

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

**Pennsylvania Special Education Due Process Hearing Officer  
Final Decision and Order**

**Closed Hearing**

**ODR No. 29529-23-24**

**Child's Name:**

A.C.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

August 12, 2024

## **INTRODUCTION**

The Student<sup>1</sup> resides with Parents and siblings within the boundaries of the Colonial School District (hereafter “District”). The Student, who is a rising [redacted] grader, has attended a private school that specializes in students with learning differences since [redacted] grade. In the Spring of 2023, the District reevaluated the Student and prepared an Individualized Education Program (“IEP”) in preparation for the Student to enroll in the District [redacted] School for the 2023-2024 school year. In April 2023, after meeting with the IEP Team, the Parents notified the District that they intended to keep the Student at the private school for the 2023-2024 school year.

On April 10, 2024, the Parents filed a due process complaint seeking private school tuition reimbursement and related expenses for the 2023-2024 school year ([redacted] grade).

The Complaint proceeded to an in-person, three-day due process hearing convened at the District’s offices on May 15, 2024, June 10, 2024, and June 27, 2024.

For the reasons set forth below, the Parent’s claim for relief is granted.

## **ISSUES**

1. Did the District’s April 2023 IEP offer a Free Appropriate Public Education (“FAPE”)?

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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). Further, to reduce the awkwardness of working around gender-based pronouns, the decision uses the gender-neutral pronouns, “they/their/them” in reference to the Student.

2. If not, does the private school provide educational benefit for the Student?
3. If so, do the equities favor reimbursing the Parents for private school tuition and related expenses for the 2023-2024 school year?

## **FINDINGS OF FACT**

1. The District is a local educational agency ("LEA") within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. All evidence, including the exhibits admitted to the record and transcripts of the testimony, was considered by the Hearing Officer.<sup>2</sup> The only findings of fact cited herein are those needed to explain the ruling. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

### **The Student's Profile and Background**

3. In 2020, a neuropsychologist, who evaluated the Student, found the following DSM-V diagnoses: generalized anxiety disorder; ADHD for inattention; autism spectrum disorder, high functioning; speech dysfluency; mixed receptive and expressive language disorder; and dyscalculia (P-15, p. 11).
4. The Student's strengths were: positivity; kindness; cooperation; good behavior; academic efforts; respectful of peers and teachers; average processing speed on cognitive assessments; average reading fluency,

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<sup>2</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number. Duplicate exhibits, those offered by both the District and the Parents, may not always be referenced twice in each Finding of Fact.

spelling, and sentence writing on academic assessments; and in terms of speech and language, the Student's articulation, voice, and speech fluency (P-4, p. 7-9, 28; P-15, p. 14; N.T., p. 702).

5. The Student began attending a Private School on October 2020 during [redacted] grade. In November 2020, the family and the District entered into a Settlement Agreement for the District to pay tuition for the remainder of the 2020-2021 school year and the 2021-2022 school year (P-4, p. 4; S-1, pp. 3-4; P-15, p. 8).

### **2022 Reevaluation Report ("RR") (P-4)**

6. The 2022 RR found the Student was eligible for special education based on (1) Specific Learning Disability ("SLD") in the area of listening comprehension skills; (2) Speech or Language Impairment ("SLI") in the areas of expressive, receptive and pragmatic language; (3) Autism; and (4) Other Health Impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD") (P-4, p. 28, 31; P-15, p. 8).
7. The Student scored in the "extremely low" range on the cognitive tests for "Visual Spatial" scale. Visual spatial deficits can affect the ability to navigate different environments, know where they are, and be able to find a location (P-4, p. 24-26; N.T., pp. 194-195).
8. The Student's Full-Scale IQ was 75 (P-4, p. 24).
9. On the Achievement Tests, the Student scored in the "extremely low" range in "Listening Comprehension" and "Oral Discourse Comprehension" (P-4, p. 26).
10. As part of the triennial review, the 2022 RR included a Speech and Language Evaluation using the Comprehensive Assessment of Spoken Language ("CASL-2"), the Clinical Evaluation of Language Fundamentals, Fifth Edition ("CELF-5"), and an informal assessment (P-4, pp. 17-23; N.T., pp. 301-328; 334-339). The evaluation took place over two days at

the Private School (N.T., p. 302). The Student's strengths were articulation, fluency and voice (P-4, p. 21; N.T., pp. 298-300).

11. Based on the deficits, the evaluator concluded that the Student met the criteria of speech and language impairment in the areas of expressive, receptive, and pragmatic language. The Student struggled gaining meaning from context that would benefit from a multimodal approach to learning. Recommendations included SDI including explicit instruction, repetition of concepts, chunking, and highlighting key concepts (P-4, p. 23).
12. The 2022 RR was not in the Student's file at the Private School (N.T., p. 644-645; 680).

### **March 2023 Reevaluation Report (P-11 & S-1)**

13. The District's March 27, 2023 RR, conducted during the Student's [redacted] grade year, reviewed elements of the 2022 RR. However, there were several major differences (See #22 below).
14. The 2022 RR assessments reviewed in the 2023 RR were the Aptitude and Achievement Tests (P-11, p. 4-5); the Autism Spectrum Rating Scales ("ASRS") (P-11, p.5); Behavior Assessment for Children ("BASC-3") (P-11, p. 5); Speech and Language assessments (P-11, p. 16-20).
15. New clinical interviews and assessments were conducted at the Private School on February 23, 2023 and March 2, 2023 (P-11, p. 11-12).
16. The report card grades, classroom assessments, observations, and teacher recommendations were new and reflected a similar profile of the Student's strengths and needs (P-11, pp. 6-11).
17. During the 2023 RR interview with the District Psychologist, the Student indicated the desire to go to college and become a teacher or someone who works in a school (S-1, p. 12; S-2, p. 13; P-11, p. 12; N.T., p. 485; P-15, p.13).

18. Present levels and recommendations were updated (P-11, pp. 21-23).
19. In order to address moments of anxiety, the School Psychologist recommended that the Student be given time to calm down in a setting with limited distractions until the situation giving rise to the anxiety can be processed with access to a school counselor or psychologist (P-11, p. 23).
20. In order to address the Student's social needs, the School Psychologist recommended social skills instruction with a focus on regulating emotions, making and keeping friendships, and developing flexibility when faced with unexpected situations (P-11, p. 23).
21. The 2023 RR recommended creating a Transition Program that included long term goals and short-term, attainable goals to assist in reaching the Student's overall objective (e.g., attending college) (P-11, p. 23).
22. There were several changes in the determination of SLD: (1) In the 2022 RR the Student was performing at grade level in academic subjects (P-4, p. 32). In the 2023 RR, the Student was achieving below age/grade level in math problem solving and computation and reading comprehension (P-11, p. 23). (2) The 2022 RR assessments indicated a severe discrepancy between the Student's cognitive ability and academic achievement in the area of listening comprehension (P-4, p. 32). The 2023 RR indicated there were no discrepancies; however, the Student continued to be eligible as a Student with a SLD based on academic needs in reading, writing, math, and dyscalculia (P-11, p. 23). (3) The 2022 RR does not indicate that the Student was found to have an Emotional Disturbance ("ED") (P-4, p. 33). The 2023 RR identified the Student as one with an ED (P-11, p. 24).
23. The Student's eligibility for special education in the areas of SLD, SLI, Autism, and OHI were reiterated (P-11, p. 20).

24. The 2023 RR was not provided to the Private School (N.T., p. 645; 680; 706).

**April 2023 IEP (P-15 & S-2)**

25. The 2023 IEP placement was for Supplemental Education, with 2.4 hours (approximately 35 percent) of the day spent in the regular education classroom. The special education supports included learning support, life skills, and speech and language services (P-15, pp. 29-31; N.T., p. 97).

26. The Student would have been included in a regular education classroom for electives (P-15, p. 29; N.T., pp. 100).

27. The Student would have received replacement instruction and supplemental learning support in reading, language arts, math, science and social studies; all were to be taught by a special education teacher using Specially designed instruction ("SDI"), including pre-teaching, facilitation, and practice. (P-15, p. 29; N.T., p. 102-104).

28. On February 23, 2023, the High School Psychologist observed the Student at the Private School. She reported that the Student appeared engaged (on-task 96 percent of the time), followed the teacher's lesson, asked clarifying questions, volunteered to read a passage, worked quietly, was cooperative, attentive, and productive (P-15, pp. 11-12).

29. The District intended to collect data to prepare a transition plan to support the Student's post-secondary desires to become a teacher or work in a school in some capacity (P-15, pp. 13-14).

30. It was expected that the Student would participate in the Keystone Exam, with accommodations, for Algebra 1, Biology, and Literature (P-15, p. 17).

31. Four goals, with baselines to be determined upon arrival at the District High School, were included: (1) for comprehension; and (2) answering

open-ended questions; (3) simplifying math expressions; and (4) math problem-solving.

32. Three speech and language goals included baselines: (1) the performance of abstract reasoning tasks, with baselines developed from the Student's CASL standard score; (2) problem-solving, with baselines developed from the Student's CELF-5 and CASL-2 standard scores; and (3) demonstrate comprehension by responding to "how" and "why" questions, with baselines developed from the Student's CELF-5 scores (P-15, pp. 19-25; N.T., pp. 358-365; 368-369).
33. The 2023 IEP also included a myriad of SDI to support executive functioning, testing accommodations, check-ins with teachers, re-teaching during bonus blocks, chunking, scaffolding, re-wording, repetition, preferential seating, access to audio versions of texts and lessons, having materials read to the Student, visual aids, an "anytime pass" to visit a counselor, and various strategies to address attention issues (P-15, pp. 26-28).
34. The Related Services offered were: (1) group Speech and Language Therapy, for 120 minutes/monthly; (2) monthly, individual community counselor check-ins; and (3) transportation (P-15, p. 28).
35. The 2023 IEP did not include a plan for transitioning the Student back into the District (P-11; S-2). The Director of Pupil Services/Special Education explained during her testimony that transition services are not typically documented in the IEP unless it was listed as an SDI for a specific thing, such as if a student were legally blind. (N.T., p. 776).
36. Following the 2023 IEP Meeting, the Parents gave notice of their intention to continue Student's placement at the private school and to seek reimbursement from the District (N.T., p. 407).



37. Almost a year later, on April 10, 2024, the Parents filed a due process complaint seeking reimbursement of private school tuition and related expenses for the 2023-2024 school year.
38. The 2023 IEP was not provided to the Private School (N.T., p. 680-681; 703).

### **October 2023 Neuropsychological Evaluation (P-16 & S-6)**

39. The District did not have this evaluation available at the time it developed the April 2023 IEP. It was reviewed in writing this decision because the Private School received this information while the Student was enrolled there during [redacted] grade, the period for which tuition reimbursement was requested.
40. The examiner recommended that the Student needed Speech and Language Therapy to address weaknesses in receptive, expressive, and pragmatic language skills (P-16, p. 20).
41. After receiving the 2023 Neuropsychological Evaluation Report, the Private School conducted its own speech and language evaluation and began providing Speech and Language Therapy to the Student in April 2024 (N.T., p. 656, 657-658, 678-679; 685; P-17).
42. The October 2023 Evaluation Report noted that reading and writing aspects of foreign languages could be challenging for the Student (P-16, p. 21). The Student took Spanish at the Private School. The Student's semester grade in [redacted] grade Spanish was A- (S-7, p. 1). The 2023-2024 report cards were not available at the time of the due process hearing.

#### **April 2024 IEP (S-4)**

43. On April 18, 2024, the District issued an IEP for [redacted] grade in anticipation of the Student's return to the District for the 2024-2025 school year (S-4).<sup>3</sup>

#### **The District [redacted] School compared to the Private School – Size, Enrollment, and Layout<sup>4</sup>**

44. The Parents were concerned about the Student's safety attending school in an environment as large as the District [redacted] School<sup>5</sup> (N.T., p. 729).

45. The District [redacted] School had approximately 1,600 students enrolled, split among grades [redacted] (N.T., p. 29).

46. The [redacted] School had over 100 classrooms, a pool, a fitness center, a cafeteria, and two gymnasiums at the Public [redacted] School, spread over three wings, and three floors. Most of the learning support classrooms were located in one wing of the building (N.T., pp. 33-42). There were approximately 15 special education classrooms (N.T., p. 51).

47. Life Skills classes had between six to ten students with one teacher, at least one classroom aide, and several 1:1 para-professionals depending on class size. The main Life Skills classroom was located on the first floor in the C-Wing. The Life Skills classroom suite included a kitchen and a small ante-room. The bathroom, the Cafeteria, and the Guidance Counselor suite were nearby (N.T., pp. 81-85).

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<sup>3</sup> However, because that school year was outside of the request for 2023-2024 tuition reimbursement, it was not included herein.

<sup>4</sup> Because this issue was paramount during the three-day hearing and the Burlington-Carter test must be applied in this decision, an exhaustive comparison of the two schools has been included herein.

<sup>5</sup> The [redacted] School campus, located on a major road, includes an elementary school/administrative offices (under renovation), athletic fields, and several parking lots.

48. Class size at the District [redacted] School was capped at 28 students. Most of the core subject classes have 20-23 students enrolled. Class sizes in elective courses varied (N.T., pp. 47-48).

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49. The Private School where the Student attended since the Fall of 2020 (S-1, pp. 3-4) was accredited by the Pennsylvania Association of Independent Schools. The students met Pennsylvania requirements for graduation (N.T., p. 638).

50. The total enrollment at the Private School was less than 200 students, about half of which were in grades [redacted] (N.T., p. 638).

51. The Private School has 36 classrooms, 16 of which are used for the upper school. It was formerly an elementary school that was converted into a private school. There were two floors and two hallways (N.T., pp. 638-639; 653; 674).

52. The Private School provided a small class size with an average of six students. Each class had one teacher and there was a learning specialist assigned to each grade level (N.T., p. 641-642; 651; 683).

53. There was no "pull-out" instruction at the Private School. The learning specialists "pushed-in" to the classrooms (N.T., p. 689).

54. The Student's classes in the Private School were contained within two hallways. The Student moved from class to class with the same students in their Mastery cohort. There was no bell schedule at the Private School (N.T., 667; 674-675).

### **Transportation**

55. The District [redacted] School provided small bus transportation for special education students, which was accessed in the inner courtyard, away from where the general student population accessed a different bus transportation system that arrived at the bus platform (N.T., pp. 31;

161). An aide was present to accompany students to and from the bus and class (N.T., pp. 162-163).

56. Typically, six security officers, five hall monitors, six administrators, and teachers were in the hallways throughout the [redacted] School to direct the students. They had “walkies” to communicate with one another (N.T., pp. 49-50; 71).

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57. The Private School had two different drop-off circles for children: one for arriving cars, and one bus circle. The students were met by a colleague at the door and directed to where they needed to go. In the afternoon, two colleagues were on bus duty. They entered each bus and took attendance on the buses before they were allowed to leave the premises (N.T., p. 662-663).

### **Transitions**

58. Navigating the building was never a problem for the Student while attending the District elementary school in the K-3 building. The Student transitioned successfully to the 4-5 school building for fourth grade and to the middle school. The 4-5 building had three stories and about 850 students at the time the Student attended school there. Class size was about 25 students. Both the 4-5 and the middle school had large cafeterias (N.T., p. 772).
59. The District created transition plans for students who returned to the High School to familiarize them with the school environment. A transition plan included such things as a private tour of the high school, student orientation, social stories, and assigning a peer buddy (N.T., pp. 67, 515-516).

60. The High School had peer orientation leaders who assisted students who were new to the building as they transitioned between classes and became acclimated to the High School (N.T., p. 67).
61. Additional transition and guidance supports could be created and added to an individual student's IEP, if needed (N.T., p. 68). Those transition services are not typically included in a student's IEP (N.T., p. 776).
62. Attending the High School would have provided the Student with an opportunity to prepare for college by practicing self-advocacy, independence, asking for help, reaching out to teachers, and navigating the education system in a larger environment (N.T., p. 759).
63. The District High School used bells to signal transitions. The time between classes was four minutes. Teachers may have been lenient about arriving after the bell for those students who have a long distance to travel between classes (N.T., p. 761).
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64. The Parents and the Private School recognized that transitions were challenging for the Student and triggered increased anxiety (N.T., p. 686; 702).
65. The Student did best with very concrete routines and structures. When things changed in that structure, it increased the Student's anxiety and impacted their learning (N.T., p. 696; 702).
66. The Student's anxiety inhibited their ability to process information and transition. The Private School developed a coping strategy for the Student to help process new situations that increased their anxiety. The Student checked in with an administrative assistant who worked with the Student to help reduce anxiety and allowed them to go on with their day (N.T., p. 655-656).

67. The Private School provided Social Emotional Learning (“SEL”) through its “Connections Program” (N.T., p. 649). This class also helped the Student learn to cope with anxiety by identifying what triggered their anxiety and used mindfulness, roleplaying social situations and social dynamics, and other skills to reduce anxiety (N.T., p. 667).
68. There were no bell schedules at the Private School (N.T., 667).

### **Scheduling and Bonus Block**

69. The District High School students followed a block schedule on a ten-day cycle. Each day had five blocks and a 30-minute bonus block (N.T., p. 52, 72).
70. Each block was 64 minutes, with a four-minute transition period between classes (N.T., p. 32).
71. The High School students were assigned alphabetically, by grade, to a “home” bonus block that met for three days of the ten-day cycle (N.T., p. 53, 72). The home bonus block was designed for the cohort and its corresponding teacher to remain the same throughout the students’ time at the High School (N.T., p. 54, 72-73).
72. There were a variety of other options the students could have selected to use the other seven bonus block periods; for example, remediation, enrichment, clubs, “best buddies,” peer coaching, writing center support, and study hall (N.T., pp. 54; 56). Guidance counselors also assigned students to participate in small groups during a bonus block (N.T., p. 56).
73. Much of the curricula was digital (N.T., p. 44).
74. Two health and physical education credits (two semester-based classes) were required for graduation. Students changed clothes for gym and used lockers to store personal belongings (N.T., p. 44-46).

75. The High School offered teachers and parents Executive Functioning training based on the work of Dr. George McCluskey, the author of the *Essentials of Executive Functioning* (N.T., p. 770).

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76. The Private School was designed to serve students with learning differences and prepare them for college. The curriculum, which was aligned with Pennsylvania's core standards, was modified to meet the needs of the students (N.T., p. 694).

77. The Private School had no IEPs, however, each student has a Learning Profile that described the student's learning accommodations (N.T., pp. 646-647). There were no goals, objectives, or progress monitoring like those in public school IEPs. Progress was monitored through academic achievement assessed through tests, quizzes, projects, anecdotal data recognized by the learning specialists, summative and formative assessments, and objectives embedded in the course curriculum (N.T., pp. 693-695).

78. The Private School required students to take a "Metacognition" class to help them better understand their learning profile to promote self-advocacy and independence (N.T., pp. 653-655).

79. The Private School students do not have to change clothes to participate in gym class (N.T., p. 668).

80. During the [redacted] grade, the Student took Basic Geometry, Communications, Reading and Writing course ("CRW"), Basic Chemistry, and Western Civilization, and was a member of the cheerleading squad (N.T., p. 660; 669-671; 692).

81. The Private School classes supported Executive Functioning deficits. The Student's executive functioning needs were also addressed in their 1:1 academic support block (N.T., p. 685-686).

82. Private School students received a diploma at graduation. Some graduates went on to four-year or two-year colleges, and technical schools. Some students returned to public schools and continued receiving special education through age 21 (N.T., p. 671-672).

### **Lunch**

83. The Public High School had one cafeteria and an adjacent courtyard where the students eat lunch. Approximately 400+ students were assigned to each of three lunch periods. Some students received guidance passes to eat lunch in a smaller setting (N.T., pp. 34-36; 72).

84. The High School had various ways to accommodate students who have a problem eating in the cafeteria. For example, they could eat lunch in a smaller environment with a paraprofessional present. Those students were permitted to bring a friend there to eat with them. And staff have been assigned to accompany students who needed help to purchase lunch and navigate the cafeteria (N.T., p. 754-755).

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85. The Private School's lunchroom served about 100 students in the commons area with six faculty members there. The Student ate lunch with the same group of students daily (N.T., pp. 667-668).

### **Counseling Services**

86. The High School had two community counselors assigned to work with students with mental health or emotional support needs (N.T., pp. 64-65; 409-411; 415).

87. The High School had mental health professionals who could be accessed by any student needing support in any situation (N.T., p. 758).

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88. The Private School had one certified counselor on staff who taught “Connections” and was available for 1:1 check ins and small-group counseling. The Private School also had one school psychologist and a SEL coordinator who was responsible for creating the SEL curriculum and served as a resource for students (N.T., pp. 663-665).
89. The Private School had no counselors solely dedicated to the [redacted] school (N.T., p. 676).

### **Parents’ Claims**

The Parents seek Private School tuition reimbursement for the 2023-2024 school year because (1) the April 2023 IEP offered by the District was not a FAPE; (2) the Private School has and is providing educational benefit for the Student; and (3) the equities favor full reimbursement.

The Parents allege that the District High School is not an appropriate environmental setting for the Student who has visual spatial deficits (1) the facility is too large; (2) there are too many students attending; (3) it would be too difficult for the Student to navigate between classes; (4) the four-minute bell schedule and changing clothes for gym would trigger anxiety; (5) class size is too large; and (6) the busing situation is overwhelming.

The Parents claim that the District offered Life Skills as a way to provide a smaller environment within the larger High School; not because the academics are appropriate for the Student, who can make progress in academic content areas such as science and social studies given the right type of curriculum, instruction, format and expectations of work production. Therefore, the 2023 IEP does not offer FAPE.

The Parents urge the Hearing Officer to not consider the 2024 IEP in determining the first prong of Burlington-Carter because it is outside the scope of the Complaint. See 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. §

300.511(d). Therefore, there can be no determination in this case of whether the 2024 IEP is appropriate for Student.

Secondly, the Parents assert that they have met their burden of proving that the Student is obtaining educational benefit at the Private School. The neuropsychological evaluation concluded that the Student's academic, social, emotional, and language needs support placement at the Private School which provides a small learning community with low teacher-to-student ratio in a small, easily navigable physical space. As such, the Parents argue that the evidence provided satisfies the second prong of the Burlington/Carter test.

Third, the Parents contend that the Parents are entitled to full reimbursement for Private School tuition and related expenses for the 2023-2024 school year because they fully cooperated and collaborated with the District through both of its evaluations processes, signed releases, and provided all the information the District requested. Furthermore, the Private School provided the District with relevant information about the Student's strengths, needs and progress, including teacher input, teacher rating scales, and report cards. The Private School provided the District with access to observe Student twice in the Private School and learn about its pragmatic language and SEL curriculum.

The Parents participated in the 2023 IEP Meeting where they expressed concerns with the size of the High School and classes and explained the basis of those concerns, which is that the Student had not been successful in a larger environment whereas the Student has been successful in the smaller learning community. The Parents concluded that the 2023 IEP did not offer appropriate interventions, and subsequently gave notice to the District of their intention to maintain Student's placement at the private school and to seek reimbursement. Furthermore, the Parents retained a neuropsychologist to evaluate Student to determine whether their

concerns were valid. Because the Parents did everything equity requires, the Parents urge the Hearing Officer to order full reimbursement of Private School tuition and related expenses.

## **District's Arguments**

The Student was not enrolled in District at the time the District's April 2023 IEP was created. The District argues that the adequacy of the IEP goals must be determined based on the knowledge available at the time the IEP was offered. Furthermore, baselines would be determined when the Student returned to the District.

The District relied on its March 2023 RR, input the Student provided for the report, and IEP meeting discussions to develop the Transition Planning section of the programming for its April 2023 offer of FAPE (N.T., p. 483).

The District uses a combination of an IEP goal and SDI to provide instruction and support to the Student in social and emotional areas.

The District contends that the absence of a plan to aid the Student's transition back to the public high school in itself does not invalidate the IEP's offer of FAPE.

The District argues that the Hearing Officer is limited to adjudicating the issues in the Complaint and those issues alone. Therefore, it urges the Hearing Officer to ignore the Parents' concerns about the size of the District High School. However, it points out that a smaller classroom setting can be provided within the larger high school. Both the Life Skills and Learning Support programs provide the smaller classroom setting recommended by the District's March 2023 RR (N.T., pp. 160, 165, 204-205, 261-262). Both placements have staff trained in Autistic Support, which is embedded into each program (N.T., pp. 69, 508-509).

Therefore, the District urges the Hearing Officer to rule in its favor and deny the Parents' request for tuition reimbursement.

## **General Legal Principles**

### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parent. *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 "equipose." 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 Parents must prove by a preponderance of the evidence that the issues raised in the Complaint should be decided in their favor.

### **Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. See *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).

In this due process hearing, the Hearing Officer finds that the witnesses testified credibly from their perspectives and memories of the events in question.

### **Eligibility under IDEA**

The Individuals with Disabilities Education Act ("IDEA")<sup>6</sup> 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). "Meaningful benefit" means that a student's program affords the student the opportunity for significant learning in light of their individual

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<sup>6</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).

needs, not simply *de minimis* or minimal education progress. *Andrew F. ex rel. Joseph F. v. 15 Douglas County School District*, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); *Dunn v. Downingtown Area School District*, 904 F.3d 208 (3d Cir. 2018).

## **Individualized Education Program (IEP)**

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). 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.

"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 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).

IDEA does not concern itself with labels, rather, once a child is eligible under one of the enumerated disability categories, the IEP of the child must be tailored to the unique needs of the particular child. 34 C.F.R. § 300.106(a)(3)(i); See *Heather S. v. State of Wisconsin*, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); *Osage R-1 School District v. Sims ex rel. BS*, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011).

The child's identified needs and not the child's disability category determine the services that must be provided to the child. *School District of Philadelphia v. Post, et al*, 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. [12] 2017); See, *Maine School Administrative District No. 56 v. Mrs. W. ex rel. KS*, 47 IDELR 219 (D. ME 2007); See also, Analysis of comments to proposed federal regulations, 71 Fed. Reg. 156 at pp. 46586, 46588 (OSVP August 14, 2006); *In re Student With A Disability*, 52 IDELR 239 (SEA WVa 2009).

A child's IEP "must aim to enable the child to make progress." *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018) (emphasis in original). Proper assessment of whether a proposed IEP meets the above standards must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same).

### **Free Appropriate Public Education ("FAPE")**

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).

The United States Supreme Court has developed a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the

child's unique circumstances. *Andrew F by Joseph F v. Douglass County School District RE-1*, 580 U.S. \_\_\_\_, 137 S. Ct. 988, 69 IDELR 174 (2017); *Board of Educ., etc. v. Rowley*, 458 U.S. 178, 553 IDELR 656 (1982); KD by *Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

The appropriateness of an IEP in terms of whether it has provided a FAPE must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. *Ridley School District v. MR and JR ex rel. ER*, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); *DS v. Bayonne Board of Education*, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009). In order to provide FAPE, an IEP must be reasonable, not ideal. See *KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018); *LB by RB and MB v Radnor Twp Sch Dist*, 78 IDELR 186 (ED Penna 2021).

## **Tuition Reimbursement**

Parents who believe that an LEA is not offering FAPE to their child may unilaterally place their child in a private school and thereafter seek reimbursement from the LEA. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi).

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).

In determining whether or not tuition reimbursement is warranted after a finding that the LEA did not offer a FAPE, two other considerations are examined: whether or not the parental placement is reasonably calculated to provide the child with educational benefit, and whether or not there are equitable considerations that operate to reduce or deny a remedy. *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*.

There are three prongs to this inquiry, which taken together, are commonly referred to as the Burlington-Carter test. 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.

## **DISCUSSION**

After properly giving notice of their plan not to return the Student to the District for the 2023-2024 school year, the Parents seek tuition reimbursement and related expenses for the Private School where the Student has been attending since [redacted] grade as the result of a confidential agreement with the District. There were no procedural deficiencies that would adversely affect the IEP offer of FAPE. The parties focus is on the appropriateness of the substantive appropriateness of the IEP.

Therefore, to determine whether or not the Parents' claim will prevail, the Burlington-Carter Test is applied here.

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.

First, the Parents must prove by a preponderance of the evidence that the 2023 IEP offered by the District does not offer a FAPE.

The Parents argue that the combination Supplemental Learning Support/Life Skills placement in the 2023 IEP is not an academic fit for the Student and it does not offer FAPE for a number of reasons.

Their first claim, that the IEP's *academic* goals lacked baselines, is not in and of itself a fatal flaw. The Hearing Officer concurs with the District's defense that baselines are difficult to develop when the Student has been out of District for three years and that growth or other changes could occur between April (when the IEP was issued) and August (when the Student would have returned to the District), which would necessitate new baseline testing anyway. In fact, it is not unusual for the IEP goals prepared for a Student who is returning to a District placement to indicate that baselines will be determined when the Student returns to the District, giving it an opportunity to collect current baseline data.

The four academic IEP goals that lacked baselines, all specifically noted that baselines would be determined by assessing the Student when the Student returned to the District. The three speech and language goals, one of which addressed comprehension on nonliteral language (P-15, p. 21), include baselines based on the District's testing completed for the 2023 RR.

The Parents also argue that 2023 IEP is not a FAPE because the reading comprehension goal does not include an instruction level. The 2023 IEP reading comprehension goal should be based on the Student's current reading level and grade-level expectations. The goal stated that it would be measured by curriculum-based assignments or probes, which as the goal

infers would be conducted when the Student returned to the District. The District, which was stymied because it did not have sufficient information about the Student's reading level at the Private School, could have conducted further testing despite its claim that it did not want to further interrupt the Student at the Private School.

The Parents contend that the 2023 IEP transition services are too broad and vague, and that the Independent Living and Employment services reference the [redacted] grade curriculum even though the 2023 IEP was proposed for the Student's [redacted] grade year. The Transition Plan regarding Post-Secondary Education and Training, which aligns with the Student's stated goal of becoming a teacher or working in a school, is based on [redacted] grade curriculum. However, contrary to its own 2023 RR, which calls for breaking down the overall goal into smaller and smaller steps to help the Student start to work on reaching the overall goal while still in high school, the [redacted] grade services and activities are broad or vague (e.g., "improve,"), lacking specifics. The only [redacted] grade activity that is somewhat specific calls for the creation of a "four-year plan" to be developed with their guidance counselor. Again, that defect is insufficient to find that the 2023 IEP does not offer FAPE.

The Parent's claim that the 2023 IEP SDI that addresses anxiety by providing for an "anytime pass" to visit a counselor is inappropriate. However, it appears that the District High School offers more than the Private School does in that regard by providing a counselor; the Private School merely offers check-ins with an "administrative assistant" when situational anxiety is an issue for the Student.

While nothing addressed herein so far rises to the level of failing to provide a FAPE, several other of the Parent's concerns about the 2023 IEP do render it inappropriate because the IEP is not tailored to the Student's

*unique* circumstances (i.e., having a visual-spatial deficit, *and* pragmatic language deficits, *and* anxiety).

First, the 2023 IEP does not offer social skills instruction as recommended by the District's own School Psychologist who conducted the 2023 RR.

Second, the District's blended Life Skills and Supplemental Learning placement in the 2023 IEP does not appear to be academically appropriate or sufficiently ambitious for the Student, but rather the District's attempt to limit the size of school environment in which the Student would have to navigate based on the Student's visual-spatial deficits. The testimony indicates that the Student has already exceeded the functional curriculum offered to Life Skills students. Therefore, despite the District's claim that it was hindered by not knowing the instructional level or how rigorous the curriculum are at the Private School, the 2023 IEP offered to the Student is not appropriate and would not provide an opportunity for meaningful growth if the Student was limited to Life Skills, Supplemental Learning Support, and some electives.

Third, the 2023 IEP does not include a plan to transition the Student from the Private School to the District High School. The District and the Parents agree that the Student's visual-spatial and pragmatic language deficits may result in directional impairment to the extent that the Student is unable to navigate different environments, be cognizant of their exact location, and find their target location. The Parents voiced their concerns about the size of the High School at the 2023 IEP meeting.<sup>7</sup> Even before the 2023 IEP meeting, the District was well aware of these deficits at least as far back as the 2022 RR in which the Student's visual-spatial scores were in the "extremely low" range. In fact, their attempt to place the Student in Life

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<sup>7</sup> In fact, the District's closing statement suggests that the Parents "harped" on their concerns about the size of the High School.

Skills to decrease the distance the Student would need to navigate in the school and demonstrates their awareness of this need.

Therefore, even if the pace of instruction and content were appropriately modified, and the Student could be successful in a larger class size, the High School may be unmanageable for this Student and their unique circumstances particularly during the 35 percent of the day that the Student would have been in a regular education setting for lunch, where up to 500 students are in the cafeteria, and electives, which may be in a class capped at 28 students. While the District alleges that accommodations would be offered to alleviate those concerns, the District failed to offer to add anything following the 2023 IEP meeting to assuage the Parents' concerns about the Student's safety in the building.

The District's own Director of Pupil Services/Special Education explained during her testimony that transition services are not typically documented in the IEP unless a special circumstance, such as blindness, requires the creation of SDI. The Student's visual-spatial deficits, anxiety, and pragmatic language deficits *are* specific, unique circumstances that require one or more SDI because they impact the Student's ability to navigate the District High School learning environment. Hypothetically, the Student's documented needs could result in the Student's becoming disoriented or lost, causing them to feel overwhelmed, triggering their anxiety, and then the Student's pragmatic language skills, minimal problem-solving, and self-advocacy skills may impede their ability to ask for help not realizing who and how to ask for directions; all of that being exacerbated by the knowledge that the transition period is four minutes. Contrary to District testimony provided at the hearing that indicates a peer buddy or other type of assistance could be made available to the Student, the 2023 IEP does not include any such SDI to assist the Student as they transition between classes.

The Hearing Officer's hypothetical scenario demonstrates that the 2023 IEP is not tailored to the Student's unique circumstances and SDI should have been included to address the Student's directional impairment in light of the potential consequences.

In conclusion, the Hearing Officer finds that the 2023 IEP offered by the District is not a FAPE because (1) the blended Supplemental Learning Support and Life Skills placement is not rigorous enough to be reasonably calculated to enable the Student to receive *meaningful* educational benefit; (2) the SDI and the related services included in the 2023 IEP are not sufficient to address the Student's anxiety and social skill deficits; and (3) the Student's unique circumstances require SDI designed to help the Student navigate the High School in the regular education environment.

Because the Parents have met their burden of proving that the 2023 IEP is not a FAPE, the remaining two prongs of the Burlington-Carter Test will be considered.

The second prong of the Burlington-Carter test requires an assessment of whether the Private School provides educational benefit to the Student. The record shows that the Private School is a small learning community that is specifically designed to accommodate students with learning differences. It has a low teacher-to-student ratio and small class sizes. The former elementary school in which it is located is a significantly smaller physical space than the District High School. The Student has successfully navigated the Private School for the last three years.

The Private School provides appropriate academic, social, emotional, and language supports for the Student. The Private School is limited by the information the Parents share with it. The Private School has no affirmative duty to elicit (from the Parents or the District), collect, or review any evaluations or IEPs created for the Student by the District.

After the Parents provided the Private School with the 2023 Neuropsychological Report indicating that the Student would benefit from Speech and Language intervention, it conducted its own assessment and began offering Speech and Language Therapy to the Student in April 2024.

One cannot conclude that the Private School failed to appropriately program for the Student. Based on the witness testimony, the Student's Private School attendance summary, learning profile, grades, and the teacher data in report cards and evaluations all demonstrate that the Private School is appropriate based on the Student's unique circumstances, and the Student is achieving an educational benefit at the Private School. The Student was even able to successfully complete a two-year Spanish class with high grades, despite an evaluator's statement that taking a foreign language would not be in the Student's best interests.

Because the Parents have met their burden of proving the first two prongs of the Burlington-Carter test, the third prong will be addressed.

The equities weigh in favor of full reimbursement of tuition and related services because there is nothing in the record because there is nothing in the record of considerations that would operate to reduce or deny a remedy of tuition reimbursement. The record shows that the Parents and the Private School fully cooperated with the District by signing documents, providing information that was requested, and providing access to the Student for testing and classroom observations at the Private School as requested.

There being nothing in the record to diminish the right to full tuition reimbursement, the Parents have met their burden of proving the third prong of the Burlington-Carter test.

Based on all of the above, the Parents' claim for relief is granted.

## **LEGAL CONCLUSIONS**

1. The Parents have met their burden of proving by a preponderance of the evidence that the 2023 IEP proposed by the District based on the information it had at the time does not provide a FAPE.
2. The Parents have met their burden of proving that the Private School is appropriate because it provides the Student with significant learning and confers meaningful educational benefit.
3. The Parents have met their burden of proving that the equities favor full tuition reimbursement and related expenses for the 2023-2024 school year.

## **ORDER**

AND NOW, this 12th day of August, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claim is **GRANTED**.

1. The District's 2023 IEP did not offer FAPE to the Student based on the information known to the District at the time.
2. The Parents are entitled to reimbursement for tuition and related expenses at the Private School for the 2023-2024 school year.
3. Within fifteen calendar days of the date of this decision and order, the Parents shall provide documentation to the District of all existing invoices and receipts for tuition they paid, and related expenses, for the Student to attend Private School during the 2023-24 school year.
4. Transportation expenses may be determined by IRS mileage rates, if applicable.



5. Within thirty calendar days of receipt of the above documentation, the District shall reimburse the Parents for the full amounts pursuant to this Order.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms in writing.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. The Hearing Officer's jurisdiction is relinquished.

*Cheryl Cutrona*

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

**Date of Decision**

August 12, 2024

**ODR 29529-23-24**