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

Pennsylvania Special Education Hearing Officer Final Decision and Order

ODR No.

26933-22-23

CLOSED HEARING

Child's Name:

A.L.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

David G. C. Arnold, Esq.
Suite 270, 2200 Renaissance Boulevard
King of Prussia, Pennsylvania 19406

Local Education Agency:

Tredyffrin-Easttown School District
940 W. Valley Road, Suite 1700
Wayne, PA 19807

Counsel for the LEA:

Lawrence Dodds, Esq.
Blue Bell Executive Campus
460 Norristown Road, Suite 110
Blue Bell, PA 19422

Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

12/16/2022

Introduction

This matter concerns the educational rights a student with disabilities (the Student). The Student's parents (the Parents) placed the Student in a private school (the Private School) during the 2020-21 and 2021-22 school years. The Parents initiated this due process hearing and demand tuition reimbursement for those school years from the respondent public school district (the District). The Parents also demand reimbursement for a program that the Student attended at the Private School in the summer of 2021.

The Parents' claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.[1]

Issues

These issues were submitted for adjudication:

1. Must the District reimburse the Parents for the cost of the Private School's tuition for the 2020-21 school year?

2. Must the District reimburse the Parents for the cost of the Private School's program in the summer of 2021?

3. Must the District reimburse the Parents for the cost of the Private School's tuition for the 2021-22 school year.

Findings of Fact

I reviewed the record in its entirety. I make findings, however, only as necessary to resolve the issues before me. I find as follows:

Background and IEP Development

1. There is no dispute that the Student is a child with a disability, as defined by the IDEA.

2. There is no dispute that Student enrolled in the District [redacted] for the 2019-20 school year. There is no dispute that the Student

[1] The Parents' complaint also references Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. However, the Parents demand tuition reimbursement only. Discussed below, tuition reimbursement is an IDEA remedy.

remained enrolled in the District through the 2021-22 school year until the family moved out of the District.

3. There is no dispute that the District was the Student's local educational agency (LEA), as defined by the IDEA, for the entirety of the Student's enrollment.

4. Prior to enrollment, the Student was identified and received early intervention (EI) services. The District evaluated the Student before the Student entered [school]. That evaluation resulted in an Evaluation Report (the 2019 ER). J-7.

5. Through the 2019 ER, the District determined that the Student qualified as a child with a disability under the category of Speech or Language Impairment (SLI). J-7.[2]

6. On April 12, 2019, the District presented the 2019 ER to the Parents during a meeting. The Parents provided feedback, and the District incorporated their input into a revised ER on May 2, 2019. J-7.

7. On April 25, 2019, the District agreed to provide additional Occupational Therapy and Physical Therapy assessments. Ultimately, those assessments were also incorporated into the 2019 RR. J-7, J-8, J-9.

8. On May 10, 2019, the Student's IEP team met to draft an IEP based on the 2019 ER, as revised. The IEP team did not finish its work on May 10. J-7, J-10.

9. On June 10, 2019, the Parents requested additional revisions to the 2019 ER. Specifically, the Parents requested (J-7 at 6):

    a. "A structured, systemic, explicit [Orton-Gillingham] OG based program used for [Student's] core program like Fundations."[3]

    b. "Biweekly curriculum based monitoring of letter-naming fluency, letter-sound fluency, and phoneme segmentation fluency performed."

[2] The Parents do not challenge the appropriateness of the 2019 ER, and so I decline to describe it in depth.

[3] Orton-Gillingham, discussed herein, is an approach to teaching reading. Fundations is an OG-based reading program.

c. "Beginning of year, middle of year, and end of year scores are reported with the percentile norms and rate of increase."

d. "Three time a week 20 minute supplementary lessons to the core language instruction focusing on areas that [Student] has demonstrated weaknesses with. To be performed by the same instructor as [Student] has demonstrated weaknesses with. To be performed by the same instruction as [Student's] core language teacher."

10. On June 11, 2019, the District agreed to place the Parents' requests into the 2019 ER and did so on the same day. J-7, J-10.

11. The Student's IEP, still dated May 10, 2019 (2019 IEP), placed the Student in a supplementary learning support program. J-10.

12. On June 20, 2019, the District issued Notice of Recommended Educational Placement (NOREP) to Parents, proposing to implement the May 2019 IEP. On June 27, 2019, Parents returned the NOREP requesting an informal meeting to discuss additional concerns. J-11.

13. The Parents obtained a private neuropsychological evaluation for the Student. The private neuropsychologist drafted an evaluation report. The report is undated, but the testing occurred on July 3, 8, 10, and 11, 2019. J-12.

14. On July 16, 2019, the IEP team then met again to discuss and revise the May 2019 IEP. It is not clear if the Parents had the private neuropsychological evaluation report at this time. The July 16 meeting was part of an ongoing dialogue between the District and the Parents in the summer of 2019. The District agreed to the Parents' proposed revisions. *See* J-34.

15. On July 24, 2019, the District issued a NOREP to the Parents, proposing to implement the revised 2019 IEP. The Parents approved the NOREP. J-14, J-15.

16. On August 18, 2019, the Parents applied for the Student's admission to the Private School. J-16. The Parents did not tell the District that they were interested in or had applied to the Private School at that time. *See, e.g.* NT at 158.

17. On August 27, 2019, the IEP team met again. By this point, the Parents had given the District a copy of the private neuropsychological

evaluation report. The District incorporated that report, including its recommendations, into the present education levels section of the 2019 IEP. The specially designed instruction (SDI) offered through the IEP was also revised. The Parents and District also agreed to place the Student in a full-day, supplemental learning support classroom. J-34.

18. On August 27, 2019, the District issued a NOREP to the Parents, proposing to implement the revised 2019 IEP (revised as of August 27). On August 30, 2019, the Parents approved the recommendation. J-20. At this point, the District still did not know that the Parents had applied for the Student to attend the Private School.

The 2019-20 School Year [redacted] – Start through COVID-19 Closure

19. The Student attended the District's [redacted] program from the start of the 2019-20 school year. From that time through March 2020, there is no dispute that the Student received the services specified in the 2019 IEP, including its multiple revisions.

20. During this time, the Parents and District were in frequent communication with each other, the IEP team met several times, and the Parents proposed revisions to the 2019 IEP. The District issued NOREPs to implement revisions that, for the most part, were requested by the Parents as noted below.

21. On September 13, 2019, the District issued a NOREP to the Parents, proposing to implement IEP revisions. The Parents approved the revisions on September 16, 2019. J-22, J-23.

22. On September 17, 2019, the parties agreed to additional revisions. On September 24, 2019, the District proposed those revisions with a NOREP. The Parents approved the NOREP on September 25, 2019. J-25.

23. On October 11, 2019, the parties agreed to additional revisions. On October 16, 2019, the District proposed those revisions with a NOREP. The Parents approved the NOREP the same day. J-30.

24. On October 30, 2019, the parties agreed to additional revisions. On November 8, 2019, the District proposed those revisions with a NOREP. The Parents approved the NOREP on November 9, 2019. J-32.

25. On November 12, 2019, the Parents sent an additional application to the Private School. J-33. As with the prior application, this was unknown to the District. *Passim*.

26. On November 13, 2019, the parties agreed to additional revisions. On November 20, 2019, the District proposed those revisions with a NOREP. The Parents approved the NOREP the same day. J-25.

27. The last IEP issued and approved before the District was ordered closed as part of the Commonwealth's response to COVID-19 the IEP at J-34. That document notes all prior revisions. Again, there is no dispute that the Student received all services contemplated in each IEP revision.

The 2019-20 School Year [redacted] – COVID-19 Closure to End

28. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

29. When the District closed, the mode of the Student's instruction evolved over time. All instruction from the school closure through the end of the 2019-20 school year was remote, but the form of remote instruction changed. The record does not reveal exact dates, but the District shifted first to asynchronous instruction. Then, the District added pre-recorded videos from the Student's teachers to the asynchronous instruction. Then, the District shifted to synchronous remote instruction via video conference. *See, e.g.* NT 455-466, 766-768.

30. The Student continued to receive the related services required by the 2019 IEP, albeit in a different modality. J-34, J-38, NT 359-361.

31. On April 13, 2020, the District issued to Parents a "Flexible IEP Implementation Plan." J-38. The purpose of that document was to explain how the District would implement the 2019 IEP, as revised, during the mandatory school closure. *See id*.

32. On April 15, 2020, the Student's IEP team reconvened by phone to draft an annual IEP for the Student. The resulting IEP (the 2020 IEP) was, essentially, a continuation of the 2019 IEP. The IEP would cover one year, including the end of the 2019-20 school year and most of the 2020-21 school year. *See* J-39.

33. During the April 2020 IEP team meeting, the Parents expressed a preference for more live instruction, but no particular concern about the District's remote instruction. NT at 58, 63, 467.

34. On April 17, 2020, the Parents signed an enrollment contract with the Private School for the 2020-21 school year. J-41. The Parents did not tell the District about their decision to send the Student to the Private School at that time.[4] NT at 163-168.

35. On April 24, 2020, the District proposed the 2020 IEP with a NOREP. The Parents approved the NOREP on April 30, 2020. J-42. The District continued remote instruction for the remainder of the 2019-20 school year. *Passim*.

Summer 2020

36. In June 2020, the Pennsylvania Department of Education (PDE) and the Health Department of the county in which the District is located issued guidelines for the reopening of schools. Those guidelines permitted the District to reopen and provide either hybrid instruction (children would receive instruction in school on some days at remotely on other days) or fully remote. *See, e.g.* J-50 at 6-7.

37. On June 12, 2020, the Parents [sent] a letter to the District saying that they had chosen to place the Student at the Private School for the 2020-21 school year. J-48. While both parties characterize this document as a "10-Day Letter," it does not include a demand for tuition reimbursement.[5]

38. On July 19, 2020, the District's School Board approved and adopted the PDE and county Health Department's school reopening plan. *See, e.g.* J-50 at 6-7.

39. On July 27, 2020, the Parents signed a contract for the Student to receive Occupational Therapy at the Private School for an additional cost. J-49.

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[4] Discussed below, the Parent's testimony that they had not decided to send the Student to the Private School when they signed the enrollment contract is not credible.

[5] In the language of special education law, 10-Day Letters are notices of private placement with demands for tuition reimbursement. Discussed below, such notices are typically a prerequisite to pursue tuition reimbursement at a due process hearing. The Parents' letter of June 12, 2020, provides notice, but does not include any sort of demand for placement by the District or reimbursement.

40. On August 12, 2020, the IEP team reconvened to revise the 2020 IEP so that it could be implemented in accordance with the District's reopening plan. *See* J-50.

41. During the August 12 IEP team meeting, the team discussed COVID Compensatory Services (CCS), a program designed by PDE that enables school district to offer compensatory educational services to remediate educational losses that students with disabilities suffered as a result of mandatory school closures. *See* J-50.

42. The August 12 revisions to the 2020 IEP explain that the IEP team would reconvene within 90 days of the return to in-person instruction to determine the Student's eligibility for CCS. J-50 at 7.

43. On August 21, 2020, the District proposed the August 12 IEP revisions with a NOREP. The Parents rejected the NOREP on August 27, 2020. The Parents checked a box on the NOREP indicating their preference for a due process hearing. J-52.

44. On August 21, 2020, along with the rejected NOREP, the Parents sent a "10-Day Letter" to the District. They told the District that the 2020 IEP as revised would not provide a FAPE to the Student, they were placing the Student in the Private School for the 2020-21 school year and were demanding tuition reimbursement. J-53.

45. On August 31, 2020, the District responded to the 10-Day Letter, advising the Parents about how to request a due process hearing. The District also provided procedural safeguards notice. The District's response did not comment on the demand for tuition reimbursement. J-54.

2020-21 School Year [redacted]

46. The Student began attending the Private School at the start of the 2020-21 school year. In addition to the educational services provided by the Private School, the Student also received OT. The Student did not receive speech services. *Passim.*

47. While it is obviously impossible to say what would have happened had the Student returned to the District for the 2020-21 school year, the District's reopening plan – as put into practice – establishes where the Student would have been educated (*See, e.g.* NT 473, 497-498).

    a. The 2020-21 school year started with fully remote instruction.

b. In late September, the District began providing in-school instruction to some children with disabilities. The record does not reveal if the Student would have fallen into this group.

c. By mid-October, the District began providing hybrid instruction to students with disabilities who had similar educational profiles to the Student in this case. Under this model, the Student would have received in-school instruction two days per week, instruction via video conference two days per week, and remote asynchronous instruction one day per week.

48. On October 16, 2020, the District sent a second response to the Parent's 10-Day Letter of August 21, 2020. In this response, the District stated its belief that the revised 2020 IEP was an offer of FAPE for the Student, but also offered to convene an IEP team meeting to address any deficiencies that the Parents perceived in that IEP. J-56.

49. The Parents did not respond to the District's October 16 letter.

50. On January 19, 2021, the Parents contacted the District via counsel. In that letter, the Parents told the District that they were considering continuing the Student's placement at the Private School for the 2021-22 school year but wanted to know what services the District could provide. J-57.

51. On February 5, 2021, the District sought the Parents' consent to evaluate the Student. The Parents provided consent on February 9, 2021. J-58.

52. The District evaluated the Student and drafted a Reevaluation Report dated March 31, 2021 (the 2021 RR). J-60. On April 5, 2021, the District added an addendum to the report at the Parents' request to reflect that the Student received private, after school OT during the 2019-20 school year. *Id*.

53. Through the 2021 RR, the District determined that the Student was still a child with a disability. Previously, the Student was identified as a child with SLI. J-7. Following the 2021 RR, the Student was identified as a child with a primary disability of Specific Learning Disability (SLD) in reading and a secondary disability of SLI. Other disabilities (dysgraphia, OHI based on ADHD) were ruled out. J-60.

54. On April 12, 2021, the IEP team reconvened and drafted an IEP based on the 2021 RR (the 2021 IEP). The year-long 2021 IEP would have provided special education for the Student in an itinerant learning support placement (83% of the school day in regular education classrooms) for the remainder of the 2020-21 school year and the majority of the 2021-22 school year. J-62.

55. Through the 2021 IEP, the District also found the Student eligible for Extended School Year (ESY) services to be provided in the summer of 2021. J-62.

56. On April 20, 2021, the District proposed the 2021 IEP with a NOREP. The Parents rejected the NOREP on April 24, 2021. The Parents checked a box indicating their preference for a due process hearing and attached a note to the NOREP stating that that the 2021 IEP would not meet the Student's needs. J-64.

57. On April 24, 2021, the Parents also sent another 10-Day Letter to the District. Therein, the Parents told the District that that the 2021 IEP would not meet the Student's needs, that they were enrolling the Student in the Private School's summer program for the summer of 2021, were enrolling the Student in the Private School for the 2021-22 school year, and would be seeking tuition reimbursement. J-65.

58. On April 26, 2021, the District responded to the Parents' most recent 10-Day Letter by explaining how the Parents could request a due process hearing. J-66.

59. On May 8, 2021, the Parents signed an enrollment contract with the Private School for the 2021-22 school year. J-102.

60. On May 11, 2021, the District sent an additional response to the Parents' 10-Day Letter offering to convene another IEP team meeting to address any problems that Parents had with the 2021 IEP. J-67.

Summer 2021

61. The Parents provided tutoring for the Student in the summer of 2021, three times per week, 45 to 60 minutes per session, focusing on word decoding in isolation and spelling. J-122, NT at 100-108.

The 2021-22 School Year [redacted]

62. The Student attended the Private School for the 2021-22 school year without OT or Speech services. J-93, J-94, J-95; NT at 81, 86, 93-95, 169-172, 492.

63. In March 2022, teachers from the Private School provided information about the Student's progress and educational levels to the District. *See* J-85.

64. On April 6, 2022, the District reconvened the Student's IEP team and, using information from the Private School's teachers drafted a new, annual IEP for the Student (the 2022 IEP). J-85.

65. On April 8, 2022, the District proposed the 2021 IEP with a NOREP. The Parents rejected the NOREP on April 9, 2022. The Parents checked a box indicating their preference for a due process hearing and attached a note to the NOREP stating that that the 2022 IEP would not meet the Student's needs. J-86.

66. On April 9, 2022, the Parents sent another 10-Day Letter to the District. Therein, the Parents state their belief that the 2022 IEP does not meet the Student's needs, that they were enrolling the Student in the Private School's summer program for the summer of 2022, were enrolling the Student in the Private School for the 2022-23 school year, and would be seeking tuition reimbursement. J-87.

67. There is no dispute that the family moved out of the District in early September 2022.

The Private School

68. There is no dispute that the Private School has a policy that it will not testify at special education due process hearings. The Private School makes it known to its families, including and especially the Parents in this case, that any effort to compel the testimony of its employees will result in the Student's dismissal.

69. The Private School monitored the Student's progress using a normative benchmarking system. That system measures several metrics. The Student's scores either remained stagnant or regressed across multiple metrics including Word Reading Fluency and Nonsense Word Fluency. The Student showed a slight improvement in Oral Reading Fluency but did no better than "below average." J-73 through J-79.

70. In other academic measures, including assessments conducted as part of the 2021 RR (after more than half a year at the Private School), also showed stagnation and regression. The Student's scores in standardized, normative assessments of reading and orthographic processing regressed. Like the Private School's benchmarking, the District found that the Student's oral reading fluency and comprehension remained below average. *See* J-60.

71. The Parents do not challenge the result of the 2021 RR, which showed that after time in the Private School, the Student was reading at an end-of-kindergarten level. *See* J-60.

72. The Private School's progress monitoring was similar for the 2021-22 school year. While the Student advanced towards most (but not all) of the Private School's own goals, objective assessment continued to show stagnation and regression. Oral reading fluence remained "well below average" improving only to "below average." The Student also regressed on the PAST assessment. J-83, J-85, J-92, J-99, J-100, J-101, J-109.

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).

In this case, all witnesses testified credibly with a few unfortunate exceptions.

The Student's father testified that, when signing the tuition contract at the Private School, the family had not decided to place the Student in the Private

School and that they were buying a very expensive "option" to place the Student in the Private School if the District failed to offer a FAPE. *See, e.g.* NT at 120. That testimony is not believable based on the value of the contract with the Private School, the Parents other actions at that time, and my observations during the hearing.[6]

The Parents also called two individuals as expert witnesses. Neither of those witnesses were credible. The term "expert witness" has little meaning in this administrative proceeding as all witnesses were permitted to present opinion testimony. I gave all opinion testimony proper weight based on the record as a whole. Their credibility is so poor that I cannot rely on the record to establish proper titles for either witness, so I will address them in the order in which they were called to testify.

The first witness did not have any direct knowledge of any portion of the Student's programming, never observed the Student in the District or at the Private School, never spoke with teachers from the District or the Private School, and never attended IEP team meetings. The witness knew the Student only from her work on the "case." The witness testified authoritatively as to the program that the Student received at the Private School despite this lack of knowledge, relying instead on her memories of working at the Private School eight years ago. The witness also testified that she administered a Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) to the Student, and then used the results of that assessment in an effort to demonstrate the Student's progress at the Private School. The witness maintained this testimony despite the fact that she administered the CTOPP-2 just three weeks before testifying (the test was clearly administered for purposes of this litigation), that the test showed maintenance or progress in some domains only when compared to testing from 2019, that the CTOPP-2 did not show favorable progress when compared to more recent testing, and that she did not compare the CTOPP-2 results to more recent testing prior to testifying. The witness was unaware of, dismissive of, and otherwise disregarded evidence showing regression while the Student attended the Private School.

Of much greater concern, the first witness held out the CTOPP-2, and her analysis of the CTOPP-2, as authoritative. The witness's testimony about the number of times she administered that test vacillated widely depending on who asked the question. Regardless of the number of times that the witness administered the assessment, the witness has no qualifications to administer or interpret the result of the CTOPP-2. In addition to having no qualifications

[6] In its closing statement, the District correctly characterizes the Student's father's testimony on cross-examination as "defensive, evasive, and even non-responsive."

(or perhaps as a result thereof), the administration of the assessment was also deeply flawed. The witness does not own a copy of the CTOPP-2. Rather, the witness was given a copy of portions of the assessment from the Parents' second "expert" witness. Those copies did not include a scoring manual, and so the final composite scores that the CTOPP-2 usually yields were not calculated. The CTOPP-2 scores that were calculated are unreliable for the same reason. The witness seemed to be oblivious about how problematic these flaws are. These obvious flaws render both the assessment and any analysis of the assessment invalid and unreliable. The witness's dismissiveness of these problems, in conjunction with all of the above, make the witness unreliable as well.

The credibility of the Parents' second "expert" witness was equally lacking. This witness submitted a resumé/CV that, upon *voir dire*, proved to grossly inflate and misrepresent the witness's qualifications while mischaracterizing the witness's affiliation with the Private School. The witness attempted to justify this by testifying that the titles appearing on her resumé were those that she was given by her employers. If my employer called me a "psychological evaluator," I would not hold myself out as a such while testifying under oath if that was not true. To her credit, the witness made no attempt to obfuscate her actual work and experience when testifying, particularly under the District's *voir dire*, but the mere presentation of that document as evidence of the witness's credentials tarnishes her credibility.

The Parents proffered the second witness as an expert in the Science of Reading and teaching reading. The witness has nothing more than a well-informed, sophisticated layperson's perspective in those domains, having no education, training, or relevant experience that would enable the witness to provide valuable opinion testimony. The witness is not, and has never been, a licensed psychologist or certified school psychologist. The witness has no significant training in psychometric assessments, holds no educational degree, has never been a certified reading specialist, and has never instructed students in the reading methodologies about which she testified. At some point the witness was a teacher. But the witness holds no current teaching certification in any state, and could not provide testimony about how she qualified to teach in other states.[7] The witness's primary experience is legislative, not educational, through affiliation with legislative advocacy organizations that endeavor to change state-wide or school district-wide reading curricula and recognize dyslexia explicitly as a disability for IDEA purposes (as opposed to SLD in reading).

[7] The witness testified that she taught in California 17 years ago and tutored children remotely in other states as well.

In addition to a near complete absence of qualifications, like the first witness, the second witness never observed the Student in the Private School or the District, never attended meetings, and never spoke with teachers. Unlike the first witness, the second witness also never evaluated the Student. The second witness contributed nothing pertinent to this matter.

During the hearing, the District repeatedly objected to the testimony of these witnesses. In any other forum with formal, binding evidentiary rules, I would have sustained those objections. I assign no weight to the testimony from either of the Parent's proffered experts and do not rely upon their testimony for fact-finding.

Applicable Laws

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

Discussion

The Private School has put the Parents in a terrible position. To satisfy their burden, the Parents must prove that the Private School is appropriate for the Student. It seems unfair that the Parents must do this while the Private School, a third-party beneficiary of any tuition reimbursement award, actively thwarts their effort. The Private School gave the Parents a choice: seek reimbursement without our help, or leave. My empathy for the Parents enables me to understand why they proceeded as they did. That empathy, however, does not change the legal standard that I must apply in this case.

The three steps of the *Burlington-Carter* test are almost always taken in the sequence described above. I decline to follow that sequence in this case and start instead with the question of whether the Private School is appropriate for the Student. Given the burdens described above, I cannot simply assume that the Private School is appropriate. Rather, the Parents must establish that the Private School is appropriate by a preponderance of evidence.

For purposes of this analysis, I will assume that the various program offers from the District were inappropriate; that they were not reasonably calculated to provide a FAPE at the time they were offered.[8]

The record of this case includes no preponderance of evidence that the Private School is appropriate. I deny the Parents' demand for tuition reimbursement on that basis.

I give no weight to the testimony from the Parents' two not-credible witnesses or the documents that they produced. Other testimony about the Private School came from the Student's father, who's credibility is also tarnished as described above. The best evidence of the Student's programming at the Private School comes from documents that the Private School gave to the District as part of the District's effort to develop IEPs for

[8] This assumption makes detailed findings concerning the District's offers and the Student's needs unnecessary.

the Student. None of those documents preponderantly establish in any detail what services the Student received at the Private School.

More importantly, none of those documents establish that the services that the Student receives at the Private School (whatever they are) are appropriate. Data generated by the Private School and shared with the District shows stagnation and regression across multiple domains. Even if the record revealed with certainty what services the Student received at the Private School, there is no preponderance of evidence that those services were "appropriate" as that term is used in the second prong of the *Burlington-Carter* analysis.[9]

Actual progress can be a red herring in IDEA cases. The appropriateness of LEA-offered special education must be assessed at the time of the offer. After an offer is accepted, progress reports demonstrate whether an IEP is working as intended, and an LEA is obligated to make corrections if the answer is 'no.' But reports of actual progress do not shed light on whether an IEP was reasonably calculated to provide a FAPE at the time of the offer. Arguably, the same analysis should apply in the second prong of the *Burlington-Carter* test. If that analysis applies, the Student's actual progress in the Private School is not relevant to the appropriateness of the Private School when the Parents signed the enrollment contract. Applied in this case, however, the record does not permit any other option but to look at the Student's actual progress. The Parents did not create a reliable, preponderant record of whether the Private School was appropriate at the time of enrollment.[10]

To be clear, this analysis applies for both school years in question and for the private ESY programming in between.

Summary and Conclusions

For all the reasons above, the Parents have not proven by a preponderance of evidence that the Private School is appropriate. Assuming that the District's offers were inappropriate, I must determine if the Parents proved by preponderant evidence that the Private School is appropriate. I find that the Parents have not met their burden. It is more likely than not that the

[9] Here, again, the Parent's efforts are thwarted by the Private School. With no credible testimony about the Private School's documents from anybody other than District personnel who used those documents to craft in-district programming, it cannot be known how Private School personnel would have contextualized those documents. My duty, however, is to resolve the case on the record before me.

[10] I do not know how such a record could be made without testimony from the Private School as to what it communicates about itself during the enrollment process. Without that, we are left with the Parent's subjective impressions that come as part of tarnished testimony.

Private School's refusal to participate in this due process hearing contributed to the Parents' inability to meet their burden. I understand the Parents' decision to not press the issue with the Private School, but that decision does not alter the necessary analysis. Under the *Burlington-Carter* test, I cannot award the relief that the Parents demand.[11]

ORDER

Now, December 16, 2022, it is hereby **ORDERED** as that the Parents' demands for tuition reimbursement are **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER

[11] I know of nothing that requires me to take the *Burlington-Carter* test in order, but the outcome is the same either way. I begin with the assumption that the District's offer was inappropriate. If I could not make that assumption and were required to complete the first prong of the analysis, I most likely would not reach the second step. No dispute concerning the appropriateness of the District's evaluations and reevaluations is raised in the complaint, there is no claim that any of the IEPs and revisions are inconsistent with those evaluations. There was hardly a direct attack against any of the IEPs. The only discernable challenge to the appropriateness of the District's special education offers was the amount of time that the Student would receive remote instruction. The Parents' claim that the Student requires OG instruction embedded across all academic domains throughout the school day is not supported, and there is scant evidence that the Student receives such intervention at the Private School. Evidence concerning the Student's alleged lack of ability to derive a FAPE from remote instruction is also not preponderant. The Private School's policy was a significant impediment to the Parents' case.