

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

## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 27445-22-23**

#### **CLOSED HEARING**

**Child's Name:**

Z.W.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for the Parents:**

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

06/10/2023

## Introduction

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing against the Student's local public school District (the District). The Parents allege that the District violated the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

The Parents raise different claims for seven different periods of time. The first of those is January 4, 2021 (two years prior to the Parent's complaint), through June 11, 2021 (the end of the 2020-21 school year). During this time, the Parents allege that the District violated the Student's right to a Free Appropriate Public Education (FAPE) to the point that full days (6.65 hours per school day) of compensatory are an appropriate remedy.

The second period is the summer of 2021. During that summer, the Parents allege that the Student was entitled to, but did not receive, Extended School Year (ESY) services. To remedy this violation, the Parents demand 720 minutes of compensatory education per week from June 28 through August 13, 2021.

The third period runs from August 31, 2021 (first day of the 2021-22 school year) through November 16, 2021 (the end of the first marking period of the 2021-22 school year). During this period, the parties worked with each other to resolve a dispute about the Student's school building placement. The District kept the Student in the Parents' preferred placement while agreeing to review data in the fall. Considering that agreement, the Parents seek only one hour of compensatory education per school day as a remedy for the lack of writing instruction.

The fourth period runs from November 17, 2021 (the start of the second marking period of the 2021-22 school year) through June 14, 2022 (the last day of the 2021-22 school year). The Parents allege that, by this point, the District understood the Student was not deriving a meaningful educational benefit from its program and did nothing to resolve the problem. The Parents demand full days of compensatory education for this period.

The fifth period is the summer of 2022. As in the prior summer, the Parents allege that the Student was entitled to ESY, that the District offered ESY, but that the District never provided ESY. They demand 720 minutes of compensatory education per week from June 20 through August 12, 2022.

The sixth period runs from August 29, 2022 (the first day of the 2022-23 school year) through October 24, 2022 (the last day of the Student's enrollment in the District). The Parents allege that the District's complete denial of FAPE resumed in the 2022-23 school year and demand full days of compensatory education during this time.

The seventh period begins on October 25, 2022, and is ongoing. The Parents enrolled the Student in a private school (the Private School) that serves students with disabilities like the Student's. The Student's first day at the Private School was October 25, 2022. From that date forward, the Parents demand tuition reimbursement.

As discussed below, I find in favor of the Parents and award all but ten days' worth of their demanded remedies.

### **Issues**

As detailed above, the issues presented are:

1. Is the Student entitled to full days of compensatory education from January 4, 2021, through June 11, 2021, to remedy a complete denial of FAPE?
2. Is the Student entitled to 720 minutes of compensatory education per week from June 28 through August 13, 2021, to remedy a limited denial of FAPE in the form of ESY services?
3. Is the Student entitled to one hour of compensatory education per school day from August 31, 2021, through November 16, 2021, to remedy a limited denial of FAPE in the form of denied writing instruction?
4. Is the Student entitled to full days of compensatory education from November 17, 2021, through June 14, 2022, to remedy a complete denial of FAPE?
5. Is the Student entitled to 720 minutes of compensatory education per week from June 20 through August 12, 2022, to remedy a limited denial of FAPE in the form of ESY services?
6. Is the Student entitled to full days of compensatory education from August 29, 2022, through October 24, 2022, to remedy a complete denial of FAPE?

7. Are the Parents entitled to reimbursement for the cost of the Student's tuition at the Private School?

### **Findings of Fact**

The parties filed 35 joint stipulations. Some of those are joint stipulations of fact and others are agreements to enter certain documents into evidence. I adopt the parties' factual stipulations as if they were my own findings. Both parties' attorneys are commended for their efficiency.

I have reviewed the record of this matter in its entirety. I make findings of fact, however, only as necessary to resolve the matter before me. I find as follows:

#### ***Pre-Enrollment Background***

1. The Student has been entitled to special education since 2016 upon qualifying for speech and language early intervention services. See *stip.* ¶ 1.
2. The 2018-19 school year was the Student's [redacted] year. See *stip.* ¶ 2.
3. The Student attended a charter school during the 2018-19 school year. See *stip.* ¶ 2.
4. The charter school, not the District, was the Student's Local Educational Agency (LEA) during the 2018-19 school year. *Passim.*
5. The charter school did not evaluate the Student to determine continued edibility for special education and did not provide special education to the Student during the 2018-19 school year. The Student received no special education during the 2018-19 school year. See *stip.* ¶ 3.

#### ***The 2019-20 School Year ([redacted])***

6. The Student enrolled in the District for the 2019-20 school year. *Stip.* ¶ 4.
7. The District became the Student's LEA upon enrollment. *Passim.*
8. The District assigned the Student to Elementary School B. *Stip.* ¶ 4.

9. The District reevaluated the Student. *Stip.* ¶ 4. The Parents requested this reevaluation due to concerns about the Student's academic progress. P-1.
10. On December 19, 2019, the District finished a reevaluation report (the 2019 RR). *Stip.* ¶ 4.
11. Through the 2019 RR, the District found that the Student qualified for special education with a primary disability of Specific Learning Disability in Mathematics and Basic Reading Skills and a secondary disability of Speech or Language Impairment. *Stip.* ¶ 4.
12. At the time of the 2019 RR, the Student could read independently at the beginning kindergarten level (DRA level A) and was found to be in the "Intensive Intervention Needed" range for reading. P-1, NT at 179.
13. The District's school psychologist found that the Student was "not able to use phonics to decode unknown words." She recommended, "[Student] is in need of an intensive approach to basic reading skills, which focuses on phonemic awareness, morphological awareness, and orthographic awareness, reading high-frequency words, spelling high-frequency words, and teaching vocabulary." P-1 at 28.
14. Standardized math testing found the Student was in the "Very Low" range (0.5 percentile on the KTEA-3). P-1.
15. Standardized writing testing found the Student was in the "Low" range (4<sup>th</sup> percentile on the KTEA-3). P-1.
16. On January 19, 2020, the Student's IEP team produced an Individualized Education Plan (IEP) for the Student (the 2020 IEP). *Stip.* ¶ 4.
17. The 2020 IEP provided for 90 minutes (1.5 hours) of Speech and Language Support per month and 450 minutes (7.5 hours) per week of Learning Support. *Stip.* ¶ 4.
18. Under the 2020 IEP, the Student received the Reading Mastery intervention program. Reading Mastery is a leveled program, and the Student was placed in level A, which roughly corresponds to the kindergarten level. NT at 181-182.

19. Under the 2020 IEP, the Student received the Connecting Math Concepts intervention program. The Student started at the first level of Connecting Math Concepts. NT at 183-184.
20. On March 13, 2020, the District physically closed in compliance with Governor Wolf's statewide school closure mandate. *Stip.* ¶ 5.<sup>1</sup>
21. I take judicial notice that the original school closure order was extended and, ultimately, all Pennsylvania schools remained physically closed through the end of the 2019-20 school year.
22. The record does not reveal a precise date but, at some point in the 2019-20 school year after the closure, the District began to provide online, remote instruction to all students. *Passim.*
23. Despite a concerning-but-understandable absence of data, I find that the Student had difficulty with and was sometimes frustrated by online, remote instruction during the 2019-20 school year. *See, e.g.* NT at 295-296.

### ***The 2020-21 School Year ([redacted])***

24. All students in the District began the 2020-2021 school year with virtual (remote) instruction. *Stip.* ¶ 6.
25. During the beginning of the 2020-2021 school year, the Parents voiced concerns about what they saw as the Student's inability to focus on the computer during instruction. *Stip* ¶ 7.
26. The Student was unable to navigate between remote classes. *Stip* ¶ 7.
27. In response to the Parents' concerns, the District proposed moving the Student into an intensive learning support classroom. *Stip* ¶ 7.
28. On November 10, 2020, the Student's IEP team revised the Student's IEP to reflect the intensive learning support placement (the 2020 Revised IEP). Time in Learning Support was increased from 450 minutes (7.5 hours) per week to 1,545 minutes (25.75 hours) per week of Learning Support a week. With this change, the Student would

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<sup>1</sup> In prior cases, I have taken judicial notice of the 2020 school closure mandate, but a stipulation works just as well. Schools were closed in an effort to combat the spread of COVID-19.

spend 5 hours and 15 minutes in the learning support classroom. *Stip* ¶ 8.

29. The Parents agreed to the 2020 Revised IEP. *Stip* ¶ 8.
30. The District implemented the 2020 Revised IEP remotely. *Passim*.
31. For both literacy and math instruction, the Student would go to a virtual breakout room with the special education teacher and a few other students. There, the Student would receive small group instruction. Then, the Student would return to the full virtual classroom and either work on skills instructed in the breakout room, or work on whatever lesson was presented to the full virtual classroom. An instructional assistant would monitor the student who went to the breakout room once they returned to the full virtual classroom. NT at 118-119, 123.
32. In addition to the special education programs, the District gave the Student independent work through the Lexia and iReady programs. See NT at 298.
33. Under the 2020 Revised IEP, the District used the iSpire program and a modified Haggerty program for special education literacy instruction. The District continued the Connecting Math Concepts program for special education math instruction. NT at 120, 123.
34. Given the amount of time that the Student spent in the intensive learning support class, the Student rarely received instruction in science or social studies. NT at 125.
35. On January 7, 2021, the Student's annual IEP team meeting convened. The District recommended continuation of Intensive Learning Support. The Parents agreed, and approved an IEP proposed by the District at that meeting (the 2021 IEP). *Stip* ¶ 9.
36. The 2020 Revised IEP contained two math goals. P-3 at 18, 20. There is no evidence that the Student mastered those goals.<sup>2</sup> Both of those

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<sup>2</sup> The first of the 2020 math goals called for the Student to demonstrate understanding of "the concepts of largest, smallest, most often, least often, and middle." P-3 at 18. The second 2020 math goal called for the Student to "demonstrate that mathematical operations can represent a variety of problem situations." P-3 at 20. The second math goal is better understood in light of its short term objectives, which include an objective for the Student to "describe the process of adding and subtracting ... [and using manipulatives for] joining and separating up to ten objects." P-3 at 20.

goals were removed in the 2021 IEP and replaced with one new math goal. The 2021 goal called for the Student to “demonstrate the concept of plus and take away to word problems and solve number sentences... .” The baseline for this goal was zero. P-4 at 17.

37. The 2020 Revised IEP contained one reading goal. There is no evidence that the Student mastered this goal.<sup>3</sup> That goal was removed in the 2021 IEP and replaced with one new reading goal. The 2021 goal called for the Student increase knowledge of sight words from a baseline of 24 words at the pre-primer level to 87 words at an unspecified level in 4 of 5 trials by January 2022. P-4 at 15.
38. The 2021 IEP included two speech and language goals: one for articulation and another for using complete sentences when sequencing events. P-4 at 23.
39. The 2021 IEP included specially designed instruction (SDI) both in the goals section and in its own section. Apart from SDIs related to the speech and language goals, all of these were generic and repeated each other (extended time, simplified directions, use of manipulatives, and the like). P-4.
40. In May 2021, the District permitted the Student to return to “in person, brick and mortar learning.” *Stip* ¶ 10. While the Student returned to school, much instruction was still provided via computer to enable children who did not or could not return to school to participate in the classroom. *Passim*.
41. In early June 2021, just before the end of the school year, the District informed the Parents that it was placing the Student at Elementary School C for the 2021-22 school year. *Stip*. ¶ 12. *See also*, NT at 305.
42. The Parents objected to the proposed building placement change. *Stip*. ¶ 12.
43. June 11, 2021, was the last day of the 2020-21 school year in the District. *Stip*. ¶ 11.
44. The District did not complete a year-end progress report for the Student. NT at 148.

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<sup>3</sup> Taken literally and as written (and as best as I can tell), the 2020 goal calls for the Student to identify 80% of **three** sight words at the **primer** level by January 2021. P-3 at 16. That would place the Student below the starting first grade level by the middle of the Student’s [school] year.



### ***Summer 2021 ([redacted])***

45. The District determined to change the Student's building placement because Elementary School B provides intensive learning support for children in grades K-2 while Elementary School C provides intensive learning support to children starting in [redacted] grade. *See stip.* ¶ 13.
46. On July 16, 2021, attorneys for both parties and the District's Special Education Director met by phone. *Stip.* ¶ 14. During that call, the Parents (via counsel) asked for the Student to receive a supplemental learning support program at Elementary School B. *Stip* ¶¶ 14, 15.
47. In the 2021 IEP, the District found that the Student was eligible for extended school year (ESY) services in the summer of 2021. The 2021 IEP provided 720 minutes per week of learning support between June 28 and August 13, 2021. During ESY, the Student was to work on a math goal and a literacy goal. P-4 at 27-28.
48. The District never contacted the Parents to make good on the ESY offered through the 2021 IEP. With no other option presented, the Parents enrolled the Student in the District summer school program that is available to all students. *See* NT 312. I find that the District offered but did not provide ESY services to the Student in the summer of 2021.
49. On August 27, 2021, the Student's IEP team reconvened. That Parent attended with a non-attorney advocate. The team discussed scheduling and programming for the 2021-2022 school year. *Stip* ¶ 16. Discussed below, the parties agreed to keep the Student at Elementary School B. *Passim.*

### ***The 2021-22 School Year ([redacted])***

50. August 31, 2021, was the first day of the 2021-22 school year in the District. *Stip* ¶ 17.
51. On August 31, 2021, the District proposed revisions to the Student's IEP. *Stip* ¶ 18.
52. On September 2, 2021, the Parents requested changes to the proposed IEP. *Stip* ¶ 18.

53. On September 10, 2021, the District proposed revisions to the IEP based on the Parents' feedback (the September 2021 IEP). See *stip.* ¶ 18. The District sent the IEP with a Notice of Recommended Educational Placement (NOREP). In this context, the NOREP is a form by which the Parents can approve the proposed IEP.
54. On September 10, 2021, the Parents approved the September 2021 IEP via the NOREP. *Stip* ¶ 18.
55. The September 2021 IEP provided 675 minutes per week of learning support (135 minutes a day, down from 1,545 minutes per week in the prior IEP). Speech and language therapy continued to be 90 minutes per month. The IEP added a 1:1 adult assistant. See *stip.* ¶ 19.
56. The literacy and math goals in the September 2021 IEP remained the same as in the prior IEP. A writing goal was added to September 2021 IEP. That goal is not baselined and nearly impossible to parse. It seems to contain a combination of multiple goals targeting multiple skills with no baseline and no clear metric for success (as written, the Student would achieve mastery either upon completion of one grammatically correct sentence in response to a prompt, or completion of a detailed explanation in response to a prompt while using a graphic organizer, or obtaining a score of 3 on the Pennsylvania Writing Rubric – none of those mean the same thing). P-10 at 20.
57. Under the September 2021 IEP, the Student received literacy instruction using the Reading Mastery program, which is the same program that the District provided for the Student during the 2019-20 school year ([redacted]). See, e.g. NT at 196.
58. A Reading Mastery placement test determined that the Student remained at the kindergarten level and had advanced approximately three months since the same test was administered in the 2019-20 school year ([redacted]). NT at 196.
59. Under the September 2021 IEP, the Student continued to receive math instruction using the Connecting Math Concepts program. The Student continued to receive instruction at the kindergarten level in this program. See NT at 200-201.
60. During the 2021-22 school year, the Student also continued to receive math instruction through the iReady program, which generated a report in November 2021, indicating that the Student needed improvement in all math domains. P-11.

61. On November 16, 2021, the District issued a first marking period report card for the Student. The Student received an A in Physical Education; Bs in Mathematics, Health, Visual Arts, and Digital Literacy and Technology; Cs in Reading, Oral Communication, Social Studies, and Science; and a D in Writing. The report card does not indicate whether the Student earned those grades with IEP supports. In the Writing section, the teacher wrote that the Student has trouble staying focused in group activities. P-12.
62. On November 22, 2021, the District issued an IEP progress report. The report included narrative feedback from teachers, but no progress data apart from data concerning the speech and language goals. The Reading, Writing, and Math goals were all "not introduced" at this time.<sup>4</sup>
63. The Writing goal was not introduced because the Student's teacher did not have access to the intervention materials. NT at 201-202.
64. In late November and early December 2021, the Student's special education teacher expressed concerns about the Student's unusual behavior in class. The Parent and the special education teacher were in frequent communication, and the Parent became concerned that the Student may have Autism. See NT 210, 320-321.
65. On December 8, 2021, the Student's IEP team reconvened. During this meeting, the Parents requested a reevaluation. *Stip ¶ 20*. No substantive changes were made to the September 2021 IEP at this time, but the IEP now specified that the Student would receive 1:1 support for 1,500 minutes per week (25 hours per week, 5 hours per day). *Stip ¶ 21*.
66. On December 16, 2021, the District issued a Permission to Reevaluate Consent Form (PTRE). On December 17, 2021, the Parents approved

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<sup>4</sup> The progress report contained several graphs. I give no weight to those graphs. At best, they indicate data collection towards prior, similar goals. The data for the first marking period of the 2021-22 school year is indicated by darkened circles on the X axis, consistent with the "not introduced" comments that one would expect to correlate with an absence of data. The graph for the writing goal, which was entirely new and "not introduced," is particularly concerning. The existence of prior data on the graph for writing goal is baffling, as are trend lines printed on all three academic goals that show a sharp upward trajectory derived from data that can best be described as three zeros. My impression is that the District's software automatically generated these graphs and forced their appearance on the document. That does not absolve the District for the absurdity of their inclusion.

the PTRE. The signed PTRE reflects that the Parents were seeking an Autism assessment as part of the reevaluation. *Stip ¶¶ 22, 23.*

67. On December 17, 2021, the District drafted a new, annual IEP for the Student. P-13. This IEP was not finalized until April 2022. *See below.*
68. The December 2021 IEP included notes on the Student's progress. Regarding reading, the District wrote: "[Student] currently identifies and reads at 3/4 trials weekly when averaged the following PP [pre-primer] sight words-can, cat, then, in, is, on, no, at, and call." P-13 at 9.
69. On the same document, regarding math, the District wrote: "[Student is] developing knowledge in number sense [and has an] emerging awareness of addition and subtraction concepts." P-13 at 9.
70. On the same document, regarding the Student's abilities more generally, the District wrote (P-13 at 11, emphasis added):

[Student] requires a constant review of previously learned skills to assure retention and functional usage of such. [Student] requires skill interventions to be broken down into small manageable tasks so that [Student] can find success and build upon [] strengths. **Instruction in both Reading and Math should begin at the most basic of letter recognition and sound equivalency as well as complete understanding and working knowledge of number sense.** Assignments in regular education involving embedded Reading or Math concepts should be modified/adapted and clearly explained criteria for completion.

71. Those comments were, generally, consistent with comments in prior IEPs. *Passim.*
72. Around this time, the Student reported physical and verbal abuse by the 1:1 aide.<sup>5</sup> The District removed the aide. NT at 273-274, 322, 324-325.

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<sup>5</sup> Nothing herein should be taken as a finding that the aide physically or verbally abused the Student. My finding only concerns what the Student reported. Claims of abuse fall miles outside of my jurisdiction.

73. On February 25, 2022, the District issued a reevaluation report (the February 2022 RR). Through the February 2022 RR, the District ruled out Autism but found that the Student continued to qualify for special education with a primary disability of Specific Learning Disability and a secondary disability of Speech or Language Impairment. *Stip.* ¶ 24.
74. The results of academic achievement testing in the February 2022 RR were substantively similar to results of testing in the 2019 RR. At the time of the 2022 RR, the District's psychologist included the same recommendations that were made in the 2019 RR (intensive, research-based, multisensory instruction to develop phonemic awareness, morphological awareness, orthographic awareness, and phonological processing skills in addition to reading and spelling high-frequency words). P-14 at 42-43.
75. The District's psychologist credibly testified that the Student's across-the-board very low or low scores on academic achievement testing were substantively similar to prior testing, which is consistent with the unchanged recommendations in contemporaneous documents. *See, e.g.* NT at 72, 75.
76. On March 10, 2022, the Parents requested an Independent Educational Evaluation (IEE) at the District's expense. *Stip.* ¶ 28.
77. On March 28, 2022, the IEP team reconvened. *Stip.* ¶ 25.
78. On April 4, 2022, the District provided an IEP progress monitoring report. Regarding the sight word reading goal, the Student was averaging 22 pre-primer words per probe. The teacher reported that the Student was not motivated, often had the camera off, was distracted, and "has work to do" if the Student was to master the goal. P-18 at 1.
79. Regarding the writing goal, objective data is hard to glean from the progress report as written. However, with the assistance of a "sight word wall" and reminders about punctuation, the Student was making "satisfactory" progress described as "60%." P-18 at 3. 60% of what is unknown, and cannot be derived from the goal itself, and was based *entirely on the teacher's judgement*. NT at 223-224. *See also*, P-10 at 20; *findings above*.
80. Regarding the math goal, the teacher marked the Student as "needs improvement" and repeated comments about the Student's motivation and distractibility. With assistance from Parents, the Student was

answering two or three out of 10 addition problems correctly per probe. P-18 at 5.

81. The April 2022 progress report also included progress data related to the Student's speech and language goals. P-18.
82. On April 17, 2022, the District issued a final IEP and NOREP (the April 2022 IEP). The IEP continued the same amount of learning support, speech and language therapy, and 1:1 adult assistant time as in the September 2021 IEP (from which the April 2022 IEP was derived). See *stip.* ¶ 26.
83. The April 2022 IEP included a sight word reading goal that was substantively similar to the reading goals in the prior IEPs. The goal was set at the kindergarten level. The baseline was zero, and mastery would be achieved when the Student could read 80% of eight words introduced in a week in four out of five trials by March 2023. As such, the Student would master the goal upon reading six or seven new kindergarten words in four of five trials at a point more than halfway through the Student's [school] year. P-16 at 19.
84. The April 2022 IEP replaced the writing goal with a different writing goal that called for the Student to write one, grammatically correct sentence in response to a prompt, using three of the Student's kindergarten sight words. The baseline was zero. Like the other goals, the Student was expected to accomplish this by March 2023, more than halfway through the Student's [school] year. P-16 at 21.
85. The April 2022 IEP included a new reading comprehension goal that called for the Student to correctly answer "WH" questions in response to a guided reading lesson. This goal called for the Student, who had not yet mastered kindergarten sight words and had negligible reading skills, to "read text using self-monitoring comprehension strategies." Mastery would be accomplished by answering 80% of "WH" questions correctly on four out of five probes. The Student's baseline was zero. P-16 at 23.
86. The April 2022 IEP replaced the prior math goal with a similar math goal. Now, the Student was to consistently demonstrate a basic understanding of math concepts like addition and subtraction. The Student was to demonstrate mastery by showing "a working and consistent understanding of this language [e.g. the concept of addition] as [the Student] completes addition and subtraction facts up to and including 10." P-16 at 25. The goal says nothing about how the

Student was to show understanding of math language and concepts, and the goal as written does not measure the Student's performance on math problems. The goal as written depends on an arbitrary and unexplained measure of the Student's ability to demonstrate an understanding of math concepts regardless of whether the Student is capable of arithmetic. *Id.*

87. The April 2022 IEP included a continuation of the speech articulation goal in prior IEPs. P-16 at 27.
88. Through the April 2022 IEP, the District again found the Student eligible for ESY in the summer of 2022. The District offered 810 hours of ESY per week from June 20 to August 12, 2022. P-16 at 33.
89. On May 4, 2022, the District granted the Parent's IEE request. *Stip.* ¶ 28.
90. June 14, 2022, was the District's last day of the 2021-22 school year in the District. *Stip.* ¶ 27.

***Summer 2022 ([redacted])***

91. As in the prior summer, despite finding the Student eligible for ESY and offering an ESY placement in the body of the April 2022 IEP, there is no evidence that the District sent anything to the Parents beyond the IEP itself. I find that the District offered but did not provide ESY services to the Student in the summer of 2022.
92. On June 29, 2022, an independent neuropsychologist (Independent Evaluator) completed the IEE and drafted a report. *See stip.* ¶ 29.
93. On August 17, 2022, the District and the Parents received a copy of the IEE report. *Stip.* ¶ 30.
94. The Independent Evaluator agreed with the District that the Student does not have autism or an intellectual disability. P-21.
95. Like the District's own evaluations, the Independent Evaluator found that the Student's academic achievement as measured through standardized tests was extremely poor, coming in between the <1<sup>st</sup> to 3<sup>rd</sup> percentile depending on the domain assessed. P-21.

96. The Independent Evaluator also found receptive and expressive speech and language difficulties, expressed in part by the Student's impaired ability to retrieve and recall known vocabulary words. P-21.
97. The Independent Evaluator recommended, among other things, a full-time learning support placement with intensive levels of special education instruction in all academics. The Independent Evaluator also recommended that speech and language strategies should be embedded into the Student's full-time program. P-21.
98. Like the District, the Independent Evaluator found that the Student lacked phonological awareness. This, in combination with the Student's other deficits – particularly in word retrieval – lead the Independent Evaluator to diagnose the Student with dyslexia. P-21. The District has never taken a position, let alone refuted, this diagnosis. *Passim*.
99. Consistent with the IEE report, the Independent Evaluator's credible and unrefuted testimony was that a comprehensive, wholistic approach is needed for the Student to derive a benefit from education. The Independent Evaluator's testimonial summary of her findings is unrefuted and well supported. I adopt it as a fact (NT at 545):

And so I think -- I thought then, and I continue to think now, that in addition to the instruction of reading decoding and the special education instruction in math and writing, [the Student] needed to be in a setting where it is modified all day long for people who have poor listening comprehension, who are virtually illiterate and who need everything broken down step-by-step.

100. On August 26, 2022, the District issued a new PTRE, seeking the Parents' consent to review the IEE report. *Stip.* ¶ 31.<sup>6</sup>

***The 2022-23 School Year ([redacted])***

101. August 29, 2022, was the first day of the 2022-23 school year in the District. *Stip.* ¶ 32.

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<sup>6</sup> The issue is not before me, but the District's issuance of a PTRE in response to receiving the IEE that it agreed to fund is concerning. LEAs need not formally seek parental consent to review documents provided by parents and must not use this procedure to delay the provision of a FAPE. The IDEA often requires parental consent before LEAs act on new information, but LEAs need not issue a PTRE to read what parents hand them. In this case, the District did not act on the IEE for over a month.



102. On September 23, 2022, the District issued a reevaluation report, incorporating the IEE (the September 2022 RR). See *stip.* ¶ 31.
103. Through the September 2022 RR, the District found (or agreed with the IEE) that the Student continued to have a Specific Learning Disability in Reading and Math, but also now in Writing. Speech or Language Impairment remained the Student's secondary disability. See *stip.* ¶ 31.
104. Now at the start of [redacted] grade, the Student's reading and math skills were still at the kindergarten level. P-25.
105. In October 2022, the Student's teacher wrote in a communications book that went back and forth from school to home that the Student was not focused and on the wrong page during a lesson. This concerned the Parent because the purpose of the 1:1 aide was to keep that from happening. The teacher explained that the event occurred while the aide was on a lunch break. Ultimately, the District changed the aide's schedule so that her break would not happen during the Student's instructional time. See, e.g. P-22.
106. The aide was informed of the schedule change during a school day. Upon returning to the classroom, the aide was "very, very upset" and acted inappropriately in front of the teacher and the Student. The teacher then called the Parent to tell the Parent what happened. In response, the Parent left work and picked the Student up at school. NT at 235, 335-336.
107. The next day, October 17, 2022, the Parent met with District personnel at the school. The parties agreed that the aide would no longer work with the Student and that the teacher would stay with the Student until a new aide was hired. Even so, when the Student returned to school, the Student saw the aide, felt sick, and went to the nurse's office and ultimately home for the day. NT at 237, 339, 724-725.
108. On October 19, 2022, the IEP team reconvened. The Independent Evaluator attended the meeting. The District offered an IEP that included 1,400 minutes per week of learning support (up from 675 minutes per week in the prior IEP). The October 2022 IEP continued to provide 90 minutes per month of speech and language therapy, and 1,500 minutes per week of adult 1:1 assistance. See *stip.* ¶ 33.

109. The October 2022 IEP referenced an unspecified “researched based phonics program.” P-26 at 19. The October 2022 IEP provided no other clue as to what that program might be, when or how it would be implemented, or whether the program was sequential, phonemic, multisensory, or teaches to automaticity. There is no reference to any such program in any other part of the IEP, and there is no SDI providing such a program. P-26.
110. The offhanded reference to a phonics program notwithstanding, the Student’s reading goal remained fundamentally unchanged. P-26 at 19. The October 2022 IEP also provide no information about how any type of phonics program will improve the Student’s ability to learn sight words. P-26. Discussed below, memorizing sight words and learning the ability to sound out words are different and sometimes competing processes and skills.
111. The writing goal also remained unchanged, still calling for the Student to use kindergarten sight words to write one sentence in response to a prompt. P-26 at 21.
112. The reading comprehension goal also remained substantively unchanged. P-26 at 24.
113. The math goal, although worded somewhat differently, remained substantively unchanged. P-26 at 27. A second, but nearly identical, math goal was added. P-26 at 29. A third math goal, calling for the Student to identify shapes was also added. P-26 at 31. Nothing in the IEP explains the inclusion of the shapes goal.
114. The Student’s speech articulation goal was continued, but nothing was added to address the receptive and expressive language concerns raised by the Independent Evaluator. P-26. Again, the District has never disputed the IEE’s findings.
115. During the IEP team meeting, the Parent told school personnel that the Student would not return to the school budling without a guarantee that the Student would not see the aide. When school personnel could provide no such guarantee, the Parent sent an email to the teacher saying that the Parent was removing the Student from school. See, e.g. NT 270, 341-342.
116. During the October 2022 IEP team meeting, the “school team told Parent ... that [the District was] offering the “intensive learning support” classroom at a different school.” *Stip.* ¶ 33.

117. On October 20, 2022, (the day after the IEP team meeting) the Parents applied for the Student's enrollment at a private school (the Private School). NT at 441. *See also stip.* ¶ 34.
118. On October 25, 2022, the Student began to attend the Private School. NT at 342.
119. The Private School is a small Quaker school that educates children with disabilities similar to the Student's disabilities. *Passim.*
120. While attending the Private School, the Student is grouped with six other students. NT at 442.
121. While attending the Private School, the Student receives 45 minutes per day of Orton-Gillingham based reading instruction with four other students. Orton-Gillingham is a sequenced, multisensory, systematic methodology of teaching reading by teaching phonics. *See* NT at 442-443.
122. Consistent with the IEE (and not inconsistent with the District's own assessments), the Private School found that the Student did not know all letters and, after placement testing, determined that the Student had little phonemic awareness. NT at 445, 448.
123. While at the Private School, the Student receives direct, explicit, sequenced, multisensory instruction with five or six other students in writing and reading comprehension. NT at 458.
124. While at the Private School, the Student receives direct math instruction using the Envision curriculum, which places an emphasis on physical manipulatives. NT at 459.
125. While at the Private School, the Student receives science and social studies instruction daily. NT at 459.
126. While at the Private School, the Student receives direct social skills instruction using Michelle Garcia Winter Social Thinking curriculum. NT at 460-461.
127. While at the Private School, the Student receives speech and language therapy from a certified speech and language therapist once per week. The therapist also pushes into the Student's classroom once per month. NT at 462.

128. On January 4, 2023, the Parents initiated this due process hearing by filing a due process complaint.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *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).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

### **Applicable Legal Principles**

#### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

## ***Free Appropriate Public Education (FAPE)***

The IDEA requires the states to provide a FAPE to all students who qualify for special education services. 20 U.S.C. § 1412. That burden falls to local education agencies, which must offer a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since 1982, when the Court decided *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

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

Third Circuit consistently interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision is no different.

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child’s circumstances to determine whether the LEA offered the child a FAPE.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

### ***Compensatory Education***

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

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

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the

position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

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

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or “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.*, 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). 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 establishing the position that the student would be in but for the denial, or evidence establishing the amount and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met. In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

### ***Tuition Reimbursement***

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

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.



## **Discussion**

### ***January 4, 2021, through June 11, 2021***

This was, without question, a remarkably challenge time for the Student, all the Student's teachers, and the District as a whole. There is no doubt in my mind that the Student's teachers did their very best to educate the Student remotely with the resources at their disposal. The difficulty of that task, however, neither abrogates the Student's right to a FAPE nor mitigates damages if the District violated that right.

By this point in time, the District had actual knowledge of how the Student struggled with remote instruction and had already increased the Student's time in Learning Support to 1,545 minutes per week. Unfortunately, while increasing the amount of time that the Student received special education, the District did nothing to make that instruction beneficial to the Student. It was simply more of what wasn't working. While the District may have had no other choice, the Student is at no fault for the lack of options.

Setting aside the problems of remote instruction, the January 7, 2021, IEP was inappropriate because was not reasonably calculated to provide a meaningful educational benefit at the time it was offered. The math goal, as written, is not objective or measurable. Starting from a baseline of zero (and with no data about how that baseline was derived), the Student was to demonstrate a conceptual understanding of addition and subtraction as used in word problems. The IEP does not explain how or why a Student with significant reading problems should have a math goal that primarily relies upon the Student's ability to read. Even if I were to assume that teachers or aides would read the math word problems to the Student, the IEP is silent as to how demonstrating a conceptual understanding of arithmetic would improve the Student's academic achievement in math.

Of even greater concern, even if I were to assume that improving the conceptual understanding of arithmetic would yield some meaningful educational benefit – perhaps a reasonable assumption – the IEP is silent about how the Student's conceptual understanding would be measured. Under the goal, the Student was to correctly complete word problems ("number sentences"). Successful completion of a word problem would show that the Student either read the word problem or heard the word problem read aloud, understood the math concept presented, and successfully did the arithmetic. Success, therefore, would establish understanding. But the process falls apart in reverse. Not reaching the correct result (a common outcome for the Student) could indicate anything from an inability to read the problem to a calculation error. Failure could have nothing to do with

understanding math concepts. There is nothing in the record of this case linking the math goal to the Student's math needs, the goal itself is not objective and, to the extent that the goal is measurable, the District's chosen method says little about the Student's progress towards the goal.

The Student's reading goal was also inappropriate. The goal called for the Student to correctly identify 87 of 100 sight words at an unspecified level on four of five trials. The IEP called for the Student to accomplish this by the middle of the Student's [school] year. At a time when most students shift from learning to read to reading to learn, the District's plan was to continue what wasn't working. This is like remote instruction but worse because evidence that the District's model – working on sight words under various curriculums – was contrary to the District's own assessments. At this time, the District had already found that the Student was "not able to use phonics to decode unknown words" and was "in need of an intensive approach to basic reading skills, which focuses on phonemic awareness, morphological awareness, and orthographic awareness, reading high-frequency words, spelling high-frequency words, and teaching vocabulary." To its credit, the District offered the iSpire and Haggerty programs, both of those have phonics components. But neither program was tied to the Student's IEP in any way, the Students' IEP goals had nothing to do with what those programs teach, and the District did nothing to systematically monitor and report the Student's progress.

In sum, the IEP in place from January 4, 2021, through June 11, 2021, was not reasonably calculated to provide a FAPE to the Student. The math goal was borderline nonsensical, not objective, not measurable, and not related to the Student's math needs. The reading goal was strikingly unambitious, calling for the Student to mostly master sight words (typically a kindergarten skill) by the middle of [redacted] grade. The reading goal was also unrelated to the Student's reading needs, which were well-known to the District by this time. Finally, although the District's hands were tied, remote instruction represented a continuation of an inappropriate placement in which the Student derived no educational benefit. The District had no plan to help the Student learn in that environment other than giving more of what had already failed. All of this represents a complete deprivation of the Student's right to a FAPE. I award full days of compensatory education for each day that the District was in session during this time. With no better evidence, I accept the Parents' representation that full days are 6.65 hours per day.

### ***Summer 2021***

There is no evidence in the record of this case that the District provided the ESY program that it promised in the Student's IEP. The District concluded

that the Student required 720 minutes per week of learning support between June 28 and August 13, 2021. The District offered that amount of ESY in the IEP. And then the District did nothing.

To be clear, I am not shifting the burden to the District. The Parents must prove what the District did not do. The Parents met this burden through testimony. Were there anything in the record to contradict the Parent's testimony, the outcome may be different. But when the only evidence of what a party did not do comes from unrefuted testimony, and when documentation of action should be readily available but is not entered into the record, testimony itself constitutes a preponderance.

The District's failure to implement the ESY portion of the Student's IEP resulted in substantive harm. The District determined that the Student required ESY to obtain a FAPE (as evidenced by inclusion of ESY in the IEP) and then failed to provide ESY. I award 720 minutes per week of compensatory education from June 28 and August 13, 2021.

***August 31, 2021 through November 16, 2021***

The Parents limit their demand for this period to one hour of compensatory education per week to remedy a lack of appropriate writing intervention. At this point, the Student could receive in person instruction at the District. The Parents acknowledge that the District proposed moving the Student to a different school that could provide a higher level of support. The Parents found the other school undesirable for reasons unrelated to the Student's special education rights. To avoid that result, the parties negotiated and decided to keep the Student at Elementary School B, collect data, and reconvene the IEP team in the fall.

Both parties had reason to hope that returning to in person instruction at the start of the 2021-22 school year would result in positive changes for the Student. Both parties were willing to reduce the amount of time that the Student spent in special education and return the Student to the same reading program implemented in 1<sup>st</sup> grade. The plan to take data and then reconvene was reasonable.

The Parents do not dispute the IEP's appropriateness for this period. Rather, the Parents argue that the writing portion of the IEP was not implemented. The record supports their argument. The District did not provide the writing program to the teacher, and so the teacher could not use it. The writing goal was, therefore, not introduced. This proves the alleged IEP implementation failure.

I award one hour of compensatory education per day that school was in session from August 31 through November 16, 2021.

***November 17, 2021, through June 14, 2022***

The Parents allege that the plan to collect data and reconvene the IEP team in the fall fell apart because the District did not collect data. The record proves that allegation in large part, but not completely. The District collected some data in the form of benchmark, placement, and curriculum-based testing. The District did not, however, collect data on IEP goals. But even the small amount of data initially collected revealed both the need for a robust evaluation and the inappropriateness of the Student's IEP. For example, the District learned early on that the Student had advanced only three months in reading over more than a year. The District learned this at the same time the Student was moving out of iSpire and Haggerty and back to the 1<sup>st</sup> grade reading program, while reducing the total amount of the Student's special education. That information was collected during the parties' wait and see agreement, but it was a clear call to action that was never taken.

By November 17, 2021, the District had actual knowledge that the portions of the IEP that it could implement were not beneficial to the Student, By the same time, the District also had actual knowledge that it was not implementing other portions of the IEP due to a lack of instructional materials. In response, the District reconvened the Student's IEP and issued a PTRE. Both of those actions were appropriate, but neither ended the District's ongoing, substantive violation of the Student's right to a FAPE.

The District reconvened the Student's IEP team before the new evaluation was complete and, under the circumstances, that choice made sense. The team, however, made no substantive changes to the IEP. Instead, the team noted that the Student's progress towards goals was negligible but maintained the same program at the same level. I do not fault the District for not making substantive changes before a new evaluation provided information about what changes were necessary. However, the District had actual knowledge that the Student was not receiving a FAPE earlier than November 17, 2021, and that violation continued. The District knew that the Student needed intensive intervention and remediation in every academic domain, and the Student had started showing behavioral symptoms by this point as well. The District knew that the Student's needs were unmet. Under the standards for compensatory education described above, full days of compensatory education begin to accrue at this point.

Between November 17, 2021 and April 17, 2022, the District completed a reevaluation report and agreed to the Parents' request for a District-funded

IEE. While these steps were necessary, the Student's program did not change, and so compensatory education continued to accrue.

On April 17, 2022, the District offered a new IEP after finishing its own reevaluation and issuing a fresh progress monitoring report. Considering the District's actual knowledge of the Student's needs, the resulting IEP is inappropriate.

Despite knowing that the Student required an intensive reading program that starts with letter/sound equivalency (knowing what sounds letters make, a prerequisite to phonics) the District's plan was to continue to work on kindergarten level sight words. Sight words, as the name implies, are not sounded out. Rather, the expectation is to see the word and know it automatically. For this Student, memorizing sight words (even if the Student was able to do so) is not the same as learning to read. The Student had no ability to sound out, let alone fluently read, unfamiliar words. The District had actual knowledge of what the Student needed and did not offer it. Instead, the District offered the same insultingly unambitious goal to be achieved through a proven-to-not-work program.

The writing, reading comprehension, and math goals were all inappropriate as well. While some of these were new in a literal sense, all represent a continuation of inappropriate, ineffectual programs that were, at best, only tangentially related to the Student's needs. These goals, along with the reading goal, are broadline arbitrary and not objective.

Compounding the problem, the IEP leaves us guessing how the Student would make even the small amount of progress these goals anticipate. SDI and program modifications constitute the special education that the District would provide to the Student to enable the Student to obtain IEP goals. Very little in the SDI or program modifications in the April 2022 IEP explains what the District would do to enable the Student to achieve IEP goals.

The April 2022 IEP was entirely inappropriate, and so the FAPE violation continued through the end of the 2021-22 school year. The Student did not derive a meaningful benefit from the District's education at this time. The IEP was not reasonably calculated to provide a FAPE at the time it was offered, given the District's actual knowledge of the Student's significant needs. The Parents have more than met their burden. As a remedy, I award full days (6.65 hours per day) of compensatory education for each day that the District was in session from November 17, 2021, through June 14, 2022.

***Summer 2022***

My analysis for the summer of 2022 is identical to the summer of 2021. I find the same violation and award 720 minutes per week of compensatory education from June 20, 2022, through August 12, 2022.

***August 29, 2022, through October 24, 2022***

While I ultimately agree that the District violated the Student's right to a FAPE during this time, I dismiss two of the Parents' claims:

First, the Parents argue that maintaining the Student's placement was inappropriate because the District could not guarantee that the Student would not encounter the former aide in Elementary School B. I do not consider this claim for two reasons. First, the District took immediate action to separate the Student and the aide upon hearing the Student and Parents' report of inappropriate conduct, but the District's building-level staffing decisions do not fall within my jurisdiction. Second, the District proposed moving the Student out of Elementary School B so that it could provide intensive learning support. While the District's proposal was inappropriate for many other reasons, the proposal would have placed the Student and the aide in different school buildings.

Second, for this period, I dismiss all claims concerning the District's proposal to move the Student from Elementary School B to Elementary School C or any other school building. It is well established that school districts may use a centers-based model for special education and need not replicate every service in every building. *See, e.g. Lebron v. N. Penn Sch. Dist.*, 769 F. Supp. 2d 788, 800-01 (E.D. Pa. 2011). This principle does not permit schools to skirt LRE obligations or ignore the mandates of *Oberti, supra*. Rather, there is no preponderant evidence in the record to support an IDEA claim based on building selection, to whatever extent that claim is raised. *See also P.V. v. Sch. Dist.*, No. 2:11-cv-04027, 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. Feb. 19, 2013).

I find that the District violated the Student's right to a FAPE during this period for several other reasons:

Before the start of the 2022-23 school year, the District received the IEE. Instead of acting immediately, the District issued a PTRE three days before school started, asking for the Parents' consent to read what the Parents gave them. Then, nearly a month passed before the District issued a new "reevaluation" that incorporated, but in no way refuted, the IEE. By this point, there can be no serious dispute that the District had actual knowledge of the Student's dyslexia and the Student's lack of progress since enrollment

over three years prior. The call to action was urgent, but the District waited nearly another month before convening the IEP team.

Regarding the dyslexia diagnosis, the IDEA recognizes the category of Specific Learning Disability (SLD). Neither the IDEA nor Pennsylvania law has a separate category for dyslexia. A child with dyslexia typically falls into the SLD category, which may become the basis of the child's eligibility. At that point, the LEA's obligation is to offer a FAPE to a child with SDL and the LEA need not list dyslexia as the basis of the child's eligibility. This in no way permits the LEA to ignore the child's needs. The LEA is obligated to offer programming reasonably calculated to provide a FAPE and that calculation is based on the child's needs. *See Andrew, supra*. Not all reading deficits are the result of dyslexia and not all reading interventions are the same. When a child's special education needs flow from dyslexia such that specific deficit areas must be targeted to teach the child to read, the District must provide special education to target those deficits.

In this case, the Student's dyslexia diagnosis came as part of an IEE that also included a comprehensive assessment and analysis of what the District must do to remediate the Student's deficits and teach the Student to read. The District has never refuted those findings or disagreed with the IEE's recommendations. In fact, the IEE's findings and recommendations are consistent with the District's own findings and recommendations. That consistency makes the October 2022 IEP somewhat baffling.

The resulting October 2022 IEP was different from the April 2022 IEP in two important ways: it increased the Student's time in learning support back up to what the District describes as "intensive" (1,400 minutes per week) and added a "research based phonics program." Unfortunately, despite these positive changes, the IEP remained inappropriate.

The Student absolutely needed a research-based phonics program. Writing those words into one sentence of one goal in the October 2022 IEP falls well short of the mark. The SDI – the special education that the District would provide – does not contain a phonics program or anything else that is designed to target the reading needs identified in the IEE or in the District's own assessments. Moreover, those words appear in a goal that has nothing to do with the acquisition of phonics skills or the remediation of the Student's individual reading deficits that comprise the Student's SLD (dyslexia by another name).

The reading goal continued to focus on word recognition, which is the opposite of what phonics programs target. Phonics-based programs teach students how to sound out words part by part. The Student's reading goal

continued to call for whole-word automatic recognition (in substance if not in form). Even if the District had offered a robust phonics-based program, there was no related goal in the IEP. While the wording changed, the inappropriate substance remained the same.

The same is true for the other goals as well. The Student's IEPs, including the October 2022 IEP, are examples of the tyranny of low expectations. By the time of the October 2022 IEP, the District was projecting that the Student would not master all kindergarten skills by the end of [redacted] grade. The October 2022 IEP is nothing more than an offer of a larger amount of a failed program; a repetition in substance of goals that are absurdly low when viewed in isolation, disconnected from the Student's needs when viewed holistically, and presented as part of a package that says almost nothing about what special education the District would provide to enable the Student to achieve anything at all.

Like the April 2022 IEP, the October 2022 IEP was entirely inappropriate. The Parents, again, have more than met their burden. As a remedy, I award full days (6.65 hours per day) of compensatory education for each day that the District was in session from August 29, 2022, through October 24, 2022.

### ***Restrictions and Limitations on Compensatory Education***

The Parents may decide how the compensatory education is used. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

Should the Student return to the District for programming before compensatory education is depleted, compensatory education shall be used in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress.

Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until the end of the school year in which the Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents.



The cost of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the District is located.

### ***Tuition Reimbursement***

The three-part *Burlington-Carter* tuition reimbursement analysis in this case is straightforward. The first prong of that test requires me to determine if the District offered a FAPE to the Student before the Parents' unilateral placement. Above, I find that the District violated the Student's right to a FAPE for years. The District offered an IEP just prior to the Private School placement that changed almost nothing in substance. The analysis above answers the first *Burlington-Carter* question: the District did not offer an appropriate placement for the Student.

The second prong of the *Burlington-Carter* test requires me to determine if the Private School is an appropriate placement for the Student. I note that "appropriate" in this context is not the same as in the IEP analysis context. For example, the District's LRE obligation is inapposite. Every private school is more restrictive than every Student's neighborhood school *per se*. If LRE were the deciding factor, there could never be tuition reimbursement.

I find that the Private School is appropriate for the Student. At the Private School, the Student receives intervention that is directly linked to the Student's well-established needs. Substantively, the Private School is providing the program that the District failed to offer: an intensive, phonics-based reading program and a math program targeting math skills. At the same time, the Private School keeps other important programs in place and even enhances some of them (e.g. speech and language therapy and social skills). The Parents have met their burden to prove that the Private School is appropriate.

The final part of the *Burlington-Carter* test is a balancing of the equities. The District argues that equities require a reduction or elimination of tuition reimbursement because the Parents failed to give the District notice before enrolling the Student in the Private School.

The IDEA includes a ten business day notice provision at 34 C.F.R. § 300.148(d)(1)(ii). Under that regulation, the "cost of reimbursement ... may be reduced or denied [if] [a]t least ten (10) business days ... prior to the removal of the child from the public school, the parents did not give written notice" of their intent to privately place the student and seek reimbursement.

The regulation goes on to provide three circumstances under which the hearing officer “must not” reduce or eliminate tuition reimbursement even when parents do not provide notice. 34 C.F.R. § 300.148(e)(1). None of those apply in this case.

The regulation also goes on to provide two circumstances under which tuition reimbursement “[m]ay, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice.” 34 C.F.R. § 300.148(e)(2). One of those circumstances concerns the Parents’ literacy and is not applicable here. The other is that providing notice would result in “serious emotional harm to the child.” § 300.148(e)(2)(ii). Even if I were to assume that seeing the aide again would result in serious emotional harm to the child, the District proposed a building change. Further, nothing in the record ties the notice itself to any harm to the Student.

Despite the conditions and exceptions, the top-level rule permits hearing officer discretion. Tuition reimbursement “*may* be reduced or denied” when parents fail to provide notice. Reduction or denial for improper notice is never mandatory. Further, the purpose of the notice provision is to give the District a window to offer an appropriate IEP. Such an offer not only protects the child’s rights, but kills a reimbursement claim at prong one of the *Burlington-Carter* test.

Applied to this case, I find that the Parents did not provide a 10-day notice before placing the Student in the Private School. The Parents expressed dissatisfaction with the October 2022 IEP, but the District issued that IEP less than 10 days before the Student started at the Private School. The Parents also told the District that the Student would not return to school until the District could guarantee that the Student would not see the aide. That statement did not place the District on notice that the Parents would enroll the Student in a private school and then seek reimbursement.

I weigh the Parents’ failure to provide notice to the District against the denial of FAPE that the Student suffered in the District for years and the inappropriate IEP that the District offered prior to the Student’s removal. I consider that the District’s last offer was broadly inappropriate, despite comprehensive, actual knowledge of the Student’s needs. Considering these factors, I conclude that it is equitable to reduce the tuition reimbursement award by 10 days. The District must reimburse the Parents for the cost of the Student’s tuition at the Private School on a pro rata bases. The District’s total reimbursement must equal the entire amount of tuition from October 25, 2022, through the end of the 2022-2023 school year, less 10 days.

Also, while it is well established that the tuition reimbursement order makes the Private School the Student's pendent placement, the circumstances of this case warrant an explicit pendency order. As an exercise of my equitable authority (*see Ferren C., supra*), pendency attaches to the Private School.

### **Summary and Legal Conclusions**

The record of this matter preponderantly establishes that the District violated the Student's right to a FAPE in fundamental ways for several years. Those years break down into discrete time periods, as described above. All denials of FAPE discussed above are substantive and resulted in educational harms. I award compensatory education to remediate those harms in the following amounts:

For January 4, 2021, through June 11, 2021, I award a full day of compensatory education for each day that school was in session as a remedy for a pervasive denial of FAPE during this time. I accept the Parents' contention that a full day is 6.65 hours per day.

For June 28, 2021, through August 13, 2021, I award 720 minutes of compensatory education per week as a remedy for the District's failure to implement the ESY portion of the Student's IEP.

For August 31, 2021, through November 16, 2021, I award one hour per day of compensatory education for each day that school was in session as a remedy for the District's failure to implement the writing portion of the Student's IEP. This award reflects the parties agreement during this period, as described above.

For November 17, 2021, though June 14, 2022, I award a full day of compensatory education for each day that school was in session as a remedy for a pervasive denial of FAPE during this time. I accept the Parents' contention that a full day is 6.65 hours per day.

For June 20, 2022, through August 12, 2022, I award 720 minutes of compensatory education per week as a remedy for the District's failure to implement the ESY portion of the Student's IEP.

August 29, 2022, through October 24, 2022, I award a full day of compensatory education for each day that school was in session as a remedy for a pervasive denial of FAPE during this time. I accept the Parents' contention that a full day is 6.65 hours per day.

All compensatory education awarded herein is subject to the restrictions and limitations set forth above.

The Parents' compensatory education claim ends on October 25, 2022, upon the Student's enrollment in the Private School. Under the first two parts of the *Burlington-Carter* test, the District failed to offer an appropriate placement prior to the Student's removal and the Private School is appropriate for the Student. The Parents are, therefore, entitled to tuition reimbursement. The third part of the *Burlington-Carter* test, however, calls for a reduction of tuition reimbursement if equitable factors so require. A ten-day pre-placement notice to the District one of those equitable factors. I agree with the District that the Parents did not provide such notice. Under the circumstances of this case, I find it equitable to reduce the tuition reimbursement award by ten days.

Finally, in an exercise of my discretion and power to craft equitable remedies, I order what case law requires: The Private School is now the Student's pendent placement.

### **ORDER**

Now, July 10, 2023, it is hereby **ORDERED** as follows:

1. To remedy denials of FAPE occurring during various time periods between January 4, 2021 and October 24, 2022, the Student is awarded compensatory education in the amounts and with the restrictions and conditions set forth in the accompanying Decision.
2. The District shall reimburse the Parents for the cost of the Student's tuition at the Private School on a pro rata bases equaling the entire amount of tuition from October 25, 2022, through the end of the 2022-2023 school year, less 10 days.
3. In the event of future disputes, the Private School shall be the Student's pendent placement unless the parties agree otherwise in writing.

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

/s/ Brian Jason Ford  
HEARING OFFICER