This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number
22644-19-20

Child's Name
C.D.

Date of Birth
[redacted]

Parent(s)/Guardian(s)
[redacted]

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Hearing Officer
Brian Jason Ford, JD, CHO

Date of Decision
06/23/2020

Introduction

This special education due process hearing arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. There is no dispute that the student at the center of this case (the Student) is a child with disabilities as defined by the IDEA. [Redacted.]

The Student attended a private school (the Private School) during the 2018-19 school year. The Student's parents (the Parents) requested this hearing and demanded tuition reimbursement from the Student's former school district (the District) for the 2018-19 school year. There is no dispute that the District was the Student's Local Educational Agency (LEA), as defined by the IDEA, during the 2018-19 school year.

As discussed below, I find that the Parents have not satisfied the applicable standard for tuition reimbursement and, therefore, I deny their claim.

Issue

The sole issue presented in this matter is: are the Parents entitled to tuition reimbursement for the Student's enrollment in the Private School during the 2018-19 school year?

Findings of Fact

The parties, through their attorneys, presented well-organized, efficient cases. The parties presented joint exhibits to avoid duplicative evidence and did so without waiving objections. The parties also filed stipulations concerning facts that are not in dispute. The entire record was not stipulated. Rather, the parties made an effort to proceed efficiently without sacrificing objections or their ability to present their cases through witness examination. I commend both attorneys' efforts.

The parties filed stipulations dated January 13, 2020. For convenience and ease of referenced, I made that document part of the record as Hearing Officer Exhibit 1 (H-1).[1] Joint exhibits are referred to as "J-#" and the transcript (notes of testimony) is referenced as "NT #."

I reviewed the record of this matter in its entirety. I make findings of fact only as necessary to resolve the issues before me. I find as follows:

1. The Student has a diagnosis of Autism Spectrum Disorder (ASD). H-1.
2. The Student is [redacted]. H-1.
3. The Student attended the Private School for the 2015-16, 2016-17, and 2017-18 school years. H-1.
4. "[The] Parents and the District entered into a private Settlement Agreement and Release on or about November 8, 2017, requiring the District to fund a portion of [the Student's] tuition at [the Private School] for the 2016-2017 school year. In exchange for this funding, Parents, *inter alia,* waived all past claims against the District arising on or before November 8, 2017." H-1 at ¶ 8. *See also* J-7.[2]
5. More specifically, the District agreed to pay for 50% of the Student's 2017-18 tuition at the private school in exchange for a release of various educational, antidiscrimination, and constitutional claims arising prior to the settlement through the end of the Student's

[1] The parties filed additional stipulation concerning the period of time that the Parents were represented. Those stipulations were made part of the record as H-2 and were ultimately inconsequential. I do, however, appreciate the parties' efforts.

[2] Coincidentally, the past claims included claims raised in a prior due process hearing that was also assigned to me. The prior due process hearing ended with the settlement agreement at J-7.

enrollment at the Private School or the end of the of the 2017-18 school year, whichever came first. J-7 at ¶ 7.

6. The settlement agreement contemplated the Student's return to the District for the 2018-19 school year. Despite an unfortunate use of the word "may," the agreement required the District to reevaluate the Student and propose an Individualized Education Program (IEP) in accordance with the following timeline (J-7 at ¶ 3):

    a. February 2, 2018 (on or before) – District must request the Parents' consent to reevaluate the Student.

    b. February 16, 2018 (no later than) – Parents must provide consent for the proposed reevaluation.

    c. The IDEA's statutory evaluation timeline starts upon the District's receipt of the Parents' consent to reevaluate, setting the deadline for the District to complete its reevaluation and issue a Reevaluation Report.

    d. May 4, 2018 (no later than) – District must propose an IEP for the 2018-19 school year, assuming the Parents cooperate with the reevaluation and IEP development.

7. The District sought the Parents' consent to evaluate the Student using a Permission to Reevaluate – Consent Form (PTRE) dated January 31, 2018. H-1, J-8.[3] The Parents' dispute that the PTRE was issued on January 31, 2018. I resolve that dispute in the credibility determination below.

[3] The parties refer to this as a PWN or Prior Written Notice form. I use a different acronym for disambiguation because other forms described herein are also used to provide prior written notice.

8. On March 6, 2018, the Parents signed the PTRE. The District then began to reevaluate the Student. H-1.

9. On May 23, 2018, the District completed its reevaluation by issuing a Reevaluation Report (the 2018 RR). H-1, J-11.

10. The 2018 RR included (J-11):

    a. Parental input,

    b. A review of the District's last evaluation, which was conducted in 2016,

    c. A review of a 2015 report by a private psychologist,

    d. A review of a 2015 report Occupational Therapy (OT) report from a hospital,

    e. A review of standardized academic assessments that the Student took while previously attending school in the District,

    f. A Functional Behavioral Assessment (FBA) Form completed by the Student's teachers at the Private School (*see also* J-12),

    g. Observations by a Board Certified Behavioral Analyst (BCBA) of the Student at the Private School (*see also* J-12),

    h. Recommendations from the Private School teachers,

    i. Standardized, comparable, assessments of the Student's cognitive functioning and academic achievement (the WISC-V and the WIAT-III), and

    j. Standardized behavioral rating scales completed by three of the Private School teachers and one of the Parents (the BASC-III).

11. The FBA Form and BCBA observations were used to generate an FBA that hypostasized the function of the Student's behaviors and proposed strategies to replace negative behaviors with positive behaviors. J-12.

12. The Student's scores on the WISC-V resulted in a determination that the Student's FSIU was 128 and, statistically, between 121 and 133. J-11.

13. The Student's scores on the WIAT-III resulted in the following composite scores, which are based on several sub-test scores (J-11):[4]

    a. Total Reading – 132 – Superior

    b. Basic Reading – 122 – Above Average

    c. Reading Comprehension and Fluency – 134 – Superior

    d. Written Expression – 133 – Superior

    e. Mathematics – 129 – Above Average

    f. Math Fluency – 101 – Average

14. The Student's scores on the WISC-V and WIAT-III were higher and more consistent than scores on prior administrations. The evaluator attributed this to the Student's compliance with 2018 testing in comparison to past testing.

[4] These are presented as Composite name – Score – Descriptor as per publisher.

15. On the BASC-III, Private School teachers' ratings placed the Student in the average range across all composite scores. The Parent's ratings were slightly elevated as compared to the teachers' ratings. Nevertheless, the BASC-III in conjunction with the other parts of the 2018 RR lead the evaluator to conclude that the Student had some difficulty controlling behavioral impulses and emotionality. J-11

16. Previous evaluations concluded that the Student qualified for special education as a child with an Emotional Disturbance. J-11, *passim*.

17. The evaluation results as a whole prompted the evaluator to conclude that the Student continued to require special education, but that the Student's needs were a function of the Student's ASD, not an Emotional Disturbance. J-11.

18. There is no dispute that the Student [redacted]. *See* H-1.

19. As part of its reevaluation, the District also completed an Occupational Therapy (OT) evaluation. J-10.

20. During the 2017-18 school year the Student received no direct OT but received OT on a consultative basis (meaning that an Occupational Therapist would consult with the Student's teachers to provide guidance about OT strategies that may benefit the Student). *Passim*.

21. The OT evaluation included a standardized questionnaire completed by the Private School teachers used to develop a sensory profile; writing, drawing, and cutting samples; a review of records; a test of visual motor integration; a comparison between writing samples and handwriting standards; a sentence copying test that mimics tasks that the Student may have to complete in school; and a clinical observation. J-10.

22. None of the OT assessments revealed school-based OT needs that required intervention. J-10

23. The OT evaluator recommended that the District continue to provide OT on a consultative basis, extending what the Student received in the 2017-18 school year. This recommendation was not based on the OT assessments. Rather, the OT evaluator wrote, "It is felt that [the Student] should receive current level of service at consultative per team request to monitor written communication/technology, social regulation, and executive functioning needs." J-10 at 5.

24. The OT evaluation is contained in its own document and was not reproduced within the 2018 RR. The OT evaluator's ultimate recommendation was incorporated into the 2018 RR. *See* J-10 at 16.

25. The District created a draft IEP for the Student. That document is dated June 27, 2018 (the 2018 IEP). J-17.

26. The 2018 IEP includes a summary of the 2018 RR and OT evaluation. J-17.

27. The 2018 IEP includes several goals, including:

    a. Improving appropriate peer interaction skills as measured by a peer interaction rubric,

    b. Improving conflict resolution and problem-solving skills as measured by a conflict resolution rubric,

    c. Improving impulse control and self-regulation when presented with a non-preferred task as measured by the amount of time that the Student's response and reaction to the non-preferred task,

    d. Improving the Student's ability to cope with stressful situations as measured by the Student's use of deescalating techniques,

    e. Improving the Student's ability to self-identify anxiety triggers while working with a school counselor,

f. Improving the Student's ability to transfer from class to class or activity to activity,

g. Improving the Student's ability to participate in games and activities with peers without refusal or shut-down behaviors, and

h. Decreasing the Student's propensity to call out in class.

28. The 2018 IEP also included [redacted]. J-17.

29. Most of the special education goals were not baselined, but all goals that lacked baselines included a statement about when and how baseline data would be collected during the first weeks of the 2018-19 school year. J-17.

30. The 2018 IEP included a significant number of program modifications and Specially Designed Instruction (SDI). These called for the District to provide direct instruction by the guidance counselor or in a social skills class in areas of weakness revealed through the 2018 RR and targeted in the IEP's goals. J-17.

31. The SDIs and modifications also included items to ease the Student's transition back to school. These included things like a school tour, check-ins with designated staff, a break card to que teachers in moments of anxiety or frustration, and limited homework. J-17.

32. The 2018 IEP provided (J-17):

a. one 30-minute group social skills class, four times per month;

b. one 15-minute one-to-one (1:1) social skills session, four times per month;

c. one session of psychological counseling per week;

d. an OT consult at team request; and

e. PBSP implementation.[5]

33. The 2018 IEP called for the Student to receive an itinerant level of Autistic support. In context, this means that the Student qualified for the supports provided in the IEP as a child with ASD, and that the Student would be educated in regular classrooms for 97% of the school day. J-17.

34. On June 27, 2018, the Student's IEP team convened. District-employed members of the IEP team brought the draft IEP to the meeting. H-1, J-17.

35. On June 27, 2018, the District also finalized and issued the draft IEP (the 2018 IEP) with a Notice of Recommended Educational Placement (NOREP). H-1, J-18.

36. During the IEP team meeting, the team reviewed the 2018 RR and draft IEP. The Parents responded positively to the 2018 RR. *Passim*.

37. On July 7, 2018, the Parents rejected the 2018 IEP via the NOREP. The NOREP included a blank area and a prompt for the Parents to write their reasons for rejecting the 2018 IEP. In total, the Parents wrote: "The proposed changes are not completely satisfying the needs of our [student]." J-18, H-1.

38. The Student continued to attend the Private School during the 2018-19 school year. H-1.

39. The 2018-19 school year was the Student's [redacted] grade year. H-1.

[5] A PBSP is a Positive Behavior Support Plan. In context, this refers to the strategies and interventions called for in the FBA at J-12. The Student's behavioral goals also are derived in large part from the FBA.

40. On August 30, 2019, the Parents requested this due process hearing. The Parents amended their complaint on September 10, 2019.

41. A different school district became the Student's LEA after the 2018-19 school year. *See* J-27, J-28.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Nearly all of the facts that I find are derived from undisputed documentary evidence or from the record as a whole. Setting opinion testimony aside, fact testimony reveals a disputed fact that is not resolved by the documents: the date that the District issued the PTRE.

The PTRE is dated January 31, 2018. Several District employees testified that the PTRE was mailed to the Parents on or around January 31, 2018. Those witnesses based that testimony upon their knowledge of the

District's internal mail processes, and an assumption that those processes were followed in this case. None of the District's witnesses mailed the PTRE or were directly responsible for doing so. There is no dispute that the Parents signed the PTRE 34 days later on March 6, 2018. The Parents testified that they signed the PTRE as soon as they received it. Neither party offered a mail receipt or envelope.

Limited to this aspect of the witnesses' testimony, I find that the Parents are more credible that the District witnesses. This is not based on any witnesses' demeanor or other observable behavior during the hearing. Rather, the Parents have a better foundation for their testimony. None of the District's witnesses were able to confirm that the PTRE was mailed on January 31, 2018. The Parents were in a position to know what mail they received.

To resolve the issue, I make no determination about when the District mailed the PTRE to the Parents. Whenever that document was mailed, I find that the Parents received it on or about March 6, 2018.

Resolution of this discrepancy is not outcome determinative. For purposes of analysis, the discussion below assumes that the District breached the timelines set in the settlement agreement by issuing the PTRE in March 2018.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must

prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

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

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

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

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

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

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students

capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

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

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. That is, did the LEA offer a FAPE. The second step is to determine whether the program obtained by the parents is appropriate for the child. As discussed below, the appropriateness of the parentally selected placement is not the same as the FAPE standard. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

Noncompliance with the Settlement Agreement Does Not, by Itself, Yield a Private Placement in This Case

In a recent due process decision, I required an LEA to fund a student's private school placement as a form of equitable relief to remedy its non-compliance with a settlement agreement.[6] *J.P. v. Reading School District* ODR 21257-1819AS. In its closing brief, the District references *J.P. v. Reading*, noting that matter is under appeal and arguing that I should not, *sua sponte*, award a private placement to remedy the breach.[7]

In the *J.P.* case, the student attended a private school at the LEA's expense pursuant to a settlement agreement. The agreement detailed the actions that the LEA was to take by certain dates in order to develop a special education program for the Student's return to public school. The LEA violated those timelines. All similarities between *J.P. v. Reading* and this case end there.

Of the great many differences between this case and *J.P. v. Reading*, some of the most important are these: In this case, the District's failure to comply with timelines set in the settlement agreement was not the

[6] That phrasing purposefully does not include the words "tuition reimbursement." In *J.P.*, I specified that I was not awarding tuition reimbursement under the *Burlington-Carter* test, but rather was requiring the LEA to fund the Student's placement as an extraordinary form of equitable relief that was proportional to the impact of the LEA's breach upon the Student's rights.

[7] The Parents do not reference *J.P. v. Reading* explicitly in their closing brief or argue that private placement is an appropriate remedy for the District's breach of the settlement agreement in and of itself. They do, however, argue that the District breached the settlement agreement, and that breach is one of several procedural and substantive violations supporting the first prong of the *Burlington-Carter* analysis.

culmination of a cascade of failures over years; the District did not establish a pattern indicating that continuation of a private placement was proper mitigation of similar breaches; the waivers and consideration provided through the settlement agreement in this case are comparatively limited; and the District's actions did not jeopardize the Student's entitlement to or receipt of a FAPE.

In *J.P.*, I wrote:

> *It may seem harsh to award a private placement for a late program offer, but this case is not analogous to cases in which LEAs miss IDEA timelines by a few days yielding no actual harm. This case concerns the functional termination of a child's special education rights in exchange for specific promises. The remedy I award is proportional to the District's failures.*

Id at 10.

In *J.P.* the duration of the LEA's delay was not a factor. The consequences of the delay were a factor. In this case, viewed in relation to the Student's rights as a whole and the Student's substantive entitlement to a FAPE, the consequences of the District's delay are fundamentally different. Reimbursement for the Student's 2018-19 tuition at the Private School is a remedy that is not proportional to the District's breach. I decline, therefore, to award the Parents the relief that they demand as an equitable remedy for the District's breach of contract. The Parents' entitlement to tuition reimbursement depends on the traditional *Burlington-Carter* analysis.

Equitable Considerations Are Not Threshold Conditions

The District argues that the Parents' actions prohibit them from seeking tuition reimbursement for the 2018-19 school year. Specifically, the District argues that the Parents did not disagree with the District's proposed

IEP during the last IEP team meeting, did not send notice of their intent to seek reimbursement 10 business days before the Student's 2018-19 Private School enrollment, and acted unreasonably by preemptively deciding to reject any District placement (this is sometimes referred to as "parental predetermination" although the District does not use that particular term). The District's argument implies that these factors are unsatisfied threshold conditions that preclude a tuition reimbursement claim.

The District is correct that these conditions are relevant factors in a tuition reimbursement case. These are not, however, threshold conditions. They are mitigating factors to consider if the Parents satisfy the first two prongs of the *Burlington-Carter* test.

Under IDEA regulations, the "cost of reimbursement … may be reduced or denied" if:

> [1] At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> [2] At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the [same];
>
> [3] If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the

evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

[4] Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

34 C.F.R. § 300.148(d)(i)-(iii); *see also* 20 U.S.C. § 1412(a)(10)(C).

The key phrase in the above regulations is "may be reduced or denied." This portion of the regulations presupposes that an award of tuition reimbursement is otherwise proper. After parents establish that tuition reimbursement is owed, these factors may reduce or eliminate that award.

The District's argument may be efficient in some cases. If the record supports a determination that a parent's actions require denial of tuition reimbursement, it would certainly be faster and easier to start with that conclusion. I decline to take that easier path because the sequence of the *Burlington-Carter* test is important.

In any tuition reimbursement case, it is possible that the parents are not entitled to tuition reimbursement even though the LEA failed offer a FAPE. In such cases, hearing officers are empowered to order LEAs to comply with IDEA procedures. 20 U.S.C. § 1415(f)(3)(E)(iii). Hearing officers may also order LEAs and fund independent educational evaluations. 34 C.F.R. § 300.502(d). Knowing whether the LEA offered a FAPE is important, therefore, even when parents are not entitled to tuition reimbursement.

In addition, the factors warranting reduction or elimination of tuition reimbursement awards are typically viewed as equitable considerations. It is consistent with case law to address those factors in the third prong of the *Burlington-Carter* test. *See, e.g. L.M. v. Downingtown Area Sch. Dist.*, No. 12-CV-5547, 2015 U.S. Dist. LEXIS 49336 at *66-70, 2015 WL 1725091 (E.D.Pa. Apr.15, 2015).[8]

The District Offered an Appropriate Program for the 2018-19 School Year

The record of this case establishes that the District offered an appropriate IEP to the Student for the 2018-19 school year. After three years of placement in a private school, the District completed a reevaluation that satisfied IDEA requirements and then used the reevaluation to formulate an IEP that satisfies the *Endrew* standard.

I. The 2018 RR Satisfied IDEA Requirements

The Parents presented some evidence challenging portions of the 2018 RR; particularly the OT evaluation and the change from Emotional Disturbance to Autism. I find no preponderant evidence that the OT evaluation or change in eligibility designation were inappropriate. The Parents also make arguments concerning the document's untimely

[8] Some scholars suggest that these factors are actually a fourth prong of tuition reimbursement cases. *See* Perry A. Zirkel, Tuition and Related Reimbursement Under the IDEA: A Decisional Checklist (2019 Update), originally 282 West Education Law Reporter (2012). While hearing officers and courts usually consider these factors in the third prong of the *Burlington-Carter* test, viewing these factors as a fourth prong may be correct because they come into place after parents establish that they are owed tuition reimbursement. As applied to this case, the distinction makes no difference.

completion. I find no preponderant evidence that the 2018 RR's untimely completion resulted in a substantive denial of FAPE.

Regarding the OT evaluation, the Parents argue that the evaluator ignored information about the Student's OT needs in the Private School. The Parents are correct that the evaluator deemphasized the Student's OT needs in the Private School, believing that was not strictly relevant to the Student's OT needs in a District placement. *See* NT 237, 239-240. The Parents' argument, however, is undercut by the fact that the Student received OT on a consultative basis at the Private School and did not require direct OT during the 2017-18 school year. If anything, deemphasizing or ignoring the Student's OT needs in the Private School compelled a more serious analysis of whether the Student should receive OT services in the District. That analysis included assessments suggesting that OT was not needed but also a recommendation to continue consultative OT. The OT evaluator made that recommendation "per team request." J-10 at 5. The fact that the OT evaluator's recommendation was in response to the team's concerns despite assessments indicating even consultative OT was unnecessary is indicative of the collaborative, multi-disciplinary approach contemplated by the IDEA.

Regarding the changed from Emotional Disturbance to Autism, I find that the change was well-supported by the 2018 RR itself. The assessment results reported in the 2018 RR constitute preponderant evidence that the change was appropriate. There is also significant evidence that the Parents were and are in agreement with that change.

Regarding the 2018 RR's timing, I find no preponderant evidence that the Student suffered any harm as a result of any timeline breach as measured against evaluation timelines set by the IDEA or Chapter 14.[9] Such violations are procedural in nature unless they give rise to a substantive denial of FAPE. I find that, in this case, they do not and, therefore, are not pertinent to the first prong of the *Burlington-Carter* test.

More importantly, and despite the foregoing, the appropriates of the 2018 RR is not truly an issue in this case.[10] The District highlights the Parents' positive reaction and lack of any objection the 2018 RR – both at the time it was issued and during this hearing. That is consistent with the Parents' amended complaint. The Parents note timeline breaches in their amended complaint, but do not challenge the substance of the 2018 RR.[11]

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[9] Above, I discuss that a timeline violation as measured against the settlement agreement does not yield a private placement as an equitable remedy in this case.

[10] I acknowledge that the IDEA's pleading standards are low. The Parents did not explicitly challenge the 2018 RR in their complaint and no such challenge can be inferred from that document. The Parents did, however, present evidence concerning the 2018 RR, and the District relies upon the 2018 RR to argue that the 2018 IEP is appropriate. My determination that the 2018 RR satisfied IDEA standards is made in an abundance of caution, given the ambiguity that can arise out of the IDEA's minimal pleading requirements.

[11] In its closing statement, the District says that the Parents' amended complaint includes "veiled allegations of various shortcomings" of the 2018 RR, particularly regarding discrepancies between the 2018 RR and the 2016 RR. I do not read the amended complaint the same way. The Parents note discrepancies in IQ scores and acknowledge that "the evaluator attributed [the discrepancies to the Student's] willingness to participate in the [2018] evaluation and emotional instability that was reported during the prior evaluations." That statement is not an alleged shortcoming. It is consistent with the Parents' position that the 2018 RR properly acknowledged the Student's high intelligence.

Rather, they claim that the District failed to use the 2018 RR to draft an appropriate IEP. *See Parents' Amended Complaint* at ¶ 21-30.

II. The 2018 IEP Satisfied the Endrew Standard

The District argues that the Parents' only real objection to the 2018 IEP is that it would be implemented by and within the District. There is some evidence in the record of this case to support that argument. Nevertheless, case law instructs that parental agreement with an IEP is not a factor in evaluating the IEP's appropriateness. When parents agree with and consent to an inappropriate IEP, the LEA is still responsible for a violation of the *student's* rights.

Even if the Parents' distaste for the District was their primary reason for rejecting the 2018 IEP, the record reveals some parental concerns about the IEP itself. Those concerns largely flowed from the Parents' misunderstanding the 2018 IEP, misunderstanding how the IEP would be implemented, or reading elements into the 2018 IEP that are not there. *See, e.g.* NT 618, 681-683, 759-762, 832-834. The District could have very easily corrected those misunderstandings had the Parents expressed specific concerns at any time prior to their testimony. But, again, the Parents disagreement with the IEP is not a factor in evaluating its appropriateness.

The Parents' testimony notwithstanding, the Parents argue that the 2018 IEP contains substantive deficiencies rendering it inappropriate. [redacted]

Regarding the substance of the proposed special education, the Parents argue that the following special education components of the 2018 IEP were inappropriate:

- Use of a break card,
- Use of a social skills rubric, and

- Lack of information about class size and schedule.

Regarding the break card, the Parents argue that break cards are "about as simple a behavioral intervention as they come…" but present no evidence or argument as to why that particular intervention is inappropriate for the Student. *Parents' Closing* at 11. Taken as a whole, both parents' testimony indicates that the Student dislikes and avoids interventions that other students could notice. Assuming that is true, there is no preponderant evidence in the record about how the break card would be used, let alone that it would be used in a way that the other students would notice. Even assuming that other students would notice the break card does not render the 2018 IEP inappropriate. At most, this could establish that the Student may reject one of the several accommodations included in the 2018 IEP. This is not a substantive violation of the Student's right to a FAPE.

Regarding the social skills rubric, the analysis is similar. The Parents' were concerned about the Student's perception of being treated "like a robot." NT 759-762. There is no preponderant evidence in the record about how the District would use the rubric, or even that the Student would be aware of its use. There is some evidence in the record that the District could use the rubric in a way that is invisible to the Student. There is also evidence that the Parents agree that the rubric targeted the Student's social skills needs. Assuming that the Student would know about the rubric, the Parents' testimony about the Student's likely reaction is heartfelt conjecture that does not render the 2018 IEP inappropriate.

Regarding information about class size and schedule, the IDEA and its regulations do not require that information to be listed in the IEP. I appreciate the Parents' concerns about class size and schedule both in general and in the particular context of the Student's transfer from the Private School to the District. I cannot find, however, that omission of information that is not required renders the 2018 IEP inappropriate.

I find that the Parents did not present preponderant evidence to establish that the 2018 IEP's alleged substantive deficiencies (individually or as a whole) rendered the IEP inappropriate.

The Parents also argue that the District predetermined that the Student's placement would be within the District and drafted the 2018 IEP to provide an administratively convenient program without regard to the Student's actual needs. Predetermination by LEAs strips parents of their right to meaningfully participate in the IEP development process. An LEA's obligation to ensure meaningful parental participation does not preclude the LEA from bringing a draft IEP to an IEP team meeting. Rather, in most cases, the analysis concerns the extent to which parents have a voice during IEP development and the extent to which LEAs seriously consider parental input. Additionally, in some cases predetermination permeates the entire IEP development process including any evaluations (that is, after predetermining a child's placement, an LEA skews or fixes the evaluation in such a way to support the predetermined placement).

There is no preponderant evidence in the record proving that the District crafted the 2018 RR to support a predetermined placement. To whatever extent the appropriateness of the 2018 RR is an issue in this case, my analysis finding that the 2018 RR was appropriate is above. I reject the Parents' argument that timeline violations are evidence of predetermination.

There is some evidence to suggest that District evaluators and members of the IEP team assumed that the Student would return to the District for programming. That assumption is consistent both with the settlement agreement and the IDEA's LRE obligations. Nothing in the record suggests that assumption influenced the results of any assessment within the 2018 RR. Nothing in the record suggests that the District would not have proposed a more restrictive placement if the 2018 RR yielded different results (ignoring that such evidence would be speculative in this case).

Similarly, analysis of the Parents' participation in the development of the 2018 IEP does not suggest predetermination. In this case, the only input that the Parents gave was their positive and specific input about the 2018 RR followed by their vague disagreement with the 2018 IEP. In some instances, the Parents' disagreements did not become clear until they testified. At the same time, the District gave the Parents a forum to provide input, ask questions, and work through the IDEA's collaborative process. This is true despite the timeline violations. Even if the 2018 RR and IEP were both untimely, the process was not rushed. The District actively solicited the Parents' input, particularly during the reevaluation. I find no evidence in the record that the District denied the Parents a meaningful opportunity to participate in IEP development or that it predetermined the 2018 IEP.

In sum, the 2018 IEP was not predetermined, but flowed from an appropriate reevaluation and was reasonably calculated to offer a FAPE to the Student at the time it was issued. Consequently, the Parents have not satisfied the first prong of the *Burlington-Carter* test, and the analysis ends.

ORDER

Now, June 23, 2020, it is hereby **ORDERED** that the Parents' demand for tuition reimbursement for the Student's enrollment at the Private School during the 2018-19 school year is **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER