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

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

CLOSED HEARING

ODR No.
22842-19-20

Child's Name:
K. S.

Date of Birth:
Redacted

Parents:
Redacted

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
02/28/2020

Introduction

This matter concerns the educational rights of a young student (the Student). The Student is eligible to receive preschool early intervention services from the Montgomery County Intermediate Unit (MCIU). The Student transitioned to MCIU from a birth to 3 early intervention program. Shortly thereafter, a dispute arose between the Student's Parents (the Parents) and MCIU about how to address the Student's needs. That dispute escalated, and the Parents requested this due process hearing.

The Parents argue that the Student is entitled to special education and related services provided by MCIU at a typical preschool, and that MCIU must provide transportation to and from that preschool. MCIU has proposed a specialized preschool with transportation but will not provide transportation to and from any traditional preschool.

The Parents also argue that MCIU's actions and inactions constitute disability-based discrimination. MCIU denies this claim.

As a general matter, Hearing Officers write in a style designed to protect children's privacy. In this case, to avoid confusion, I must name the various schools and placements involved. The Parents' preferred, typical preschool is called [School #1]. MCIU offered two different specialized preschools. The first specialized preschool is called the [School #2]. The Second specialized preschool is called [School #3]. More information about these programs appears below. Apart from naming the programs and the cover page of this decision, identifying information is omitted to the extent possible.

As discussed below, I find in favor of the Parents in part and in favor of MCIU in part.

Issues

The issues presented in this matter are:

1. Are the Parents entitled to tuition reimbursement for the Student's placement at [School #1]?
2. Is MCIU required to provide the Student with transportation to [School #1]?
3. Did MCIU violate Section 504 by failing to provide the Student a FAPE and/or be retaliating against the Parents by offering a revised IEP in response to the concerns raised by Parents?

Stipulations

The parties have stipulated the following facts. I adopt their stipulations as if they are my own findings. My edits, indicated by brackets, are intended to protect the Student's privacy. The stipulations are:

1. [The parties stipulated the Student's date of birth.]
2. [The parties stipulated the Student's home address.]
3. [The parties stipulated the address of [School #1]
4. [The parties stipulated the address of [School #3]]
5. [The parties stipulated the address of the [School #2] Classroom/Autism Classroom ([School #2]).]
6. [The Student received a] diagnosis of Autism Spectrum Disorder by CHOP [the Children's Hospital of Philadelphia].
7. [The Student received a] diagnosis of Mixed Receptive-Expressive Language Disorder by CHOP.
8. [The Student] is eligible for services from the MCIU.
9. MCIU is a recipient of federal funding.

10. [The Student] is a child who is eligible for preschool special education services under the category of Autism.

11. On January 7, 2019, [The Student's] initial IEP meeting was held. Parent signed to indicate receipt of Procedural Safeguard Notice.

12. On January 7, 2019, MCIU issued a [Notice of Recommended Educational Placement (NOREP)] for initial preschool special education services.

13. On January 30, 2019, MCIU and Parent met for a rejected NOREP meeting.

14. On March 11, 2019, MCIU and Parent met for a rejected NOREP meeting.

15. Parent toured MCIU's offered [School #2] on March 19, 2019 and MCIU's offered reverse mainstream classroom, [School #3] on July 29, 2019.

16. Parent was offered the opportunity for an additional tour of [School #3] classroom in September 2019. Parent ascertained that the classroom that she would be visiting was the same one she had toured. Parent declined an additional tour.

17. On June 6, 2019, the MCIU and Parent met with counsel for a rejected NOREP meeting.

18. On October 30, 2019, the MCIU and Parent met and updated [the Student's] proposed IEP goals.

19. [MCIU authorized all NOREPs, including NOREPs that are not signed by MCIU personnel]

20. By NOREP dated 12/23/2019, the MCIU has agreed to provide 42.5 hours of makeup Special Instruction.

21. The MCIU and Parents have agreed via the October 30, 2019 IEP and NOREP to the following services:

    a. 1.5 hours of behavior support once per week.

    b. Thirty minutes of consultation between the behaviorist and the private behavior support team once every thirty days.

    c. 45 minutes of occupational therapy once per week.

    d. One hour of consultation between the occupational therapist and the private behavior support team every thirty days.

    e. Thirty minutes of physical therapy once every fourteen days.

22. The MCIU and Parents have agreed via NOREP to 45 minutes of speech therapy twice per week.

23. The name of the Early Intervention group is Montgomery County Department of Health and Human Services – Early Intervention (HHS).[1]

Findings of Fact

I reviewed the record in its entirety. I make findings of fact, however, only as necessary to resolve the issues before me. In addition to the stipulations above, I find as follows:

[1] The record does not establish whether HHS or, later, the MCIU is the MAWA holder for early intervention services or if either entity was the student's LEA through other means. Regardless, there is no dispute that MCIU was not responsible for the Student's education until January 13, 2019, or that MCIU was responsible for the Student's education from that date forward.

1. In addition to Autism Spectrum Disorder, the Student was found to have a mixed receptive-expressive language disorder and a sensory processing disorder (SPD).[2] P-52.
2. During early birth to 3 intervention, the Student received the following services (P-2):
    a. Two hours per week of speech therapy,
    b. 5 hours per month of occupational therapy,
    c. 6 hours per month of behavioral services, and
    d. 2 hours per week of special instruction.
3. The Student received early intervention services from HHS. At that time, HHS personnel recommended placement in a typical preschool. Nothing suggests that HHS personnel recommended any particular typical preschool. Acting at least in part on HHS's recommendation, the Parents enrolled the Student at [School #1]. NT 49-51, 531.[3]
4. [School #1]is an eight to 14-minute drive from the Student's home. P-41b.
5. The Parents enrolled the Student at [School #1] in October 2018. NT 49, 161, 314, 531.

[2] SPD has no IDC-10 diagnostic code, nor is it identified in the DSM-5.

[3] Some evidence suggests that MCIU provided early intervention services. While MCIU may have provided some services, per the parties' stipulation, MCIU was not the early intervention service provider. I find that MCIU is not charged with constructive knowledge of information known to HHS.

6. [School #1] is a typical preschool. All special education and related services that the Student receives at [School #1] is provided by MCIU and the Parents' insurance. NT 157, 558-559, 600-601.[4]

7. In the absence of services provided by MCIU and the Parents' insurance, [School #1] is an inappropriate placement for the Student.[5]

8. During the Student's enrollment at [School #1], the Student received full-day, one-to-one (1:1) support from a Registered Behavior Technician (RBT). The RBT is supervised by a Board Certified Behavior Analyst (BCBA). Both the RBT and the BCBA are provided through and funded by the Parents' insurance.

9. The Student was eligible to transition from HHS early intervention services to pre-school early intervention services on January 13, 2019. P-8. Pre-school early intervention services are provided by MCIU. To prepare for the transition, MCIU sought and received parental consent to evaluate the Student in October 2018. *See, e.g.* P-15.

10. MCIU evaluated the Student, starting in late October 2018. The evaluation report (ER) was complete on December 11, 2018. P-15.

11. The ER reported information provided by the Parents, a review of outside reports provided by the Parents, the results of an administration of the Battelle Development Inventory 2nd Edition (a cognitive assessment), the results of a Functional Behavior

[4] After hearing testimony from the Student's teachers, I have no doubt that the Student is well cared-for at [School #1]. The attention and hard work of the Student's teachers at [School #1], however, should not be confused for specially designed instruction.

[5] It appears that there is no dispute about this fact. There is, however, a preponderance of evidence establishing this fact, including testimony from the Parents' witnesses at NT 434, 419-492. *See also* P-77.

Assessment (FBA), information obtained through the Autism Rating Scales and the Sensory Processing Measure – Preschool, a report of a classroom observation, a report of observations of the Student during testing, and the results of a Peabody Motor Scale. P-15.

12. At the time of the evaluation, the Student was attempting to imitate simple facial gestures, had emerging eye contact, and was starting to repeat words. The Student had difficulty following directions, transitioning between activities, communicating wants and needs, and socializing with peers. P-15

13. At the time of the evaluation, the Student could become frustrated at school. The Student's teachers were concerned about elopement. P-15.

14. Through its evaluation, MCIU identified the following as the Student's needs (P-15):

> *[I]ncrease following directions, initiate social contact with adults and peers, increase functional play, transition between activities, increase knowledge of preschool concepts, improve receptive and expressive communication, improve functional communication skills, improve fine motor control and coordination to promote functional participation in preschool-related activities, and improve self-regulation skills to support engagement in learning tasks.*

15. The January 7, 2019 IEP team meeting was the first IEP team meeting for the Student convened by MCIU. *See stipulations.*

16. During the January 7 IEP team meeting, MCIU offered an IEP with a NOREP. P-19. That IEP included the following services:

    a. One hour per week of speech therapy (a reduction of 1 hour per week as compared to HHS services),

b. 1.5 hours per week of behavior support (roughly the same as what HHS provided),

c. 45 minutes per week of occupational therapy (roughly a reduction of 2 hours per month as compared to HHS services), and

d. 30 minutes per week of specialized instruction (a reduction of 1.5 hours per week as compared to HHS services).

17. The IEP noted that the Student received services at [School #1] provided by the Parents' insurance. P-19.

18. The IEP was designed and intended to provide special education and related services for the Student at [School #1]. P-19

19. The IEP did not provide transportation between the Student's home and [School #1]. P-19.

20. During the January 7, 2019 IEP team meeting, MCIU also proposed a physical therapy evaluation. The Parents provided consent for that evaluation. P-25.

21. On January 9, 2019, the Parents rejected the IEP via the NOREP. P-24.

22. The Parents typed an explanation of their rejection onto the NOREP. In summary, the Parents rejected the IEP because (P-24):

a. The ER did not reflect the Student's skill development between October 2018 and January 2019,

b. The IEP did not include a full-time, 1:1 RBT,

c. The IEP did not include specific skills that the Parents wanted the Student to work on,

d. The IEP did not offer transportation between [School #1] and the Student's home.

e. The IEP did not offer funding for tuition at [School #1].

23. The Parents typed on the NOREP that they wanted to "discuss" funding and transportation. P-24. As such, the NOREP is not a written demand for tuition reimbursement or notice of intent to seek tuition reimbursement. However, it was clear to MCIU at the time that the Parents were rejecting the NOREP because they disagreed with the proposed reduction in services, wanted MCIU to fund the [School #1] placement, and wanted MCIU to provide transportation. NT *passim* (*see, e.g.* NT 78).

24. On January 30, 2019, the parties met again for a "rejected NOREP meeting."[6] The parties did not come to terms during that meeting. *Passim*.

25. On February 1, 2019, the parties met at a second IEP team meeting. During this meeting, the IEP team revised the level of the Student's services. MCIU then proposed a revised IEP with a NOREP on February 5, 2019. P-28. The February 2019 IEP included the following services:

    a. Two, 30-minute sessions of speech therapy per week, with one session at [School #1] and one session at home (the same amount of speech therapy provided in the January IEP, but configured differently; a reduction of 1 hour per week as compared to HHS services),

[6] The term "rejected NOREP meeting" is the term that the parties use for the January 30, March 11, and June 6 meetings. I accept the parties' language as the descriptor provides appropriate context. That descriptor, however, is not derived from the IDEA. Functionally, these meetings were something akin to an IEP team meeting, but for the purpose of resolving the parties' dispute.

b. 3 hours per week of behavior support provided in two, 90-minute sessions at [School #1] (double the time as compared to the January IEP, roughly the same amount of time as HHS),

c. 30 minutes per month of behavior support consultation (this was a new offer),

d. 45 minutes per week of occupational therapy (the same as the January IEP, roughly a reduction of 2 hours per month as compared to HHS services), and

e. 30 minutes per week of specialized instruction (the same as the January IEP, a reduction of 1.5 hours per week as compared to HHS services).

26. The February 2019 IEP did not provide transportation or tuition. P-28.

27. On February 7, 2019, the Parents rejected the February IEP via the February NOREP. As with the prior NOREP, the Parents typed out their reasons for rejecting the NOREP onto the NOREP. P-29.

28. As with the January NOREP, the Parents expressed their belief that the level of service offered through the February IEP was insufficient. In terms of services, the Parents demanded:

a. Two, 30-minute Speech sessions at [School #1] per week and an additional two, 30-minute Speech sessions at home per week for a total of two hours of Speech per week (double the amount offered in the February IEP, but configured similarly),

b. Two hours of special instruction per week provided at [School #1] and at home (four times the amount offered in the February IEP, and configured differently),

c. Two, 90-minute sessions of behavior support per week, but provided entirely at home because the Student received services

from the private, insurance-provided RBT at [School #1] (the same amount of time offered in the February IEP, but in a different location).

29. On the February NOREP, the Parents again requested transportation. The February NOREP does not mention tuition. Regardless, MCIU understood that the Parents continued to want MCIU to provide transportation and fund the Student's tuition at [School #1]. *Passim.*

30. On March 9, 2019, MCIU completed the physical therapy (PT) evaluation proposed during the January 7, 2019 IEP team meeting. The PT evaluation report recommended adding SDIs and services related to the Student's PT needs. P-32.

31. On March 11, 2019, as stipulated, the parties met again for a second "rejected NOREP meeting." During this meeting, the parties discussed the Student's level of service and came to an agreement that the Student would receive the following:[7]

    a. 30 minutes of Speech per week at home and at school,

    b. One 45-mintue Occupational Therapy session per week,

    c. One 30-minute Special Instruction session per week,

    d. One hour of Behavioral services, three times a week at school,

    e. One thirty-minute behavioral consult per month, and

    f. One 30-minute PT session every 14 days.

[7] The record includes no contemporaneous documentation of this agreement. Rather, this amount of service is written in the Parents' rejection of a later NOREP at P-41. An MCIU employee who attended the meeting on March 11, 2019, confirmed through testimony that the Parents' writing on the later NOREP is consistent with the parties' agreement on March 11, 2019.

32. MCIU never offered the particular level of service agreed to during the March 11, 2019 meeting through an IEP or NOREP.

33. MCIU provides transportation to specialized preschools. MCIU has a policy that it will not transport students to or from regular preschools unless the regular preschool is providing before- or aftercare for a child attending a specialized preschool.[8]

34. In March 2019, MCIU personnel concluded that MCIU would be able to grant the Parents' transportation request if the Student attended a specialized school. MCIU personnel contacted the Parents to share this information and asked the Parents to tour [School #2].

35. On March 19, 2019, as stipulated, one of the Student's parents toured [School #2].

36. [School #2] is a class of nine children who have Autism Spectrum Disorder. [School #2] is staffed by a teacher and teacher assistant and is supervised by a BSC. The classroom uses Applied Behavioral Analysis (ABA) principles. Students attending [School #2] interact with neuro-typical peers during recess and have incidental contact with neuro-typical peers throughout the day. NT 325-328, 616-617.

[8] The actual policy, if it exists, is not in evidence. To the extent that multiple witnesses described MCIU's practice for transportation as a "policy," there is no dispute that MCIU will not provide transportation to typical preschools for children who do not also attend a specialized school as a blanket rule.

37. On March 20, 2019, the Parents sent an email to MCIU expressing their belief that [School #2] was an inappropriate placement for the Student. The Parents were specifically concerned that a 45-minute commute would dysregulate the Student, and that the Student should be in an environment with neuro-typical peers in order to model their behavior. P-34.

38. The Parents again requested transportation to and from [School #1] in the March 20, 2019 email. P-34.

39. On March 25, 2019, the parties met again at a third IEP team meeting. During this meeting, MCIU revised the IEP to include services recommended in the March 9, 2019 PT evaluation.

40. MCIU issued a revised IEP with a NOREP on March 27, 2019. For services, the only change as compared to the February IEP was the addition of PT services. For placement, the March IEP offered placement in [School #2] with transportation, Mondays through Thursdays from 8:15 a.m. to 11:15 a.m. IU-24.

41. On April 2, 2019, the Parents rejected the March 2019 NOREP. The Parents again typed their reasons for rejecting the NOREP onto the document. The Parents rejected the NOREP for two reasons: 1) the level of service offered in the March 2019 IEP did not match the agreement reached during the March 11, 2019 rejected NOREP meeting and 2) the Parents concluded that [School #2] was inappropriate for the Student for all of the reasons detailed above. P-41.

42. On June 6, 2019, as stipulated, the parties met at another rejected NOREP meeting with counsel. During this meeting, MCIU revised the Student's related services, but continued to offer [School #2]. IU-27, P-51.

43. Sometime after the June 6 meeting, MCIU personnel encouraged the Parents to tour [School #3]. MCIU provides transportation to and from [School #3]. *Passim*.

44. On July 29, 2019, as stipulated, the Parents toured [School #3].

45. [School #3] is [redacted]. Half of the class is made up of neuro-typical children. [School #3] is staffed by a special education teacher and two assistant teachers. Related service providers also push into the classroom. [School #3] uses a research-based curriculum for academic instruction. NT 341, 619-621, 624.

46. Parents raised concerns about [School #3] that are similar to their concerns about [School #2]. The Parents were concerned about the travel time to and from [School #3] and the availability of positive peer models. *Passim*.

47. On September 6, 2019, the parties met at a fourth IEP team meeting. During this meeting MCIU offered another revised IEP with a NOREP. The September 2019 IEP changed the Student's placement to [School #3]. The September 2019 IEP makes no changes to the Student's related services, including transportation. P-58.

48. On September 10, 2019, the Parents rejected the September 2019 NOREP. Again typing onto the document, the Parents referred MCIU back to the prior NOREP to explain their reasons for rejection. P-59.

49. The Parents requested this due process hearing by filing a complaint on October 11, 2019.[9]

[9] The complaint is dated October 8, 2019. ODR received the complaint on October 11, 2019.

50. On October 30, 2019, the parties met at a fifth IEP team meeting and updated the Student's goals and related services, as stipulated. MCIU issued the updated IEP with a NOREP on November 11, 2019. IU-32.

51. On November 21, 2019, the Parents partly accepted and partly rejected the November 2019 NOREP. The Parents completed the NOREP to indicate that they approved the November 2019 IEP except for the level of speech and the placement. IU-32.

52. The Parents obtained a private Psychological Report for the Student in November 2019. P-73.

53. Transporting the Student to and from [School #1] is a substantial burden for the Parents. The Parents have incurred out-of-pocket expenses to transport the Student. Transporting the Student has also negatively impacted upon the Parents' employment. *See, e.g.* NT 71-74.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community*

School District), 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this hearing, the parties interpret the facts differently and reach different conclusions about what the law requires, but almost none of the underlying facts are in dispute. Some facts were stipulated. All documentary evidence was entered via stipulation. While I cite to testimony as the bases of some of the facts that I found, it is not clear if any of those findings were ever truly in dispute.

Nevertheless, to the extent that an explicit credibility determination is necessary in all due process hearings, I find that all witnesses testified credibly, differences in memory and opinion notwithstanding.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

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

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

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

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Tuition Reimbursement

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

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

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

> *"Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."*

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or

family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities."
22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student."
22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited.
22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion

Tuition Reimbursement

MCIU's Placement Offer was Not Appropriate

The first step in a tuition reimbursement analysis is to determine if the LEA, MCIU in this case, offered a FAPE to the Student. In most tuition

reimbursement cases; the child is attending a public school and then enrolls in a private school. That is not the fact pattern of this case. The Student attended [School #1] at all times. Consequently, I look to see if MCIU offered a FAPE within 10 days of the Parents' notice of intent to seek tuition reimbursement.

The date of the Parents' notice is a bit muddy in this case, as they expressed their desire for an MCIU-funded placement at [School #1] with each rejected NOREP. Even so, the only written demand for tuition *reimbursement* comes in the Parents' due process complaint of October 11, 2019.[10] Therefore, as a technical matter, the test calls for an examination of MCIU's last offer before October 21, 2019, which is the September 2019 IEP.

I must acknowledge, however, that the parties were able to resolve a significant part of their dispute after October 21, 2019. Working through attorneys, the parties came to an agreement resolving the dispute about the level of service that the Student should receive with the exception of Speech. I will not penalize MCIU for its attempt to resolve this matter, and so I will consider whether the October 2019 IEP (NOREP-ed in November 2019) is appropriate. The fact that the September and October IEPs are identical but for changes to include an agreed-to level of service is a substantial factor in my analysis. This decision is not an invitation for LEAs to offer a FAPE only after parents' demand tuition reimbursement.

The Parents argue that the October IEP is inappropriate because it fails to provide a sufficient level of Speech therapy, and that the [School #3] placement is inappropriate.

[10] A demand for tuition reimbursement is quite different from a demand for placement at MCIU's expense. As remedies, placement and tuition reimbursement are vastly different.

I find that the Parents have not met their burden to prove that the offered level of Speech therapy is insufficient. The Parents largely rely upon private evaluations obtained after this hearing was requested, and the Student's actual progress with a higher level of service. Establishing progress with a higher level of service does not prove that the Student could not make progress with a lower level of service. Further, MCIU's offer was consistent with the evaluations that were completed and available to MCIU.

Conversely, I find that the Parents have met their burden to prove that the [School #3] is an inappropriate offer for the Student. I find that MCIU offered [School #3] as a matter of administrative convenience. That conclusion is supported by the testimony in this case from MCIU personnel (which I found credible) and by the chronology of events.

MCIU's own evaluation supported the Student's placement at [School #1]. To whatever extent MCIU's evaluation is ambiguous about placement, my finding gives MCIU the benefit of the doubt. If MCIU's evaluation warranted a placement at a specialized preschool, and MCIU failed to offer a specialized preschool but instead drafted an IEP for services at [School #1], the violation in this case would be greater.

The only evaluation completed after MCIU's initial evaluation and before this hearing was requested is MCIU's PT evaluation. Nothing in the PT evaluation indicates that the Student requires a specialized preschool in order to receive a FAPE. Consequently, no evaluation has ever concluded that the Student requires a specialized preschool in order to receive a FAPE.

In the absence of an evaluation supporting its placement recommendations, MCIU's decision to offer [School #2] was necessary based on other things. The record of this case reveals that two factors prompted the [School #2] recommendation:

1. The Parents wanted transportation and

2. The Student's diagnosis matched the classroom criteria.

[School #2] was a mechanism by which MCIU could acquiesce to the Parents' demand for transportation without violating its own policy.

The Parents toured [School #2] and found it unsatisfactory. MCIU then offered [School #3]. MCIU personnel testified that there are significant differences between [School #2] and [School #3]. This makes the [School #3] offer even more difficult to understand because no evaluation signaled that the Student required [School #2], and no subsequent evaluation suggested that the Student required [School #3]. As with [School #2], MCIU's offer was not made in response to an assessment of the Student's needs. Rather, like [School #2], placement at [School #3] would enable MCIU to offer transportation without violating its own policy and practice.

In conclusion, MCIU offered [School #3]

1. In an effort to acquiesce to the Parents' demand for transportation without violating its own policy,
2. because [School #3] serves children with the Student's diagnosis, and
3. because the Parents rejected [School #2].

These factors are matters of administrative convenience and are not related to the Student's needs. At the time, all evaluations indicated that the Student's needs could be met by providing services in a typical preschool.

The Parents have satisfied their burden to prove that MCIU's IEP is inappropriate by proving that the placement offer embedded in the IEP is inappropriate.

The Parents' Placement is Appropriate

Next, I must consider whether the Parents' placement is appropriate. MCIU argues that [School #1] cannot be appropriate because MCIU services are required there. MCIU is correct that [School #1] provides none of the special education and related services that the Student requires. Even considering the lower standard that parentally-selected placements are held to in the second part of the *Burlington-Carter* test, [School #1] in isolation is not appropriate. However, my task is not to determine if [School #1] in isolation satisfies the Student's needs because the parentally-selected placement is not [School #1] in isolation.

The Parents have never demanded [School #1] by itself. Rather, the parentally-selected placement is [School #1] with special education and related services provided by MCIU. While the parties disagreed about what level of service is necessary, MCIU conceded that MCIU special education at [School #1] constitutes an appropriate placement for the Student by offering that placement after evaluating the Student in January 2019. The appropriateness of that placement is substantiated by MCIU's own evaluation and placement offer.[11] The Parents satisfy the second prong of the *Burlington-Carter* test for these reasons.

[11] The Parents ask me to consider the Student's actual progress at [School #1] as evidence establishing the appropriateness of that placement. I decline for several reasons. The Student received services at [School #1] through the IDEA's pendency rule and so the Student's actual progress is a function of that placement. As discussed, the placement for my consideration is similar but not the same: [School #1] with the agreed-to level of service from October 2019 (again, Speech notwithstanding).

Equitable Considerations Do Not Warrant Elimination or Reduction of Tuition Reimbursement

The record reveals no equitable considerations that warrant a reduction or elimination of tuition reimbursement. The Parents were remarkably consistent in explaining what they wanted and why. They expressed their concerns in detailed writing at all times, even absent an obligation to do so. They visited both placements that MCIU suggested.

The Parents provided consent to each evaluation that MCIU proposed and took no action that hindered MCIU's ability to gather information about the Student. The Parents did not give documents generated by [School #1] to MCIU as they were created, but there is no evidence that MCIU ever requested documents about the Student's progress at [School #1] before this hearing was requested.

With no mitigating equitable considerations, I find that the Parents are owed tuition reimbursement for the Student's attendance at [School #1] on a *pro rata* basis from October 21, 2019 through the end of the 2019-20 school term.[12]

Transportation

Under the IDEA, transportation is a related service. The Parents argue that MCIU is, therefore, obligated to make an individualized determination as to whether transportation is necessary in order for the Student to receive a FAPE. The parties agree that no such individualized determination was made

[12] The Parents demand tuition from the Student's enrollment in October 2018. The Parents were clear that they wanted MCIU to fund the Student's tuition since January 2019. However, the Parents did not request tuition reimbursement in writing at any point prior to their complaint on October 11, 2019. MCIU then had 10 days to cure its placement offer. As such, MCIU owes tuition reimbursement starting on October 21, 2019.

in this case. MCIU, however, argues that the IDEA is deferential to state law on matters of early intervention transportation, and that Pennsylvania's early intervention law, 1 Pa. Stat. Ann. § 875-103, does not require early intervention providers to transport students to typical preschools.

I disagree with MCIU's argument. To the extent that the IDEA is deferential to state law, the IDEA's obligations cannot be reduced by an absence of state law. MCIU is correct that transportation is not included in as a service that Pennsylvania early intervention agencies must provide. That omission does not negate an affirmative IDEA mandate.[13]

The Parents are correct and that MCIU was obligated to make an individualized determination and then offer transportation if necessary, for the Student to receive a FAPE. The Parents have proven that no such individualized determination was made. The Parents' burden, however, is to prove that transportation is a necessary component of FAPE for the Student – not just that MCIU's decision-making was flawed.

Nothing in the record directly links the Student's educational needs through the lens of specially designed instruction. For example, no evidence suggests that teaching the Student how to be a passenger on a bus is necessary for the Student to obtain a FAPE. However, transportation is a related service, meaning that I must determine whether transportation is necessary for the Student to benefit from special education. Preponderant evidence establishes that connection.

[13] MCIU argues that, to the extent Pennsylvania law is vague, custom and practice in Pennsylvania establish that early intervention providers do not transport students to typical preschools. That is true, but not controlling.

The Parents' credible, undisputed testimony is that transportation issues have placed a tremendous burden upon them. Transporting the Student interferes with the Parents' livelihood. They must either miss work to transport the Student or pay others to transport the Student.

The Parents' argument that the Student cannot obtain a FAPE if the Student cannot get to school logically sound, but a touch hyperbolic. The Student gets to school, but only because the Parents sacrifice to make that happen. That sacrifice, in this case, is significant. As a result, the Student's appropriate public education is not *free* if MCIU does not provide transportation. The Student is entitled to a *free* appropriate public education and so, under the unique facts of this case, the Student is entitled to transportation as a related service.

Below, I order the District to reimburse the Parents for any out-of-pocket transportation expenses incurred after October 21, 2019, and then either fund or provide transportation going forward.

Speech

Evidence establishing that the Student requires more Speech therapy than what MCIU offered in October 2019 is not preponderant. As noted herein, the Student's progress with a different level of Speech therapy does not establish that level of Speech therapy is necessary for the provision of FAPE.

Section 504 / Chapter 15

The Parents argue that MCIU discriminated against the Student and Parents under Section 504 and the ADA by denying the Student the benefit of necessary itinerant instruction and the related service of transportation. I reject this argument. Ignoring that itinerant instruction and transportation are IDEA concerns within the context of this case, there is no evidence

whatsoever that MCIU denied the Student access to a regular education program as a form of disability discrimination. Even assuming that I may view these claims separate and apart from the Parents' overarching IDEA action, no evidence supports the type of Section 504 discrimination claim that I may adjudicate.

The Parents also argue that MCIU retaliated against the Student and Parents under Section 504 and the ADA by reducing services and proposing a more restrictive placement when the Parents advocated on the Student's behalf. The record is contrary to this assertion. MCIU proposed reducing services before the Parents began their advocacy. The function of MCIU's placement offers are discussed above. They are not the product of discrimination, but rather an effort to acquiesce to the Parents' transportation demand while compiling with its own policy.

The Parents also argue that MCIU retaliated against the Student and Parents under Section 504 and the ADA by pressuring Parents to respond to NOREPs within 48 hours. The record establishes that the Parents had no difficulty providing comprehensive responses to NOREPs, whatever pressure was applied. Regardless of the Parent's abilities, I find nothing in Section 504 that prohibits an LEA from requesting a speedy response to a NOREP.

For all of these reasons, the Parents have not established Section 504 or Chapter 15 claims separate and apart from their IDEA claims, and the IDEA remedies provided herein are complete remedies to the extent that the claims are coextensive.

ORDER

Now, February 28, 2020, it is hereby **ORDERED** as follows:

1. The Parents are entitled to *pro rata* reimbursement of the cost of tuition at [School #1] and reimbursement for any out-of-pocket transportation costs from October 21, 2019 through the end of 2019-2020 school year.

2. Going forward, MCIU may, at its discretion, either continue to reimburse the Parents for transportation purchased by the Parents or provide its own transportation through the end of 2019-2020 school year.

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

/s/ Brian Jason Ford
HEARING OFFICER