designed to ensure that all of the child’s individual educational needs are examined: (1) the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic

information; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b).

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).

And, 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).

If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation (IEE) at public expense. IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); *PP by Michael P and Rita P v. Westchester Area School District*, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009).

In order to trigger a school district’s responsibilities under IDEA, a parent who enrolls a child in a private school must request an evaluation or begin the public school enrollment process. *A.B. through Katina B. v. Abington Sch. Dist.*, 841 F. App’x 392, 395 (3d Cir. 2021).

In 2018, the Parents requested an evaluation and the District conducted one in a timely manner. The 2018 Evaluation utilized several

assessment tools and strategies to gather relevant information about the Student, it included parental input, it did not rely on any single measure or assessment as the sole criterion to determine whether the Student is a child with a disability and to determine an appropriate educational program for the Student, and it used technically sound instruments that to assess the Student's needs. The ER concluded that the Student meets the eligibility requirements to received special education services for SLD. There is no evidence contesting this SLD eligibility conclusion. The evaluation provided sufficient information to determine the educational needs of the Student. There is no evidence that before the instant Complaint was filed, the Parents objected to the ER, requested an IEE, or enrolled the Student in the District.

The Parents argue that the 2018 Evaluation was insufficient because it did not comprehensively assess the Student's reading and word recognition fluency (N.T. at 103-04), written expression (N.T. 109), and attention-related abilities (N.T. at 110). The ER does, however, indicate that the KTEA-3 reading, mathematics, writing, and listening comprehension subtests were administered and it lists the scores and an explanation of the results (S-2 at 7). The WISC-V assessed working memory (S-2 at 5-6). The School Psychologist testified that Student was in the average range across the board, and that the Student's memory is in the average range at the 42nd percentile – as compared to age-matched peers – indicating that the Student has the ability to retain information and retain both auditory and pictorial information (N.T. 147). She also explained that she did not administer the silent reading fluency subtest because it requires the child to read sentences she did not think the Student would be able to read sentences so the results would not add anything to the recommendations (N.T. at 149-150). The Hearing Officer found the School Psychologist's testimony to be credible and based on her years of experience and the number of evaluations that she

has administered over the years concluded that the evaluation was comprehensive enough to sufficiently assess the Student's needs.

Therefore, the Hearing Officer concludes that the 2018 evaluation was appropriate and meets the requirements as set forth in IDEA and its implementing regulations.

## **The IEP**

An IEP follows and is based on an evaluation. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew 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)). 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).

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 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).

Although the IEP must provide the student with a “basic floor of opportunity,” it does not have to provide “the optimal level of services,” or incorporate every program requested by the child’s parents. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010). It has been established that an eligible student is not entitled to the *best possible program*, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). The statute guarantees an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

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.

In this case, it is uncontested whether or not the Student is eligible for special education services. The 2018 ER concluded that the Student meets the eligibility requirements for a student with a Specific Learning Disability, and as such, requires SDI to benefit from the educational program.

The question is whether or not the District’s 2019 IEP was reasonably calculated to enable Student to make progress in light of the unique circumstances. The IEP included two goals (1) a nonsense words goal and (2) a rhyming goal (S-4 at 12-13) that were developed to specifically target the Student’s identified needs: phonemes; decoding; and phonological processing (N.T. 127-28). The IEP Team properly included numerous SDIs to support the Student’s reading and writing needs as well as to address other needs, for example, self-monitoring skills (N.T. at 129). To answer this question, the Hearing Officer afforded heavy weight to the testimony of the

School Psychologist who assessed the Student, and the Special Education Teacher who was involved in drafting the IEP.

The Parents alleged that the proposed IEP would place the Student in a regular education environment with no more specialized learning support than the Student was receiving during the first grade in a private-school setting. The Parents were concerned about the Student being pulled-out of class for supplemental learning support services because that process did not meet the Student's needs during first grade (N.T. at 53). The IEP proposed 60 minutes per day of itinerant reading support (N.T. at 264; 267-268; S-4 at 16) which is more than the 45 minutes twice per week with a reading specialist that the Student was receiving in the private school during first grade (S-2 at 4). Plus, the Student would receive an additional 30 minutes of reading during the daily Multi-Tiered Support System (MTSS) time where the Students work with a reading specialist or a learning support teacher using a research-based curriculum (N.T. at 269-270).

The Parents alleged that the IEP did not contain direct instruction in a research-based reading intervention. However, while the learning support services are not necessarily delivered one on one, they are taught in a small groups that are formed to match the students' needs and skill level (N.T. at 267-268). The Special Education Teacher testified that there are several research-based decoding curricula available and that a specific curriculum would be selected based on the Student's needs (N.T. at 268).

The Parents were concerned about class size of the District classrooms (N.T. at 51). The classroom at the private school where the Parents unilaterally placed the Student is nine students. While the District classroom would not be that small, there would be less students, typically 14-16 students (N.T. at 269), than the 21-student classroom at the private school where the Student attended first grade.

The Parents also contended that the IEP did not include written expression or executive functioning supports. The Special Education Teacher testified that the writing curriculum is based on the PA 15 Standards and regulated throughout the common core standards. As such, writing happens throughout the entire day based on the curriculum used in math, reading, science, and social studies (N.T. at 27).

The School Psychologist testified that the Student's executive functioning issues appeared mainly in the school setting where the Student is having difficulty with reading. From that, the School Psychologist concluded that the issue may be one of self-confidence rather than executive functioning (N.T. at 150-151).

The Parents averred that the SDI outlined in the IEP were comprised entirely of accommodations. The Hearing Officer disagrees. An accommodation merely changes *how* a student learns the curricula whereas "Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3). The following SDIs in the proposed 2019 IEP involve teaching methodology and delivery of instruction and, as such, are not merely accommodations, for example: chunking to adapt the complexity of the task, frequent checks for understanding during independent work; multi-sensory approach to instruction; the use of a highlighter to mark key words; paired verbal/visual presentation of new concepts and skills; multi-modal instructional strategies; simplify and chunk verbal instructions at a slower pace; adapted homework; and a whisper phone (S-4 at 14).

Based on the evidence presented, the Hearing Officer finds that the IEP team properly took the results of the ER into consideration in crafting IEP goals, program modifications and SDIs to develop the 2019 IEP. As required by *Endrew*, the 2019 IEP is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Therefore, the Parents failed their burden of proving that the 2019 IEP was not appropriate.

### **The District’s IDEA Obligations to Students in Private School**

Children who have been unilaterally placed in a private school may not receive the same services they would in a public-school setting. “If a parent of a disabled child chooses to forego the public school services, the student is not entitled to the same level of service as a public school student. The more limited services provided to parentally-placed children in private schools is commonly known as “equitable participation.” 20 U.S.C. § 1412(a)(10)(A)(ii)(II); *Moorestown Twp. Bd. of Educ. v. S.D ex rel. M.D.*, 811 F. Supp. 2d 1057, 1066 (D.N.J. 2011)

Furthermore, “[i]f a student is enrolled at a private school because of a parent’s unilateral decision [to wit, when a student is disenrolled from a public school and placed in a private school without the district’s consent] the school district does not maintain an obligation to provide an IEP.” *Sch. Comm. of Town of Burlington, Mass.*, 471 U.S. at 365, 105 S.Ct. 1996, (citing 20 U.S.C. § 1412(a)(10)(A)(i)); see also *I.H.*, 842 F. Supp.2d at 772.

“The statutory framework logically suggests that [a school district] need not have in place an IEP for a child who has unilaterally enrolled in private school and thereby rejected the district’s offer of a FAPE.” *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F.Supp.2d 1057, 1068 (D.N.J. 2011); see also *A.B. through Katina B. v. Abington Sch. Dist.*, 841 F.



App'x 392, 395 (3d Cir. 2021) (a non-precedential Memorandum Decision); and 20 U.S.C. § 1412(a)(10)(A)(i).

However, the District has an obligation to evaluate and develop an IEP for children known to be eligible under the IDEA and residing in the District when a parent either: (1) re-enrolls their eligible child in their district of residence; or (2) requests the District evaluate and/or offer the family a proposed IEP with the intention of re-enrolling the student. *L.T. v. North Penn Sch. Dist.*, 2018 WL 6600206 (E.D. Pa. 2018); *Shane T. v. Carbondale Area Sch. Dist.*, 2017 WL 4314555 (M.D. Pa. 2017); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (citing 34 C.F.R. 300.536 (1999)). See also *James v. Upper Arlington School District*, 228 F.3d 764 (6th Cir. 2000), cert. denied, 532 U.S. 995 (2001).

When the Parents did ask for an evaluation, the District complied. A comprehensive evaluation was conducted and an appropriate IEP was offered. There is no testimony that following the 2019 IEP meeting the Parents followed through on enrolling their child in a District school, or communicated to the District any concerns with the 2018 evaluation or the proposed IEP, or requested an IEE. In fact, the Parents emailed an enrollment application to the private school, where they unilaterally placed the Student, only two days following the IEP meeting with the District.

So the next question here is, did the Parents enroll the Student in the District or request an evaluation for the 2020-2021 or the 2021-2022 school year? In 2020, the Parents contacted the District by email to inquire about "how" to enroll the Student, but there is no evidence in this record that the Parents requested that their child be evaluated or enrolled in the District for the 2020-2021 or the 2021-2022 school year. Therefore, in this specific case and considering the facts presented here, the District was under no obligation to evaluate or prepare an annual IEP for the Student, who was not enrolled in or ever attended a District elementary school.

## **Tuition Reimbursement**

Long-standing case law and the IDEA provide the potential for private school tuition reimbursement 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)).

Here, Parents seek reimbursement for out-of-pocket tuition payments they incurred as a result of their unilateral placement decision. Therefore, to determine whether or not the Parents' claim will prevail, the Burlington-Carter Test is applied, which has been incorporated into IDEA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

The Parents must establish all three prongs of the Burlington-Carter Test for an award of tuition reimbursement to be warranted for the time period at issue.

The Burlington-Carter Test's three prongs involve: (1) examining whether the district's proposed, or last operative, educational program, offers a FAPE; (2) assessing the appropriateness of the private school placement unilaterally selected by the parents; and (3) weighing the equities to determine if and how much tuition reimbursement should be. 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 child. 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 program offered by the District. Here, as discussed above, when asked by the Parents, the District conducted an appropriate, comprehensive evaluation of the Student and offered an IEP that appropriately conforms with the FAPE requirements.

The District complied with the IDEA by developing an IEP that is reasonably calculated to enable the Student to receive *meaningful* educational benefit.

Based on the conclusions above, there is no need to further address the remaining two prongs of the Burlington-Carter Test, and Parents' claim for tuition reimbursement for the 2019-2020 school year is denied.

The Parents' 2020 email enrollment inquiries (S-7 at 1-3) were insufficient to trigger the District's responsibilities under IDEA to evaluate the Student or develop an IEP in 2020 for the following school years because the Parents never requested an evaluation or began the public school enrollment process at that time. Therefore, the Parents' claim for tuition reimbursement for the 2020-2021 and the 2021-2022 school years are also denied.


## **CONCLUSION**

The District offered the Student a FAPE under the IDEA and Section 504. In accordance with the findings of fact and conclusions of law as set forth above, the Parents have failed to carry their burden of proof on the claim for tuition reimbursement by the School District for Parents' unilateral private placement for the 2019-2020, 2020-2021, and 2021-2022 school years.

Any claim not specifically addressed in this decision and order is denied and dismissed.

## **ORDER**

The Parent's claims are denied in their entirety.



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**Cheryl Cutrona, J.D.**  
**Special Education Hearing Officer**

**Date of Decision**

October 1, 2021

**ODR 24950-20-21**