

*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**

**ODR No. 28726-23-24**

#### **CLOSED HEARING**

**Child's Name:**

R.C.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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Berwyn, PA 19312

**Local Education Agency:**

Hatboro-Horsham School District  
229 Meetinghouse Road  
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**Hearing Officer:**

Cathy A. Skidmore, Esquire

**Date of Decision:**

03/15/2024

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, R.W. (Student),<sup>1</sup> is a mid-teenaged student residing within the boundaries of the Hatboro-Horsham School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> based on specific learning disability, and accordingly has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup> Student currently attends a private school (Private School) at the option of the Parents.

During the fall of the 2023-24 school year, the Parents filed a Due Process Complaint under the IDEA and Section 504, contending that the District did not propose appropriate programs for Student for the 2022-23 and 2023-24 school years; as a remedy, they sought reimbursement for tuition and related expenses for Private School. The District denied the Parents' contentions and the relief demanded. The matter proceeded to an efficient hearing.<sup>4</sup>

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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 details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. Counsel for both parties, commendably, limited the evidence to that directly relevant to the narrow issues presented.

Following review of the record and for all of the reasons set forth below, the claims of the Parents shall be granted in part and denied in part.

## **ISSUES**

1. Whether the District's proposed programs offered for the 2022-23 and/or 2023-24 school years were appropriate for Student;
2. If the District's programs proposed for the 2022-23 and/or 2023-24 school years were not appropriate for Student, is Private School appropriate; and
3. If the District's programs proposed for the 2022-23 and/or 2023-24 school years were not appropriate for Student, and Private School is appropriate, are there equitable considerations that may operate to reduce or deny a remedy of tuition reimbursement to the Parents?

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student residing within the District. Student is eligible for special education under the specific learning disability category. (N.T. 38.)
2. Student has an interest in [redacted]. Socially, Student is reluctant to express emotions with people whom Student does not know, and has expressed insecurity and lack of self-esteem. (N.T. 41-44, 57.)
3. The District is a recipient of federal funding. (N.T. 38-39.)

4. The District middle school that is Student's neighborhood middle school assigns students to teams that have common teachers (English/Language Arts, mathematics, social studies, and science) whose classrooms are grouped in close proximity. There is also one special education teacher on each team. Teams are comprised of approximately ninety students. The team teachers meet regularly, at least twice each week and usually more frequently. (N.T. 132-33, 150-51, 159-60, 322-23.)
5. Content area class sizes at the District middle school that is Student's neighborhood middle school are approximately twenty-four students cotaught by a general education teacher and a special education teacher. (N.T. 104-05.)
6. The District middle school that is Student's neighborhood middle school has a daily student support period that is individualized depending on a student's needs. (N.T. 140-41.)
7. The District middle school offers that is Student's neighborhood middle school a variety of electives (such as foreign languages, family consumer science, and coding) and extracurricular activities (such as sports, a play, and student government). (N.T. 152-53.)
8. The District middle school that is Student's neighborhood middle school offers a variety of supports for new students transitioning to the school and community-building opportunities for all students. (N.T. 292, 334-36.)

## **Early Family and Educational History**

9. [redacted] (N.T. 40-41, 45, 57-58.)
10. While attending school in the [redacted], the Parents became concerned with Student's reading skills and believed that Student was not performing at expected levels. They obtained private evaluations of Student, who also was provided with outside reading instruction through distance learning that was reportedly successful in improving Student's reading ability but with weaknesses remaining. (N.T. 44-49; P-1; P-2; S-1 at 1-2; S-6 at 6-7.)
11. The first private evaluator, a psychologist, determined when Student was late elementary school-aged that Student exhibited deficits in reading, spelling, handwriting, and mathematics skills. This evaluator also suggested that Student's weaknesses were suggestive of dyslexia. (P-1; S-1 at 3-10.)
12. A different psychologist conducted an evaluation of Student focused on working memory, with a report issued in September 2021. Although Student's cognitive functioning was considered to be average, Student's visual spatial, working memory, and processing speed abilities were in the below average to average range. This psychologist concluded that Student had a learning disability.<sup>5</sup> (P-2; S-1 at 11-20.)
13. When the Parents learned of the transfer to [redacted], they began to investigate schools for Student and moved to the District near other family. They decided on Private School and enrolled Student there very soon after the move in June 2022. (N.T. 47-48; S-2.)

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<sup>5</sup> This conclusion was not made pursuant to the IDEA.

## **2022-23 School Year**

14. The Parents registered Student in the District following the move to [redacted] when they learned that enrollment was necessary in order to obtain Student's transportation to Private School. (N.T. 50, 52.)
15. In response to Student's registration, the District convened a meeting and issued a Permission to Evaluate form; the Parents consented to the evaluation. (N.T. 50-51, 348-50; P-3; P-4; S-3.)
16. Parent input into the District's Evaluation Report (ER) reflected elementary school-age concerns with Student's ability to read and their provision of 400 hours of reading instruction; and then-current concerns with reading and spelling, self-confidence, and social skills. The Parents also reported that Student had a fear of learning with typical peers who were performing at grade level. At home, Student required reminders to complete homework and support for planning tasks. (P-5; P-6 at 2-3; S-4; S-6 at 3-4.)
17. The ER included a summary of an observation at Private School by a District school psychologist during English/Language Arts class, with Student participating and complying with teacher directives. Private School teacher input reported on Student's performance in English/Language Arts, Wilson Reading, mathematics, and science. Student was receiving classroom-based strategies and accommodations including multisensory instruction and supports for written expression. Student also was provided with additional accommodations in science class for assignments, and work expectations were modified. Student exhibited a number of strengths in Private School classes, and weaknesses in the areas of fluency, decoding, spelling, vocabulary, drawing inferences, and mathematics

problem solving; along with difficulty with self-confidence, self-advocacy, and organizational skills. (S-6 at 3-6.)

18. Assessment of cognitive ability for the ER (Wechsler Intelligence Scale for Children – Fifth Edition) revealed variable composite scores, but both the Full Scale IQ and General Ability Index scores were in the average range, with the latter considered to be more valid. Student exhibited a relative strength on the Visual Spatial Index and relative weaknesses on the Fluid Reasoning and Processing Speed Indices. (S-6 at 14-16.)
19. Academic assessment for the ER (Wechsler Individual Achievement Test - Fourth Edition (WIAT-IV)) yielded below average skills in Word Reading, but average range scores in Pseudoword Decoding, Reading Comprehension, and Listening Comprehension. An additional reading measure identified a number of areas of deficit: phonological processing, decoding, overall fluency, and comprehension. On other areas of the WIAT-IV, Student earned scores in the below average range in spelling, essay composition, math problem solving, and numerical operations. (S-6 at 8-13.)
20. Student's behavioral functioning was also assessed for the ER (Behavior Assessment Scale for Children - Third Edition (BASC-3)) using rating scales completed by the Parents, Private School teachers, and Student. The ratings of one teacher were to be viewed with caution based on the Consistency Index. One clinically significant area was endorsed by the Parents (withdrawal); and several areas of at-risk concern were identified by the Parents (functional communication, activities of daily living) and one or more teachers (atypicality, withdrawal, adaptability). Student's self-report did not reflect any concerns on this instrument. (S-6 at 16-19.)

21. Occupational therapy assessment for the ER reflected a weakness in visual motor and visual perceptual functioning, with a recommendation for direct services bi-monthly to better develop those skills. This portion of the evaluation did not otherwise identify any needs. (S-6 at 19-21.)
22. The conclusion of the ER was that Student was eligible for special education on the basis of specific learning disability in the areas of basic reading, reading fluency, written expression, mathematics calculation, and mathematics problem-solving. Needs were identified in each of those areas as well as for visual motor and visual perceptual skills; support for weak processing speed was also noted. (S-6.)
23. Recommendations in the ER were for direct systematic instruction in a phonemic program; highly structured instruction in written expression; support for reading activities; support for written expression; support for mathematics including use of manipulatives; assignment accommodations; and occupational therapy. The ER also recommended informal monitoring of self-advocacy and withdrawal behaviors in light of Student's recent transition to this country and a new school. (S-6 at 19, 25-26.)
24. The Parents agreed with the District's ER. (N.T. 58.)
25. An IEP meeting convened in early December 2022. The discussion at the meeting included the ER results, goals and items of specially designed instruction, a description of the general education environment and special education support, and procedures should the Parents not agree with the IEP. The Parents voiced concerns about Student making another transition if Student would begin to attend school in the District, as well as Student's lack of comfort in regular



education classes with typical peers performing at grade level. (N.T. 59, 64-65, 101, 251-52; S-7.)

26. Annual goals in the December 2022 IEP addressed reading decoding with no level of expectation; encoding with no level of expectation; composing written expression pieces based on a specified score on a rubric; solving grade-level mathematics computation and problem-solving problems with an expected level of accuracy; and solving multiplication and division problems at an unknown level with an expected level of accuracy. None of the goals contained baselines. (P-7; S-9 at 21-25.)
27. Program modifications and items of specially designed instruction were: direct systematic phonemic skill instruction two times per week (for a total of fifty minutes); reading skills practice; reading accommodations including supports for mathematics word problems; writing supports (technology, cues and prompts, a highly structured writing task process, note-taking tools and guides); mathematics manipulatives; extra processing time and checks for understanding; assignment and test accommodations (extra time, small group setting, chunking of assignments with checklists, repetition of directions); and access to learning support during the student support period three days each week. (P-7; S-9 at 27-28.)
28. Occupational therapy (group) was specified in the December 2022 IEP, as were consultations among general and special education personnel. A post-secondary transition plan was included. (P-7; S-9 at 17-18, 28.)
29. The December 2022 IEP provided for learning support at a supplemental level, with Student participating in regular education

classes except for basic reading and written expression instruction, occupational therapy, and learning support during student support periods. The IEP was to be implemented at Student's neighborhood middle school. (P-7; S-9 at 30-31.)

30. The District proposed that Student have special education support (through direct and consultative services) in regular education for social studies, science, and mathematics; Student's English/Language Arts class would be in the learning support classroom with approximately fifteen total students, two teachers, and a paraprofessional. The content-area regular education classes (mathematics, science, social studies) were co-taught by a general education teacher and a special education teacher. (N.T. 103-05, 142-43.)
31. In English/Language Arts, Student's reading instruction for the 2022-23 school year would include a program that involved individual work using a computer program, individual or small group direct instruction by a special education teacher, and individual or small group remediation along with direct instruction as needed for each student. Phonemic skills, grammar, and reading comprehension were part of that reading program. There are also other elements of the curriculum for those students. (N.T. 106-08, 140, 253-54, 277-80.)
32. Student would also receive additional instruction to address phonemic skills, reading fluency, and encoding in a very small group (approximately three students) twice each week during the daily support period during the 2022-23 school year. (N.T. 110-12, 120, 140-41.)

33. A Notice of Recommended Educational Placement (NOREP) for the proposed program in the December 2022 IEP was provided to the Parents following the meeting. (S-11.)
34. Several days after the December 2022 IEP meeting, a teacher at Private School provided information on Student's reading, writing, and social/behavioral strengths and needs. In reading, Student needed to increase fluency, self-correct decoding errors, and challenge self in processing text; in writing, Student required prompts and guidance through those tasks. Student reportedly followed and understood directions, remained attentive, and benefited from multisensory presentations when not distracted or fatigued. Modeling, positive reinforcement, Socratic questioning, visual checklists and images, and writing prompts were among the successful strategies for Student. (S-10 at 1-2.)
35. Additional Parent input after the December 2022 IEP meeting noted that Student was anxious when around new people and sometimes hyperactive. (S-10 at 3-10.)
36. The Parents did not return the December 2022 NOREP to the District. (N.T. 65-66.)

### **2023-24 School Year**

37. The Parents decided to maintain Student's placement at Private School for the 2023-24 school year and signed an agreement with Private School in February 2023 as it required to hold Student's place. They contacted the District shortly before that school year began because they had learned that reimbursement for tuition was a possibility. This contact indicated that the District had not proposed an appropriate program for the 2023-24 school year, and notified the District of their

intention to maintain Student's Private School placement. (N.T. 67-69; P-8; S-14; S-16.)

38. Another IEP meeting convened in August 2023 to discuss programming for the 2023-24 school year. At that time, the District had asked for but not been provided with records from Private School. The District had also asked the Parents to have Student available for testing to determine baselines if the Private School information was not then available; the Parents did not do so. (N.T. 68, 71, 121, 144-45, 149, 259, 286-87, 321-22, 354-56; P-9; S-12; S-14 at 1.)
39. The IEP team discussed Student's placement at Private School and the Parents' wish for Student to remain there where Student feels similar to peers and everyone in the class is provided the same instruction. They also discussed the Parents' concerns with general education classes; the likelihood that Student would feel different from peers and awkward in that setting; and small group learning support for English/Language Arts and Mathematics. (S-15 at 3.)
40. The IEP was revised from that proposed in December 2022. The program modifications and items of specially designed instruction were modified as follows: providing for small group instruction for word study, reading fluency, reading comprehension, vocabulary development, and written expression five days per week; adding a tour and meeting with the case manager prior to the start of school to support the transition; providing for small group instruction in mathematics; and adding a referral for a SETT<sup>6</sup> process meeting.

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<sup>6</sup> This framework considers assistive technology in view of the Student, Environment, Tasks, and Tools.

Weekly counseling was added as a related service and occupational therapy increased to weekly. (P-9; S-15.)

41. The August 2023 IEP provided for learning support at a supplemental level, with Student participating in regular education classes except for English/Language Arts and mathematics instruction, occupational therapy, counseling, and learning support during student support periods. The IEP was to be implemented at Student's neighborhood middle school. (S-15 at 29-30.)
42. The District proposed that Student be provided with instruction to address phonemic skills, reading fluency, and encoding five days per week during the student support period; the same reading program that was proposed in the December 2022 IEP would continue during English/Language Arts in learning support. However, the IEP team did not discuss the specific reading program it proposed for the 2023-24 school year at the meeting. (N.T. 72, 123-25.)
43. The District continued to propose co-taught content area regular education classes, with Student provided materials on Student's grade level. (N.T. 151-52.)
44. The Parents again voiced concerns at the August 2023 IEP meeting about Student making another transition if Student would begin to attend school in the District. They also shared concerns about Student being in classes where peers would have varying abilities. (N.T. 127, 251-52, 355-58, 360-63.)
45. The Parents disapproved the NOREP accompanying the August 2023 IEP. (N.T. 75; S-17.)

### **Private School**

46. Private School is licensed and accredited, serving students with language-based learning disabilities in first through twelfth grade, split among three sections of the school buildings by grade level (first through fifth, sixth through eighth, and ninth through twelfth). Approximately 400 students attend there during the 2023-24 school year. (N.T. 174-77.)
47. Private School is college preparatory and follows a curriculum aligned with state standards. Classes in English/Language Arts, separate reading/writing (Wilson) instruction, mathematics, science, social studies, physical education, and electives are provided. (N.T. 174-76, 181-82, 184-86.)
48. Students at Private School at Student's grade level are in content-area classes with approximately eight to ten students and one teacher. (N.T. 178, 185-86.)
49. Private School students have a first period advisory class for a daily check-in and weekly executive functioning skill instruction. (N.T. 187-88.)
50. Student was assessed by Private School in late June 2022 using the Word Identification and Spelling Test. Student scored in the below average to poor range on most subtests. Private School also administered the Wilson Assessment of Decoding and Encoding to Student in June 2023. These assessments were not provided to the District until the hearing. (N.T. 263-64; P-11; P-12.)
51. Progress reporting by Private School over the 2022-23 school year anecdotally reflected Student's steady, but not rapid, growth in skills and academic content across subject areas. Student attained A to B grades each quarter and as final grades. (P-14 at 1-42.)

52. Student has made friends at Private School and Student's self-esteem has improved. Student looks forward to attending school there. (N.T. 75-76, 80, 180.)
53. Student participates in extracurricular activities at Private School. (N.T. 76.)
54. Progress reporting by Private School for the first quarter of the 2023-24 school year reflect that Student adjusted to the new year and continued to exhibit growth in skills and academic content across subject areas. (P-14 at 43-52.)

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

In any legal proceeding, the burden of proof is commonly described as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion in this type of administrative hearing lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The burden of persuasion in this case thus must rest with the Parents who filed the Complaint leading to this administrative proceeding. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume the role of fact-finders, are responsible for making "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses," particularly when discounting certain testimony. *Blount ex rel. Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 WL 22988892 \*10, 2003 LEXIS 21639 \*28 (E.D. Pa.

2003). *See also J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *T.E. v. Cumberland Valley School District*, 2014 WL 47340 \*4, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts despite some gaps in recollection. Any contradictions among witness accounts may be attributed to lapses in memory or differences in perspective, rather than to any intention to mislead. The weight accorded the evidence, however, was not equally placed. The persuasive value of the testimony and documentary evidence must be assessed in light of the record as a whole. *See J.P., supra*, 516 F.3d at 261; *T.E., supra*. In other words, merely because all witnesses appeared to believe what they swore to under oath does not make all of the testimony reliable or convincing with respect to the issues presented.

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

### **General IDEA Principles**

The IDEA broadly mandates that each of the states provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services as are necessary for the child. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Nearly forty years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that FAPE obligations are met by providing personalized instruction and support services that are designed to permit the



child to benefit educationally from the program, and also complying with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), meet the substantive obligation of providing FAPE through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). An IEP is developed “only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017). In terms of substantive content, the IEP must be responsive to the child’s individual academic, functional, and developmental needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Individualization to the child is unquestionably the central consideration for purposes of the IDEA.

An LEA is not obligated, however, to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012); see also *El Paso Independent School District v. Robert W.*, 898 F. Supp. 442, 449 (W.D. Tex. 1995) (quoting *Rowley*, *supra*, 458 U.S. at 186) (holding that an LEA “is not required to maximize a handicapped child's potential ‘commensurate with the opportunity provided to other children.’”).

A child’s IEP is not a guarantee. “The 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). IEP development, of course, must follow and be based on an evaluation, and then be continuously monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

### **General IDEA Principles: Least Restrictive Environment**

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

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). LEAs generally are provided with broad authority to determine the site for providing special education services, as long as the selected location is appropriate. *White v. Ascension Parish School Board*, 343 F.3d 373, 382-83 (5th Cir. 2003); *Lebron v. North Penn School District*, 769 F.Supp.2d 788, 801 (E.D. Pa. 2011). Nevertheless, as the *Lebron* Court observed, *supra* at 800, the federal regulations implementing the IDEA require that, “[u]nless the IEP of a child with a disability requires some other arrangement, the

child is educated in the school that he or she would attend if nondisabled' and generally the placement should be 'as close as possible to the child's home.' " 34 C.F.R. § 300.116(c), (b)(3).

### **General IDEA Principles: Procedural FAPE**

From an IDEA procedural standpoint, the child's family including his or her parents must have "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. at 53. This fundamental concept extends to placement decisions for the child. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne, supra*, 602 F.3d at 565. The procedural requirements must, however, be viewed within the context of the above substantive standards.

### **General IDEA Principles: Parental Placements**

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

557 U.S. 230 (2009); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. Those principles include compliance with the ten-day notice provision in the IDEA. 20 U.S.C. § 1412(a)(10)(C)(iii). A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.* Taken together, there are three prongs to this inquiry, commonly referred to as the *Burlington-Carter* test. There is no requirement that a child have prior provision of public special education services for purposes of this remedy. *Forest Grove, supra*, 557 U.S. at 247.

### **General IDEA Principles: LEA Obligation for Students Not Enrolled**

LEAs have different obligations to students enrolled in private schools compared to students attending their schools. Generally, an LEA has no obligation to continue to develop IEPs for students who are educated outside of the District through a unilateral placement, unless the parents make such a request. "A parent need not affirmatively enroll their child in public school to receive an offer of a FAPE," but he or she "must either manifest an intent to enroll the child or request an evaluation." *A.B. v. Abington Sch. District*, 841 F. App'x 392, 396 (3d Cir. 2021) (citations omitted); *see also Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. ex rel. D.S. v. Cumberland Valley School District*, 842 F. Supp. 2d 762, 772 (M.D. Pa. 2012) (same). In *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683, 2017 WL 4314555 (M.D. Pa. Sep. 28, 2017), the District Court reviewed a situation where the school district had an obligation to evaluate the student unless

there was a clear expression by the parent that the student would not return. “[I]t is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school.” 2017 U.S. Dist. LEXIS 163683 \*41, 2017 WL 4314555 \*15. However, “it is not the secret desire of the parent that matters, but the objective manifestation of those desires that dictate whether or not the public school must offer a FAPE.” *Id.*

“Once these IDEA requirements are triggered, private school tuition reimbursement [may be] an appropriate remedy only where ‘there has been a substantive harm—namely, that ‘the [school district] ha[s] not made a [FAPE] available to the child in a timely manner.’ ” *A.B.*, 841 F. App'x at 395 (quoting *C.H. ex rel. Hayes v. Cape Henlopen School District*, 606 F.3d 59, 67 (3d Cir. 2010)). These same principles apply equally to Section 504 claims. *A.B.*, 841 F. App'x at 396 n.8.

### **General Section 504 and ADA Principles**

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims

under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

### **The Parents' Claims**

The Parents raise essentially the same claim for the 2022-23 and 2023-24 school years. However, the circumstances for each of those school years differed markedly and they must, therefore, be addressed separately. It is most logical to begin with the 2022-23 school year following the family's move into the District.

The first prong of the tuition reimbursement test is in inquiry into whether the program proposed by the District met IDEA standards, *i.e.*, whether it was reasonably calculated to provide meaningful educational benefit based on Student's individual circumstances. The IEP for the 2022-23 school year must be evaluated based on information known to the District at the time that December 2022 program was developed and proposed.

In considering this step, it is important to recognize that the District had no obligation or even opportunity to begin development of a program for the fall of 2022 prior to Student's enrollment in August of that year. The December 2022 IEP followed a timely and comprehensive evaluation that considered previous assessments, parent input, and information by the Private School. A number of assessments were administered to gather relevant information about Student's education-related needs. Although the Parents did not challenge the District's ER, this hearing officer finds that it

was wholly compliant with the IDEA and relevant implementing regulations and provided a solid foundation for an IEP.

Two major flaws are readily apparent in the December 2022 IEP. This IEP contained goals addressing Student's academic areas of need; however, none of them included a baseline and several did not specify any level of expected growth. Without this information in the IEP, neither Parents nor anyone reviewing the document would be able to gauge whether these goals were appropriate and reasonably ambitious for Student, nor could progress or lack of progress over time be assessed with any certainty. This is also not a circumstance where a student was unavailable for curriculum-based or other assessments in order to establish baselines in light of the District's complete evaluation of Student that fall. Glaringly, the IEP also did not mention any form of planning for Student to transition into the District after a significant geographical (and cultural) move for the family just six months earlier, and the Parents expressions of concern prior to and at the December 2022 IEP meeting. That the District considered such a plan appropriate for the August 2023 IEP strongly suggests that it recognized, albeit belatedly, a need for some new environment transition planning in the December 2022 IEP. Moreover, as the Parents observe, the evidence on many of the available offerings to all students new to the middle school to help them acclimate was, while positive, not directly relevant to what the Parents understood about the proposed December 2022 IEP. The law is clear that retrospective evidence that contradicts the substance of the IEP itself does not ensure that parents have adequate information in order to properly evaluate the IEP. *R.E. v. New York city Department of Education*, 694 F.3d 167, 187 (2<sup>nd</sup> Cir. 2012); *see also D.S. v. Bayonne, supra*, 602 F.3d at 564-65 (citation omitted). The absence of this provision in the December 2022 IEP was not appropriate for Student. In sum, these two categories of

omission are fatal in the first prong of the *Burlington-Carter* analysis for the 2022-23 school year.

The obligation of the District for the 2023-24 school year, however, was much different. The Parents elected to place Student in a private school the year before, and the District was not required to propose a program for the new school year unless and until the Parents asked for an evaluation or offer of FAPE. The Parents did neither; rather, they asked for reimbursement for tuition at Private School for the 2023-24 school year approximately one week before classes began.<sup>7</sup> That was the Parents' objective manifestation to the District and did not trigger an obligation on its part under the applicable law. Although the Parents correctly point to their compliance with the notice requirement in the IDEA for seeking reimbursement, there must first be a responsibility to develop a program

Even if the District had such an obligation, or arguably assumed one when it convened the August 2023 IEP meeting, the case law is clear that the IEP must be evaluated based on the District's knowledge at the time. Although the District responded very promptly in the short timeframe remaining before the start of the school year, it had no information from Private School on which to ascertain then-current levels of academic and functional performance, and had had no reason to seek updated data and input after December 2022. The District nonetheless made several revisions to the program modifications and specially designed instruction section based on known information including the Parents' concerns. New program modifications and items of specially designed instruction included a

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<sup>7</sup> The first day of the 2023-24 school in the District was September 5, 2023, the day after Labor Day, a date of which the Parents clearly aware. (N.T. 51, 366.) This section of the discussion is not a criticism of the Parents for failing to make a request that would impose an obligation on the District, or knowing the applicable law, but is relevant to assessing the District's response to their late August communication.



transition plan that, with well over a year of Student's acclimating to this country, was reasonable only days before the beginning of the school year; a further revision provided for counseling with the precise services yet to be determined but certainly would address the ER's recommendation to monitor concerns from the BASC-3 for the ER, including withdrawal noted by the Parents and teachers. Contrary to the Parents' contentions, however, those areas of concern were not at a level where specific special education IEP goals to address them was necessary. Most critically, however, the District was not in a position, through no fault of its own, to determine the need for new or additional goals or other IEP provisions at the time of the August 2023 meeting. Moreover, the August 2023 IEP fully complied with the LRE mandates in the IDEA, proposing Student's neighborhood middle school with appropriate student-to-teacher ratios across that environment.

It may be understandable to some extent that the Parents do not wish for Student to experience environments with which Student may be uncomfortable.<sup>8</sup> Nonetheless, LRE principles are a core element of the IDEA, and the District is required to adhere to them. Further, as explained above, the District was not required to propose an ideal program consistent with the Parents' wishes.

The Parents also contend that the specific reading programs to be provided to Student were not fully discussed or understood by them. While the Parents are unquestionably entitled to be aware of programs implemented for their child, there was ample opportunity for them to ask questions in the August 2023 IEP meeting. This argument further appears not to recognize that, as the District observes, questions of methodology

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<sup>8</sup> There was District testimony describing many of the positive aspects of inclusive education. It is respectfully suggested that the Parents consider that information as Student continues to mature and prepares for life as an adult.

have typically been left to the discretion of the LEA. Longstanding case law fully supports this principle. *Tucker by & Through Tucker v. Calloway County Board of Education*, 136 F.3d 495, 506 (6th Cir. 1998); *Roland M. v. Concord School Commission*, 910 F.2d 983, 992 (1st Cir. 1990); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988); see also, e.g., *J.E. v. Boyertown Area School District*, 834 F.Supp.2d 240 (E.D. Pa. 2011). Even the U.S. Supreme Court in *Rowley* acknowledged the deference owed to the agency on this type of programming decision. *Rowley, supra*, 458 U.S. at 208.

Having found the District's offer for programming for the 2022-23 school year not to be appropriate for Student, the next question is whether Private School was reasonably calculated to be appropriate for Student that year. Private School provides programming for children with language-based learning disabilities and is focused on these students' needs throughout the school day. Student's classes included both English/Language Arts and separate reading/writing instruction, all provided in small class sizes, and with support for executive functioning skills. Although progress was more anecdotal than objective or informed by ongoing monitoring, Student exhibited growth at Private School, attaining A to B grades, and developed social friendships as well as participating in extracurricular activities. Although the District posits that Student simply did not demonstrate ongoing progress across subject areas and needs, and notes Private School's failure to more closely monitor Student's variable performance at times, it must be recalled that Student started the 2022-23 school year shortly after moving to this country and acclimating to new environments and relationships. Moreover, Private School was not required to comply with IDEA obligations in deciding this prong of the *Burlington-*

*Carter* test. The Parents have established that Private School was appropriate for Student for the 2022-23 school year for this step.

The final consideration is whether equitable principles should apply to reduce or deny tuition. With respect to the 2022-23 IEP developed in December, it is true that the Parents enrolled Student at Private School long before registering Student in the District, and they did not provide the requisite notice to the District of their intention to seek reimbursement for tuition. The Parents were, however, new to the U.S.A. and its laws, and there is no reason to suspect that they disregarded any actually or constructively known obligations to the District. On the other hand, the District timely responded to Student's initial enrollment, conducted a comprehensive ER, and developed a proposed IEP in December 2022. On balance, the delay in the Parents' request for reimbursement presented a complication to both parties that does not favor either. Therefore, the award for reimbursement for the 2022-23 school year shall not be reduced or denied.

Although it is not necessary to address the equities for the August 2023 IEP, this hearing officer does find it prudent to discuss this prong for the 2023-24 school year. The Parents' request for reimbursement that was made approximately one week before the District's school year began was an objective manifestation of an intention to maintain Student at Private School. The District's decision to nonetheless convene an August 2023 IEP meeting gave its hearing witnesses some perspective on the Parents' position on a possible District program and placement, and that testimony was not only credible but also supported by the notes in the IEP itself. The responses of the Parent who testified to their openness to a District placement at that time (N.T. 69-70) were not convincing to this hearing officer for two main reasons: the leading nature of those questions on direct

examination with no elaboration by the Parent/witness, and the witness' demeanor in rotely responding to these questions; additionally, this testimony was not supported by any other evidence in this record. Accordingly, that portion of the Parent testimony was discredited and would operate to deny reimbursement should the other *Burlington-Carter* prongs have favored the Parents for the 2023-24 school year.

## **CONCLUSIONS OF LAW**

The District's December 2022 proposed IEP was not appropriate for Student, and the Parents are entitled to full reimbursement for tuition to Private School for the 2022-23 school year.

The August 2023 proposed IEP was appropriate for Student based on the limited information known to the District at the time.

## **ORDER**

AND NOW, this 15<sup>th</sup> day of March, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's December 2022 proposed IEP did not offer FAPE to Student based on the information known to the District at the time.
2. The District's August 2023 proposed IEP was an offer of FAPE to Student based on the information known to the District at the time.
3. The Parents are entitled to reimbursement for tuition and related expenses at Private School for the 2022-23 school year.
4. 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 transportation expenses, for Student to attend Private School for the 2022-23 school year. Transportation expenses may be determined by IRS mileage rates.

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.

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 28726-23-24