

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

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

ODR No. 30080-24-25

CLOSED HEARING

Child's Name:

S.G.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Brian Jason Ford

Date of Decision:

11/27/2024

Introduction and Procedural History

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). The Student's parents (the Parents) filed a due process complaint (the Complaint), alleging that the Student's public school district (the District) violated the Student's rights 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.*

More specifically, the Student attended a specialized private school for children with disabilities (the Private School) during 2022-23 school year pursuant to a prior settlement agreement between the parties (the Settlement). In April 2023, the District reevaluated the Student and issued a reevaluation report (the 2023 RR). Using that report, the District drafted an Individualized Education Program in May 2023 (the May 2023 IEP). The District then proposed the May 2023 IEP as the Student's special education placement and program for the 2023-24 school year. The Parents disagreed with the May 2023 IEP and kept the Student at the Private School. The Parents also obtained a private evaluation of the Student in March 2024.

On July 31, 2024, the Parents filed the Complaint. They demand tuition reimbursement for the cost of the Private School during the 2023-24 school year and reimbursement for the private evaluation.

Discussed below, I find that the Parents are entitled to tuition reimbursement, but not reimbursement for the private evaluation.

Issues

The issues presented for adjudication are:

1. Are the Parents entitled to reimbursement for the Student's tuition and related expenses for the Private School during the 2023-24 school year?
2. Are the Parents entitled to reimbursement for the cost of a private evaluation?

Findings of Fact

As is often the case, I am hard pressed to find a single material fact in dispute. There simply is no daylight between the parties when it comes to what happened and when. And yet, the parties failed to reach stipulations,

necessitating a multi-session hearing that could have been greatly shortened if the parties had acknowledged their overarching agreement as to the facts of this case. As in all cases, the parties view the facts differently and reach different conclusions based on those facts – but there is no disagreement about what the facts are.

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

1. There is no dispute that the Student is a child with a disability or that the District is the Student's Local Educational Agency as those terms are defined by the IDEA. *Passim*.
2. There is no dispute that the Student is a child with Autism and a Speech and Language Impairment as those terms are defined by the IDEA. There is no dispute that the Student has significant communication needs and cognitive impairments. *Passim*.
3. There is some dispute as to whether the Student should be identified as a child with an Intellectual Disability, as that term is defined by the IDEA, as an additional qualifying disability.¹ See *below*.
4. During the 2022-23 school year, the Student attended the Private School pursuant to a settlement agreement between the Parents and the District (the Settlement). *Passim*.
5. The Private School is a very small (34 students in total) licensed private school that serves children with significant, complex needs related to Autism and functional communication deficits. *Passim*; see, e.g. NT 504-510.
6. While attending the Private School, the Student received a full time Applied Behavioral Analysis (ABA) program. That program focused on functional communication and functional academics and was overseen by a Board Certified Behavior Analyst (BCBA). The Student received all instruction one-to-one (1:1). That ratio was set in response to the Student's level of need – the Private School teaches between a 1:1 and 4:1 student/teacher ratio but determined 1:1 was necessary for

¹ The question of whether the Student is a child with an Intellectual Disability is not presented in this case. Of equal importance, resolution of that question in no way alters the outcome of this case. Children with Intellectual Disabilities receive increased protections under Pennsylvania regulations. None of those increased protections are pertinent to this case. Rather, as discussed below, this case is resolved through analysis of the Student's needs and the District's program offer, not the Student's labels.

the Student. The Student receives that 1:1 instruction in a classroom with no more than four other children, some of whom have their own adult support. See NT 510-512.

7. The Settlement established a process by which the District would reevaluate the Student and propose an IEP for the 2023-24 school year. *Passim*.
8. Both parties acted in accordance with the terms of the Settlement. Consequently, the District reevaluated the Student and issued a reevaluation report on April 2, 2023 (the 2023 RR). S-6.
9. The 2023 RR included a review of records. S-6. That review included:
 - a. Findings of Early Intervention testing from 2017;
 - b. A summary of Early Intervention services (an Autistic Support program, Occupational Therapy (OT) and Speech/Language (S/L) supports);
 - c. Findings of a March 2019 RR;
 - d. Information about the Student's transition from Early Intervention to school-age services during the spring of 2020 when schools were closed as a result of COVID-19;
 - e. Findings of an April 2021 RR, holding that the Student remained eligible for special education as a child with Autism and a Speech and Language Impairment, and continued to require OT;
 - f. A summary of the Student's receipt of additional related services while attending the Private School; and
 - g. A summary of the Student's educational objectives and progress towards those objectives from the Private School. Those included number identification, counting objects, identifying "more or less," extending patterns, activities of daily living (dressing, putting on shoes, washing hands, and various grooming functions), S/L objectives, and social skills objectives.
 - h. Regarding reading at the private school, the Student could identify a set of five letters with 71% accuracy on the most recent probe available to the District at the time of the 2023 RR.

- i. According to information available to the District at the time of the 2023 RR, the Student's math and behavioral objectives were intertwined. The Private School took data on the Student's compliance with directions to "count" or "give me (target number)" as behavioral objectives.
10. The 2023 RR included parental input provided by the Parents both through a form that the District provided and through a telephone interview with the District's Certified School Psychologist (the CSP). That input concerned the Student's physical, social, and educational history, as well as the Student's strengths and needs. S-6.
11. The 2023 RR included a report of a 45-minute observation and a 60-minute observation of the Student in the Private School by the CSP. The observations were on different days. The 45-minute observation described the Student typical presentation in Private School. The 60-minute observation was broken into the CSP's observations of the Student during 30 minutes of direct testing at the Private School and then an additional 30 minutes of observation after the testing. S-6.
12. The 2023 RR included a summary of the Specially Designed Instruction that the Student received at the Private School, which included ABA instruction in a 1:1 environment. S-6 at 28.
13. The 2024 RR included new testing as well. These included multiple standardized, normative assessments of intellectual ability and academic performance, some of which are designed for use with nonverbal children. These also included multiple rating scales targeting Autism, adaptive behaviors, sensory needs, and functional communication skills. S-6.²
14. The new testing was administered at the private school. The Student was unable to complete the new testing, and so the CSP broke standardization protocols to accommodate the Student. The CSP thoroughly documented the accommodations, which included but were not limited to help from a familiar adult, a token reward system, food rewards, and frequent prompting. S-6.

² There is no dispute concerning the assessments that were selected. Concerns about how the assessments were administered are noted throughout. For completeness, the District administered or tried to administer the WISC-V, KABC-IIINU, KTEA-3, ASRS, ABAS-3, ROWPVT-4, EOWPVT-4, a Sensory Profile School Companion, and Functional Communication Profile-Revised. All of those acronyms are well-known to the parties and are spelled out at S-6, page 30.

15. Some of which testing accommodations in the 2023 RR were necessary simply because the Student was placed with a “novel adult” to work on “novel tasks.” As the CSP explained in the 2023 RR (S-6 at 31):

Even when using accommodations and dynamic assessment techniques, [Student’s] communications deficits, impulsivity with answering and [Student’s] frequent stereotypy clearly impacted [Student’s] performance on standardized assessments. Further, the fact that this was a novel adult working with [Student] on novel tasks also clearly plays a role in [Student’s] performance and is very different from [Student’s] day to day instruction [Student] sees at [the Private School]. Even while acknowledging that due to the above factors, the current standardized cognitive assessment is an underestimate of the [Student’s] overall cognitive ability, it is clear through these testing results and a review of educational data provided from [the Private School] that [Student] does present with significant cognitive deficits that are impacting [Student] across areas within [the] educational setting.

16. Although the test was not standardized, the Student’s General Ability Index (GAI) as measured by the WISC-V was found to be a 47 (standard score) which is below the 0.1 percentile. Academic achievement scores on the KTEA-3 were also not standardized but, to the extent they could be scored, were consistent with the GAI score. The evaluator was not able to score other tests, like the KABC, due to the Student’s inability or unwillingness to respond to testing prompts, and deviations from standardization. S-6.
17. Autism rating scales (ASRS) completed by the Parents and a Private School teacher resulted in elevated scores across nearly all domains, with some variation between raters, and a few sub-domains falling into the average range. The same raters found significant deficits in the Student’s adaptive skills (ABAS-3), many of which relate to safety in the community an independent living. S-6.
18. The 2023 RR included an OT Reevaluation which, in turn, included an observation and rating. The Occupational Therapist found significant OT needs and recommended twice weekly, direct OT for 30 minutes per session to address coordination, strength, dexterity, visual motor

skills, and school-related self-care. The Occupational Therapist also recommended a sensory diet, to be monitored by an Occupational Therapist, to address the Student's sensory processing needs. S-6.

19. The 2023 RR included a Speech and Language assessment conducted by a Speech/Language Pathologist (CCC-SLP). That assessment included a multiple communication rating scales completed by a Private School teacher, a review of the Student's progress towards speech goals before the Student attended the Private School, and the Student's history of S/L supports. The 2023 RR also included a summary of the Student's expressive and receptive language goals at the Private School (e.g. stating name, age, address and other safety information). The evaluator concluded that the Student receive direct S/L therapy, targeting expressive and receptive language, twice weekly for 30 minutes per session. S-6.
20. The 2023 RR included a Functional Behavioral Assessment (FBA) completed by a BCBA. The FBA included a review of records and present behavior interventions, a description of the behaviors of concern, observations of the Student at the Private School, input from the Private School's BCBA. Behaviors of concern were many, varied, and sometimes dangerous – including self-injurious behaviors. The District's BCBA concluded that the Student requires a Positive Behavior Support Plan (PBSP) and recommended several "proactive procedures" that might help the Student maintain positive behaviors. S-6.
21. The 2023 RR concluded that the Student continued to qualify as a child with Autism based on the Student's "significant verbal/nonverbal communication deficits and social skills deficits that significantly impede [Student's] educational progress [in addition to the Student's] concurrent behavioral rigidity and stereotypy that globally impact [Student's] progress and ability to engage in instruction." S-6 at 59.
22. The 2023 RR also concluded that the Student continued to qualify as a child with a S/LI "due to difficulties with expressive/receptive language" and that the Student continued to qualify for OT and required a PBSP. S-6 at 60.
23. The evaluator considered Other Health Impairment as another disability category but concluded that the Student's needs were better attributed to Autism and S/LI. S-6.
24. The evaluator also considered an Intellectual Disability classification. The evaluator acknowledged that the Student's intellectual ability as

measured through testing in combination with the Student's adaptive skills could warrant an Intellectual Disability designation. However, the evaluator also recognized that the Student's measured intellectual ability may not be a true reflection of the Student's actual intellectual ability because the testing represented a "novel task with a novel adult, which impacted [Student's] ability to generalize some of the skills [Student] has learned at [the Private School] in this novel type of situation." S-6 at 60.

25. The 2023 RR included numerous, actionable recommendations to the IEP team. S-6.
26. On May 4, 2023, the Student's IEP team convened, and the District presented an IEP of the same date (the May 2023 IEP). S-8.
27. The May 2023 IEP offered placement at the District's level 3 Autistic Support program (the AS3 program). The AS3 program focuses on language and communication through all modalities (including devices that the Student did not use). The AS3 classroom was supported by a BCBA, who was present in the classroom at least once per week. All instruction in the AS3 classroom is provided either 1:1 or in a small group. Students in the AS3 program also participate in general education classrooms and whole-school spaces like the cafeteria. *Passim, see e.g.* S-8 at 5.
28. The AS3 program teaches using ABA principals but does not use the same ABA program used in the Private School. *Passim, see* S-8.
29. The May 2023 IEP is a 103-page document. The first 56 pages of the May 2023 IEP are mostly a copy/paste of other documents, including the 2023 RR and summary of the FBA suggesting the PBSP. S-8.
30. The May 2023 IEP included several goals. Except as noted, all goals were objective and measurable as written. All goals either included a baseline derived from information about the Student's performance at the Private School or noted that a baseline would be calculated within two weeks of implementation. S-8.
31. The May 2023 IEP included two "PBSP goals." These are goals called for the Student to increase positive behaviors or decrease negative behaviors (with particular emphasis on tantrums and self-injurious behaviors) in conjunction with the PBSP. S-8 at 62-64.

32. The May 2023 IEP included a goal for the Student to independently transition between different parts of the AS3 classroom (e.g. from a desk to a carpeted area, and then to a bathroom in the classroom). S-8 at 64.
33. The 2023 IEP included a “manding” goal. Manding is an ABA term related to communicating to express a request (a command or demand). The goal called for the Student to mand “using multimodal communication ... with a 2-word phrase, utilizing at least 5 different core actions and 20 objects with fading supports in 80% of opportunities across 3 consecutive first trial probes.” S-8 at 66.
34. The manding goal is not objective or measurable as written because it is vague. As written, the Student could achieve mastery by making any two-word mand, by whatever means, with any level of prompting, related to whatever is happening around the Student, for some unknown number of times. In other words, the May 2023 IEP does not say what the Student must do – how often or with what level of success – to master this goal.
35. The May 2023 IEP included a social skills goal calling for the Student to reciprocate greetings. S-8 at 67.
36. The May 2023 IEP included two S/L goals. One of those called for the Student to use manding-like skills. Those skills were to be taught using direct and explicit instruction and then measured against a Functional Communication rubric. The other S/L goal called for the Student to demonstrate comprehension of object functions and categories. S-8 at 68-69.
37. The May 2023 IEP included three OT goals targeting fine motor skills, coordination, and handwashing. S-8 at 70-72.
38. The May 2023 IEP included two Reading goals: one for letter identification and one for the Student to identify sight words. For clarity, “sight words” typically refers to simple, high-frequency words that are read automatically without sounding out. The Student’s goal called for the Student to receptively identify 20 different sight words by correctly identifying a sight word named by an instructor from a field of six sight words. S-8 at 73-74.
39. The May 2023 IEP included two math goals: one for number identification and one for counting/one-to-one correspondence. The number identification goal was like the sight word goal in that it called

for the Student to correctly, receptively identify a number from a field of numbers. The counting goal called for the Student to demonstrate an ability to count out quantities. S-8 at 75-76.

40. The May 2023 IEP included the PBSP as developed through the FBA, which was part of the 2023 RR. S-8 at 76-79.
41. The May 2023 IEP included a significant amount of program modifications and SDI. Key among them were (S-8 at 79-83):
 - a. 30 minutes per day of direct social skills instruction in the AS3 classroom;
 - b. 120 minutes per day of direct instruction in functional academic skills in the AS3 classroom;
 - c. 20 minutes per day of ABA based instruction focused on adaptive behaviors, self-care, health, safety, and community living skills³; and
 - d. A sensory diet throughout the day, to be developed upon the Student's return to the District.
42. The May 2023 IEP included individual OT, twice per week, 30 minutes per session; small group S/LT, twice per week, 30 minutes per session; and an aide for transportation (a bus or van). All of these were listed as related services. S-8 at 83.
43. The May 2023 IEP represented a supplemental level of Autistic Support and Speech and Language Support. In this context, "supplemental" means that the Student would spend more than 20% but less than 80% of the school day receiving programming from special education personnel. The District calculated that the Student would spend 1.75 hours in regular education classrooms per school day, representing 26% of a 6.75-hour typical school day. S-8 at 86-87.
44. The Student's time in regular education under the May 2023 IEP would have included lunch, recess, and specials (art, music, STEM, gym, and library). P-4, NT at 435.

³ Many of the modifications and SDI are more detailed descriptions of the ABA principles, prompting, social skills instruction, or the functional academics instructed in the AS3 classroom.

45. The May 2023 IEP did not provide 1:1 support specifically assigned to the Student. Apart from individual OT sessions, the only reference to 1:1 support or instruction in the May 2023 IEP comes in the description of the AS3 classroom. That description does not constitute a guarantee of anything, let alone 1:1 instruction, for the Student. Even if the description can be read as a program offer, no assurance is provided as what instruction will be provided 1:1, or how much instruction will be provided 1:1. Under the May 2023 IEP as written, the District could provide all instruction in small groups. S-8.
46. The May 2023 IEP is silent as to what the District would do, if anything, to transition the Student from the Private School's program to the District's program. S-8.
47. The Parents rejected the May 2023 IEP and notified the District of their intent to maintain the Student's placement at the Private School and seek reimbursement.
48. The Student's program at the Private School during the 2023-24 school year was a continuation of the 2022-23 program.
49. In March of 2024, the Parents obtained a private Neuropsychological Evaluation of the Student (the Private Evaluation). The results of the Private Evaluation were in many ways similar to the District's 2023 RR. However, the Private Evaluator concluded that the Student is a child with an Intellectual Disability. P-8.

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.").⁴

⁴ 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).

None of the findings above hinge in any way on the credibility of any witness. Consequently, my assessment of the witnesses' credibility has no substantive impact upon this case and is in no way outcome determinative. To the extent that I am obligated to make a credibility determination, I find that all witnesses testified credibly. To the extent that different witnesses reached different conclusions from the same set of facts, those differences reflect genuine disagreements. Resolution of those disagreements does not change the outcome of this case.

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). The parties' burdens for each of the issues presented is noted above.

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* 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* decision is no different.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. 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*, 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*, 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.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

Independent Educational Evaluation at Public Expense

Parental rights to an independent educational evaluation (IEE) at public expense are established by the IDEA and its implementing regulations: “A

parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

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

The Parents present two issues for adjudication: reimbursement for the Private Evaluation and tuition reimbursement for the 2023-24 school year. I will address those demands in order.

The Parents are Not Entitled to Reimbursement for the Private Evaluation

The IDEA enables parents to obtain independent educational evaluations at public expense when they disagree with a school's evaluation. See 34 C.F.R.

§ 300.502(b)(1). That disagreement is a necessary threshold condition to obtain an IEE at public expense. The IDEA does not specify when parents must voice their disagreement, but the disagreement must exist.

There is no evidence of disagreement at any point before the Parents requested this due process hearing. To the contrary, at every turn from their Complaint through their closing argument, the Parents rely upon the 2023 RR to argue that the May 2023 IEP is inappropriate because it fails to address the Student's needs as identified by the District's own evaluation.

The Parents highlight the differences between the 2023 RR and the Private Evaluation. If highlighting those differences constitutes a disagreement, it is noteworthy that the Parents did not demand reimbursement for the Private Evaluation before requesting this hearing, months after the Private Evaluation was written. But, again, the IDEA imposes no timeline for the Parents to raise a disagreement.

As for the difference itself, the Private Evaluator concluded that the Student is a child with an Intellectual Disability while the 2023 RR deferred that conclusion. The Parents are correct that, under Pennsylvania law, children with Intellectual Disabilities have greater protections than children with other disabilities. See, e.g. 22 Pa. Code §§ 14.124(c), 14.143(b). At the same time, however, the Parents do not allege that the 2023 RR violates any of the elements established at 20 U.S.C. § 1414(b)(2). Further, the Parents do not disagree with the substantive results of the 2023 RR. The 2023 RR did not conclude that the Student does *not* have an Intellectual Disability but rather deferred that conclusion, recognizing that standardized tests may not accurately reflect the Student's cognitive abilities. Moreover the Parents use the substantive results of the 2023 RR to make other arguments, signaling broad agreement with the 2023 RR by necessary implication.

Under the unique facts of this case, I find that highlighting the differences between the 2023 RR and the Private Evaluation does not establish the Parents' disagreement with the 2023 RR for purposes of 34 C.F.R. § 300.502(b)(1). I deny the Parents' demand for reimbursement for the 2023 RR on that basis.

In an abundance of caution, I also note that I would find the 2023 RR was appropriate even if highlighting the differences between the 2023 RR and the Private Evaluation was sufficient to establish a disagreement for purposes of 34 C.F.R. § 300.502(b)(1). To obtain an IEE at public expense, the Parents must prove that the 2023 RR violated any of the elements established at 20 U.S.C. § 1414(b)(2). There is no preponderant evidence any such violation in the record. Rather, the 2023 RR represents a procedurally compliant,

comprehensive and thorough assessment of the Student's strengths and needs; a careful, nuanced analysis of evaluation data; and the transmission of actionable recommendations to the Student's IEP team.

The Parents are Entitled to Tuition Reimbursement

As outlined above, the *Burlington-Carter* test provides a three-step analysis for tuition reimbursement claims. Applying that test to the facts of this case is straightforward.

The May 2023 IEP was Inappropriate

The May 2023 IEP was not reasonably calculated to provide a FAPE for the Student when it was offered. Throughout the hearing, District personnel testified that, if the Student attended the District's program, they would have gone above and beyond what May 2023 IEP calls for in order to help the Student. That testimony was credible, and the care and diligence of District personnel is laudable. Unfortunately, many of the services that the District would have provided are not reflected in the May 2023 IEP.

Under the *Burlington-Carter* standard, I must judge the appropriateness of the District's offer, as reflected in the four corners of the May 2023 IEP. That is the offer that the Parents considered when choosing to reject the District's program and seek tuition reimbursement. As I have said before (and as I have reminded the parties frequently throughout these proceedings):

The first prong of the Burlington-Carter test hinges on the appropriateness of the program that the District actually offered – not the program that was discussed, not the program that the District intended to offer, not the program that the District would have implemented had the Student attended. The only program that the District offered is the program set forth in the ... IEP.

In re: J.C., Marple Newtown School District, ODR 29358-2324 at 24 (02/09/2024).

Applying that standard to this case must begin with the fact that the May 2023 IEP does not include a plan to transition the Student from the Private School's program to the District's program.⁵ The District's offer represents a

⁵ The IDEA and its regulations tend to discuss "transition" in relation to shifts from early intervention services to school-age services, or from school-age services to adult life. See,

radical departure from the Student's programming in the Private School. The Student would move from a full-time ABA program where all instruction was provided 1:1, to a supplemental ABA program where the Student would attend general education classes with 20 or more other children, as well as lunch and recess. The District proposed this very large change with no consideration for the Student's transition needs in the IEP as written. Those transition needs are significant, are a direct function of the Student's disabilities, and were known to the District through its own 2023 RR.

The 2023 RR included scores of instances in which the presence of one novel adult presenting a novel task rendered the Student incapable of demonstrating basic skills. Those novel tasks were presented at the Private School, a small setting that was familiar to the Student. Even within that setting, in order to demonstrate progress towards basic skills, the Student required the smallest possible student-to-teacher ratio to attend to the Private School's ABA program. The District proposes reducing the Student's ABA instruction, providing that instruction through novel adults in a novel setting, mixing that instruction with general education classes (e.g. specials) and unstructured time in large groups (e.g. lunch and recess), and providing no guaranteed student-to-teacher ratio. Testimony that the Student would receive a significant portion of ABA instruction 1:1 in the District's AS3 classroom was credible. The program that the District described in this hearing is not the program reflected in the May 2023 IEP, which provides no guarantee of 1:1 instruction.

Such a massive shift in the Student's program without a carefully planned transition very likely would have been disastrous. Of course, such projections involve some amount of speculation, and I make no affirmative findings about things that might have happened under different circumstances. Rather, I find that the need for an appropriate transition plan was beyond evident at the time the May 2023 IEP was drafted and offered. The District had actual knowledge of the Student's response to novel adults and tasks and understood that careful planning was needed to move the Student from the Private School's program to its own. The May 2023 IEP did not include such a plan. That absence – in and of itself – results in a finding that the May 2023 IEP was not reasonably calculated to provide a FAPE when it was offered. As a result, the Parents have satisfied the first prong of the *Burlington-Carter* test.⁶

e.g. 34 C.F.R. § 300.321. However, IDEA regulations do not limit the term "transition" to that context and clarify that transition services are consisted special education and may be a fundamental part of a child's right to a FAPE. See 34 C.F.R. § 300.43.

⁶ I make no other determination concerning the appropriateness of any other aspect of the May 2023 IEP. The May 2023 IEP, viewed as a singular program offer, was not appropriate at the time it was offered for the reasons described herein.

The Private School was Appropriate

The standard for “appropriateness” applied to the Private School at the second prong of the *Burlington-Carter* test is different from the standard for “appropriateness” when examining IEPs under *Endrew, supra*. For example, specialized private placements are more restrictive than public schools *per se*. Were that controlling, no parent could ever be entitled to tuition reimbursement. The Private School also need not satisfy the IDEA’s procedural requirements for IEP development. The Student’s actual progress at the Private School is not controlling either. Rather, I consider whether the Private School’s program was reasonably calculated to enable the Student to receive educational benefits at the time that the Parents chose to continue the Student’s placement there. Under this standard, I find that the Private School was appropriate.

Full-time, 1:1 programming is the hallmark of the Student’s program at the Private School. There, the Student receives 1:1 intervention throughout the day in a classroom with only four other children. That program is designed for children who, like the Student, have significant communication needs. The program is overseen by a BCBA and includes a significant amount of occupational therapy and speech therapy. The program at the Private School focuses on the Student’s lacking functional communication skills. Building those skills will be a necessary foundation for many other skills as well.

At the time the Parents made a choice to reject the District’s offer and continue the Student’s placement at the Private School, the District’s own evaluations indicated that the Private School’s program was appropriate relative to the Student’s needs. The Private School was appropriate for the Student under the second prong of the *Burlington-Carter* test.

No Equitable Factors Mitigate Against Tuition Reimbursement

At the time that the Parents chose to continue the Student’s placement at the Private School, the Parents knew that the Student’s progress in the Private School’s program was less-than-desirable. But the Parents were facing the choice of continuing an imperfect program that squared with the Student’s needs as identified by the District, or a fundamentally different program without any means of transition drafted into the May 2023 IEP.

I find that the Parents’ actions prior to the school year in question were in conformity with the Settlement. More importantly, the Parents did nothing to hinder the District from offering a FAPE to the Student. The Parents agreed to the District’s evaluations, participated in those evaluations, made the

Student available to the District, and shared whatever information from the Private School they were able to obtain. The District correctly notes that the Private School itself hindered the District's effort to obtain current data about the Student's progress there. That hinderance, however, is not a significant factor because the District had significant data from the Private School when the 2023 RR was drafted. Additionally, to whatever extent the Private School hindered the District, that action is not attributable to the Parents. More importantly, because of the Parents' cooperation, the District was in a position to provide an appropriate program for the Student – so much so that District personnel were able to explain in their testimony what they would have done to help the Student returned to the District's program. That plan, which seems sensible and responsive to the Student's needs, was absent from the District's program offer as reflected in the May 2023 IEP.

No equitable factors merit elimination or a reduction of the tuition reimbursement award. In making this determination, I reject the District's argument that tuition reimbursement is not available to the Parents because they did not give the District an opportunity to educate the Student. First, that argument is contrary to the facts of this case. The District had an opportunity to make an appropriate FAPE offer and failed to do so. Second, the IDEA does not require families to accept inappropriate public education before seeking reimbursement for appropriate private education. In fact, families may be entitled to tuition reimbursement when LEAs fail to offer a FAPE, even if the child has never set foot in a public school. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).⁷

Conclusions of Law

The Parents' demand for an IEE at public expense, in the form of reimbursement for the Private Evaluation, is denied because the Parents have not established a "disagreement" with the District's own evaluation for

⁷ The District's citation to *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 995 (1st Cir. 1990), is not well-taken. The Supreme Court's decision in *Forrest Grove* makes *Roland M.* bad law for the proposition that the District advances. One year after the Supreme Court decided *Forrest Grove*, the Third Circuit cited to *Roland M.* in its decision resolving *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59 (3d Cir. 2010). That citation, however, was for a different proposition. Specifically, when weighing equitable factors, the Third Circuit concluded that parents should not benefit from their efforts to block an LEA from offering a FAPE. *Id.* at 72. The equitable factors in *C.H. v. Cape Henlopen* were that those parents "disregarded their obligation to cooperate and assist in the formulation of an IEP, and failed to timely notify the District of their intent to seek private school tuition reimbursement." *Id.* The Third Circuit found that those actions were "unreasonable" for purposes of 20 U.S.C. § 1412(a)(10)(C)(iii)(III). *Id.* The Student's actual attendance in a public school program was not a factor. *Id.*

purposes of 34 C.F.R. § 300.502(b)(1). Alternatively, the District's 2023 RR complied with the IDEA's procedural and substantive mandates.

The Parents demand for reimbursement for the cost of tuition and related services at the Private School is granted because the Parents have proven all three elements of the *Burlington-Carter* test, described above.

First, the District's program offer was the May 2023 IEP, which was not reasonably calculated to provide a FAPE at the time it was issued. The District's offer was inappropriate for its failure to include an appropriate plan to transition the Student from the Private School's program to the District's program. Such a plan was a necessary element of the Student's entitlement to a FAPE under the facts of this case.

Second, the Private School's program was appropriate at the time that the Parents chose to maintain the Student's placement for the 2023-24 school year. The Private School's program was designed to address the Student's significant needs, as identified by the District at that time.

Third, no equitable factors merit elimination or a reduction of the tuition reimbursement award. The Parents did nothing to hinder the District's ability to offer a FAPE to the Student.

ORDER

Now, November 27, 2024, it is hereby **ORDERED** as follows:

1. The District shall reimburse the Parents for the cost of the Student's tuition and related services paid or owed to the Private School that accrued during the 2023-24 school year.
2. The Parents' demand for reimbursement for the cost of the Private Evaluation is **DENIED**.

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

/s/ Brian Jason Ford
HEARING OFFICER