

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. 28358-23-24

CLOSED HEARING

Child's Name:

J.C.

Date of Birth:

[redacted]

Parents:

[redacted]

[redacted]

Counsel for Parent:

Mark W. Voigt, Esquire
600 W. Germantown Pike, Suite 400
Plymouth Meeting, PA 19462

Local Education Agency:

Marple Newtown School District
40 Media Line Road
Newtown Square, PA 19073

Counsel for the LEA:

Gabrielle C. Sereni, Esquire
32 Regency Plaza
Glen Mills, PA 19342

Hearing Officer:

Brian Jason Ford

Date of Decision:

02/09/2024

Introduction

This special education due process hearing concerns a child with disabilities (the Student). The Student's educational disabilities are, at least in part, related to a genetic condition. The Student has been identified with different categories of disabilities over time, as discussed below.

The Student's public school district (the District) is located within an Intermediate Unit (IU). The IU operates a hearing support classroom that is housed within a neighboring school district. During the 2020-21 and 2021-22 school years, the District placed the Student in the IU's classroom within the neighboring school district. For a portion of that time, the schools were closed because of the COVID-19 pandemic. When schools reopened, the Student received more instruction in school but, unfortunately, made little progress in reading. During the 2021-22 school year, the gap between the Student's reading ability and that of peers (including other children with hearing impairments) became apparent. The District then proposed moving the Student to a learning support program within the District.¹

As the 2022-23 school year was starting, the Student's parent (the Parent) concluded that the District's program would not provide a free, appropriate public education (FAPE) to the Student. The Parent then placed the Student into a private school that specializes in teaching children with language-based educational disabilities (the Private School). The Student attended the Private School during the 2022-23 school year.

On July 28, 2023, the Parent requested this due process hearing. The Parent alleges that the District violated the Student's right to a FAPE during the 2021-22 school year and demands compensatory education as a remedy. The Parent also demands reimbursement for the Student's placement at the Private School for the 2022-23 and 2023-24 school years. The Parent also alleges that the District failed to provide appropriate extended school year (ESY) services to the Student in the summers of 2021 and 2022, and demands additional compensatory education for those periods. The Parent also demands reimbursement for a private evaluation obtained during the 2022-23 school year.

As discussed herein, I find in part for the Parent and in part for the District.

¹ Discussed herein, a portion of the dispute concerns the method by which the District effectuated that change.

Issues

The following issues were presented for adjudication:

1. Is the Student entitled to compensatory education to remedy the District's violation of the Student's right to a FAPE during the summer of 2021?
2. Is the Student entitled to compensatory education to remedy the District's violation of the Student's right to a FAPE during the 2021-22 school year?
3. Is the Student entitled to compensatory education to remedy the District's violation of the Student's right to a FAPE during the summer of 2022?
4. Is the Parent entitled to reimbursement for the Student's placement at the Private School during the 2022-23 school year?
5. Is the Parent entitled to reimbursement for a private evaluation obtained during the 2022-23 school year?
6. Is the Parent entitled to reimbursement for the Student's placement at the Private School during the 2023-24 school year?

Findings of Fact

Background

1. There is no dispute that the Student is a child with a disability and that the District is the Student's local educational agency (LEA) as those terms are defined by the IDEA.
2. The Student has a genetic condition that is associated with multiple symptoms that may have educational implications. The record establishes that the Student has right sided hearing loss and [redacted], and that the Student's hearing difficulties are associated with the Student's genetic condition. P-25.
3. The Student has several learning disabilities. P-25, P-33. The record does not establish whether the Student's learning disabilities are a

function of the Student's genetic condition.² The Student's learning disabilities as recognized by the District changed over time, as indicated below.

The 2020-21 School Year [redacted]³

4. During the 2020-21 school year, the Student attended a full-day [redacted] program. The Student attended a program for students who are deaf or hard of hearing. That program was run by the Intermediate Unit (IU) in which the District is located and housed in a neighboring school district. See P-2.⁴
5. As a result of the COVID-19 pandemic, the Student's [redacted] program ran virtually from the start of the 2020-21 school year through October 2020. After that, portions of the Student's program were held in person and other portions continued to run remotely. See P-2; NT at 42.
6. During the 2020-21 school year, the Parent asked the District to provide 1:1 support for the Student. The District declined. Also during the 2020-21 school year, the Parent obtained six hours per week of private tutoring for the Student. P-2, NT at 41, 46.
7. On December 10, 2020, The Parent obtained a private evaluation of the Student (the 2020 Private Evaluation). The Private Evaluator found deficits in phonological processing and phonemic awareness and determined that the "[Student's] pattern of deficits is consistent with what is commonly seen in children with developmental reading disorders, such as dyslexia. Further, developmental reading disorders are common in children with [the child's] particular genetic condition." P-1.
8. The 2020 Private Evaluation included several recommendations:
 - a. Placement in a "co-teaching classroom" and that a teacher of the deaf should be a member of the Student's IEP team.

² The cause of the Student's disabilities has little relevance and is in no way outcome determinative. Discussed below, the IDEA requires the District to offer appropriate programming relative to the Student's abilities and needs, regardless of the source of the Student's disabilities. At the same time, the District can only provide programming based on what it knows (or should know). The extent to which the Parent shared information about the Student's genetic condition is discussed below.

³ No claims or demands are presented concerning the 2020-21 school year.

⁴ The location of the Student's [redacted] program does not alter the District's LEA status.

- b. Group counseling and/or Speech/Language Therapy to address the Student's ability to maintain conversations and cope with anxiety.
 - c. Specialized reading instruction using Orton-Gillingham methodologies (Lindamood Bell, Wilson, and Barton Reading were provided as examples).⁵
 - d. Several recommended accommodations. Some of those are simply good teaching practices. Others are recommendations about how to orient the Student to the teacher, and how to reduce the Student's anxiety (e.g. scheduling consistency, multi-modal instruction, teacher facing the Student, etc.)
9. The 2020 Private Evaluation did not conclude that the Student was a child with a specific learning disability in reading. Rather, the 2020 Private Evaluation recommended monitoring the Student's progress over time and increasing supports if needed. P-1.
10. The Parent shared the 2020 Private Evaluation with the District, prompting the District to conduct its own evaluation both to gain more information and to incorporate the 2020 Private Evaluation. P-2.
11. On May 18, 2021, the District completed its own reevaluation and issued a Reevaluation Report (the 2021 RR). P-3.
12. Through the 2021 RR, the District concluded that the Student qualified for special education as a child with a Hearing Impairment. The District did not find that the Student had any other educational disability. P-3 at 38.
13. Although Hearing Impairment was the only disability found in the 2021 RR, the 2021 RR included a comprehensive records review (including the 2020 Private Evaluation) and a broad range of testing (including testing from multiple related service providers). As a result, the 2021 RR found a wide array of the Student's strengths and needs and provided recommendations for academics (reading, writing, and math), audiological recommendations, occupational therapy (OT) recommendations, physical therapy (PT) recommendations, speech

⁵ Orton-Gillingham describes a methodology for teaching reading that has been proven effective for many students with reading disabilities. Orton-Gillingham is a multisensory, phonics-based approach to reading. Orton-Gillingham is not a reading curriculum itself, but forms the basis of several reading programs including Wilson Reading.

therapy (ST) recommendations, and social/emotional recommendations. P-3 at 38-40.

14. Regarding reading, the 2021 RR found that the Student was not making progress commensurate with peers. As the complexity of reading assignments increased (relative to a [grade] level), “despite interventions, [Student’s] scores on the benchmark assessment continued to drop.” P-3 at 12-13, 39. Those interventions included “daily opportunities for instruction and practice using phonemic awareness and phonics skills to guide reading success ... language and vocabulary are taught and supported in the small group setting ... [and] regular practice with sight word reading at school and ... at home.” P-3 at 39.
15. Regarding writing, the 2021 RR found that the Student’s writing abilities had improved through implementation of the District’s writing curriculum throughout the school year. P-3.
16. Regarding math, the 2021 RR found that math was a strength for the Student. Despite a single, lower test result, the Student consistently demonstrated grade and age-appropriate math skills. P-3.
17. Regarding the audiological recommendations, the 2021 RR found that the Student would benefit from continued use of a personal amplifier. P-3.
18. Regarding OT, small group work to improve visual motor skills, fine motor skills, and manual dexterity was recommended. P-3.
19. Regarding PT, continued services were recommended to address coordination, balance, strength, and functional mobility. P-3.
20. Regarding ST, continued interventions to address accurate production of certain letter sounds was recommended. P-3.
21. Regarding social and emotional recommendations, the 2021 RR found that the Student “should continue to receive social emotional support and skill development regularly through work with the School Psychologist.”
22. On June 6, 2021, the District convened the Student’s IEP team and drafted an IEP (the 2021 IEP). P-6.
23. The 2021 IEP included seven goals (P-6):

- a. A ST goal targeting the Student's production of the /l/ sound.
 - b. A PT goal targeting gross motor skills.
 - c. An OT goal targeting fine motor skills.
 - d. An auditory comprehension goal calling for the Student to correctly respond to "WH-" questions after hearing a passage read aloud.
 - e. A reading goal targeting phonics-based decoding skills.
 - f. A spelling goal.
 - g. A reading goal targeting sight words.⁶
24. The 2021 IEP anticipated the possibility that schools would close in response to COVID-19. As such, it included modifications and specially designed instruction (SDI) to be implemented in school and SDI that would be implemented if schools went back to virtual or hybrid programs (called "flexible learning options" in the 2021 IEP). See P-6 at 47.
25. The IEP included several SDI and modifications directedly linked to the Student's hearing loss. These included direct instruction from a teacher of the deaf and instruction in the use of the Student's personal amplification devices.
26. Academic SDI included implementation of "research-based reading/literacy materials and activities in the support classroom to build literacy skills with multi-sensory applications/instruction." That included "Pre-teach and re-teach of phonics and phonemic awareness skills" within the District's core reading program. To that, the District was to add a "research based supplemental reading program to build decoding, fluency and comprehension skills." P-6.
27. In addition to the District's reading program and supplemental program in the general education classroom, the 2021 IEP provided "supplemental phonics/phonemic awareness support/instruction in the

⁶ A sight word is a word that is read on sight without the use of phonics skills (a word that is memorized, not sounded out).

hearing support classroom in a 1:1 setting or small group on a daily basis." The 2021 IEP provided writing supports as well. P-6.

28. The 2021 IEP also included SDIs and modifications related to OT, PT, and ST. For related services, the 2021 IEP provided:
 - a. Individual PT (once per week, 30 minutes per session)
 - b. PT consultation (once per month)
 - c. Audiological services (as needed but not more than once per week, 20 minutes per session)
 - d. Hearing monitoring (twice per week, 15 minutes per session)
 - e. Individual Hearing support (once per day, 15 minutes per session)
 - f. Group ST (once per week, 30 minutes per session)
 - g. ST consultation (once per trimester)
 - h. Group OT (once per week, 30 minutes per session)
 - i. OT consultation (30 minutes per month)
29. Through the 2021 IEP, the District found the Student eligible for ESY services in the summer of 2021. The District proposed an ESY program in which the Student would work on reading, ST, and PT goals. P-6.
30. The Student's placement via the 2021 IEP was Deaf or Hearing Impaired Support and Speech and Language Support at a supplemental level.⁷ The Student would continue to attend the IU's Hearing Impaired classroom, housed in a neighboring school district. P-6.

Summer 2021

31. The Student participated in the District's ESY program during the summer of 2021.

⁷ Supplemental in this context means that the Student would receive instruction from special education personnel for more than 20% but less than 80% of the school day.

32. The Student's ability to read sight words stayed relatively consistent during the summer of 2021 (starting at 23 of 40 and ending at 20 of 40). P-6, P-9, P-12.

The 2021-22 School Year – [redacted] Grade

33. The Student started the 2021-22 school year under the 2021 IEP.
34. On September 25, 2021, the IEP team reconvened at the Parent's request. The Parent and District agreed to a new round of testing in the spring of 2022. The Parent also requested quarterly progress monitoring. The IEP team also discussed that the school that the Student attended (the District's placement in an IU program housed in a different school district) was changing its sight word reading program. P-10.
35. The District documented the conversation during the September 25, 2021, IEP team meeting as a revision to the 2021 IEP but made no substantive changes. P-10 at 33.
36. By December 5, 2021, the Parent had growing concerns about the Student's reading abilities and wrote an email to the Student's teachers. The Parent asked if the school screened for dyslexia. The Parent reminded the teachers that the 2020 Private Evaluation raised concerns about dyslexia. The Parent also noted her observations that the Student reversed letters. The Parent also reported a family history of dyslexia, including the Student's older sibling. In the same email, the Parent asked questions about the Student's hearing support program and whether the Student received ELA instruction in hearing support or the general education classroom. P-47.
37. The teachers that the Parent wrote to on December 5, 2021, are employees of the neighboring school district. On December 6, 2021, one of the teachers replied to the Parent, and included an IU school psychologist who worked in the IU's hearing support program. The teacher answered the Parent's questions about ELA instruction and advised that they shifted the Student's instruction to a more direct model so that the Student would not be distracted by an iPad during reading instruction. The teacher deferred to the IU's psychologist about a dyslexia screening. P-47.
38. On December 8, 2021, the IU's psychologist replied to the Parent that "[b]est practice for Dyslexia screening includes small group instruction and progress monitoring. [Student] receives this in [the] Hearing

Support class with the supplemental reading time allotted to [Student] in [the] IEP.” The psychologist recommended continuing the Student’s current program through the end of the school year, collecting data, and then seeing “whether [Student] is making the progress [that Parent] and [school and IU personnel] would hope to see.” P-46.

39. While recommending continuation of the status quo, the IU psychologist asked the Parent if the Parent agreed to continue the current program and then go forward with the reevaluation contemplated in the September 2021 IEP revisions, or “push up” those assessments to “this winter.” P-46.
40. There is no clear record of if or how the Parent responded to the IU psychologist’s inquiry. *Passim*.
41. By December 19, 2021, the Parent had retained an attorney (not the same attorney or firm that represented the Parent at this due process hearing). P-46.
42. On January 12, 2022, the Student’s IEP team reconvened. Around that time, as measured by the general education reading system, the Student was reading at a mid-kindergarten level. The IEP team revised the IEP to add an additional 30 minutes of literacy instruction with a focus on phonemic awareness skills, phonics, and sight word instruction. P-12, P-15.
43. By January 24, 2022, the District’s progress monitoring for the showed that the Student was not making progress towards IEP reading goals. *See, e.g.* P-13.
44. On March 29, 2022, the District issued a NOREP offering ESY services for the summer of 2022. The offer was for the Student to participate in the District’s “K-2 Language Support ESY program” from July 5 to August 4, 2022, from 8:30 a.m. to 1:15 p.m. That program also included transportation, 15 minutes per day of hearing support (to check equipment), 20 minutes per week of PT, 30 minutes per week of ST, and 30 minutes per week of OT. Summer goals included phonics, sight word reading, OT, PT, and two ST goals from the IEP. P-21, S-22.
45. In April 2022, the Student was still reading at a kindergarten level as measured by the general education curriculum. The Student’s sight word, phonics, and spelling abilities had not improved. *See, e.g.* P-18.

46. The District reevaluated the Student (as was planned at the start of the school year) and issued a reevaluation report on May 28, 2022 (the 2022 RR). S-23.
47. The majority of the 2022 RR consists of a review/reproduction of prior evaluations and the Student's current academic performance. S-23 at 1-40.
48. The 2022 RR included narrative observations from the IU's psychologist and the hearing support teacher. S-23 at 40-41.
49. The 2022 RR included updated information from the speech therapist, and the occupational therapist, and recommendations from all of the school professionals who worked with the Student S-23 at 41-45.
50. The 2022 RR included new testing: sub-tests from the WIAT-3 (a standardized, normative test of academic achievement) targeting reading skills, the CTOPP-2 (a test of phonological processing), and a PT assessment. S-23. Taken together, the new testing and teacher input illustrated a significant and growing divide between the Student's ability to read and that of same-age peers (both with and without hearing impairments). *See id.*
51. Through the 2022 RR, the District concluded that the Student's primary disability category was now a Specific Learning Disability (SLD) in reading with secondary disability categories of Hearing Impairment including deafness and SLI. S-23.
52. At the time of the 2022 RR (and presently) school personnel took the position that it was necessary to observe the Student for a full year in the curriculum before making the SLD eligibility determination. NT at 494.

Summer 2022

53. On June 7, 2022, the IEP team reconvened and drafted a new IEP based on the 2022 RR (the 2022 IEP). S-27.
54. The 2022 IEP included two ST goals that, together, were a continuation of goals from the 2021 IEP (articulation of the /l/ sound). S-27.
55. The 2022 IEP included an OT goal targeting fine motor skills, similar to the 2021 IEP. S-27.

56. The 2022 IEP included a hearing support/listening comprehension goal that was also carried over from the 2021 IEP. S-27.
57. The 2022 IEP included a reading (phonics) goal that represents a very small step forward from the phonics goal in the 2021 IEP. *C/f* P-6 at 44, S-27 at 42.
58. The 2022 IEP included a sight word reading goal similar to the sight word goal in the 2021 IEP, but updated to represent curricular changes. *C/f* P-6 at 46, S-27 at 43.
59. The 2022 IEP included two PT goals, one targeting the Student's lower extremity strength and endurance for functional mobility, and the other targeting the Student's ability to run. S-27.
60. As with the 2021 IEP, the SDI and program modifications in the 2022 IEP are divided by sub-headings.⁸ The "academic" modifications and SDI in the 2021 IEP and 2022 IEP related to all aspects of reading are substantively identical. *C/f* P-6 at 50-52, S-27 at 47-49.
61. Hearing modifications and SDI in the 2022 IEP are substantively similar to those in the 2021 IEP. *C/f* P-6 at 47-50, S-27 at 49-50.
62. Some of the social/emotional modifications and SDI in the 2022 IEP are identical to those in the 2021 IEP, and some were changed to reflect the Student's current abilities and goals. *C/f* P-6 at 52-54, S-27 at 50-51.
63. Modifications and SDI related to ST, PT, and OT in the 2022 IEP were substantively the same as those in the 2021 IEP. P-6, S-27.
64. The related services in the 2022 IEP are identical to those in the 2021 IEP except as follows (P-6, S-27):
 - a. Small group hearing support was increased from 30 minutes per day to 60 minutes per day and was to be provided during supplemental reading instruction.
 - b. S/LT consultation went from once per trimester for 10 minutes per session to once per month for 5 minutes per session.

⁸ This is a helpful but rarely used practice. I commend the District for developing and using a clear, logical structure in what can sometimes be an unwieldy part of IEPs. Regardless of the substantive content, this is an example of good form in support of clarity.

- c. OT consultation went from 20 minutes per month to 10 minutes per month.
65. The 2022 IEP includes multiple references to the elementary school in the neighboring school district that the Student had been attending during the 2021-22 school year. The 2022 IEP, as written, indicates that the Student's placement in the neighboring school district would continue under the 2022 IEP. *See, e.g.* S-27 at 61.
 66. The 2022 IEP continued to provide a supplemental level of Deaf or Hearing Impaired Support and Speech and Language Support. The percentage of time that the Student would spend inside of a regular education classroom increased to 61% of the school day. S-27.
 67. There is no indication in the 2022 IEP of a Learning Support placement. S-27. *See also* P-21 at 61.
 68. On June 21, 2022, the District issued a NOREP for the Parent to approve the 2022 IEP. That NOREP, however, recommended a placement that is not reflected in the 2022 IEP: Learning Support at a supplemental level. The NOREP indicates that supplemental hearing support was considered and rejected. P-23.
 69. On July 21, 2022, the Parent approved the NOREP. P-23.
 70. Starting on August 2, 2022, the Parent obtained another evaluation from the same private evaluator who evaluated the Student in 2020. The second private evaluation concluded with a conference between the Parent and the private evaluator and the Parent on August 22, 2022. The private evaluator then drafted a report dated August 26, 2022 (the 2022 Private Evaluation). P-25.
 71. The 2022 Private Evaluation included intelligence testing that the District did not conduct as part of the 2022 RR, and different reading assessments from those conducted in the 2022 RR. Like the 2022 RR, the 2022 Private Evaluation found significant deficits in reading domains and recommended special education eligibility for SLD in reading. The 2022 RR made an affirmative finding of dyslexia and characterized the Student's reading deficits as "severe." P-25.
 72. In comparison to the 2020 Private Evaluation, the 2022 Private Evaluation included a more definite and forceful recommendation for special education reading interventions based on Orton-Gillingham

methodologies. The Wilson Reading System and other brand-name programs were again highlighted as examples. P-25.

73. As in 2020, the 2022 Private Evaluation made several other recommendations for SDI and related services unrelated to reading but related to the Student's other needs. Generally, the private evaluator connected the Student's other needs, including the Student's hearing impairment, to the Student's genetic condition. See S-25.
74. Sometime after July 21 but before August 22, 2022, the Parent received a letter from the District welcoming the Student to one of the District's elementary schools. See, e.g. NT 67, P-47. The Parent was surprised by this letter because she believed that the Student would continue in the neighboring school district's program and was upset because of a negative experience at the District's elementary school involving the Student's sibling.
75. On August 22, 2022, the Parent wrote to the District, expressing her surprise and concern that transportation had not been arranged. P-47.
76. Later the same day, the District's Supervisor of Special Education replied. The Supervisor recalled that, during the parties last meeting, there was agreement that the Student's "needs would best be met through a learning support environment with an itinerant hearing support." The Supervisor also noted that the Parent had approved a learning support placement on the NOREP. P-47.

The 2022-23 School Year –[redacted] Grade

77. On September 1, 2022, the Parent transmitted the 2022 Private Evaluation to the District. The communication specifically highlighted the dyslexia diagnosis and stated the Parent's opinion that the 2022 IEP would not provide a FAPE to the Student. P-47.
78. On September 2, 2022, the Parent again informed the District that the 2022 IEP was not appropriate, that the Parent had secured a placement for the Student at the Private School, asked the District to fund the placement, and reserved the right to seek reimbursement. See S-31.
79. On September 5, 2022, the District sent a letter to the Parent refusing the request to fund the Private School, taking the position that the 2022 IEP offered a FAPE. The District offered an IEP team meeting to discuss the Parent's concerns. P-47.

80. The Student did not immediately start at the Private School at the beginning of the 2022-23 school year. The parties met, as the District requested and the District shared information about the type of program that it would provide for the Student in its elementary school.⁹ See, e.g. NT at 72. The District did not, however, revise the 2022 IEP or issue any other NOREP. *Passim*.
81. The record is somewhat ambiguous about exactly when the Student began attending the Private School. The record indicates that placement started on or around September 19, 2022. See S-32, P-26.
82. At the Private School, the Student receives 60 minutes per day of Orton-Gillingham based reading instruction and 60 minutes per day of math instruction in addition to other academic classes (science, social studies) specials and electives (music, art, and the like) and counseling. NT 152-153.
83. Teachers in every subject area at the Private School have experience teaching students with learning disabilities and can use Orton-Gillingham principles in other academic domains.¹⁰ See, e.g. NT 154-157.
84. In November 2022, the Parents obtained another private evaluation of the Student. This evaluation was conducted by a different private evaluator. Testing was completed in November 2022 and January 2023, and then the evaluator wrote a report (the 2023 Private Evaluation). The 2023 Private Evaluation is not dated, and the record is ambiguous as to when the Parent received the report. P-33.
85. At the time of the evaluation, the Parent was primarily concerned about the Student's reading ability and that the Student was exhibiting behaviors associated with Autism Spectrum Disorder (ASD). P-33.
86. The second private evaluator observed the Student at the Private School, had the Parent, a grandparent, and a teacher complete

⁹ The record is somewhat ambiguous as to whether this meeting can properly be called an IEP team meeting. None of the documentation typically associated with IEP team meetings was entered into evidence. There is no dispute, however, that the parties met and were in communication via counsel at the start of the 2022-23 school year. *Passim*.

¹⁰ This does not mean that the Student receives Orton-Gillingham based reading lessons in a math class. Rather, the same multisensory teaching methods used in a O-G reading lesson are also used in other academic domains. *Id*.

behavior rating scales, and administered tests for intelligence, academic achievement, and autism. P-33.

87. The second private evaluator found that the Student met clinical criteria for ASD Level 1 (mild), ADHD combined type (mild), SLD in reading and written expression, a genetic disorder, and right-ear hearing loss. P-33.
88. While the 2023 Private Evaluation reached new medical diagnoses, the recommendations in the 2023 Private Evaluation are essentially the same as those in the 2022 Private Evaluation. In fact, the 2023 Private Evaluation references the 2022 Private Evaluation as a source of recommendations. P-33 at 13.
89. On March 25, 2023, the Parents (via a new attorney) contacted the District, advised the District of the new ASD diagnosis, and requested an IEP team meeting to develop a program for the Student for the 2023-24 school year. P-47.
90. On April 6, 2023, the Parents wrote to the District again (via counsel), provided a copy of the 2023 Private Evaluation, and again requested an IEP. P-47.
91. While attending the Private School, the Student made progress in reading. This is not to say that the Student was completely remediated during the 2022-23 school year – far from it. Rather, in the domains in which the Student received reading instruction (fundamental, phonics-based components of reading), the Student showed growth on subjective measures and nearly all objective measures. The Student also thrived socially at the Private School See, e.g. P-26, 27, 28, 28, 33, 38.

Summer 2023 and the 2023-24 School Year – [redacted] Grade

92. On July 18, 2023, the District reconvened the Student’s IEP team. Both parties were represented by attorneys during the meeting. The District prepared an IEP and reviewed the IEP with the Parent during the meeting (the 2023 IEP). P-34.
93. The 2023 IEP included a comprehensive review of the Student’s progress at the Private School. P-34.
94. The 2023 IEP included the same Speech, PT, and OT goals as the 2022 IEP, but with notation that the District would assess the Student’s

abilities within the first four weeks of school and then update those goals as needed. P-34.

95. The 2023 IEP included a substantively identical reading phonics goal as the 2022 IEP, but with updated baselines reflecting the Student's progress at the Private School. P-34.
96. The 2023 IEP included a new phonemic awareness goal. The goal called for the Student to score within the average range across all domains of a test of phonemic awareness. The test was to be administered twice – once at the beginning of the year and once at the end of the year. Progress towards this goal was to be reported once per trimester. The record does not explain how the Student's performance on a test administered at the beginning and end of a school year can be reported on a trimester basis. P-34.
97. The 2023 IEP removed goals concerning sight words and hearing support. P-34.
98. Unlike the prior IEPs, the SDI and program modifications in the 2023 IEP are not divided by sub-headings but rather are all lumped together.¹¹ Most of the modifications and SDI relate to OT, PT, ST, and ensuring that the Student was paying attention to the teacher and heard the teacher's instructions. Nearly all of the SDI and modifications were to be provided on an "as needed" basis – guaranteeing no amount of support or special education.
99. A notable exception to the general trend in the SDI is a "multi-sensory research based reading program" to be delivered daily. Nothing in the IEP reveals what that program might be.
100. The 2023 IEP provided individual ST and PT (both once per week, 30 minutes per session), group ST and OT (both once per week, 30 minutes per session), and Hearing Consultation (once per week, 15 minutes per session). Consultation with related service providers was included on an as needed basis. P-34.
101. The 2023 IEP offered a supplemental level of Learning Support and Speech and Language Support at the District's elementary school. The Student would spend 65% of the school day in the regular education classroom. P-34.

¹¹ This practice is entirely standard, but less helpful than the groupings in prior IEPs.

102. On July 25, 2023, the District proposed the 2023 IEP with a NOREP. P-35.
103. On July 26, 2023, the Parent rejected the NOREP. P-35.
104. On July 28, 2023, the Parent requested this due process hearing. The due process complaint also constituted notice that the Parent intended to place the Student in the Private School for the 2023-24 school year and seek reimbursement.
105. The District did not invite the Parent to an IEP team meeting or otherwise revise the 2023 IEP at any time after July 25, 2023.
106. The Student's program at the Private School during the 2023-24 school year is substantively a continuation of the same services that the Student received at the Private School during the 2022-23 school year. *Passim*.

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. To the whatever extent that witnesses contradicted each other, the differences are attributable to genuine differences in recollection or opinion.

Applicable Laws

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 Parent is 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 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.

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.

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 *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 even for an academically strong child, depending on the child's circumstances.

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

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 almost always taken in sequence, and the analysis ends if any step is not satisfied.

Evaluation Criteria

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

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive a free appropriate public education (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 are (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A).

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

Independent Educational Evaluation at Public Expense

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

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

Discussion and Conclusions of Law

I will address the multiple issues presented in this case in chronological order. The first of those is the demand for compensatory education to remedy a denial of FAPE in the summer of 2021.

Summer of 2021 – No Compensatory Education

The District determined that the Student was eligible for ESY in the summer of 2021 and offered an ESY program. It is the Parent's burden to prove that the ESY program was not appropriate at the time that the District offered it. There is no evidence, let alone preponderant evidence, establishing that the 2021 ESY program was inappropriate at the time it was offered. The Parent's demand for compensatory education for the summer of 2021 is denied.

The 2021-22 School Year – No Compensatory Education

The 2021-22 school year was the Student's first full year back in in-school programming after the COVID-19 school closures. Early in that school year, the Parent expressed concerns about reading. The parties agreed to reevaluate the Student at the end of the school year. At the time, the decision to hold the Student in the then-current program (a hearing support program with reading interventions), evaluate the Student's responses to

interventions, and then reevaluate was appropriate. Notably, the private evaluations available to the District at that time raised concerns about reading, but also endorsed the course of action that the District pursued.

It is concerning that the District (via employees of the program in which the District placed the Student) actively discouraged the Parent from seeking an evaluation before the end of the school year. At the same time, that discouragement reflected well-reasoned educational expertise that happened to be consistent with the Parent's own private reports. It is well established that schools cannot delay special education identification as children pass through regular education interventions like MTSS. See, e.g. OSEP Policy Memorandum of January 21, 2011. That is not what happened in this case. The Student was identified and receiving special education responsive to what was known about the Student's needs at the time.

As the school year passed, both parties became increasingly concerned about the Student's reading abilities. This prompted the parties to move forward with evaluations at the end of the school year as planned. That resulted in the 2022 RR in late May 2022. Through the 2022 RR, the District found that the Student had an SLD in reading. The District acknowledged that the Student was not keeping pace with peers (both peers who had hearing impairments and peers without hearing impairments). While the Parent takes issue with the completeness of the 2022 RR, both parties agree with its ultimate conclusion: the Student is eligible for special education to address a reading disability.

In sum, both parties were alert to a potential reading disability at the start of the 2021-22 school year. The parties discussed that concern and a private evaluation addressing the same issues. The educational professionals who worked with the Student and the private evaluation recommended monitoring the Student and reassessing. The parties agreed to that course of action and, as a reading disability became apparent, the parties agreed to reevaluate as planned. That reevaluation confirmed the reading disability that the parties suspected. All of this is consistent with IDEA requirements. The Parent has not proven an IDEA violation resulting in a denial of FAPE during the 2021-22 school year. I do not award compensatory education for this period of time.

Summer 2022 – No Compensatory Education

The Parent's claim for the summer of 2022 is stronger than the summer of 2021. At this point, the Student was found to have an SLD in reading. However, the District offered the summer 2022 ESY program on March 29, 2022, before the Student was found to be eligible as a child with an SLD in

reading. Even so, the 2022 ESY program offered continuation of related services and work towards phonics-related IEP goals. Discussed above, I must evaluate the appropriateness of the program at the time it was offered. I do not find a preponderance of evidence in the record to prove that the summer 2022 ESY program was inappropriate at the time it was offered. I do not award compensatory education for the summer of 2022.

The 2022-23 School Year – Tuition Reimbursement

The Parent has presented preponderant evidence to establish a right to reimbursement for the Student's placement at the Private School during the 2022-23 school year.

The District found that the Student required special education as a child with a SLD in reading. The District made this unambiguous, well-supported determination on May 28, 2022, when it issued the 2022 RR. The 2022 RR was a clarion call for a significant change to the Student's program. The IEP team reconvened on June 7, 2022, to make that change. The record suggests that the team discussed moving the Student into a Learning Support program to focus on reading. The resulting IEP in no way reflects that conversation.

The first prong of the *Burlington-Carter* test hinges on the appropriateness of the program that the District actually offered – not the program that was discussed, not the program that the District intended to offer, not the program that the District would have implemented had the Student attended. The only program that the District offered is the program set forth in the 2022 IEP. That program does not reflect the Student's SLD eligibility and does not include a Learning Support placement. Rather, the 2022 IEP continued the Student's placement in the IU's hearing support program, housed in the neighboring school district, with no substantive changes. The 2022 IEP is inappropriate, and so the Parents have satisfied the first prong of the *Burlington-Carter* test.

I note that the NOREP for placement in learning support does not alter the analysis. I judge the appropriateness of the District's program. That program is set forth in the 2022 IEP, not a NOREP. In context, the NOREP is nothing more than a form by which the Parent could approve or reject the IEP. Arguably, the NOREP can be viewed as a prior written notice of the District's intent to change the Student's placement from Hearing Support to Learning Support. By discounting that argument, I am giving the District the benefit of the doubt. Had the NOREP been anything more than a form by which the Parent could approve or reject the 2022 IEP, the District would have been moving the Student to a new placement without any IEP. I decline to find

such a flagrant violation. The more likely scenario is that the three agencies involved in the Student's education at that time (the IU, the neighboring school district, and the District) were not all on the same page. The Parent and Student cannot be at fault for that lack of coordination, and that does not change the fact that I must assess the appropriateness of the program that the District offered. Again, that program is captured in the 2022 IEP, and the 2022 IEP is inappropriate based on the District's own 2022 RR.

The second prong of the *Burlington-Carter* test is equally straightforward in this case. The standard for appropriateness for parentally selected placements is not the same standard of appropriateness in a FAPE analysis. Specialized private placements are more restrictive than public schools *per se*. Were that controlling, no parent could ever be entitled to tuition reimbursement. The Student's actual progress at the Private School is not controlling either. Rather, I consider whether the Private School's program was appropriate for the Student when the Parent selected it. I find that it was appropriate.

The Private School specializes in teaching Students with SLDs in reading. It offers precisely the type of program recommended in the 2020 Private Evaluation and subsequently confirmed in the 2022 RR. The Student's primary area of need at the time was reading, and an Orton-Gillingham based reading program was recommended. That is what the Private School provides.

The District challenges the Private School's appropriateness because it does not provide many of the related services that the Student would have received from the District. Looking to the 2022 IEP, those services included ST, PT, OT, and Hearing Support. I reject these arguments. At that time, the District was recommending a continuation of a hearing support program in contradiction of its own evaluation. The Student had hearing loss in one ear, and the primary function of direct hearing support to the Student was to monitor and help the Student use amplification equipment. Testimony from the Parent and Private School personnel indicates that amplification in the Private School is not needed, given the smaller school setting, but no finding is needed in that regard. The standard for appropriateness is different at this prong of the *Burlington-Carter* test. The question does not turn whether the Private School provides all the services to which the Student would have been entitled, had the Student remained in the District. Rather, the record is beyond preponderant that the Student required a special education program to learn how to read. When the District failed to offer that program, the Parent found it on her own. The Private School satisfies the *Burlington-Carter* standard for appropriateness.

Turning to the third prong of the *Burlington-Carter* test, no equitable considerations warrant a reduction or elimination of a tuition reimbursement award. The District found that the Student required a Learning Support program to address the Student's reading disability. The District then failed to offer that program. The Parent alerted the District to that error, gave the District notice of her intent to place the Student in the Private School, and gave the District ample time (more than the IDEA requires) to correct the error. During that time, the Parent met with the District in the hope of securing an appropriate IEP. The District made no changes to the 2022 IEP in response to the Parent's efforts. The equities favor tuition reimbursement.¹²

Having satisfied all three prongs of the *Burlington-Carter* test, I award the Parent reimbursement for the cost of tuition at the Private School for the 2022-23 school year.

The 2023 Private Evaluation – No Reimbursement

The Parent argues that she is entitled to reimbursement for the 2023 Private Evaluation pursuant to 34 C.F.R. § 300.502(b)(1), which is detailed in the preceding section of this decision. Under that regulation, the Parent is entitled to an IEE at public expense only if certain conditions are met. The primary condition is a determination that the District's own evaluation was inappropriate. Reasonable minds could differ as to which party must prove that the District's evaluation was or was not appropriate. In this case, considering all evidence presented by both parties, I find that the record preponderantly establishes that the 2022 RR was appropriate.

The 2022 RR satisfies the IDEA's procedural requirements for evaluations. The Parents challenge that the 2022 RR was incomplete for its lack of IQ testing. I disagree. The Student's intelligence had been well-established by that point and both parties were concerned about the Student's reading. The IU's psychologist selected assessments to target the Student's suspected areas of disability. The psychologist then used those assessments and a large amount of other information to conclude that the Student was a child with an SLD in reading. Both parties agreed with (and continue to agree with) the conclusions of the 2022 RR. Those conclusions are also consistent

¹² This is typically stated in the negative: nothing warrants reduction or elimination of a tuition reimbursement award. In this case, the equities affirmatively favor tuition reimbursement. By the time that the Student started attending the Private School, the District knew or should have known about the disconnection between the 2022 IEP and the NOREP. The District had an opportunity to correct the 2022 IEP and offer an IEP that would serve as a blueprint for an in-District learning support program. The District did not take advantage of that opportunity.

with the Student's private evaluations. The Parent is not entitled to reimbursement for the 2023 Private Evaluation because the 2022 RR was appropriate.

The 2023-24 School Year – Tuition Reimbursement

The Parent has presented preponderant evidence to establish a right to reimbursement for the Student's placement at the Private School during the 2023-24 school year.

The 2023 IEP corrected the primary error in the 2022 IEP: it represents a Learning Support placement in the District's elementary school. Beyond that, it is difficult to discern how the program in the 2023 IEP is different from the program in the 2022 IEP. It is easy to take for granted that there are fundamental differences between a learning support program and a hearing support program. That does not excuse the District from offering an IEP that says what special education the Student would receive. The 2023 IEP falls short of that mark.

It is not necessary for IEPs to include brand-name reading programs. Generic descriptions are acceptable, and schools have wide latitude to choose curriculum and methodologies. In practice, schools often use coded language to avoid naming a program like "Wilson" explicitly. Schools can speak in code without running afoul of the IDEA. In this case, the District's description of what special education the Student would receive is unacceptably vague even by that low standard. The IEP says only that the District will provide a "multi-sensory research based reading program" for some unspecified amount of time per day. The 2023 IEP provides no guarantee of a phonics-based reading program, let alone Orton-Gillingham based reading program. By the time the 2023 IEP was drafted, the Student's reading disability was the primary concern. The 2023 IEP includes less than a sentence about what special education the District would provide to teach the Student how to read.

I do not judge the District's offer on the amount of space it takes on the page. IEPs are intended to be functional documents, and so less is often more. Yet the IEP must say what special education a child will receive. The 2023 IEP does not satisfy that standard and, therefore is inappropriate. The Parent has satisfied the first prong of the *Burlington-Carter* test for the 2023-24 school year.

The Private School was appropriate for the Student in the 2023-24 school year for the same reasons that it was appropriate in the 2022-23 school

year. No further analysis is needed. The Parent has satisfied the second prong of the *Burlington-Carter* test for the 2023-24 school year.

No equitable considerations warrant a reduction or elimination of a tuition reimbursement award. As in the 2022-23 school year, the Parent placed the District on notice and gave the District an opportunity to correct the IEP.

Having satisfied all three prongs of the *Burlington-Carter* test, I award the Parent reimbursement for the cost of tuition at the Private School for the 2022-23 school year.

An appropriate order follows.

ORDER

Now, February 16, 2024, it is hereby **ORDERED** as follows:

1. The Parent's demands for compensatory education are **DENIED**.
2. The Parent's demand for reimbursement for the 2023 Private Evaluation is **DENIED**.
3. The District shall reimburse the Parents for the cost of the Student's placement at the Private School during the 2022-23 and 2023-24 school years.
4. Within 14 days of this Order, the District shall send written notice to the Parent of its reimbursement practices and procedures. Such notice shall inform the Parent of any documentation that they must submit, where or to whom that documentation must be submitted, and the District's payment terms if greater than 30 days.
5. The District may either reimburse the Parents through direct payment to them, or by payment to the Private School for outstanding invoices, if any.

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

/s/ Brian Jason Ford
HEARING OFFICER