

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

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 19750-17-18

Child's Name: B.S. **Date of Birth:** [redacted]

Dates of Hearing:
11/1/2017, 12/19/2017, 1/10/2018, 1/11/2018, 1/29/2018 and 2/5/2018

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Hearing Officer: Brian Jason Ford, JD, CHO **Date of Decision:** 03/16/2018

Introduction

This special education due process hearing was requested by the Parents, on behalf the Student, against the School District (the District).¹ Both parties agree that the Student is a child with a disability, as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Parents allege that the District misidentified the Student as a child with an Emotional Disturbance (ED). They argue that the Student should be identified as a child with a Specific Learning Disability (SLD) and an Other Health Impairment (OHI). The District argues that the ED identification is correct, with a secondary identification of Speech and Language Impairment, and that the Student does not qualify as a child with SLD or OHI.

Substantively, the Parents allege that the District denied the Student a free, appropriate public education (FAPE) during the 2015-16 and 2016-17 school years, and demand 1,080 hours of compensatory education to remedy that denial. The Parents placed the Student into a specialized private school (the Private School) during the 2017-18 school year, and demand tuition reimbursement for that placement.² The Parents also demand reimbursement for a private program that the Student attended in the summer of 2017, and reimbursement for an independent educational evaluation (IEE) that they obtained in June 2017. The District argues that FAPE was provided at all times, and that neither compensatory education nor reimbursement is owed.

For reasons discussed below, I find that the District committed no error in classifying the Student as a child with an ED. The program and placement that the District offered to address the Student's ED was appropriate. Unfortunately, the Student has a reading disability that the District all but ignored. The Student is owed compensatory education for the District's failure to address the reading disability. The Parents are owed reimbursement for the IEE for the same reason. Further, the Parents are owed reimbursement for the summer program because the District acknowledged the need for extended school year (ESY) services but failed to timely offer ESY services. Finally, under the test that I must apply for tuition reimbursement, the Parents are entitled to nearly full reimbursement for the cost of tuition at the private school. As discussed below, the test does not permit me to discount tuition reimbursement by the extent to which the Student's IEP was appropriate. Although the IEP was appropriate for the most part, current jurisprudence permits a reduction in tuition reimbursement only for certain equitable factors. Those factors in this case warrant only a small reduction.

Issues

1. What are the Student's correct IDEA eligibility categories?

¹ With the exception of the cover page of this Decision and Order, identifying information is omitted to the greatest extent possible.

² The Parents demand that the District reimburse the cost of tuition, books, one-to-one support, and ESY services at the private school. The Parents also demand reimbursement beyond the 2017-18 school year "ongoing, per pendency." There is a well-established body of case law on the impact of a Hearing Officer's order for tuition reimbursement on the IDEA's pendency or "stay-put" rule. That rule may be triggered by appeals or litigation subsequent to this due process hearing. By their nature, however, questions about Student's pendent placement subsequent to this hearing are beyond the scope this hearing. Consequently, I will not address what the Student's pendent placement will be should there be subsequent disputes.

2. Did the District deny the Student a FAPE during the 2015-16 and 2016-17 school years and, if so, is the Student owed 1,080 hours of compensatory education?
3. Are the Parents entitled to reimbursement for the costs of private ESY services obtained in the summer of 2017?
4. Are the Parents entitled to reimbursement for the cost of the IEE that they obtained for the Student in June 2017?
5. Are the Parents entitled to reimbursement for tuition and other costs associated with the Private School?

Findings of Fact

I carefully reviewed and considered the entirety of the record in this case, including the large amount of documentary evidence that was entered. However, I make findings of fact only as necessary to resolve the issues presented. Consequently, not every document and not every point made during testimony is referenced herein. To the extent that the parties introduced the same document twice (once as a Parent exhibit and again as a School exhibit) I refer to only one copy. Facts that are not in dispute are presented without citation. When credible testimony is in alignment with documentary evidence, I cite to the document rather than the testimony.

I find as follows:

Background

1. For reference:
 - a. 2015-16 School Year – Kindergarten
 - b. 2016-17 School Year – 1st Grade
 - c. 2017-18 School Year – 2nd Grade
2. The Student started the 2015-16 school year attending a parochial school. The Student experienced a negative incident in the parochial school, and then transferred to a private kindergarten. The family and the private school parted ways in the middle of the 2015-16 school year.

The 2015-16 School Year

3. On February 8, 2016, the Parents enrolled the Student in the District. S-1.
4. On March 3, 2016, the Parents requested a special education evaluation. The Parents were concerned about the Student's social and emotional development, and the Student's disruptive and difficult behaviors. The Parents also questioned [redacted]. S-2.

5. On March 7, 2016, the District formally sought the Parents' consent to evaluate the Student and solicited parental information for the evaluation. The Parents provided consent and information on March 15, 2016. S-3, S-4.
6. The District evaluated the Student. The evaluation concluded on May 16, 2016, with the issuance of an evaluation report (the First ER). S-8, S-9.
7. At the time of the evaluation, teachers expressed concerns about the Student's reading ability. The Student was functioning below expectations relative to the District's curriculum, but teachers attributed any delay to the fact that the Student's exposure to the curriculum started more than half way through the school year. S-9.
8. At the time of the evaluation, teachers also expressed concerns about the Student's behaviors. The Student could be defiant and challenge teachers' authority. However, the Student was amenable to basic redirection, and the Student's behaviors did not prevent the Student from completing Kindergarten work. S-9.
9. The teacher's input was consistent with the Parents' input. The Parents noted that the Student could become upset when the Student perceived things as unfair and could have tantrums. The Parents reported behavioral incidents during before-care programs, but that all seemed well in the District. S-9.
10. The District's evaluation included standardized, normative assessments of intellectual ability and academic achievement. The Student's full-scale IQ score was found to be in the "very high" range as compared to same-age peers, with some variability in sub-test scores.³ S-9.
11. On standardized, normative tests of academic achievement, the Student scored in the "average" range in an assessment of early reading skills as compared to same-age peers. This score aggregated measures of the Student's ability to name letters, letter-sound correspondence, phonological awareness, and word comprehension. The Student's ability to write letters was "below average" but the Student's spelling was "average" as measured against same-age peers. S-9.
12. The Student was tested in the "average" range in all other academic assessments, including listening comprehension, oral expression, and math. S-9.
13. On standardized, normative behavior rating scales, teachers scored the Student in the "clinically significant" range (meaning a high level of maladaptive behavior was observed) for externalizing problems. That included clinically significant ratings in both aggression and conduct problems. Hyperactivity was observed in the "at-risk" range (meaning that problems were observed, but not severely enough to warrant a formal

³ While I do not substitute my knowledge for the skills and training of qualified professionals, experience informs me that both the reliability and the predictive nature of intelligence tests of young children should be interpreted only with the utmost caution.

diagnosis). Attention problems, adaptability, adaptive skills, and the Behavior Symptom Index were also found to be in the at-risk range. S-9.

14. In sum, the First ER found that the Student “had behavioral difficult across school environments,” but that behavior was an improvement from past placements, was not physically aggressive, required no support from the office, and could be redirected by teachers. S-9.
15. The First ER also found that the Student was at grade level in all areas, meaning that the Student was completing grade-level work without accommodations that go beyond good teaching practices. However, in reading in particular, the First ER also noted that the Student was behind grade and age level expectations in the District’s reading curriculum. S-9.
16. The First ER concluded that the Student did not qualify for special education. Evaluations found that the Student’s reading and math abilities were in the average range as compared to same-age peers, despite the fact that the Student was behind in the District’s reading curriculum. S-9.
17. Further, the District found that there was a statistically significant discrepancy between the Student’s ability and achievement in spelling. However, the District could not rule out “instructional inconsistency,” and did not qualify the Student for special education. S-9.
18. The First ER did not note a statistically significant discrepancy between the Student’s ability and achievement in reading more generally, although there the Student’s full-scale IQ score was two standard deviations above the Student’s early reading skills. S-9.
19. According to the Student’s report card, the Student was meeting academic and behavioral expectations in general. The Student was “approaching,” but had not met expectations in regard to working cooperatively with others, identification of three dimensional geometric shapes, rhyming, reading high-frequency words, and writing skills. S-11.

The 2016-17 School Year

20. The Student’s behavior changed significantly at the start of the 2016-17 school year. Almost immediately, the Student began to exhibit poor conduct on the school bus, and was frequently hostile, insubordinate, oppositional and defiant in school. S-12, NT *passim*.
21. In late September, the Student had a prolonged behavioral incident in school. This incident involved [redacted]. S-12.
22. At one point during the behavioral incident, [redacted]. S-12.

23. An investigation of the incident, which relied heavily upon parental input, concluded that the precipitating event was the Student's perception of being treated unfairly by the classroom teacher. S-12.
24. The Student received a two-day out-of-school suspension. The District also met with the Parents to put a behavior plan in place for the Student. S-12.
25. When the Student returned from the suspension, still in late September, there was another significant behavioral incident [redacted]. S-12.
26. A similar incident occurred the next week, now in early October [redacted]. S-12.
27. The early October incident prompted an in-school suspension. The Student was assigned to the school's conference room and worked with the school principal, who provided frequent breaks, reinforcement, and redirection. Even with that intervention, the behaviors escalated to the point where the Student could not be controlled, and the Parents were called to bring the Student home. S-12.
28. By mid-October, the Student was physically aggressive towards other children in the playground, hid from teachers, and [redacted]. As the Student's behaviors escalated, the District brought the Student to the conference room again, in the hope of calming the Student, redirecting the Student to work, and maintaining school safety. There, the Student [redacted]. S-12.
29. The next day, the Student's behaviors escalated in the classroom again. The Student [redacted]. S-12.
30. As these incidents occurred, the District proposed to evaluate the Student on October 3, 2016. The Parents approved the evaluation the same day. The evaluation was specifically and explicitly prompted by the increase in the Student's behaviors. S-14.
31. On October 19, 2016 the District completed the evaluation and finalized an evaluation report (the Second ER). S-18, S-19.
32. In the Second ER, the Parents noted that the Student becomes frustrated when presented with reading and writing tasks and struggles with self-expression. The Student's 1st grade teacher, however, noted that the Student is a strong writer who pays attention to detail and is motivated to spell words correctly. S-19.
33. Regarding reading, the 1st grade teacher noted that the Student was somewhat behind other children in the District's reading curriculum, was frustrated by that fact, and was unwilling to practice reading independently. The teacher also described the Student as being on grade-level in both reading and math. The Student received high marks in both sight word and phonics assessments in October of 2016. S-19.

34. Regarding behavior, the 1st grade teacher reported concerns consistent with the above incidents but, more generally, the Student was frequently angry, frustrated, and aggressive in class. S-19.
35. The Second ER included an in-school observation by a school psychologist. The observation was reported in detail and did not include any of the major incidents described above. However, the observation is replete with examples of oppositional and defiant behavior, distractibility, and self-sabotage (e.g. [redacted]). S-19.
36. The Second ER found that the Student's behaviors interfered with the Student's learning and the learning of others. S-12.
37. The Second ER re-reported the results of the cognitive and academic assessments completed as part of the First ER. S-12.
38. The Second ER included a speech and language assessment, geared at evaluating the Student's pragmatic use of language and ability to infer information. This assessment revealed that the Student's abilities to ask for help, respond to directions, express disagreements, and respond to anger were all under-developed. S-12.
39. The standardized behavior rating scale was re-administered. The Student's teacher now rated the Student in the clinically significant range for externalizing problems, with each externalizing sub-set (hyperactivity, aggression, and conduct problems) all in the clinically significant range as well. The Behavioral Symptoms Index was also clinically significant, as was the Student's adaptability (a sub-set of the adaptive skills measure). Ratings from the Parents were lower, mostly falling in the average range. S-12.
40. An autism rating scale was also administered. Although some domains were slightly elevated, the Student's ratings were inconsistent with an autism diagnosis. S-12.
41. The Second ER notes that the school's class-wide and school-wide behavior plans were not effective for the Student, and that the standard, regular education behavior support plan put in place in late September was not effective either. S-12.
42. The Second ER concluded that the Student was eligible for special education primarily as a child with an emotional disturbance (ED) and secondarily as a child with a speech/language (S/L) impairment (resulting from the language pragmatics issues detailed above). S-12.
43. The Second ER described the presentation of reading and writing tasks as triggering for the Student. S-12.
44. The Second ER continued to note the "lack of consistent reading instructional time [due to behavior] cannot be ruled out as a determining factor for concerns with academic progress." S-12.

45. The Student's IEP team met on October 24, 2016 and October 31, 2016 to draft an IEP for the Student. S-23.
46. The IEP indicates that the Student exhibits behaviors that impede the Student's own learning and the learning of others. The IEP indicates that a Functional Behavior Assessment (FBA) is required, and that the IEP must include goals that target the Student's behavior using a Positive Behavior Support Plan (PBSP). S-23.
47. The IEP restates information from the First ER and Second ER to describe the Student's present levels of academic achievement and functional performance. S-23
48. The IEP includes a behavior goal that calls for the Student to use self-regulation strategies and refrain from physically inappropriate behaviors when faced with a non-preferred activity 100% of the time for 10 consecutive weeks. The baseline for this goal was "to be determined." S-23.
49. A second behavioral goal more specifically targeted behavior when the Student is presented with an academic demand. The goal called for the Student to either initiate a task or request a one-minute break, take the break, and then initiate the task in response to the demand 100% of the time for 30 consecutive days. The baseline for this goal was also "to be determined." S-23.
50. A reading goal called for the Student to read grade-level sight words in isolation with 100% accuracy for three consecutive bi-weekly trials. The Student's baseline was 28 out of 60 words (47%). S-23
51. A speech goal targeted pragmatic language. The goal called for the Student to improve problem solving skills in social situations. Mastery of the goal was to be measured by the Student's attainment of short term objectives. Those objectives called for the Student to identify problems from the perspective of others, develop reasonable solutions once problems were identified, and then identify consequences of various behaviors and solutions, all in the therapy setting. Mastery of each objective required the Student to correctly perform the objective in therapy sessions in four out of five trials across four consecutive sessions (each session included multiple trials). This goal did not include a baseline statement. S-23.
52. A second speech goal called for the Student to improve nonverbal communication skills. Mastery of this goal was also measured by the Student's attainment of short term objectives in therapy. First, the Student was to identify "body talk" components, then use body talk components 40% of the time during timed trials over four sessions, and then use body talk components 80% of the time during timed trials over four sessions. This goal did not include a baseline statement. S-23.
53. The IEP included significant program modifications and specially designed instruction (SDI). The IEP called for the Student to receive some instruction from a speech and language pathologist (S/LP) in a "speech room" to work on speech goals. There, the IEP

called for individualized instruction and pacing, positive reinforcement (both verbal praise and tangible reinforcement), modeling target behaviors, and visual and tactile cues and prompts. S-23.

54. Also as modifications and SDI, the IEP called for use of a highly structured classroom with clear expectations and follow through, frequent reinforcement of positive behaviors, and preplanned consequences for negative behaviors. This means that the IEP called for District personnel to have a plan in place for the Student's anticipated behaviors. S-23.
55. As an SDI, the IEP called for daily direct, explicit instruction and frequent practice in self-regulation and appropriate social behaviors with instruction about how to use those skills when not receiving direct instruction (i.e. generalization). S-23.
56. As an SDI, the IEP called for teachers to be on the lookout for generalization of self-regulation techniques, and immediately praise that effort. S-23.
57. As an SDI, the IEP called for the gradual integration of less-preferred activities during the school day, with increasing breaks as less-preferred activities are added. The IEP noted that the Student's most problematic behaviors occurred in the afternoons, after recess. S-23.
58. As SDIs, the IEP called for differential reinforcement strategies, frequent breaks, rewards that appeared to motivate the Student, errorless learning, and strict adherence to a PBSP that was attached to the IEP. S-23.
59. The PBSP was derived from the observations and teacher input collected as part of the Second ER. Collectively, that information was described in the PBSP as an "informal FBA." The PBSP identified behaviors of concern, noted antecedents to those behaviors, and linked itself to an IEP goal (initiating a task or asking for a one-minute break when presented with an academic demand). The PBSP also included several strategies to prevent the Student's behaviors. S-30.
60. The IEP called for the Student to receive two 30-minute individual S/LT sessions per week, and an additional two 30-minute group S/LT sessions per week. S-23.
61. The IEP called for the Student to receive two 30-minute individual counseling sessions per week, and an additional two 30-minute group counseling sessions per week. S-23.
62. The IEP included a statement that, at the time, the Student did not qualify for ESY. S-23.
63. The IEP included a statement that the Student required direct, explicit instruction in replacement behaviors, coping skills, and self-regulation to meet the IEP goals, and that instruction must be integrated throughout the school day. The IEP also included a statement about why that type of instruction cannot be provided in regular education settings. Consequently, the IEP called for the Student's removal from the regular education classroom and full-time placement into an Emotional Support classroom. S-23.

64. The Student's elementary school does not house an ES classroom. Placement into an ES classroom required the Student to change school buildings. NT *passim*.
65. The Parents approved the IEP via a Notice of Recommended Educational Placement on October 31, 2016. S-24.
66. The Student began attending the ES classroom in November 2016. With the direct behavioral instruction, small class size, and highly structured setting, the Student's behaviors improved significantly. In general, the Student consistently exhibited appropriate behaviors in the ES classroom. S-21.
67. ES classroom teachers noticed an increase in behaviors from late February to early March 2017. During that time, the teachers were able to identify a more motivating reward for the Student. The teachers were able to incorporate that reward, yielding a decrease in behaviors.
68. The Student still had serious behavioral incidents after placement in the ES classroom. However, the frequency of those incidents decreased substantially. Between November 2016 and May 2017, the Student engaged in nine (9) significant behavioral incidents.⁴ As a point of contrast, the Student engaged in the same number of significant behavioral incidents during the 19 school days from September 23 to October 28, 2016. S-12, P-36, P-16, NT 219, 966- 980, 1116-1120, 1109-1111.
69. By the end of the 2016-17 school year, the Student had mastered 67% of targeted sight words. The baseline was 23%, and the goal was 100%. S-21, S-23.
70. On May 19, 2017, the District issued a NOREP offering ESY to the Student. The NOREP included a statement that the Student was found eligible for ESY but included no basis for that statement. The NOREP also recommended "the continuation of [SDI] in an [ESY] Program," but included no other information about what ESY program the District was recommending.
71. The Parents rejected the ESY NOREP both for its vagueness and because, by that time, the Parents had already selected a summer program for the Student.

Summer 2017

72. The Student attended a summer program housed at a military school in the summer of 2017. That program included both reading instruction and traditional summer camp activities. The Student had no behavioral incident while participating in the program. NT 212-214.⁵

⁴ At least one of the incidents in the ES classroom prompted District personnel to restrain the Student. See S-40.

⁵ Discussed below, the Parents' testimony has low credibility. Despite this, the Parents' testimony is the best evidence of the 2017 summer program in the record.

73. The Parents also obtained an independent educational evaluation (IEE) of the Student, which was completed on June 1, 2017. S-37.
74. The IEE included standardized, normative tests of intellectual ability and academic achievement, certain dyslexia-oriented tests, a behavior ratings scale that examines behaviors related to ADHD, a clinical observation and interview with the Student, an interview with the Parents, and input forms completed by both teachers and parents. S-37.
75. Tests of intellectual ability resulted in somewhat lower scores than the District's prior testing. S-37
76. Tests of academic achievement revealed relative weaknesses in basic reading skills, reading comprehension, and written expression. The evaluator linked these weaknesses to the Student's deficits in phonological memory and perception of symbol directionality (which were also revealed through the IEE). S-37.
77. The relative severity of the Student's reading weaknesses as measured by deviation from the norm on standardized tests stands in contrast to the Student's actual ability to read. For example, the Student's basic reading skills, reading comprehension skills, and reading fluency were all roughly one year below expectations, and the Student's reading comprehension and writing skills were roughly half a year below expectations despite the fact that all of these were tested within one standard deviation from the mean. S-37.
78. The IEE revealed that, despite strong intellectual ability and statistically unremarkable measures of discrete reading skills, the Student's ability to read was roughly one year behind where it should have been as a result of particular processing deficits related to reading. The IEE recommended interventions to address those deficiencies. S-37.
79. Regarding behavior, the IEE was substantively similar to the District's prior evaluations. Nothing in the IEE contradicted the District's assessments.⁶ The IEE was consistent with the District's prior conclusion that both academic tasks (reading in particular) and non-academic situations (transitions, changes to schedules, group therapy, perceived unfairness, negative peer relations) were antecedents to the Student's behaviors. S-37.
80. The evaluator concluded that the Student's presentation is consistent with medical diagnoses (DSM-5) of ADHD and Oppositional Defiant Disorder. S-37.
81. On August 8, 2017, the District invited the Parents to an IEP team meeting to revise the IEP based on the IEE. The Parents requested this meeting when sharing the IEE with the District. S-39.
82. The IEP team met on August 16, 2017. The District proposed revising the IEP to update the Student's present education levels. The District also proposed to change the Student's

⁶ The evaluator recommended changing the Student's eligibility category from ED to OHI while adding SLD and maintaining S/LI. My analysis concerning the Student's eligibility categories is below, and I give no deference to the evaluator's legal conclusions to the contrary.

program modifications and SDIs to include a special education reading program that was aligned with the recommendations in the IEE. The District issued a proposed IEP with these changes during the meeting. S-40.

83. The revised IEP included no changes to the Student's goals. S-40.
84. During the IEP team meeting, acting on the advice of their attorney, the Parents refused to consider any IEP that continued to label the Student as a child with ED, and refused to engage in any discussion about what programming the Student could receive in the District. Rather, the Parents were only willing to discuss tours of private schools. During the meeting, the Parents demanded a private placement, and then would not discuss anything other than placement in a private school, or tuition reimbursement. NT 1134-1137, 1251-1252, 1332-1335
85. The District offered the revised IEP via a NOREP on August 30, 2017. S-42.⁷

The 2017-18 School Year

86. The Parents enrolled the Student in a small, specialized school for college-bound children with learning differences for the 2017-18 school year (the Private School).
87. The Private School specializes in educating children with learning differences. Emotional support is embedded both in the Private School's curriculum and in the Private School's overarching pedagogical system. NT 347-349.
88. At the Private School, the Student receives a multisensory structured reading program that targets the particular deficits identified in the IEE. NT 365-366. The Student also receives small group instruction in core academics. *See, e.g.*, NT 366-367.
89. The Student has had no significant behavioral incidents at the Private School. *See, e.g.* NT 370-371.⁸

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

⁷ The District revised the IEP again to include a reading fluency goal and a writing goal. S-44. That revision was not proposed to the Parents via a NOREP until September 22, 2017. By that point in time, the Student was already attending the Private School. As such, the August revisions, not the September revisions, are the last program and placement offered before the Parents enrolled the Student in the private school.

⁸ There is some merit to the District's characterization of this testimony as hearsay. The testimony comes from the Private School's Director, who learned about the Student's behavioral presentation from the Student's teacher. However, the Director's general lack of knowledge of any significant behavioral episodes speaks volumes. Based on the Director's testimony as a whole, I conclude that if the Student engaged in violent, destructive behaviors at the Private School, the Director would have known.

determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, except as noted, all witnesses testified credibly. Witnesses were honest about the bases of their knowledge, explicit about what they could and could not recall, and answered questions to the best of their abilities. Broadly, their answers were consistent with contemporaneously-drafted documents.

Two witnesses did not testify credibly: both Parents. Neither parent acknowledged the frequency, severity, or dangerousness of the Student’s behaviors in general. To the extent that either could acknowledge the Student’s behaviors, their minimization of events diminished their credibility, as did their insistence that the Student’s behaviors were *only* triggered by reading tasks. Further, both parents indulged in overtly hyperbolic rhetoric to make points that were not supported by evidence. Both Parents were more interested in venting at the District and engaging in semantic debates than they were in providing clear answers to straightforward questions – particularly on cross examination. I have never faulted a parent for being emotional during a special education due process hearing, and I do not do so now. In this context, parental stoicism would be odd. Rather, there is a difference between emotionalism and outright evasiveness. Both Parents were excessively evasive. I give their testimony very little weight, relying upon it only when it is the best evidence available to me.

Applicable Legal Standards

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

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including

school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. This long-standing Third Circuit standard was recently confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

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

Historically the Third Circuit has 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).

Under the historical meaningful benefit standard, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “*de minimis*” benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). Nothing in the *Endrew F.* case changes that. Consequently, it is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics — as is clearly evident in this case.

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.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). That continuum must include “instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. § 300.115(b)(1); *see also* 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. *See* 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id.*

Compensatory Education

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

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

More recently, 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). These courts 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. This more nuanced approach 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 by 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 “same position” 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) may be warranted 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. *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 Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996).

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. 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.

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 in order 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).

Tuition Reimbursement

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

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. 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 reduce an award of tuition reimbursement, either in full or in part. *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

Special Education Eligibility Designation

The record establishes that the Student is a child with a SLD. My analysis reaching that conclusion is below, in the section discussing the Student's right to a FAPE during the 2016-17 school year. This section considers the appropriateness of the ED designation, as opposed to OHI, why the ED designation does not preclude an SLD designation in this case, and why both an ED and SLD designation are required for the Student.

The IDEA defines SLD as:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

34 C.F.R. § 300.8(c)(10)(i), (ii).

The basis of the SLD determination is discussed below, as is the impact of the District's failure to make that determination upon the Student's substantive right to a FAPE. Regarding eligibility criteria, however, the record suggests that the District was somewhat confused about whether a child can have both a SLD and an ED.

When learning problems are primarily the result of emotional disturbance, those problems are not a SLD by definition. In this case, the District's ED designation should not have precluded SLD. As discussed below, reading was a non-preferred activity for the Student. The Student's reaction to non-preferred activities was indicative of ED. However, the Student's reading deficits are learning problems that are *not* primarily the result of ED. If the Student engaged in behaviors that interfered with the District's delivery of reading instruction, then the Student's reading deficits would be attributable to the Student's behaviors, as opposed to a reading disability. The record establishes, however, that the Student was frequently amenable to reading instruction, especially after placement in the ES classroom. Consequently, the ED designation did not preclude an SLD designation.

In contrast, the Student's ED designation has been proper at all times. The IDEA defines an emotional disturbance as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- C. Inappropriate types of behavior or feelings under normal circumstances.
- D. A general pervasive mood of unhappiness or depression.
- E. A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

Given the parties' burdens, the District's ED designation is appropriate unless the Parents can prove otherwise. The Parents argue that the Student's problem behaviors always followed reading tasks (both assignments calling for the Student to read and reading instruction). The Parents point to this as evidence that the Student does not have an emotional disturbance. The record, however, does not support the Parents' contention, and the law does not support their argument.

The record establishes that reading tasks frequently preceded behavioral incidents, but I am cautious to not confuse correlation with causation. Moreover, the record also establishes both that reading tasks did not always trigger behavioral incidents, and non-preferred, non-reading tasks could also trigger behavioral incidents. As such, the record contradicts the Parents' argument. Reading did not always spark behaviors, and things other than reading could set off the Student.

Further, even if the record supported the Parents' argument that the Students' behaviors are only triggered by reading tasks, such facts would tend to support the District's position. Given the Student's reading disability and ADHD, it is easy to accept the Parents' argument that reading is a difficult, non-preferred activity for the Student. With that understanding, I will assume *arguendo* (and contrary to the record) that reading tasks are the only antecedent to the Student's negative behaviors. With these assumptions in place, the Student's response to a non-preferred activity (reading) is consistent with an ED designation. The Student exhibits inappropriate behaviors under normal circumstances (the presentation of a reading task in school). Those behaviors occurred over time, to a marked degree, and adversely affected the Student's educational performance.

Further, still with the same assumptions in place despite a contrary record, the Student's behaviors cannot be explained by an SLD designation alone. The Student's difficulty with reading can be explained by, and is consistent with, SLD. The Student's behaviors in response to non-preferred activities, be it reading or anything else, is not satisfactorily explained by SLD. Rather, SLD is a necessary but insufficient disability term to describe the Student. SLD describes the Student's reading difficulties. Something else is needed to describe how the Student responds to reading and other non-preferred activities.

The “something else” that is needed to capture the Student’s behaviors could either be ED or OHI. At first glance, OHI seems like the correct disability term because the definition includes ADHD. The IDEA defines OHI as follows:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or *attention deficit hyperactivity disorder*, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9) (emphasis added).

Upon closer scrutiny, the record compels the conclusion that OHI is an improper designation for the Student. Nothing in the record establishes that the Student has limited strength, vitality, or alertness. The Student’s behaviors are not properly described as a heightened alertness to environmental stimuli. Rather, they are properly described as inappropriate behavior under normal circumstances, over a long period of time and to a marked degree, that adversely affect the Student’s educational performance. The Student, therefore, is a child with both SLD and ED, but not OHI.

A substantial portion of the record concerns the Student’s behavior outside of school. It is an understatement to say that the parties describe and explain the Student’s out-of-school behavior differently. Both parties are correct that behavior across the home, school, and community environments is typically a factor in ED determinations. Behavior rating scales typically request ratings from multiple raters in part to enable comparison of behaviors across environments. Ultimately, however, my analysis of the Student’s proper disability designation depends on statutory definitions, not upon the practices of various educational and psychological disciplines (no matter how sound or well-reasoned those practices are). Nothing in the definition of ED or OHI requires a comparison of behaviors between the home, school, and community settings.

In sum, the record establishes both SLD and ED are proper disability designations for the Student. All of the Student’s evaluations and the reading goal in the Student’s first IEP clearly illustrate that the Student has a reading disability that is properly described as a SLD. The same evaluations, and the Student’s response to non-preferred activities (including reading) support the District’s ED designation.

Provision of FAPE – 2015-16 School Year

As noted above, 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). Said differently, 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 this case, the Student attended two schools in Kindergarten before enrolling in the District during the second half of the 2015-16 school year. The Student enrolled in February. The Parents requested an evaluation in March. The evaluation report was completed and presented to the parents on May 16, 2016. No evidence suggests that the District should have proposed an evaluation in the month before the Parents did. It was certainly reasonable to give the Student some time to adjust to the new school environment before proposing a special education evaluation. Schools can run afoul of the IDEA by ignoring red flags during an overly-prolonged adjustment period. In this case, the few weeks between the Student's enrollment and the start of the evaluation process was reasonable.

The evaluation concluding on May 16, 2016 was also appropriate. The evaluation's conclusions are wrong only with the benefit of 20/20 hindsight. At the time, all of the Student's areas of suspected disability were evaluated using procedures that satisfy all of the above-described procedural requirements. In substance, the evaluation was appropriate in regard to the Student's behaviors. Across multiple ratings and observations, the Student's behaviors were consistent with a child adjusting to a new school setting after multiple placements in rapid succession. The Student's behavioral presentation at the time of the May 2016 evaluation was quite different from the Student's behaviors during the 2016-17 school year. The May 2016's appropriateness is less obvious regarding reading. The District recognized the discrepancy between the Student's ability and achievement, but could not rule out a lack of consistent, appropriate reading instruction. At that point in time, the Student had received reading instruction in the District for a bit more than three months. The Student appeared to be working diligently through the District's reading program and appeared to be making progress through that program. The record, therefore, does not support a finding that the May 2016 evaluation was inappropriate at the time it was conducted.

In sum, the District was not required to initiate the evaluation process before March 2016. That is when the evaluation process started. The first evaluation report, completed in May 2016, was also appropriate at the time. For these reasons, the District did not violate the Student's rights during the 2015-16 school year.

Provision of FAPE – 2016-17 School Year

The Student's behaviors changed substantially during the 2016-17 school year. Those changes were evident almost immediately; they were documented as early as September 9, 2016. By the end of September, the Student had been referred for intervention. By October 3, 2016, the District had proposed another evaluation. The Parents provided consent immediately, and the evaluation was completed by October 19, 2016.

The October 2016 evaluation was appropriate in regard to its assessment of the Student's behaviors. As discussed above, the evaluation correctly determined that the Student is a child with an emotional disturbance and requires specially designed instruction to derive a meaningful educational benefit from school. Unfortunately, behaviors were the only domain that the District

assessed. By this point in time, the District had knowledge of the Student's reading ability and achievement from the prior evaluation, the results of regular education reading interventions from February 2016 through the end of the 2015-16 school year, and the Student's progress with regular education reading interventions during first few weeks of the 2016-17 school year. At this time, there was concern about the Student's reading abilities sufficient to warrant drafting a reading goal into the Student's IEP. Even so, the District maintained the position that the Student's reading deficits could be the result of a lack of consistent, appropriate reading instruction. I respectfully disagree because, by this point in time, the District had evaluative data and information about the Student's progress in its own reading programs.

To be clear, I do not suggest that additional reading assessments were needed just five months after the formal testing in May 2016. Rather, the October 2016 evaluation was an opportunity for the District to take information from the prior evaluation, combine that with information about the Student's progress after October 2016, and then make a determination about whether the Student required special education to address reading deficits. The District did not undertake this analysis, but rather relied on an out-of-date statement regarding the consistency of appropriate reading instruction. By that point in time, the District had enough information to conclude that the Student's ability to read was not in line with expectations based on the Student's age, grade, or intellectual ability (some conflicting statements from the Student's teacher notwithstanding).⁹ A deficit in basic phonological processes impeded the Student's reading, preventing the Student from mastering sight words and catching up with peers, despite superior intelligence. This is a hallmark of SLD.

For the foregoing reasons, the May 2016 evaluation did not assess the Student in all areas of suspected disability. This insufficiency resulted in a substantive denial of FAPE. The District set a reading goal in the Student's IEP, but provided no SDIs aimed to improve the Student's reading abilities. Moreover, the IEP goal targeted the Student's ability to read sight words. While recognizing sight words is an important skill, that skill is not aligned with the particular deficits identified in the May 2016 evaluation. Consequently, the Student's increased ability to read sight words provides no information about how the District's regular education interventions impacted upon the Student's reading deficits.

The District's failure to identify the Student's reading disability, and then offer special education to accommodate and remediate that disability, constitute a substantive denial of FAPE. Compensatory education is owed to remedy this denial. The challenge in this case is to determine what amount of compensatory education is owed.

The record establishes that even in the absence of specially designed instruction, the Student was still able to derive some benefit from regular education reading interventions.¹⁰ For example,

⁹ I do not doubt the evidence about the Student's level-to-level progress through the District's regular education reading curriculum. Rather, my concern is about the Student's actual ability to read in a global sense. The District's own testing and progress monitoring signaled that a serious reading evaluation was needed. That evaluation was not completed until the IEE was finished. The IEE, in turn, leaves very little doubt that the Student has a reading disability and requires SDI for reading remediation.

¹⁰ It is possible that the Student's progress with regular education reading interventions could yield a conclusion that the Student is a child with a reading disability, but not in need of SDI. Were that the case, the District's conclusion that the Student does not require special education reading interventions might have been valid. However, the

between April 2016 and October 2016, the Student moved through a level of the District's reading program and between November 2016 and May 2017, the Student moved another four levels in the District's reading program. Of course, the Student was still performing at a lower reading level than what was expected of children at the same age and grade and had not mastered the sight word reading goal. The IEE ultimately confirmed that the District's reading program was not targeting the Student's reading deficits. Looking to the IEE in this instance does not constitute Monday morning quarterbacking, as the IEE essentially fleshed out what the District should have expected based on its own evaluations seven months prior.

Similarly, as discussed below, the Student's behaviors improved significantly after the Student moved to the ES classroom. To whatever extent the Student's behaviors inhibited the Student's receipt of reading instruction before the move – regular or special education – the same cannot be said after the move. Generally, the Student could have received special education reading interventions from November 2016 through the end of the 2016-17 school year.

It is important to keep in mind that the 2016-17 school year was the Student's 1st grade year. During the early elementary years, children who do not have reading disabilities learn to read so that they can read to learn. Early identification of reading disabilities yields better outcomes. Even so, the record does not establish how the Student would be reading today were it not for the denial of FAPE, or what it will take to put the Student in that position now. Consequently, preponderant evidence was not presented to enable a *Reid* analysis. An hour-for-hour analysis is also extremely difficult in this case. It is not as if the Student's IEP called for a certain number of hours of reading interventions, and then the District failed to implement the IEP. Nothing in the record tells me how much, or what type, of special education in reading the Student should have had during the 2016-17 school year.

In stricter areas of the law, this lack of evidence could be construed as the Parents' failure to establish entitlement to a remedy after substantiating the District's violation. In special education jurisprudence, it is as if some amount of compensatory education is owed *per se* as an equitable remedy once parents establish a substantive denial of FAPE. *See, e.g. Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Even with a lack of evidence of how much compensatory education to award, case law compels me to award something.

With no better evidence, I can conclude only that the Student should have received special education reading interventions, received only regular education reading interventions, and those did not remediate the Student's reading deficits. Even so, as noted, the Student derived some benefit from the District's reading program. Consequently, I award one half hour (0.5 hours) of compensatory education for each hour that the Student received reading instruction from October 19, 2016 through the end of the 2016-17 school year. The order below explains how that compensatory education can be used.

District did not consider the Student's need for SDI in reading and did not make that part of the Student's IEP. Rather, the District relied exclusively on what it perceived to be a lack of consistent receipt of reading instruction.

The Parents' other claims concerning the 2016-17 school year are denied. The Parents attack the Student's IEP on several grounds, but two stand out: the objectivity of the Student's goals, and the restrictiveness of the Student's placement.

Regarding the objectivity of the Student's goals, the Parents highlight the fact that the goals are not baselined. Although this is true, the flaw is not fatal in this case. Establishing baselines for goals at the time IEPs are drafted enables IEP teams to assess the meaningfulness of the goals. Using arbitrary numbers, a goal calling for a student to get to level 10 means one thing if the student is at level 1 and something else if the student is at level 9.

In this case, the evaluations clearly indicated that the Student had significant difficulties in every domain targeted by a goal. For each goal, it was clear at the time the IEP was written that the Student had a long way to go. Also, since the IEP was the Student's first IEP, the Student's baseline levels with special education supports and services could not be known at the time the document was drafted. Of course, the District could have re-opened the IEP shortly after services started to add baselines based on initial data collection (the Parents make this argument). Instead, the District provided objective progress monitoring. This progress monitoring provided accurate information about the Student's performance, as a baseline would, and tracked the Student's performance over time. This data was sufficient for the District and Parents to know where the Student stood in relation to IEP goals, and so the lack of baselines in goals does not constitute a substantive denial of FAPE in this case.¹¹

Regarding the restrictiveness of the Student's placement, there is no dispute that the ES classroom is a more restrictive setting than the regular education classroom. The ES classroom was, however, an appropriate placement for the Student at the time it was offered.

There is no conflict between the FAPE and LRE obligations. LEAs are required to determine what special education services a child needs in order to receive a FAPE. In theory, for any child, that set of services could be provided in multiple placements. LEAs are obligated to offer the least restrictive placement of all of the placements in which the necessary services can be delivered. In doing so, LEAs are further obligated to consider what additional supports and services can be added to less restrictive placements to enable the child's receipt of FAPE in those placements.

This structure, however, does not create a situation in which children are forced to fail. An LEA must never offer an inappropriate placement simply because it is less restrictive than the placement a child needs. Not every placement can be rendered appropriate for every child, no matter how many additional supports are added. An LEA need not place a child into an inappropriate-but-less-restrictive setting only to collect evidence of the child's failure before offering an appropriate-but-more-restrictive setting. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

¹¹ The District should not take this as an invitation to forsake baseline data in IEPs generally. Under different, more common facts, failure to include baseline data that directly relates to IEP goals can result in a substantive denial of FAPE.

At the time that the IEP was drafted, the Student's behaviors were frequent, severe, and dangerous. Although technically outside of special education, the District had already added substantial supports and interventions to the Student's regular education setting. Those supports did not help. At the same time, the District correctly determined that the Student is a child with an emotional disturbance. The District also determined the type of special education supports that the Student needed. Only then did the District determine that the ES classroom was the place in which those services could be delivered. In sum, the ES classroom was the least restrictive environment in which the Student could receive the special education that the Student required.

The Parents' surprise and outrage at the sequence of events during the IEP team meeting only strengthen the District's arguments. The IEP team did not discuss placement until the end of a lengthy meeting. The majority of time was spent assessing what services the Student required. The District proposed the ES classroom only after the team reached a consensus about what services the Student needed. While the Parents may have felt blindsided, this sequence of events is consistent with the District's legal mandate.

An IEP's appropriateness is measured at the time it is offered. For this reason, my assessment is based on what was known about the Student at the time, and not the Student's actual progress in the ES classroom. Despite this, the dramatic improvement in the Student's behavior in the ES classroom, in comparison to the Student's behavior in the regular education classroom, is noteworthy. This is not to say that the ES placement miraculously solved all of the Student's problems. The Student still exhibited severe, dangerous behaviors, but the frequency decreased remarkably. Further, the Student's progress in the ES classroom is a factor in assessing the various IEP revisions that took place after the IEP was initially approved. Data available to the IEP team in December 2016, August 2017, and September 2017 indicated that the Student continued to require placement in the ES classroom in order to receive a FAPE.

In sum, the District failed to identify and program for the Student's reading disability during the 2016-17 school year. This constitutes a substantive denial of FAPE for which compensatory education is owed. I award one half hour of compensatory education for each hour that the Student received reading instruction during the 2016-17 school year. In all domains other than reading, including behavioral difficulties resulting from the Student's emotional disturbance, the District offered a special education program and placement that was reasonably calculated to provide a FAPE at the time it was offered.

IEE Reimbursement

The Parents are entitled to reimbursement for the June 2017 IEE. As discussed above, the District's evaluation failed to assess all of the Student's suspected areas of disability. For purposes of IEE reimbursement analysis, the District's evaluation is inappropriate for that reason. The IEE comprehensively assessed all areas of suspected disability, correcting the District's error. The Parents are entitled to reimbursement for that reason.

Reimbursement – Summer 2017

The Parents are entitled to tuition reimbursement for the summer program that the Student attended in 2017. The constellation of procedural errors that the District committed regarding ESY are tantamount to a substantive denial of FAPE. Here, the Parents' legal argument is rock solid. Pennsylvania regulations require expedited ESY determinations for children with emotional disturbances. 22 PA Code §14.132(d). The District missed statutory deadlines by several months, and then only offered ESY services in the vaguest terms. Ultimately, by the time the District agreed that the Student qualified for ESY services, the Parents had already enrolled the Student in the summer program. In that program, the Student had an opportunity to display appropriate behaviors in a highly structured setting with non-disabled peers. The Student also worked on reading skills.

In sum, the Parents selected an appropriate ESY placement while the District missed multiple deadlines and offered a placement in terms too vague for the Parents to seriously consider. Reimbursement is owed for these reasons.

Tuition Reimbursement – 2017-18 School Year

The Parents are owed tuition reimbursement for the 2017-18 school year, but that award is reduced based on equitable considerations.

The majority of this case focused on the Student's behaviors, and whether the District offered a program that was appropriate to accommodate and remediate those behaviors. The District accomplished that. The District correctly identified the Student as a child with an emotional disturbance, offered programming that was reasonably calculated to appropriately address the emotional disturbance, and offered the least restrictive placement in which those services could be delivered. That placement was restrictive on a *per se* basis, but not in relation to the Student's needs. If this case were about the Student's behaviors exclusively, the District would prevail. Rather, this case concerns the Student's education as a whole.

As discussed above, the Student has a reading disability. At the end of 1st grade, the Student's basic reading skills, reading comprehension skills, and reading fluency were all roughly one year below expectations. Broad reading and reading fluency were both more than one standard deviation from the mean on normative testing. The Student's reading comprehension and writing skills were roughly half a year below expectations as measured by grade equivalency, but both were within a standard deviation from the mean. These deficits were attributable to the Student's weaknesses in phonological memory and perception of symbol directionality. The IEE included recommendations to specifically target these weaknesses.

Despite the foregoing, the District has never recognized the Student as a child with SLD. That, by itself, would be a procedural failure. Once a student is found eligible for special education, the LEA must address all areas of need, regardless of the Student's eligibility category. In this case, the District's failure to recognize the Student's reading disability rendered the Student's IEP inappropriate.

The program offered by the District before the start of the 2017-18 school year is the IEP with the August 2017 revisions. Those revisions included special education reading and writing programs. Evidence suggests that those programs would have been appropriate. It is beyond strange, therefore, that the District did not draft goals that targeted the Student's reading deficits or tracked the offered reading programs. Continuation of a sight words goal has nothing to do with the development of the Student's phonemic awareness. In fact, one could reasonably expect the Student's sight word fluency to decrease in a phonics-based program, since the Student would be encouraged to sound out previously memorized words. As such, the District offered an appropriate reading program without offering appropriate reading goals. This renders the IEP inappropriate for purposes of a *Burlington-Carter* analysis.¹²

The District argues that the Private School is inappropriate. I respectfully disagree. The Private School would likely be considered inappropriate were it held to the same standard as the District. The Student has no IEP, and the Private School does not complete the same type of progress monitoring that the District would be obligated to provide. It is also true that the Student receives much less behavioral support than the Student would have received at the District. Even so, the small, controlled environment created by the Private School, in combination with the behavioral and emotional support services offered in the Private School, is somewhat analogous to the small, controlled environment created by the ES classroom. Although the Parents' testimony is not credible, and the Private School witness has limited direct contact with the Student, I accept the fact that the Student has not had a serious behavioral incident in school since entering the Private School. Moreover, the entire focus of the Private School is to provide the type of reading remediation programs recommended in the IEE. For purposes of the *Burlington-Carter* test, the Private School provides what the District did not: appropriate reading interventions.

For purposes of the *Burlington-Carter* test, the District's IEP was inappropriate and the Private School is appropriate. This brings us to equitable considerations, which favor a small reduction in tuition reimbursement.

The District highlights the Parents' revocation of consent to communicate with outside mental health agencies as an equitable consideration. That would certainly be a factor if the IEP failed to meet the Student's needs as a child with an emotional disturbance. But the IEP was appropriate in that regard. Consequently, the Parents' exercise of their right to revoke consent did not inhibit the District's ability to offer an IEP that appropriately addressed the Student behavioral and school-based mental health needs.

In contrast, the Parents' behavior during the August 2017 IEP meeting is a relevant equitable factor in this case. For that meeting, acting on the advice of their attorney, the Parents attended the meeting but refused to participate. The Parents were only willing to discuss placement in the Private School, or an agreement to fund the Private School's tuition. The Parents refused to

¹² It is unfortunate that the case law does not permit a subtler analysis. The first prong of the test requires me to make a binary determination of the IEP's appropriateness. Under the test, the IEP is either appropriate or not, and so a mostly-appropriate IEP fails. The Student's primary educational disability is the Student's emotional disturbance and its behavioral symptoms. The District offered an IEP that was reasonably calculated to address the Student's most significant, pressing needs. But the test does not take into account the proportional appropriateness of the IEP. If I could consider proportional appropriateness, the outcome of this case would likely be different.

discuss the modifications that the District proposed. Those modifications were based on the IEE and included the implementation of a special education reading program. The IEP's primary deficiency was its failure to include reading goals. The Parents' refusal to participate undoubtedly made it difficult for the District to develop reading goals. This does not excuse the District's failure to propose reading goals; it was obligated to propose an appropriate IEP regardless of parental cooperation. Nevertheless, there is a direct connection between the Parents' refusal to participate in an IEP team meeting to develop a reading program for the Student, and the IEPs ultimate failure to address the Student's reading needs.

Again, for purposes of the *Burlington-Carter* test, the IEP is inappropriate *only* for its failure to include reading goals. The District proposed an appropriate reading program during an IEP team meeting in which the Parents attended but refused to participate. That refusal, coupled with the Parents' determination to only discuss private placement and tuition reimbursement, inhibited the District's ability to offer an appropriate IEP. This constitutes a small but affirmative obstruction. The Parents' behavior, however, in no way abrogated the District's responsibility to offer an appropriate IEP. The District would have been obligated to offer an appropriate IEP even if the Parents did not attend the meeting.

The Parents' obstruction was small both in absolute terms, and relative to the District's obligations. Even so, it warrants a small, equitable reduction in tuition reimbursement. Consequently, I reduce the tuition reimbursement award by two percent (2%).

ORDER

Now, March 16, 2018, it is hereby **ORDERED** as follows:

1. The Student is properly identified as a child with an Emotional Disturbance and an Other Health Impairment.
2. This order does not preclude the Student's IEP team from identifying the Student with additional disability categories.
3. This order does not require the Student's IEP team to identify Emotional Disturbance and Other Health Impairment in perpetuity, should an evaluation in the future find that those categories no longer apply.
4. For reasons discussed above, the Student is awarded one half (0.5) hour of compensatory education for each hour that the District provided direct reading instruction, either individually or in a group, during the 2016-17 school year.
5. Compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that is intended to accommodate or remediate the Student's reading disability. The cost of such services, products, or devices shall not exceed the market rate within the District's geographic area.
6. If the Student returns to the District before the compensatory education is exhausted, any remaining compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP.
7. The Student may access compensatory education through high school graduation or the end of the school year in which the Student turns 21 years old. Any unused compensatory education is forfeited.

8. Upon receipt of invoices and any other documentation required by the District, the District shall reimburse the Parents for the cost of the June 2017 independent educational evaluation.
9. Upon receipt of invoices and any other documentation required by the District, the District shall reimburse the Parents for the cost of ninety-eight percent (98%) of the Private School's tuition incurred by the Parents during the 2017-18 school year. Tuition includes the cost of the Private School's academic program, and the cost of any fees or materials, including but not limited to books, that the Private School requires in order for the Student to participate in its academic program, less any scholarships or discounts. Tuition does not include the cost of uniforms, transportation, field trips, voluntary activity fees, and the like.

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

/s/ Brian Jason Ford
HEARING OFFICER