

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. 29406-23-24

CLOSED HEARING

Child's Name:

M.G.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

David J. Berney, Esquire
Jennifer Sang, Esquire
Princess Diaz Birca, Esquire
8 Penn Center
1628 John F. Kennedy Blvd, Suite 1000
Philadelphia, PA 19103

Local Education Agency:

Chester County IU/EI Program
455 Boot Road
Downingtown, PA 19335

Counsel for the LEA:

Mark W. Cheramie Walz, Esquire
331 Butler Avenue, P.O. Box 5069
New Britain, PA 18901

Hearing Officer:

Brian Jason Ford

Date of Decision:

10/28/2024

Introduction

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing by filing a due process complaint (the Complaint) with the Office for Dispute Resolution (ODR). In the Complaint, the Parents raised claims on the Student's behalf against the Chester County Intermediate Unit (the IU), 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.*

There is no dispute that the Student is a "child with a disability" as defined by the IDEA and, therefore, is entitled to a free appropriate public education (FAPE). The Student is young, and the IU is the agency responsible for providing special education and related services to ensure that the Student receives a FAPE under IDEA Part B.

The Parents allege that the IU violated the Student's right to a FAPE by failing to provide appropriate special education and related services to the Student. For a time, the Student received services directly from the IU. Only a part of that time is pertinent to this case. The Parents demand compensatory education to remedy an alleged denial of FAPE during that time. Unsatisfied with IU's program, the Parents placed the Student in a specialized private school (the Private School). From that point onward, the Parents demand tuition reimbursement. The Parents also demand reimbursement for various out-of-pocket costs and declaratory relief.

Discussed below, I find in favor of the IU.

Procedural History

On March 20, 2024, the Parents requested this hearing by filing a due process complaint (the Complaint) with the Office for Dispute Resolution (ODR). The Parents amended the Complaint on March 31, 2024.

On April 11, 2024, the IU filed an answer to the amended Complaint (the Answer). Therein, the IU raised prior settlement agreements between the parties as a defense, claiming that parts of the Parents' claims are barred by waivers within those agreements. By May 24, 2024, the parties had briefed the issue and provided copies of the agreements.

On June 3, 2024, I issued a pre-hearing order resolving the IU's waiver defense. Therein, I concluded that the periods from August 23, 2022, to February 6, 2023, and March 23, 2023, to September 4, 2023, were subject

to contracts and waivers between the parties. I dismissed claims related to those periods on jurisdictional grounds. I also found that there was no contract or waivers between the parties prior to August 22, 2022, or after October 29, 2023. For all other periods, I found that a contract or waivers may exist, additional fact finding was necessary, and the parties would have an opportunity to present contract evidence during the hearing.

A four-day evidentiary hearing then convened. After the hearing started but before the hearing ended, the parties submitted joint stipulations of fact and stipulations as to the testimony of a witness. The parties then filed post-hearing briefs/written closing statements.

Issues

The following issues were presented for adjudication:

1. During periods when the Student received services from the IU that were not subject to a waiver, did the IU violate the Student's right to a FAPE?
2. Are the Parents entitled to tuition reimbursement for the Student's placement at the Private School?
3. Are the Parents entitled to other out-of-pocket reimbursement?
4. Are the Parents or the Student entitled to declaratory relief?

There is some ambiguity as to whether the Parents have abandoned their demands for out-of-pocket expenses and declaratory relief. *See Parents' Closing* at 2. I include those demands for completeness.

Findings of Fact

As is often the case, there is no dispute about the chronology of events – what happened and when. The underlying facts are not in question. There are certainly disputes about what the facts mean. The questions presented in this case resolve on mixed questions of fact and law; primarily whether the IU's program was reasonably calculated to provide a FAPE at the time it was offered. The disputes in this case hinge on the appropriateness of the IU's offer, but there is no disagreement about what that offer was.

I reviewed the record in its entirety. I find facts only as necessary to resolve the issues presented. For that reason, a substantial portion of the record is not relayed in the findings below.

To the extent that the parties' stipulations are necessary to resolve this matter and/or provide an agreed-to chronology of events, I adopt them as if they were my own findings (sometimes verbatim). I find as follows:

1. On March 16, 2022, the Parents signed a permission for the IU to evaluate the Student. *Stip ¶ 8.*
2. On May 17, 2022, the IU provide its evaluation report (ER) to the Parents. Through the ER, the IU found the Student eligible for special education services under the Autism disability category. *Stip ¶ 9-10.*
3. The ER did not include a Physical Therapy (PT) evaluation but recommended a PT evaluation. *Stip ¶ 11.*
4. On May 23, 2022, the IEP team met to discuss the IU's initial proposed IEP. *Stip ¶ 12.*
5. On May 29, 2022, the Student aged into IDEA Part B services. *Stip ¶ 6.*
6. On June 7, 2022, the IU issued another permission to evaluate to assess the Student's PT needs. *Stip ¶ 13.*
7. On June 14, 2022, the Parents provided consent for the PT evaluation and rejected the IU's proposed IEP via a Notice of Recommended Educational Placement (NOREP). *Stip ¶ 14.*
8. On August 10, 2022, the IU issued a reevaluation report (RR) that maintained the Student's eligibly as a child with autism, but also found that the Student qualified for PT services. *Stip ¶ 15.*
9. In lieu of the proposed IEP services, the Parents requested that the IU provide one hour of specialized instruction, 30 minutes of occupational therapy (OT), 30 minutes of PT, 15 minutes of individual speech and language therapy (S/LT), and 15 minutes of group S/LT in the Student's private preschool. *Stip ¶ 16.*
10. The IU agreed to provide the Parents' preferred program so long as Parents signed a waiver agreement to provide the requested services in lieu of a FAPE. *Stip ¶ 17.*

11. On August 23, 2022, the parties signed a waiver agreement and an NOREP. *Stip ¶ 18.* The IU then provided services to the Student in the private preschool in accordance with the waiver.
12. On January 4, 2023, the Parents asked the IU about getting a communication device for the Student and requested a meeting for that purpose. *Stip ¶ 20.*
13. On January 23, 2023, Parents advised the IU that they “may want to start [Student] in the [IU] classrooms soon” starting either “February or March.” *Stip ¶ 21.*
14. On February 27, 2023, the Student’s IEP team reconvened and the IU offered an IEP. The February 2023 IEP included 2.75 hours per day of specialized instruction for four days per week, 30 minutes of OT, 30 minutes of PT, 15 minutes of individual S/LT and 15 minutes of group S/LT. *Stip ¶¶ 22, 23.*
15. On March 1, 2023, the Parents rejected the February 2023 IEP. The Parents requested that the CCIU provide a subset of the services offered through the February 2023 IEP, but in an IU classroom (not the private preschool). The IU again agreed to provide the Parents’ preferred services, but only if the Parents signed a waiver agreement to provide the requested services in lieu of a FAPE. *Stip ¶¶ 23-26.*
16. On March 23, 2023, the Parents signed a revised waiver agreement. Pursuant to the new agreement, the IU agreed to provide the Parents’ preferred services and conduct an assistive technology evaluation using the Student Environment Tasks and Tools (SETT) framework. See *Stip ¶ 27.*
17. On March 28, 2023, the Student started attending the IU’s classroom pursuant to the second waiver agreement. The Student attended the IU’s school on Tuesday and Thursday afternoons, from 12:30 p.m. to 3:15 p.m. *Stip ¶¶ 28, 29.*
18. The Student received private ABA services from a private ABA provider (Private ABA). The Private ABA included a verbal behavior (VB) program. *Stip ¶¶ 30, 31.*
19. Sometime before August 2023, the Parents began to work with private providers and evaluators. Those individuals concluded that it was more likely than not that the Student had Childhood Apraxia of Speech (CAS). The Parents worked with a private evaluator who tested for

CAS, among other things, and reached a preliminary conclusion that CAS was an appropriate diagnosis for the Student. The private evaluator did not make a conclusive diagnosis or issue a final report until much later. *Passim*; see, e.g. P-44.

20. On August 2, 2023, the parties participated in a video conference to discuss the Student's CAS. The parties also discussed placing the Student in the IU's classroom for four days per week pursuant to an IEP (not a waiver agreement). The Parents also requested transportation for the Student, should the Student attend four days per week. IU personnel discussed the Parents' request for transportation the same day. See *Stip* ¶¶ 32, 33.
21. On September 5, 2023, the parties held an IEP meeting and the IU proposed a new annual IEP for the Student (the September 2023 IEP). The September 2023 IEP included 2.75 hours per day of specialized instruction for four days per week, 30 minutes of OT, 30 minutes of PT, 15 minutes of individual S/LT and 15 minutes of group S/LT. *Stip* ¶ 36.
22. The September 2023 IEP included a program that incorporates ABA principles and is based on the VB MAPP program. That program is implemented with the support and supervision of the Pennsylvania Training and Technical Assistance Network (PaTTAN). The VB MAPP program is a researched-based program developed by a third-party educational institution which produces a VB MAPP manual. The program offered by the IU through the September 2023 IEP mirrors the VB MAPP program but does not represent absolute adherence to the manual. *Passim*.
23. On September 15, 2023, the IU issued a NOREP for the September 2023 IEP. That NOREP contained an error, and the CCIU issued a revised NOREP on September 18, 2023. The Parents signed the corrected NOREP the same day, and the Student immediately began to attend the CCIU's program four days per week, Monday through Thursday, from 12:30 p.m. to 3:15 p.m. *Stip* ¶¶ 37-41.
24. On October 12, 2023, Parents sent a 10-day notice of their intent to privately place Student at the Private School and to seek reimbursement from the CCIU.
25. The Student began to attend the Private School on October 30, 2023. NT 95.

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.”).¹

All witnesses testified credibly. Testimony reveals strong disagreements about what program and placement is appropriate for the Student. Those disagreements reflect each witness’s genuine conclusions based on the facts as seen through each of their perspectives. This does not mean, however, that all testimony is accorded equal weight. For example, any witness’s statement that reflects a personal preference – as opposed to the sort of analysis that the IDEA requires – has limited relevance and probative value.

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 case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

¹ 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).

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 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, 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.

An LEA 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). 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). However, the meaningful benefit standard requires LEAs to provide more than a “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). 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 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 the child 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 39.²

² See 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*

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

The starting point to resolve all of the issues in this case is a single question: was the September 2023 IEP appropriate at the time it was offered? If the

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).

answer is “no,” the Student’s right to a FAPE was violated while attending the IU’s program and the IU owes compensatory education to the Student. A “no” also resolves the first prong of the *Burlington-Carter* analysis in the Parents’ favor. Conversely, if the answer is “yes,” it becomes difficult for the Parents to prove their compensatory education claim, and the tuition reimbursement analysis ends.

The September 2023 IEP Was Appropriate in September 2023

The legal framework to resolve the September 2023 IEP’s appropriateness is well-established. *Endrew, supra*, is seven years old. Even when *Endrew* was “new,” it did not represent a significant change to two decades of Third Circuit jurisprudence. Both parties – to varying degrees – advance arguments that represent departures from this framework. I decline to address in detail the parties’ arguments concerning the September 2023 IEP that do not comport with the analysis required by the Supreme Court and the Third Circuit.

Under current case law, the September 2023 IEP cannot be judged in hindsight. The progress that a child makes under an IEP provides critical information about when and how an IEP must change over time. For example, progress data collected pursuant to a child’s first IEP becomes essential information for crafting a child’s second IEP. Continuing the example, the same progress data says nothing about whether the first IEP was “reasonably calculated” to provide a FAPE at the time it was offered. See *Mary Courtney T., supra*, at 240. Instead, one must look to the information available to the LEA at the time the first IEP was offered.

Further, under current case law, a child’s diagnosis or IDEA eligibly category does not prohibit or proscribe the content of a child’s IEP.³ Rather, under *Endrew*, once eligibly is established, the child’s needs drive the child’s program. A child’s entitlement to a FAPE is in no way contingent upon what the child’s disability is called.

The two principles stated above make a substantial amount of both parties’ arguments irrelevant. The most significant disputes between the parties concern the IU’s knowledge of the Student’s CAS diagnosis, and what that diagnosis signifies programmatically. But the IU’s knowledge of the Student’s CAS diagnosis is irrelevant because the diagnosis itself neither guarantees nor prohibits any type of special education. Instead, as the law requires, I

³ In Pennsylvania, children with intellectual disabilities receive additional protections, illustrating an exception to the general rule that eligibility categories carry no special significance for a FAPE analysis once eligibility is established. See 22 Pa Code § 14.

look to what the IU knew about the Student's needs when the September 2023 IEP was drafted. From there, I determine whether the IEP squared with the Student's needs as understood at that time.

Under *Schaffer v. Weast, supra*, it is the Parents' burden to prove that the September 2023 IEP was inappropriate at the time it was drafted. Considering the entire record of this case, nearly all of the evidence presented to establish this claim falls into two categories: 1) the Parents' genuine, sincere belief that the Private School offers a superior program for the Student and 2) the IEP does not represent the sort of strict, by-the-book VB program that the Student required. The first category is not relevant under *Endrew*. The second category, as noted by the IU, has been rejected in similar cases.

The Parents are correct that the September 2023 IEP was not a perfect match to the VB MAPP program as detailed in the VB MAPP manual. Most notably, the Parents argue that any true implementation of the VB MAPP program requires supervision from a Board Certified Behavior Analyst (BCBA). If strict implementation of the VB MAPP program is required, the Parents are correct. However, an identical argument concerning a similarly-presenting child, who also had CAS, was considered and rejected in *T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 797 (E.D. Pa. 2017).⁴ The logic of *T.M. v. Quakertown* is compelling and comports with *Endrew*. An IEP's call for strict adherence to a methodology or curriculum is relevant only to the extent that the child's need for the same is established.⁵ The question is not whether the IEP offered a strict VB MAPP program – it did not. The question is whether the Student required a strict VB MAPP program.⁶

As in *T.M. v. Quakertown*, I find no preponderant evidence that the Student required something different from what the September 2023 IEP contained. While the Parents have proven that the September 2023 IEP represents something different from the program described in the VB MAPP manual, that fact provides no information about the Student's needs at that time, or how the September 2023 IEP did or did not meet those needs. It was the Parents' burden to prove that the IU knew (or, arguably, should have known) in September 2023 that the specialized instruction, PT, OT, and S/LT, was

⁴ See also *M.S. v. Downingtown Area School District*, ODR 22920-19-20, affirmed *M.S. v. Downingtown Area Sch. Dist.*, No. 20-cv-5085-JMY, 2022 U.S. Dist. LEXIS 196375, at *32 (E.D. Pa. Oct. 28, 2022)

⁵ This principle should not be confused with FAPE violations that can flow from an LEA's failure to implement an IEP. If an IEP calls for a program, and the LEA then fails to deliver that program, that failure can easily become a substantive FAPE violation.

⁶ Again, that question must be answered using the information available to the IU at the time the IEP was offered, not in hindsight.

either insufficient to meet the Student's needs or that the Student needed something else entirely. The record does not support this claim.

In reaching this conclusion, I reject all of the Parents' arguments predicated on a private speech and language evaluation report that they obtained in January 2024 (P-44). That report indicates that the Student requires intensive motor speech therapy to appropriately address CAS. Assuming, for the sake of argument, that the report is correct, there is no preponderance of evidence in the record that either party knew of this need in September 2023. Even assuming that the IU knew that the Student had CAS in September 2023, nothing in the record proves that the IU had reason to know that the Student required intensive motor speech therapy when it drafted the September 2023 IEP. This in no way abrogates the IU's obligation to consider the private report as it develops IEPs for the Student in the future. But, for the issues presented in this case, considering the private report as evidence of the September 2023 IEP's appropriateness invites the sort of 'Monday morning quarterbacking' that precedent prohibits.

Similarly, I reject all of the Parents' arguments predicated on a document drafted by the Private School that details the special education that the Student received at the Private School (P-42).⁷ This document represents an agreement between the Private School and the Parents as to what services the Student will receive at the Private School. Moreover, the document was created in December 2023. This document may have significant value in an assessment of the Student's current and ongoing needs, much in the same way that IEP progress data informs subsequent IEPs. But, under applicable case law, the questions presented in this hearing require analysis based on what was known in September 2023.

For clarity, the IU's argument concerning methodology disputes is not the basis of my decision. The IU argues that the parties' dispute about the September 2023 IEP is properly understood as a methodology dispute. This argument has merit but is ultimately not compelling. Generally, LEAs have broad discretion to select methodologies to address a child's special education needs. Assuming agreement about what a child's needs are, caselaw overwhelmingly favors LEAs' prerogative to select a methodology to address those needs. *See, e.g. Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 277 (3d Cir. 2012).⁸ Parental input still matters, and an LEA may run afoul of its FAPE obligation by repeating known-to-fail methodologies, but those are not the facts of this case. Regardless, the IU's methodology argument is less

⁷ The Private School used Pennsylvania's IEP form to draft a document detailing the special education that the Student receives there. This document, despite its printed title, is not an IEP under the IDEA's definition.

⁸ *See also Alexander G. v. Downingtown Area Sch. Dist.*, No. 20-131, 2021 U.S. Dist. LEXIS 79244, at *22 (E.D. Pa. Apr. 26, 2021).

compelling because analysis of the September 2023 IEP does not hinge on an assessment of competing methodologies. Instead, the analysis hinges on the appropriateness of the IU's offer relative to the Student's needs as understood at that time. Discussed above, the Parents have not established that the September 2023 IEP was substantively inappropriate at the time it was offered.

Compensatory Education Is Not Owed

An IEP can be reasonably calculated to provide a FAPE and then fail in practice. When that happens, the LEA is obligated to act. The IDEA does not permit an LEA to allow a child to languish in an inappropriate program just because the LEA thought the program would work when it was proposed. In this case, to obtain compensatory education, the Parents must prove that the September 2023 IEP was inappropriate when it was offered or must prove that something placed the IU on notice that IEP was not working as intended. Above, I find that the September 2023 IEP was reasonably calculated to provide a FAPE when it was offered. This leaves the Parents with one avenue to pursue compensatory education.

The Student attended the IU's programs starting on September 18, 2023. The Parents sent their 10-day notice letter on October 12, 2023. The record does not precisely reveal the Student's final day in the IU's program, but it was on or about Friday, October 27, 2023, because the Student began attending the Private School on Monday, October 30, 2023.

Regardless of the Student's actual final day in the IU's program, the IU was responsible to directly provide the Student's special education from September 18 through October 27, 2023. This is the only period of time in question when the Student received services from the IU that is not subject to a waiver agreement. During this time, the Student received services pursuant to the September 2023 IEP.⁹

The Parents must prove that something occurred between September 18 and October 27, 2023, that placed the District on notice of a FAPE violation. I find no such evidence in the record.

For clarity and completeness, I reject the IU's argument that the Student was not in the IU's program long enough to generate robust data concerning the efficacy of the September 2023 IEP. The IU is correct that the Student

⁹ The parties met at an IEP team meeting on October 31, 2023, and the District offered an updated IEP the same day (IU-20). The September and October IEPs were substantively similar but, more importantly the October revision was never implemented.

attended the IU's program for only 16 days before the Parents sent the 10-day notice letter. Nevertheless, the IU was the guarantor of the Student's right to a FAPE not only for those 16 days, but during the 39 days (29 weekdays) from the Parents' acceptance of the IU's program through the Student's matriculation at the Private School. The IDEA does not set a period during which the IU is excused from its FAPE obligation while it tests an IEP. Rather, an IEP is reasonably calculated to provide a FAPE when it is offered or it is not. Then, assuming the former, the IU is obligated to collect data with whatever frequency is specified in the IEP itself, and then use that data to determine if changes are needed.

The IU's alternative argument is stronger: the data collected while the Student attended its program indicates progress. Broadly speaking, I agree with the IU's assessment of data collected during this relatively short period. I decline, however, to parse that data in detail because doing so invites an incorrect analysis. The amount of progress that the Student made while attending the IU's program does not resolve the question. Rather, the question is whether the IU had any reason to know that the Student was not receiving a FAPE under the September 2023 IEP. That IEP was reasonably calculated to provide a FAPE when it was offered, and so the Parents must present evidence that the IEP failed in practice. I find no such evidence in the record. The Parents' demand for compensatory education is denied on this basis.

I also reject the Parents' argument that compensatory education is owed because the IU failed to implement the September 2023 IEP. The Parents argue that the IEP calls for 12.5 hours of service per week, but that the IU's program consisted of only 11 hours per week. The parties stipulate, however, that the Student attended the IU's program four days per week for three hours per day (Mondays through Thursdays, 12:30 p.m. to 3:15 p.m.). This comes to 12 hours per week. The parties also stipulated that the IEP called for 2.75 hours per day of specialized instruction, 30 minutes of OT, 30 minutes of PT, 15 minutes of individual S/LT and 15 minutes of group S/LT. The PT, OT and SL/T rates were one time per seven days (IU-16 at 24-27). That rate, one time per seven days, is not the same as the four days per week that the Student attended the IU's program. Consequently, the IEP did not require the IU to provide 4.25 hours of instruction in a 3-hour window. There is no preponderance of evidence that the IU failed to implement the September 2023 IEP.

Tuition Reimbursement and Out-Of-Pocket Reimbursement is Not Owed

The Parents' demand for tuition reimbursement is resolved entirely by my determination that the September 2023 IEP was appropriate at the time it was offered. To obtain tuition reimbursement under the *Burlington-Carter* test, *supra*, the Parents must first prove that the IU failed to offer an appropriate placement. The IU offered an appropriate placement because the September 2023 IEP was reasonably calculated to provide a FAPE when it was proposed. The Parent's demand for tuition reimbursement is denied for this reason.

It is not entirely clear what out-of-pocket expenses the Parents demand. The totality of the record indicates that those expenses are related to the Student's enrollment and attendance at the Private School. That demand is denied for the same reason.

Declaratory Relief is Not Owed

The Parents demand relief in the form of a declaration that the IU violated the Student's IDEA rights. I make no such finding, and so I provide no such declaration.

Summary and Conclusion of Law

The Parents primary demand is for tuition reimbursement. The Parents also demand compensatory education. Both of those demands hinge on the appropriateness of the September 2023 IEP. As discussed above, that IEP was appropriate when it was offered.

Regarding compensatory education, there is no preponderant evidence in the record that the IU knew, or had reason to know, that the Student was not receiving a FAPE under the September 2023 IEP. The Parents, therefore, have not established their compensatory education claim.

Regarding tuition reimbursement, the finding that the September 2023 IEP was appropriate when it was offered necessary results in a determination that the Parents are not entitled to tuition reimbursement.

The Parents other demands, reimbursement for out-of-pocket expenses and declaratory relief, are also denied for reasons detailed above.

ORDER

Now, October 29, 2024, it is hereby **ORDERED** that the Parents' claims are **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER