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

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

CLOSED HEARING

ODR File Number:
22205 18-19 KE

Child's Name:
J. O.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
01/31/2020

Introduction

This special education due process hearing concerns the educational rights of a child with disabilities (the Student).[1] The Student's parents (the Parents) bring claims against the Student's school district (the District) arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

For the period of time in question, the Student went to school one of the District's schools until the Parents placed the Student in a private school (the Private School). The Parents allege that the District violated the Student's right to a FAPE by while attending the District's school by failing to implement the Student's Individualized Education Plan (IEP) and by placing the Student in classrooms that did not meet the Student's needs. The Parents demand compensatory education to remedy the FAPE violation, and ask that I assign a dollar value to the compensatory education and order the District to place that money in a trust for the Student. The Parents also demand tuition reimbursement for the Student's private school.

For reasons detailed below, I find mostly in favor of the District.

Issues

These issues were presented for adjudication:

1. Is the Student entitled to compensatory education to remedy a FAPE violation during the 2018-19 school year? If so, must that compensatory

[1] Except for the cover page of this decision and order, identifying information is omitted to the greatest extent possible.

education be reduced to a dollar amount and placed in a trust for the Student?

2. Are the Parents entitled to tuition reimbursement?

Findings of Fact

The parties filed joint stipulations. I adopt those stipulations as if they were my own findings.

I carefully reviewed the large record of this case in its entirety. I make findings of fact only as necessary to resolve the issues before me.

I find as follows:

1. The Parents and the District entered into a Settlement Agreement and General Release (the Settlement) on August 9, 2018. P-100.

2. Under the terms of the Settlement, the Parents released all claims against the District prior to August 9, 2018. P-100.

3. Under the terms of the Settlement, the District agreed to provide compensatory education, fund three independent educational evaluations (IEEs), and propose an interim IEP. P-100.

4. The three IEEs specified in the Settlement agreement were: Speech and Language, Occupational Therapy (OT) including handwriting, and a Functional Behavioral Assessment (FBA) including a VB-MAPP.[2]

5. The parties agreed that the interim IEP would include a handwriting goal and support to school personnel from a Board Certified Behavior Analyst (BCBA). P-100.

6. The Settlement included examples of the type of type of BCBA support that the Student was to receive. Those included behavior plans, data tools and collection, reinforcers, and schedules. P-100.

7. The Parties also agreed to place the Student in a general education 1st grade classroom with one-to-one (1:1) support. The Settlement is silent as to the credentials of the person providing the 1:1 support. However, the District agreed that the BCBA would train the 1:1 provider both prior to working with the Student and on an ongoing basis. P-100.

8. The Parties also agreed that the Student could be removed from the general education classroom to receive social skills instruction and individual speech therapy. P-100.

9. The parties intended that the Student would be educated pursuant to the interim IEP until the IEEs were completed. At that point, the Student's IEP team would reconvene and revise the Student's IEP as needed. *See* S-100.

[2] The VB-MAPP is an assessment tool that measures the school-readiness of young children.

10. On August 16, 2018, the District proposed an interim IEP with a Notice of Recommended Educational Placement (NOREP).[3] S-3. Although this IEP is not explicitly marked as interim, this is the interim IEP contemplated by the Settlement.

11. The August 16, 2018 IEP conforms to the requirements of the Settlement. S-3, P-100.[4]

12. The Parents proposed revisions to the August 16, 2018 IEP. The District substantively incorporated those revisions and issued a revised interim IEP with a NOREP on August 31, 2018. S-4.

13. After the revision, the Parents were still not satisfied with the interim IEP's goals. The Parents rejected the NOREP, and the IEP team reconvened to address the goals on September 14, 2018. S-4, S-5, S-6.

14. After the meeting, the District revised the interim IEP again and issued a second revised interim IEP on September 17, 2018. The District issued the September 2018 IEP with a NOREP. The Parents approved the revised interim IEP via the NOREP on September 18, 2018. S-7.

15. The IEEs were still pending when the IEP team convened on September 17. At that time, the parties agreed that the Student's behavior impeded the Student's learning or that of others. Despite this conclusion, the parties agreed that the District should not conduct its own FBA, since the Student was about to receive an independent FBA.

[3] NOREPs are documents through which parents may approve or reject proposed IEPs.
[4] The Parents argue that the August 16, 2018 IEP and subsequent revisions to that IEP were inappropriate for several reasons. The Parents do not argue that the August 16, 2018 IEP or subsequent revisions to it failed to conform to the Settlement.

The parties agreed instead that the District would collect behavioral data and would use existing information to draft a Positive Behavior Support Plan (PBSP) for the Parents' review. *See* S-7, S-8, NT 98-99.

16. On October 5, 2018, IEP team met to review the PBSP. The District finalized the PBSP and sough the Parents' consent to implement the PBSP via a NOREP. The Parents provided consent on October 12, 2018. S-15, S-16.

17. The independent FBA (S-12), independent OT evaluation (S-13), and independent Speech and Language evaluation (S-17) were all completed and in the District's possession by December 3, 2018.[5] S-73 at 67.

18. On December 4, 2018, the District sent an invitation for an IEP team meeting to convene on January 3, 2019. The IEP team meeting convened as scheduled. The purpose of the meeting was to review the IEEs and revise the IEP (as contemplated by the Settlement). *See* S-20.

19. During the January 3, 2019 IEP team meeting, the District expressed concerns about the independent FBA. Specifically, the District was concerned that the independent FBA recommended that a "BCBA should conduct a complete Functional Behavioral Assessment including a functional analysis to have the best possible data regarding the function of [Student's] challenging behaviors within the school setting." S-12 at 28. The District had been under the impression that the purpose of the independent FBA was to determine the function of the Student's

[5] All three IEEs include dates that the Student was assessed. Some of the reports are undated. None of the dates on the IEEs are reliable indications about when the District received the IEEs. I accept the Parent's email at S-73 page 67 as the best indication of when the District had all three IEEs.

behaviors in the school setting and make recommendations to improve those behaviors. *Passim.*

20. The District's concerns notwithstanding, the District accepted criticism within the independent FBA regarding the Student's general education classroom. In response to this concern, the District arranged for the Parents to observe a different general education classroom in the same school building. *Passim.*

21. The Student transferred to the other general education classroom on January 7, 2019. NT *passim*.

22. The District also proposed to conduct its own FBA in response to the recommendation within the independent FBA to determine the function of the Student's behaviors. The District sought the Parents' consent for the FBA on January 15, 2019. The Parents provided consent on January 22, 2019. S-22

23. The District also accepted the VB-MAPP information within the independent FBA. The VB-MAPP results supported placement in a general education classroom. S-12, NT 1323-1327.

24. The IEP team was not able to complete its tasks of reviewing the IEEs and revising the Student's IEP during the January 3, 2019 meeting. The District scheduled the IEP team to reconvene on January 31, 2019. S-21.

25. On January 31, 2019, the Parents arrived to the IEP team meeting with a non-attorney advocate. The Parents did not tell the District that they

were bringing an advocate, and the District would have brought different personnel to the meeting had it known. This prompted the District to cancel and reschedule the meeting.[6] *See e.g.* NT 107-108, 160 (7/24/19).

26. Immediately after it canceled the January 31, 2019 IEP team meeting, the District sent an invitation for the team to reconvene on February 11, 2019. S-27. The District re-issued the same invitation on February 2, 2019, because the Parent had not responded by that date. S-28

27. On February 4, 2019, the Parents responded to both copies of the invitation, saying that they wished to attend the meeting with their advocate but could not attend on February 11, 2019. S-27, S-28.

28. On February 4, 2019, the District issued a new invitation for the IEP team to reconvene on February 14, 2019. S-29. While that invitation is not signed, there is no dispute that the IEP team reconvened on February 14, 2019.

29. During the February 14, 2019, IEP team meeting, the team continued to discuss the IEEs, a reevaluation report drafted by the District that synthesizes and responds to the IEEs (S-30), and the Student's IEP. *Passim*.

[6] There is some testimony that the Parents' advocate became confrontational when the District canceled the January 31 meeting. I have no doubt that the District's actions were both consistent with its own practices (regardless of any written policy), but I make no finding in this regard as the District's compliance with its own practices is irrelevant. I also have no doubt that the District's actions and the advocate's response spurred the growing animosity between the parties, but I make no finding in this regard as the parties' feelings toward each other are also irrelevant.

30. On February 21, 2019, the District proposed an IEP with a NOREP. The February 2019 IEP was a revision of the IEP discussed during the February 14 IEP team meeting. The revisions were in response to the Parents' concerns raised during the meeting. P-43.

31. The Parents did not complete and return the February 2019 NOREP. Nevertheless, the District understood that the Parents continued to have concerns about the IEP's goals and that the Parents were not consenting to the February 2019 IEP by not rejecting the NOREP. Instead, the Parents requested a conference call with District personnel to further discuss the goals. That call convened on March 1, 2019. *Passim*.

32. The District made additional revisions after the conference call and issued an IEP and NOREP on March 8, 2019. S-36.[7]

33. In addition to the March 8, 2019 IEP and NOREP, the District sent an additional NOREP (also on March 8, 2019) proposing Extended School Year (ESY) services (the 2019 ESY NOREP). Through the 2019 ESY NOREP, the District proposed a two-week program at a private therapeutic center that the Student had previously attended, and a six-week autistic support program housed in a learning support classroom during the summer of 2019. S-39.

34. On March 12, 2019, the Parents returned the ESY NOREP to the District, asking for an informal meeting to discuss the ESY proposal. S-39.

[7] The March 2019 IEP and NOREP are dated March 7, 2019. Those documents were transmitted to the Parents on March 8, 2019.

35. The Parent did not respond to the March 8, 2019 NOREP (the NOREP attached to the IEP, not the ESY NOREP). On March 13, 2019, the District asked via email if the Parents were accepting or rejecting the NOREP. The Parents responded the same day, saying that they did not think the March 8, 2019 IEP and NOREP were "finalized" and asked the District to send finalized documents. S-73 at 151.

36. The District re-issued the March 8, 2019 IEP and NOREP as a "finalized" IEP and NOREP on March 14, 2019. The March 8 and March 14 IEP and NOREP are substantively identical. The Parent signed the NOREP providing consent for the District to implement the IEP on March 22, 2019. S-44.

37. When signing the NOREP on March 22, 2019, the Parents checked a box to approve the District's recommendations. However, the Parents also wrote, "I am agreeing to sign this so that services will be implemented for [Student]. But I am not agreeing that this is appropriate or sufficient to meet [Student's] needs." S-44.

38. The parties met on March 22, 2019, to discuss ESY. This was the informal meeting that the Parents requested by returning the ESY NOREP. After significant discussion, the District acquiesced to the Parents' preferences and revised its offer to include two weeks at the private therapeutic center and a private camp that serves children with disabilities – not to exceed eight weeks total for both programs combined. More specifically, the District would fund the Student's participation at the camp and would provide 40 hours of compensatory education that the Parents could use to obtain services from the therapeutic center. S-47.

39. The District sent its updated ESY proposal on March 25, 2019 via a NOREP (2nd ESY NOREP). The Parents checked boxes on the 2nd ESY NOREP indicating that they both approved and rejected the District's proposal. They approved the offer for participation at the camp but stated that 40 hours of service from the therapeutic center was insufficient. They requested seven hours of service per week for 10 weeks from the therapeutic center in addition to the camp.

40. On April 22, 2019, the Parents sent an email to the District stating their belief that the Student did not make progress since the start of the 2018-19 school year, that the IEPs offered by the District were insufficient, and that they intended to enroll the Student in a private school and seek reimbursement from the District. In the same email, the Parents also said that the District's ESY offer was insufficient and that they would seek reimbursement for the Student's participation in parentally selected ESY programs (the camp and more time at the therapeutic center than the District offered). P-59 (the 10-Day Notice).

41. In response to the Parents' 10-Day Notice, the District reconvened the Student's IEP team by conference call on April 25, 2019. The District issued an updated IEP the same day. The updated IEP is substantively similar to the March 14, 2019 IEP, but with updated information about the Student's progress and with a mastered goal removed. P-60.

42. During the April 25, 2019 IEP team meeting, the District proposed to conduct additional achievement testing. The Parents initially declined

that request verbally during the meeting.[8] The District issued an updated, revised IEP on April 25, 2019 with a NOREP. S-57.

43. The Parents enrolled the Student at a private school (the Private School) on May 7, 2019. The Student started attending the Private School shortly thereafter.

44. On May 13, 2019, the Parents requested this due process hearing by filing a complaint with the Office for Dispute Resolution with copy to the District.

45. The Student attended the camp and received services from the therapeutic center during the summer of 2019.

46. The Student attends the Private School during the 2019-20 school year.

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

[8] After declining the evaluation verbally during the meeting, the Parents later agreed to the testing. By then, the Student was attending the Private School. The District was not permitted to evaluate the Student at the Private School, and so the Parents brought the Student to the District for testing. The District could not administer the tests because the Student would not comply with the testing.

Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this hearing, the underlying chronology of events is not truly in dispute, and so witness credibly is not relevant to the chronology. Regardless, I find that all witnesses testified credibly. To the extent that any witness's opinion testimony conflicted with another's, those witnesses honestly reach different conclusions from the same facts. To the extent that any witness's fact testimony conflicted with another's, those witnesses honestly recall the facts differently, or saw the Student exhibit different behaviors on different days.

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.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 at 39. S*ee also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the

moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Tuition Reimbursement

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

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third

step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

I. Compensatory Education

Start of the 2018-19 School Year through December 3, 2018

A very large quantity of evidence was presented concerning the Student's progress during the 2018-19 school year. The Parents argue that the District's data collection is replete with errors and contradictions and is, therefore, unreliable. Instead, the Parents point to a small amount of evidence that they consider to be reliable as proof that the Student did not make progress during the 2018-19 school year. For its part, the District stands by its data and argues that data, and evidence based on that data, demonstrate that the Student made progress during the 2018-19 school year. By perseverating on the minute of this evidence, both parties miss a larger point: much the Student's 2018-19 school year was controlled by the Settlement.

Case law establishes that hearing officers have authority to determine whether an enforceable contract exists between parties to a special education dispute. *See, I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution (Quakertown Cmty.)*, 88 A.3d 256 (Pa. Commw. Ct. 2014). Those same cases confirm the long-standing concept that hearing officers have no authority to enforce a contract.

Despite this lack of enforcement authority, whenever a student's education is controlled by a settlement agreement, I must determine whether the parties acted in accordance with their agreement. Breach of the agreement by the LEA may give rise to FAPE claims, which fall under my jurisdiction. *See, H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch*., 220 F. Supp. 3d 574 (E.D. Pa. 2016) (the existence of a settlement agreement is not dispositive of IDEA claims). By the same logic, compliance with a settlement agreement indicates the provision of FAPE or adherence to an agreed-to course of action that might be different from what the IDEA would otherwise require.

When parents and schools sign a settlement agreement, they agree to set aside whatever the IDEA requires and educate the Student in accordance with the agreement. If the school violates the agreement, the violation itself can be a denial of FAPE, and parents can seek a remedy for that violation through a due process hearing. Going in the other direction, depending on the terms of the contract, the LEA's compliance with the agreement may abrogate FAPE claims. In either case, the question concerns the impact of the contract upon the Student's right to a FAPE as opposed to contract enforcement. Seeking a remedy for a FAPE violation resulting from a breach of contract is quite different than seeking contract enforcement in court. *See also, In re: The Educational Assignment of J.P., a Student in the Reading School District*, ODR No. 21257-1819AS (October 2, 2019).

It is worth noting that the particular language of any settlement agreement may render the logic above inapplicable. For example, if an agreement includes a waiver of past claims in exchange for consideration that has nothing to do with a student's current programming, the agreement has

nothing to do with provision of FAPE at any point after its execution. But those are not the facts of this case.

In this case, the Parents explicitly waived their rights under the IDEA and Section 504 through the date of the Settlement in exchange for the consideration detailed therein. *Settlement* at ¶¶ 2, 3. The Parents also reserved their rights by "not releasing any claims that may arise after the date of this Agreement regarding events that occur after the date Parents sign the Agreement." *Settlement* at ¶ 3. By reserving those rights, the Parents are entitled to claim that a breach constitutes a denial of FAPE and can seek redress through a due process hearing. The Parents' reservation, however, cannot be construed as nullification of portions of the Settlement that direct the parties' actions after its execution.

The Settlement explicitly addresses the District's obligations to the Student after its execution. Specifically, the District was obligated to:

1. Offer an interim IEP that met conditions specified in the agreement,[9]
2. Fund three IEEs,[10] and
3. Use the IEEs to develop the Student's program.[11]

Regarding the use of the IEEs, the Settlement specifies that the interim IEP would be in place "pending production and review of the IEEs…" *Settlement* at ¶ 4(G). The Settlement does not literally say what the parties must do once the IEEs were finished. The parties agree, however, that their intent in signing the agreement was to educate the Student pursuant to an interim

[9] *Settlement* at ¶¶ 4(G)-(H).
[10] *Settlement* at ¶ 4(F).
[11] *Settlement* at ¶ 4(G).

IEP until the IEEs were complete, and then use the IEEs to draft a final IEP for the Student.[12]

Even in the absence of an agreement about how the IEEs were to be used, it is clear within the four corners of the Settlement that the parties agreed to proceed under its terms, as opposed to what the IDEA requires. The concept of an interim IEP appears nowhere in the IDEA.[13] Rather, the IDEA requires schools to have an appropriate IEP in place for children with disabilities at all times. In exchange for three IEEs and specific, agreed-to provisions within the interim IEP, the Parents agreed that the District could issue an interim document establishing what special education it would provide to the Student. As such, the interim IEP was part of the consideration in the Settlement, set the metes and bounds of the District's obligations to the Student at least until the IEEs were complete, and was something other than what the IDEA would otherwise require.

The District offered an interim IEP that complied with the requirements set forth in the Settlement. The Parents make no argument to the contrary. Between the start of the 2018-19 school year and December 3, 2018, the interim IEP was revised several times. None of those revisions brought the interim IEP out of compliance with the Settlement. Consequently, I will not consider whether the original interim IEP or any of its revisions were reasonably calculated to provide a FAPE on the day that they were issued. Those documents need only comply with the Settlement, and all of them do.

[12] I use the term "final IEP" colloquially, and to distinguish final IEPs from interim IEPs. IEPs are often described as "living documents" because they can be re-opened and revised as a child's needs change, even before the expected term of the IEP ends.
[13] The closest analogy is the IDEA's regulations for mid-year, interstate transfers. *See* 34 C.F.R. § 300.323(f) (requiring the receiving LEA to provide comparable services to those that the Student received previously until it can draft its own IEP).

The Parents claim that the District did not implement the interim IEP or any of its revisions with fidelity. The Settlement does not protect the District from a denial of FAPE arising from an IEP implementation failure. Such a failure is the type of contract breach that gives rise to a denial of FAPE claim in and of itself. *See, H.E. v. Walter D. Palmer, supra.*

Even so, none of the interim IEP revisions are amendments or codicils of the Settlement, and the Settlement establishes the minimum criteria for the substance of the interim IEPs. To comply with the Settlement, the District was obligated to place the Student in a 1st grade classroom; implement a handwriting goal; provide support to school personnel from a BCBA in the form of plans, data tools and collection, reinforcers, schedules and the like; and provide 1:1 support from a person trained by a BCBA. There is no preponderant evidence that the District failed to provide the services required by the Settlement while the interim IEP was in place. Consequently, from the start of the 2018-19 school year through December 3, 2018, the District acted in accordance with the Settlement and does not owe compensatory education to the Student for this period of time.

In reaching this conclusion, I am sensitive to the Parents' argument that their consent to any IEP does not constitute a defense for the District. The substantive right to a FAPE is the *child's* right, not the parents' right.[14] Consequently, when parents agree to an inappropriate IEP, the school still violates the child's right to a FAPE and the child is owed a remedy. *See D.F. v. Collingswood Borough Bd. of Educ*., 694 F.3d 488, 500 (3d Cir. 2012). Cases involving settlement agreements are different because the parties purposefully chose to set aside IDEA processes in favor of their own agreement. To my knowledge, no court has ever found that a parent cannot

[14] *Winkelman v. Parma City School District*, 550 U.S. 516 (2007) notwithstanding.

waive their child's IDEA rights through a settlement agreement.[15] In this case, the Parents singed the Settlement on their own behalf and on behalf of the Student. Consequently, the District's obligations to the Student were controlled by the Settlement, not the IDEA, through December 3, 2018.

II. Compensatory Education
December 3, 2018 through March 22, 2019

IEPs drafted after December 3, 2018, must be judged against IDEA standards, not the standards set by the Settlement. The chronology of events, however, significantly impacts upon the District's obligations.

After December 3, 2018, the District did what it promised to do: it reconvened the Student's IEP to consider the IEEs and revise the IEP. The record does not reveal why the District scheduled the IEP team meeting to convene a full month after it received the IEEs but, given the time of year and the considerable work that the District was required to do simply to prepare for the meeting, I find that it was reasonable for the District to convene the IEP team on January 3, 2019.

Despite concerns about the independent FBA, the District accepted several of the independent evaluator's findings and proposed its own evaluations. The IEP team did not finish reviewing the IEEs and drafting the IEP on January 3, 2019, and so the team was scheduled to reconvene on January 31, 2019 to complete its work. In the interim, with the Parents' consent, the District changed the Student's classroom and proposed its own evaluations (as recommended in the independent FBA).

[15] The practical implications of a contrary holding would be disastrous for children, parents, and schools who routinely resolve special education disputes via settlement agreements.

The record concerning how the IEP team reconvened is problematic for both parties. The parties were in constant communication, and so it is striking that the Parents did not tell the District that they would bring an advocate to the January 31, 2019, meeting. It is equally striking that the District did not bring personnel to the meeting who could proceed with an advocate, given the history between the parties.[16] Ultimately, the meeting did not reconvene on January 31, 2019. Instead, the IEP team reconvened on February 14, 2019, and concluded their work. This resulted in the proposed IEP of February 21, 2019.

The Parents did not approve the February 21, 2019 IEP. Instead, they continued to negotiate IEP terms with the District. For all practical purposes, both parties acted like the IEP team meeting that started on January 3, 2019, was still ongoing. The Student's education remained controlled by an interim IEP that was drafted before the parties had the IEEs. This stasis remained in place through March 22, 2019, when the Parents provided consent for the District to implement the March 14, 2019 IEP without agreeing to its appropriateness.[17]

In sum, the Student's education was controlled by the Settlement from the start of the 2018-19 school year through December 3, 2018. From December 3, 2018 onward, the District was obligated to convene the

[16] I do not fault the District for its practice of insisting upon bringing upper-level administrators to IEP team meetings when parents bring advocates. Rather, in this case, the District knew the Parents had already requested a due process hearing resulting in the Settlement which, in turn resulted in an IEP team meeting to incorporate three IEEs into a child's programming. That, plus the communications and revisions to the interim IEPs, should have alerted the District that the IEP process for the Student was of a different intensity than what is typically expected.

[17] As the Parents argue, an unqualified approval would yield the same result. A parent's belief that an IEP is or is not appropriate does not alter a child's right to a FAPE.

Student's IEP team, review the IEEs, revise or redraft the interim IEP into a final IEP. That process started on January 3, 2019 and ran through March 22, 2019. Consequently, from December 3, 2019 through March 22, 2019, the District was obligated to implement the last-approved revision to the interim IEP (September 18, 2018, S-7).

Even though the District was obligated to implement an interim IEP from December 3, 2018 through March 22, 2019, the Parents still argue that the Student is entitled to compensatory education during this period of time. As with the prior period, they claim that the District did not implement the interim IEP with fidelity, resulting in a denial of FAPE. As with the prior period, the District's obligation to implement the interim IEP is not a defense against an implementation failure claim.

There is some question as to whether IEP implementation for the period from December 3, 2018, through March 22, 2019 is judged against the Settlement or the IDEA. My conclusion is the same under either standard.

If implementation is judged against the Settlement, I find no preponderant evidence that anything specifically required by the Settlement was not implemented. If implementation is judged against IDEA standards, the scope is broader. The Parents raise two arguments about implementation that may apply with a broader scope, and so I consider both.

First, the Parents argue that the data concerning the Student's behavior is "nonsensical and unreliable." *Parents Closing Brief* at 23. The Parents are correct that faulty data can be tantamount to an IEP implementation failure. *See See Z.S. v. v. Pittston Area Sch. Dist.,* No. 7154-0607KE, at 14 (ODR

Apr. 25, 2007); *Escambia Cty. Bd. of Educ. v. Benton,* 406 F. Supp. 2d 1248, 1275 n.45 (S.D. Ala. 2005).

The Parents reach this conclusion by noting that the data collection forms that the District used changed over time, that those forms defined behaviors differently, and that there are some inconsistencies between daily communication logs sent to the Parents and documents prepared by the District for this hearing. Moreover, the Parents highlight twelve (12) instances in which two data collection forms that tracked the same day at the same time conflict with each other.[18]

I make no findings above concerning the data that the District collected or its accuracy because doing so is not necessary to resolve the issue. Rather, for the sake of analysis, I assume that the Parents' analysis of the District's data is correct.

Considering the Parent's argument, I am struck by overwhelming lack of conflict in the District's behavioral data. The Parents found conflicting data by comparing data collection forms at P-74 and P-77. P-74 is a 130-page document, collecting daily communication logs. On those logs, teachers commented on the Student's behavior period-by-period for 11 periods and determined whether the Student eared a "star" for the period. P-74, therefore, represents roughly 1,430 data points (not including the comments). P-77 is a 100-page document in which negative behaviors were tracked (one page per day, a blank page indicates no behaviors were observed). Even using the smaller number – the 100 days represented in P-77 – the 12 instances conflicting data (sometimes representing conflicts

[18] The Parents do an excellent job of summarizing these conflicts on pages 13 and 14 of their closing brief.

during a period, not a day) is not preponderant evidence that the District's data is faulty. Rather, assuming that the Parents' analysis is correct, the evidence would be more than preponderant that the forms agree with each other. The overwhelming majority of the data does not indicate a conflict or error. Such consistency would also indicate that the operational definitions of the Student's behavior were consistent and well-understood among the people who collected data.

I reject the Parents' first argument about IEP implementation from for the period from December 3, 2018, through March 22, 2019. I make no findings concerning the District's data collection but rather accept the Parents' averments as true for the sake of analysis. Based on those averments, the evidence is contrary to the Parents' position.

The Parents second argument about IEP implementation concerns the Student's academic progress and the District's methodologies. The Parents argue that the Student's performance in reading was inflated by the way that the District presented words for the Student to read.[19] The Parents also argue that the District provided math instruction in a way that forced the Student to rely upon inefficient methods.

As with the behavioral data, I make no findings about the Student's academic progress. Rather, I accept the Parents' averments as true for the sake of argument. The Parents' averments about the Student's academic performance do not establish an IEP implementation failure.

[19] The Parents argue that by presenting the same words in the same order, the District was testing the Student's memory, not the Student's reading ability.

IEP implementation failures are not established by a child's progress. Faithfully implementing an IEP does not guarantee a child's success. Rather, progress (or lack thereof) signals how IEPs must change as a child moves forward. Similarly, implementing an IEP using methods that are not to the Parents' liking is not an IEP implementation failure. Unless the IEP in question specifies a particular methodology, LEAs are free to adopt whatever methodology they wish to implement an IEP.[20] Rather, to establish an IEP implementation failure, the Parents must show that the services promised in the IEP were not delivered. There is no preponderant evidence that services offered in the Student's IEP from December 3, 2018 through March 22, 2019 were not delivered.

For the period of time from December 3, 2018 through March 22, 2019, I find that the Parents did not prove by preponderant evidence that the District failed to implement the Student's last-approved interim IEP (which the District was obligated to implement). The Student is not owed compensatory education for this period of time.

III. Compensatory Education
March 22, 2019 through May 7, 2019

Between March 22, 2019 and May 7, 2019, the District was obligated to implement the March 14, 2019 IEP. I find that the March 14, 2019 IEP was appropriate based on the information available to the District at the time it was offered.

[20] This general rule, of course, changes with evidence that a particular methodology is ineffective for a student.

The District started drafting the document that ultimately became the March 14, 2019 IEP in preparation for the January 3, 2019 IEP team meeting. At this point, the District had all three IEEs and, despite its concerns about the independent FBA, accepted those documents as a fair indicator of the Student's abilities as assessed by the independent evaluators. Moreover, the District took the recommendations in the IEEs seriously, and either incorporated those recommendations in substance or explained why it declined to do so.[21]

The January 3, 2019 IEP team meeting adjourned with unfinished business and reconvened on February 14, 2019 (as explained above). The District then offered an IEP on February 21, 2019. More revisions were then made, mostly at the Parents' insistence, but none of those revisions changed the core services offered through the IEP. Those core services were derived from the IEEs and the District's experience with the Student. The District's March 14, 2019, IEP was reasonably calculated to provide a FAPE when it was offered because, from its inception, it was based on the most current, thorough evaluations of the Student available at the time the document was drafted.

The IEP that was in place from March 22, 2019 through May 7, 2019, was appropriate. The Parents have not proven by preponderant evidence that the District failed to implement that IEP for the same reasons as stated above. Consequently, the Student is not entitled to compensatory education for this period of time.

[21] Substantive incorporation of an IEE's recommendation does not require the District to place the recommendation word for word in the Student's IEP.

IV. Tuition Reimbursement

Under the *Burlington-Carter* standard (see above), my first task is to determine if the District offered a FAPE before the Student enrolled in the Private School. The District argues that the April 25, 2019 IEP is controlling for this analysis. The April IEP was issued between the 10-Day Notice (April 22) and the Student's enrollment in Private School (May 7). The District is correct, therefore, that the April IEP is controlling.

The District is also correct in its argument that the April IEP is a refinement of the March 14, 2019 IEP. I find that the April IEP was reasonably calculated to provide a FAPE at the time it was offered for all of the same reasons that the March 14, 2019 IEP was reasonably calculated to provide a FAPE when it was offered.

The District continued to offer a FAPE in response to the Parents' 10-Day Notice. The Parents, therefore, have not substantiated the first prong of the *Burlington-Carter* test, and are denied tuition reimbursement on that basis.

V. ESY 2019

The District argues that the Parents have not met their burden to prove entitlement to reimbursement for services that the Parents paid for in the summer of 2019. The District is correct that very little evidence about the summer of 2019 exists, and much of that evidence is hearsay.[22] Even so, there is preponderant evidence that the District offered to pay for the camp that the Student attended and 40 additional hours of compensatory

[22] I note that I sustained the District's disclosure objections when the Parents attempted to introduce evidence about the Student's progress during the summer of 2019.

education. Those 40 hours were intended to offset the cost of services from the therapeutic center.

The fact that the District made this offer despite its own belief that it could provide an appropriate ESY program itself is irrelevant. The District made its ESY offer through a NOREP. The Parents accepted that NOREP, and so the District is bound by it.

There is no preponderant evidence that the Student required more services than what the District offered through the ESY NOREP. The Parents are entitled to reimbursement for the camp that the Student attended in the summer of 2019 and 40 hours of compensatory education to offset the cost of service from the therapeutic center.

VI. Compensatory Education Trust

The Parents argue that all compensatory education must be reduced to a dollar amount and placed in a trust for the Student. The language in the ESY NOREP compels me to address this issue. Through the ESY NOREP, the District did not offer to fund 40 hours of services at the therapeutic center. Rather, the District offered 40 hours of compensatory education to offset the cost of those services.

Unlike the compensatory education offered through the Settlement, the ESY NOREP does not put a dollar-per-hour cap on the compensatory education. The ESY NOREP did, however, restrict the use of compensatory education as follows: "The LEA is offering 40 hours of compensatory education to be used for [the therapeutic center] between June 5, 2019 through June 19, 2019." S-47 at 2.

I find the evidence presented in this case concerning the District's payout of compensatory education, accrued either through settlement agreements or NOREPs, to be both credible and troubling. At the same time, my authority to order the District to fund a compensatory trust, as opposed to provide compensatory education, is ambiguous at best. Such an order is clearly analogous to an award of monetary damages, and I have no authority to issue such awards.

Examining the circumstances of this case, however, precludes an overly literal reading of the ESY NOREP. At the time that the Parents approved the ESY NOREP, the District could have contracted directly with the camp and the therapeutic center. That window is now closed, and the Parents are out-of-pocket for the services that the Student received in the summer of 2019. Ordering the District to honor the NOREP, therefore, is not a matter of compensatory education, but a matter of reimbursement.

Just as the District must reimburse the Parents for the cost of camp, so too must it reimburse the parents for the cost of services obtained from the therapeutic center from June 5, 2019 through June 19, 2019, up to 40 hours. Given the lack of a dollar-per-hour cap in the NOREP, such reimbursement is calculated at the therapeutic center's hourly rate.

For both the camp and the therapeutic center, the District shall reimburse the Parents for payments made or debts incurred during the summer of 2019, as set forth in the order below.

Conclusions

For the period running from the start of the 2018-19 school year through December 3, 2018, the District's obligations to the Student were set by the parties' Settlement. The District complied with the Settlement, and so the Student is not owed compensatory education for this period of time.

For the period from December 3, 2018 through March 22, 2019, the District was obligated to implement the Student's last-approved interim IEP. I find that there is no preponderant evidence proving that the District failed to implement the interim IEP during this time. The Student is, therefore, not entitled to compensatory education during this period of time.

For the period from March 22, 2019 through May 7, 2019, the District was obligated to implement the March 14, 2019 IEP. I find that IEP was reasonably calculated to provide a FAPE at the time it was drafted. I find that there is no preponderant evidence proving that the District failed to implement the Student's IEP during this time. The Student is, therefore, not entitled to compensatory education during this period of time.

The Parents enrolled the Student in the Private School on May 7, 2019. The Student has attended the Private School since that time. The District offered an IEP in April 2019 in response to the Parents' 10-Day Notice. The April 2019 was reasonably calculated to provide the Student a FAPE. Consequently, the Parents are not entitled to tuition reimbursement.

The District offered to fund private services for the Student as an ESY program in the summer of 2019. The District presented that offer through a NOREP, which the Parents accepted. There is no preponderant evidence

establishing that the Student required more than what the District offered for ESY, but the District is bound to the accepted NOREP. It must reimburse the Parents for the cost of camp and 40 hours of services provided by the therapeutic center in the summer of 2019.

ORDER

Now, January 31, 2020, it is hereby **ORDERED** as follows:

1. The Parents' demand for reimbursement for services obtained for the Student in the summer of 2019 is **GRANTED** in accordance with the terms of this order.

2. Within five (5) business days of this Order, the District shall provide information in writing to the Parents, listing whatever information or documents it requires from the Parents to approve the reimbursements ordered herein. The District will send any forms that the Parents must complete in order to receive reimbursement along with this information.

3. The District shall reimburse the Parents for the cost of the Student's participation in a specialized summer camp during the summer of 2019. Such reimbursement is limited to enrollment fees, participation fees, and other fees required for the Student's participation excluding transportation.

4. The District shall reimburse the Parents for up to 40 hours of services provided for the Student by the therapeutic center from June 5, 2019 through June 19, 2019. The rate for such reimbursement is set at the

therapeutic center's hourly rate at the time that services were rendered.

5. The District shall issue reimbursement awarded herein within five (5) business days of its receipt of information or documentation that conforms to the information that it will send to the Parents in accordance with #1.

6. The Parents demands for compensatory education and additional reimbursement for private school tuition at the end of the 2018-19 school year through the 2019-20 school year are **DENIED.**

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

/s/ Brian Jason Ford
HEARING OFFICER