

INDIVIDUALS WITH DISABILITIES EDUCATION ACT
BEFORE THE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF FLORENCE	)	
	)	
In the Matter of:	)	
	)	DECISION OF THE
R.C.R. & K.F. on behalf of A.R., ¹	)	STATE REVIEW OFFICER
Appellant	)	
	)	
v.	)	
	)	
Florence County School District One, ²	)	
Appellee	)	

This matter is before me as the State Review Officer (SRO) pursuant to an appeal by the Parent of a decision by Douglas F. Dent, the Local Hearing Officer (LHO). As explained in specific detail *infra*, the LHO ruled that the Parents were not entitled to reimbursement for their unilateral placement. As similarly specified *infra*, the Parent timely appealed the LHO’s decision.

¹ Assuming that this cover section will undergo redaction, the rest of this decision will generically use “Parents” (without differentiation as to singular or plural or as to father and/or mother) and “Student” (without name or other personally identifying information). The rest of the decision will also use general roles, such as “designated legal representative” (without names), and “he” or “his” (without differentiation as to actual gender) for the same purpose. Moreover, cross references within this decision are, per legal citation style, via “*supra*” (above), “*infra*” (below), and “*id.*” (same as immediately preceding identified source).

² Similarly, for overall consistency, the rest of this decision will generically refer to “District.” As a result of this generic label, the references herein to its exhibits use “D” rather than “R” (for respondent).

I. PROCEDURAL BACKGROUND³

On May 23, 2023, the Parents filed the complaint in this matter under the IDEA, seeking reimbursement for their unilateral placement of their child for 11th grade. SRO-1. More specifically, the Parents advanced various claims specific to the contents and implementation of the Student’s IEPs in 9th and 10th grade as amounting to denial of FAPE, and they limited the requested remedy to reimbursement for their private placement of the Student. *Id.*

On September 11, 2023, after holding hearing sessions on August 30, August 31, and September 1, 2023, the LHO issued a final decision. SRO-2. For the threshold equities step of the analysis for tuition reimbursement cases, the LHO concluded that the Parents “generally” met the timely-notice requirement. *Id.* at 3.⁴ Characterizing the first appropriateness step of the applicable analysis as “determinant ... in this case,” the LHO concluded that the individualized education programs (IEPs) for the Student’s 9th and 10th grades at a designated District high school met the Supreme Court’s substantive standard for free appropriate public education (FAPE). *Id.* at 3–4 (citing *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386 (2017)). More specifically, the LHO concluded that the Student’s decrease in progress from the rate in 7th and 8th grades at middle school was attributable to the change to the expectations and distractions at the high school level in the individual circumstances, including the nature and severity of the Student’s disabilities. *Id.* at 9. The LHO found that the teachers’ efforts and system’s opportunities under the 9th and 10th grade IEPs met the standard for appropriateness, including “ample parental participation,” “a specialized class with small groups ... [with] one on one

³ The record in this matter includes two volumes of exhibits (designated herein as “P-” and “D-” for those of the Parent and District, respectively) along my exhibits (designated as “SRO-”). The record also includes a transcript consisting of three volumes corresponding to the hearing sessions but numbered consecutively (designated generically as “Tr. at” with the page number).

⁴ Partially explaining this qualified conclusion, the LHO prefaced it with these observations: “Neither party’s evidence was particularly clear or conclusive. It does appear that the [Parents] were not totally candid with the [District].” *Id.*

assistance from the teachers and assistants,” and “substantial life skills development opportunities.” *Id.* at 9–10.⁵ As a result, the LHO did not definitively rule on the remaining flowchart-like steps of the otherwise applicable analysis, which are the appropriateness of the private school and the final equities.⁶

On September 24, 2023, the Parent appealed the LHO’s decision. SRO-3.⁷

On September 25, 2023, the state superintendent of education appointed me as the SRO in this case, specifying October 24, 2023 as the due date for my decision. SRO-5.

On September 26, 2023, I emailed the parties to schedule a Zoom status conference. SRO-6.

On October 2, 2023, which was the agreed-upon date, I conducted the status conference, resulting in the following documented understandings: (1) the parties jointly stipulated that the issue was limited to tuition reimbursement per the applicable multi-step analysis; (2) the District agreed, based on the “aggrieved party” issue, to withdraw its appeal, with the understanding that the document served to preserve its initial arguments in response to the Parents’ appeal; (3) the parties agreed that they had no issue with the procedural fairness of the hearing and no need for additional evidence; and (4) they also agreed to a firm deadline of October 17, 2023 for the submission of written arguments. *Id.*

On October 17, 2023, both parties timely submitted their written arguments, also referred to in this context as their appeal briefs. SRO-7; SRO-8.

⁵ Conversely treating the “minimal and rather uninformative” progress reports during this period by implication as incidental or procedural violations, the LHO reasoned that these reports’ “inattention to detail” did not result in a substantive loss to the Parents or the Student in this case. *Id.* at 10.

⁶ For the full framework of the applicable muti-step test for reimbursement, see *infra* Part III.

⁷ The District also filed an appeal on the same day. SRO-4. However, the District withdrew this appeal during the parties’ status conference, as explained *infra*.

II. STANDARD OF REVIEW

The standard of review for an SRO under the IDEA is for an “independent decision” after examining the entire record. 34 C.F.R. §§ 300.514(b)(2). The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995), requiring “plenary review” with one narrow exception: “[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.”⁸

III. FINDINGS OF FACT

In 2012–13, the District first provided the Student with an IEP in kindergarten, with due consideration of a private evaluation diagnosing the Student with developmental delays. Tr. at 23–24; P–1.⁹

In 2019–20 (grade 7) and 2020–21 (grade 8), the Parents were pleased with the Student’s progress in the neighborhood District middle school. Tr. at 26 & 33. The Student’s annual IEP in grade 8, dated 11/15/20 and thus extending to the first part of grade 9, included, inter alia, a primary classification of intellectual disabilities (ID) and a secondary classification of autism; present levels of approximately grade 2 in reading and math; measurable goals for each basic academic area (e.g., reading comprehension - from 29% to 80%); transition services; a self-contained special education placement; various accommodations (e.g., homework

⁸ At least one other Circuit that includes one of the approximately eight states that have opted for a review officer tier, has at least indirectly approved this approach. *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 888–89 (9th Cir. 2001). The Fourth Circuit has only partially addressed this issue, finding that LHO’s credibility findings are entitled to deference at the SRO level. *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991). The rest of the review-standard ruling in *Doyle* and its subsequent line of decisions in the Fourth Circuit address the similar but separable issue of judicial review of LHO decisions. *See, e.g., id.* at 104–05; *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009).

⁹ A subsequent private evaluation just before 5th grade included several diagnoses, including autism. P-3.

maximum of 15 minutes); a functional course of study; and a projection of the high school credential (non-diploma) program. P-3. The reported progress of the Student in grade 8 largely aligned with the goals on this IEP. P-4; Tr. at 34–38.¹⁰ On 6/8/21, the IEP team provided an amendment providing for placement for grade 9 at a designated, non-neighborhood high school because it included a program oriented to employability and functional skills. P-5 & P-6; Tr. at 41.

In 2021–22 (grade 9), the initial transition was not smooth, including the special education teacher’s informal adjustments that did not fully comply with the IEP or the prerequisite IDEA amendment process. *E.g.*, Tr. at 44, 167–69, 434, 442. Due to particular concerns, which included homework and progress reporting, the Parents requested an IEP meeting. *E.g.*, *id.* at 44–47; P-8. On 11/10/21, the IEP team met and adjusted the goals and replaced the credentials (non-diploma) program with the attendance (non-diploma) program. P-10. The Parents raised further concerns, and the District was responsive, during the second semester of grade 9, including the transfer of the Student to another special education teacher. *E.g.*, Tr. at 56–71; P-12; D-3. The Student’s progress reports showed what amounted to a maintenance level in the graphed data, thus evidencing neither positive progress nor regression. P-13.

In 2022–23 (grade 10), the Student’s special education self-contained class had ten other students, three teacher assistants, and a nurse in addition to the teacher. Tr. at 233. The support specialists included the transition-services coordinator and autism consultants. *Id.* at 304.

On 9/12/22, in response to repeated Parents’ requests (*e.g.*, P-14; P-15), the IEP team met. The decision was to keep the Student at the same high school but in the credential rather

¹⁰ The quarterly progress for the first reading goal, for example, went from the 29% on 9/17/20 to 70% on 6/10/21. P-4 at 1.

than attendance-only program. P-16. The IEP team met again on 10/24/22, making limited other changes to the previous IEP. P-17; P-18.¹¹ The Student had difficulty in the required courses for the credential program. *E.g.*, P-20; P-23. The special education teacher tried various adjustments based on the Parents' communications, which at times requested for more challenging work and at other times expressed concerns that the work was too difficult. *E.g.*, Tr. at 83, 212-13, & 305-06. During the first semester, one of the adjustments was to change an elective course from government to self-advocacy. P-15; Tr. at 82 & 140.

On 12/29/22, the Parents submitted an application for a private special education school in Massachusetts for at least the 2023 summer program. D-2. For the application's required follow-up references, they obtained a recommendation letter from the 10th grade special education teacher on the avowed basis that the purpose was specific to the private school's summer program. D-7.

During the second semester, the special education teacher was, again, responsive to the Parents' continuing concerns. P-19; P-21.

On 4/13/23, the private school sent the Parents' an acceptance letter for both the 2023 summer and the 2023-24 (grade 11) year, specifying a deadline of 5/1/23 for the respective deposits for the summer and school year. D-1.¹²

On 4/25/23, the Parents requested an IEP meeting before the end of the school year, without specifying the reason for the meeting. P-24. At the resulting IEP team meeting on 5/18/23, the Parents expressed their perception that the District had failed to provide the Student

¹¹ The specified ending date for services was 10/23/23. P-18, at 9.

¹² The Parents testified vaguely that they sent in the deposits for both the summer and school-year programs in late May or June (Tr. at 127 & 503), but they did not provide a copy of the check or receipt that would have provided, in light of their lack of candor, the appropriate definitiveness as to whether they met the applicable timeliness provision.

with FAPE and that they are considering placement at the private school in Massachusetts for grade 11 and would let the District know by the end of the said school's summer program, requesting reimbursement if they decided in favor of said placement. P-25. The rest of the IEP team responded that they would explore the District's life skills program and other IEP revisions if the Parents decided instead in favor of returning the Student to the District for grade 11. *Id.*

The progress reports for grade 10 generally did not show any change until an upward trajectory in the graphs for the final quarter. P-22. The Student's 10th-grade report card had final grades ranging from 80 to 96. P-27.

On 5/22/23, the Parents telephoned the District's special education director, making "pretty clear" they intended to send the Student to the private school and were seeking reimbursement for its cost. Tr. at 548.

On 5/23/23, the District received their aforementioned request for a due process hearing.

On 8/12/23, the private school issued the progress report for its five-week summer program to the Parents, which did not seem to evidence significant progress. P-30.¹³

The private school has a focus on students with intellectual or learning disabilities; classes with one staff member and no more than eight students; and a notable transition program. Tr. at 339, 342–44. The tuition for the 2022-23 school-year on a residential basis is \$104,569. *Id.* at 347.¹⁴

¹³ Although representing only a five-week program and shorter academic day, the report (P-30) did not include a baseline level for comparison, and the overall level on the scale from 4 (limited progress) to 1 (mastery) was 3 ("requires ongoing review and reinforcement") for all of the Student's objectives, except for a 2 (significant progress) for editing.

¹⁴ The school's corresponding day-program tuition for 2022-23 is \$60,656. P-29.

IV. CONCLUSIONS OF LAW

The Parents have clarified and confirmed that the only issue in this case is whether they are entitled to tuition reimbursement. Tr. at 7–8; SRO-6. Thus, per the aforementioned understanding in the status conference, the applicable analysis is limited to the multi-step analysis that the Supreme Court established in successive decisions and that Congress partially codified in subsequent amendments. 20 U.S.C. § 1412(a)(10)(C); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359 (1985).¹⁵

As a result, the organization for the following legal conclusions is the full framework that the subsequent lower courts’ case law has made clear. Although the central steps are the flowchart questions as to the appropriateness of the district’s and parents’ placements, the complete multi-step test extends to the equities, first as a threshold question of timely notice and ultimately, if the extent of reimbursement is reached, as an overall matter. The four successive steps are addressed herein for the sake of judicial economy in case of appeal, although I agree with the LHO that the controlling step in this case is what is enumerated herein as step 2. Moreover, for each of these steps, the pertinent probative standard is preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii).¹⁶

¹⁵ The 1997 amendments incorporated the initial framework, and the 2004 amendments added limited refinements. *See, e.g.*, Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012) (enumerating the four steps of the full framework). The codification is incomplete, leaving the underlying Supreme Court decisions for the residuum. For example, the cited IDEA provision does not expressly include the *Carter* appropriateness step. Of less legal force, the corresponding IDEA regulation almost entirely duplicates the statutory provision, although indirectly and partly incorporating the *Carter* step. 34 C.F.R. § 300.148. Finally, the most recent Supreme Court decision specific to tuition reimbursement is not relevant in this case, although it shows that the legislation codification is not complete. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (ruling that the child’s lack of previous enrollment in special education did not, despite the express legislative language, preclude application of the reimbursement analysis).

¹⁶ The District’s initial emphasis in its closing brief on the burden of persuasion is of no meaning in this case. As the Supreme Court concluded, this burden at a due process hearing is on the filing party, but it only comes into play when the evidence is in equipoise. *Schaffer v. Weast*, 546 U.S. 49, 58, 62 (2005). The balance of the evidence here does not amount to one of those rare cases.

1. Timely Notice

The threshold equities step is for parents' notification "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" either (a) in writing at least ten days prior to removal of the child or (b) at the most recent IEP meeting before the removal 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Although the parental notification does not need to use these quoted magic words, it is clear that the notice must, as an equitable matter, provide the local education agency (LEA) with fair warning of not only a definitive rejection of the LEA's proposed IEP but also their definitive intent for unilateral private placement at LEA expense. The obvious purpose is to give the LEA, upon definitive notice that the threat is not a matter of huffing and bluffing, the last-chance incentive and opportunity to promptly revise the IEP via the prescribed team process, thus saving both parties the considerable costs of reimbursement and/or adjudicative resolution.¹⁷

To the unclear extent that the LHO's qualified and cursory finding that the Parents "generally" met this threshold requirement was credibility-based, he concluded that he found them to be less than candid in relation to this step.¹⁸ In any event, the extrinsic evidence in the record justifies a contrary finding.¹⁹

First, for the oral alternative under the cited statutory provision, the record of this case and preponderantly shows that at the last IEP meeting on 5/18/23, the Parents did not provide the requisite definitiveness of their "intent to enroll their child in [the] private school at public

¹⁷ See, e.g., *Bernardsville Bd. of Educ. v. J.H.*, 42 F.2d 149, 157 (3d Cir. 1994) ("[affording the school district] the practical opportunity ... to modify its IEP or to determine definitively whether expenditures occurred outside the district could have been obviated by [receiving prompt notice].").

¹⁸ *Supra* note 4 and accompanying text.

¹⁹ *Supra* note 8 and accompanying text.

expense.” The prior written notice (P-25), which the Parents received and did not challenge promptly after receipt, documents the gist of their statements at the IEP meeting that they were “considering” unilateral placement and would later make and convey their decision based on the Student’s experience at the private school’s summer program.

Second, for the written alternative, the record clearly lacks the requisite notification. The only written reference is the incidental allusion to the Student’s “school for next year” in a rather routine 5/11/23 email to the Student’s 10th-grade special education teacher about who would be picking the Student up at the end of the school day for the limited remainder of the school year. Even assuming *arguendo* that said cursory written communication met the prescribed deadline for timeliness and that the teacher somehow was the LEA representative in this context, this email obviously does not suffice, because it lacks the requisite contents about FAPE rejection and unilateral placement at public expense. P-26.

Specific to this written-notification alternative, the Parents cited limited case law beyond this jurisdiction interpreting “removal” as the “actual physical removal of the child from public school.” *E.g.*, *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 (D. Md. 2000). I do not find this interpretation to be persuasive because it ignores both the express prefatory IDEA content of “intent to enroll the child in a private school” and the obvious purpose of the timely notice provision. Moreover, it is premised on the assumption, which more recent and higher judicial authority has dispelled,²⁰ that lack of timely notice automatically bars reimbursement. *Id.* at 704. However, even if one were to accept this unpersuasive interpretation, it is not availing to the Parents because the record is clear that they did not provide the requisite contents in a

²⁰ *E.g.*, *Upper Freehold Reg’l Bd. of Educ. v. T.W.*, 496 F. App’x 238, 244 (3d Cir. 2012). For recognition of this equitable understanding that made adoption or rejection of the *Sarah M.* interpretation, see *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, 77 IDELR ¶ 163, at *7–8 (D.D.C. 2020).

written notice at any time prior to the start of grade 11, whether it was at either the District or at the private school.

Nevertheless, as the applicable IDEA provision suggests by prefacing the timely notice step with “may” rather than “shall” for the adjudicator’s denial (or reduction) of reimbursement (20 U.S.C. § 1412(a)(10)(C)(iii)(I)) and as the majority view in the applicable case law establishes, the failure to provide timely notice amounts to an equitable strike, not strike-out. *E.g., Upper Freehold Reg’l Bd. of Educ. v. T.W.*, 496 F. App’x at 244 (remanding the case to determine the equities more generally).

2. District’s Placement

The applicable focus for this key appropriateness step is the District’s placement, as formulated in the IEP, for the year of requested reimbursement. Although the IDEA refers in part of its codification to whether the LEA made a FAPE “available to the child in a timely manner prior to ... [the] enrollment,” the rest of the codification and the underlying *Burlington* decision makes clear that said availability means the IEP for the period for reimbursement. *E.g.*, 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (“placement proposed by the [LEA] to provide a [FAPE] to their child”); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. at 374 (“the IEP proposed by the school officials”). The Fourth Circuit’s subsequent rulings confirm this interpretation.²¹

Thus, in contrast to the LHO’s focus on the appropriateness of the District’s placement of the Student during grades 9 and 10, the relevant inquiry under the tuition reimbursement analysis is focused on the IEP for grade 11, which is the year for which the Parents seek

²¹ *E.g.*, *Schaffer v. Weast*, 554 F.3d 470, 480 (4th Cir. 2009); *A.B. v. Lawson*, 354 F.2d 315, 332 (4th Cir. 2004); *Z.W. v. Smith*, 210 F. App’x 282, 287–88 (4th Cir. 2004); *A.B. v. Weast*, 354 F.2d 313, 330 (4th Cir. 2004) (ruling that district’s *proposed* placement for the reimbursement year(s) offered FAPE).

reimbursement. Moreover, to the large and perhaps entire extent that the issue is the substantive appropriateness of the IEP for grade 11, the applicable standard is whether the IEP was “reasonably calculated to enable [the] child to make progress in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. at 399. This standard generally applies holistically to the IEP rather than to the specific components. *E.g.*, *R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237, 250–51 (4th Cir. 2019) (applying the *Endrew F.* standard to the IEP as a whole, rather than to the behavior intervention plan or the specific goals).²² Finally, as a result of *Endrew F.*, the Fourth Circuit appears to have endorsed the so-called “snapshot approach,” thus premising the “reasonable calculation” on what the IEP team knew or had reason to know at the time of developing the IEP at issue. *R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d at 250 (incorporating the recognition in *Endrew F.* that “crafting an appropriate program of education requires a prospective judgment by school officials”).²³

In this case, the timing of the IEP and the parents’ filing for reimbursement is a bit unusual. More specifically, rather than issuing an IEP at the end of the school year for the entire following school year, the IEP team initially met on 9/12/22 and 10/24/22 (in grade 10) to finalize the annual IEP scheduled to expire on 10/23/23 (in grade 11). *Supra* note 11 and accompanying text. Thus, this IEP extended to the first few months of grade 11. Moreover, the IEP team met again at the end of grade 10 with regard to this IEP, specifically on 5/18/23, although not resulting in any change to the IEP in response to the Parents’ FAPE denial and conditional reimbursement claims. Thus, the snapshot approach applies to these two successive

²² See, e.g., *R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237, 250–51 (4th Cir. 2019) (applying the *Endrew F.* standard to the IEP as a whole, rather than to the behavior intervention plan or the specific goals); see also *Washington v. Katy Indep. Sch. Dist.*, 82 IDELR ¶ 218, at *4 (5th Cir. 2023); *Alexander G. v. Downingtown Area Sch. Dist.*, 78 IDELR ¶ 213 (E.D. Pa. 2021) (upholding holistic approach for substantive FAPE).

²³ For the specific contours and widespread adoption of this approach, see Perry A. Zirkel, *The Snapshot Standard under the IDEA: An Update*, 358 EDUC. L. REP. 767 (2018).

junctures of the early part and end of grade 10.

First, at the meetings during the first two months of grade 10, the IEP team knew or had reason to know of the Student's lack of positive progress during the difficult transition from middle to high school, including the attendance-only program of the expiring IEP. They reasonably decided try the more challenging credentials program along with other more limited revisions.

Second, at the meeting at the end of grade 10, the IEP team knew or had reason to know of the Student's difficulties in the required courses of the credentials program and the belated upward trajectory during the final quarter after various adjustments continued responsiveness to Parents' requests. The decision not to change to a different placement was not optimal but was within the range of reasonable calculation in light of the nature and severity of the Student's disabilities and the continued rather ample array of specialized personnel and transition services. Although at this point updated and in-depth evaluation data, more refined goals, a particular effective protocol, and more objectively and specifically informative progress reports may well have been desirable, the courts often analyze these issues under the rather forgiving two-part test for procedural FAPE and, in any event, do not require them under aforementioned applicable standard for substantive FAPE.²⁴ Similarly, the extent of actual progress that the post-*Andrew F.* courts legally accept as appropriate in holistically applying the reasonably calculated standard is often less than parents and professionals normatively expect.²⁵

²⁴ See, e.g., Perry A. Zirkel, *Legal Requirements for Progress Monitoring under the IDEA: What Do the Courts Say?* 30 EXCEPTIONALITY 297 (2022) (finding the vast majority of the court rulings specific to progress reporting have been analyzed under the two-part, harmless-error test for procedural violations and have been in favor of districts despite evidence of progress monitoring provisions that are either entirely absent in the IEP or do not meet professionally prevalent standards).

²⁵ See, e.g., *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248 (3d Cir. 2018) (fragmented progress); *F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 745 F. App'x 38 (2d Cir. 2018) (slow and mixed progress); *D.F. v. Smith*, 74 IDELR ¶ 75 (D. Md. 2019) (inconsistent progress); *E.G. v. Great Valley Sch. Dist.*, 70 IDELR ¶ 3 (E.D. Pa. 2017) ("maddening slow [progress] and stagnation"). For the prevailing severe discrepancy

Although bridging grades 9 and 10 and only a District-offered after-school option, the District's Together Involved Every Student (TIES) music program serves, by analogy, as an illustrative microcosm of the difference between the Parents' understandable optimum-oriented approach and the District's applicable reasonableness requirement. In grade 9, the Parents opted to have the Student participate in the TIES program, which included reverse mainstreaming via pairing with a nondisabled peer and which the Student enjoyed; however, the Parents replaced it in grade 10 with individual private music lessons for the Student. *E.g.*, Tr. at 508 & 520–26. Like the TIES program, the IEP that extended into grade 11 was reasonable but not optimal, and the Parents elected instead for a private program that they considered superior. Their choice is understandable, but not as requiring District reimbursement.

Although not essential to the applicable tuition reimbursement analysis and only mentioned here by way of secondary dicta, the District's continuing responsiveness to the Parents' requests and concerns also fits this less-than-ideal but reasonable-under-the-circumstances pattern, as do the Parents' procedural claims. For example, the District's advance provision of IEP drafts may not have met its own practice standard, but the IDEA does not have an applicable procedural requirement specific to draft IEPs, and the evidence is amply preponderant level that the District did not significantly impede the Parents' opportunity for active participation in the IEP process at any time through to the end of grade 10. Similarly, although not at the desirable level of proactive professional best practice, the limited gaps in implementation do not necessarily equate to the requisite standard for denial of FAPE. *See, e.g., R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d at 247–48; *Sumter Cnty. Sch. Dist. 17 v. Heffernan*,

between judicial applications and professional expectations, see Perry A. Zirkel & Mitchell L. Yell, *Indicators of Progress in the Wake of Endrew F.: The Distinction Between Professional Recommendations and Judicial Rulings*, EXCEPTIONAL CHILD. (in press).

642 F.3d 478, 484 (4th Cir. 2011). If this case were for compensatory education based on implementation or other FAPE issues for grades 9 and 10 beyond the limited focus of applicable analysis for tuition reimbursement, the scrutiny and outcome may have been different. For example, these issues in grade 9 would have warranted direct attention for compensatory education rather than its rather remote background role for tuition reimbursement.

The single court decision that the Parents rely on in their appeal brief for the application of step 2, which is the federal district court of Colorado’s ruling on remand from the Supreme Court in *Endrew F.*,²⁶ is simply too thin a reed to counter the prevailing weight of the related case law.²⁷ Moreover, that decision focused with particularity on the defendant-district’s failure to address the child’s escalating maladaptive behaviors and to provide more challenging goals. In clear contrast, the Student in the instant case did not have behavioral issues, and the overall focus was, as the 10th-grade teacher explained, to find “a nice median” between the more challenging level the Parents sought and the difficulties that the Students evidenced. Tr. 212.

Consequently, although adhering much more specifically to the applicable contours of the first of the central appropriateness steps of tuition reimbursement analysis, my bottom-line conclusion agrees with that of the LHO. The District met the applicable standard for an appropriate IEP for grade 11. Although this conclusion for Step 2 resolves the issue in this case, I provide, on a briefer basis, my conclusions for the remaining steps.

3. Parents’ Placement

The applicable standard for the appropriateness of the unilateral placement is limited to the substantive dimension of FAPE. *E.g.*, *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. at 14–15; *L.H. v. Hamilton Cnty. Sch. Dist.*, 900 F.3d 779, 796 (6th Cir. 2019). Based on the

²⁶ *Endrew F. v. Douglas Cnty. Sch. Dist.*, 290 F. Supp. 3d 1175, 1184 (D. Colo. 2018).

²⁷ *Supra* notes 22 and 25.

record of this case, this out-of-state residential school is no more, and perhaps less, substantively appropriate than the District's proposed 11th-grade placement. The private school's class size in relation to staff directly serving the class is not more favorable than what the District provided to the Student under the applicable IEP; the private school's transition services and after-school activities are approximately comparable to those of the District in relation to the Student's needs; and the Student's reasonably known progress at the private school also was not any more informatively positive than under the District's IEP. *Supra* note 30 and accompany text.

Conversely, to whatever extent that the District retains the argument made to the LHO that challenged the appropriateness of the private placement based on the IDEA's least restrictive environment (LRE) provision, the contention is not persuasive for two independent reasons. First, although the District did not identify and I do not know of any Fourth Circuit decision on point, the prevailing view in other circuits that have addressed this issue is that LRE is not a disqualifying factor at step 3 in tuition reimbursement analysis. *E.g.*, *Doe v. Newton Pub. Schs.*, 48 F.4th 42, 59 (1st Cir. 2022); *C.B. v. Special School District No. 1*, 636 F.3d 981, 991 (8th Cir. 2011); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999). Second, the District's argument rings effectively hollow because its own proposed placement for grade 11, in light of the grade 10 implementation of the IEP, provided for negligible interaction with nondisabled students, thus being basically on a par with the LRE of the Parents' unilateral placement.

Finally, as an overlapping matter with step 4, the evidence was not preponderant that the residential portion of the private placement was necessary. *See, e.g.*, *Shaw v. Weast*, 364 F. App'x 47, 52–53 (4th Cir. 2010). More specifically, there was no showing that the Student had

mental health, social, self-help or other such needs that required residential placement, much less that intertwined with the Student's educational needs.

4. Overall Equities

In cases in which the the proposed placement is not appropriate and the Parent's unilateral placement is appropriate, the IDEA ultimately provides for adjudicative discretion to reduce or deny reimbursement based on the equities, including but extending beyond lack of timely notice. 20 U.S.C. § 1412(a)(10)(C)(iii)(I).

In the instant case, I provide two separate conclusions in the event that this decision is appealed and the earlier rulings are overturned. First, the Parents' actions do not amount to "unreasonableness" in the context of the partially codified statutory provision. More specifically, the courts' prevailing majority view requires obstructionist or preclusive conduct to meet the level of unreasonableness to justify reduction or denial. *See, e.g., C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 71 (3d Cir. 2010). The Parents' actions in this regard, including and extending beyond the timely-notice step, must, as a matter of balancing the equities, be weighed against the District's conduct. Although the Parents refused to have an IEP meeting during the resolution session, the District's administrative representative should have moved more quickly to resolve the matter upon sufficiently ascertaining their intent. Tr. at 548.

Second, overlapping with the step 3 analysis about the residential component of the Parents' unilateral placement, the Supreme Court added the following clarification:

[Adjudicators] fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

Florence Cnty. Sch. Dist. Four v. Carter, 511 U.S. at 1. In this case, the Parents did not provide

evidence that the private schools residential, as compared to nonresidential, tuition cost was reasonable. Thus, if step 4 were reached, this equitable factor and the overlapping step 3 factor, would warrant reduction to this private school's nonresidential tuition (*supra* note 14 and accompanying text). *Cf.* Doe v. Newton Pub. Schs., 48 F.4th at 60.²⁸

IV. DECISION AND ORDER

The Order in the case is as follows: the LHO's decision to deny tuition reimbursement is affirmed.

V. NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless an aggrieved party appeals the decision by commencing a civil action in any state court of competent jurisdiction or in the federal district court in South Carolina within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516.

s/Perry A. Zirkel

Perry A. Zirkel
State Review Officer

October 23, 2023

²⁸ Conversely, the District did not proffer evidence of any reasonably available comparable alternative with substantially lower nonresidential tuition, thus justifying a lesser reimbursement amount. Similarly, the Parents in this case did not request reimbursement for travel or any other related costs, thus also equitably mitigating further reduction if this step were reached.