

*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 File Number**

25758-21-22

**CLOSED HEARING**

**Child's Name:**

S.P.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

06/03/2022

## **Introduction and Procedural History**

This special education due process hearing concerns the rights of a child with disabilities (the Student). This hearing arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and was requested by the Student's parents (the Parents). The Parents demand that the Student's public school district (the District) reimburse the tuition that they paid or owe to a private school (the Private School) for the Student's enrollment during the 2021-22 school year.

The Student attended the Private School at the District's expense for [the past 3 school years]. The settlement contemplated the Student's return to the District for [redacted] (the 2021-22 school year). The District offered a [redacted] special education placement, but the Parents were not satisfied with the District's offer. The Parents continued the Student's Private School enrollment during [2021-22 school year] at their own expense. On November 22, 2021, the Parents requested this hearing, seeking tuition reimbursement.

As set forth in detail below, I find that the record of this hearing does not support the Parents' demand for tuition reimbursement.

### **Issue**

The only issue presented in this case is: are the Parents entitled to tuition reimbursement for the 2021-22 school year?

### **Findings of Fact**

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

#### ***Background and Prior Settlement Agreements***

1. There is no dispute that the Student is a child with a disability as defined by the IDEA or that the District is the Student's Local Educational Agency (LEA).
2. There is no dispute that the Student attended school in the District from kindergarten through [redacted]. The Student's [redacted] grade year was the 2017-18 school year.
3. There is no dispute that the parties had a disagreement about the appropriateness of the Student's special education program, or that

the Parents enrolled the Student in a private school (the Private School) for [redacted] (the 2018-19 school year).

4. The Private School is a specialized school for children [with] language-based learning disabilities that provides an Orton-Gillingham-based reading program that forms the foundation of the Private School's language arts programs. *See, e.g.* NT 100-101, 154-155. Orton-Gillingham is not a curriculum, but an over-arching pedagogy model. All of the Private School's students receive Orton-Gillingham based instruction, regardless of the particular curricula used within the Private School. *See, e.g.* NT 154-155.
5. On June 14, 2019, the parties signed a settlement agreement. Under the terms of the agreement, the District paid the Student's tuition at the Private School for [redacted] (the 2019-20 school year). S-18.
6. The settlement agreement contemplated that the Student would return to the District's programs for the 2020-21 school year. S-18.
7. The parties agreed to extend the settlement agreement.<sup>1</sup> Under the terms of the extension, the District agreed to fund the Student's tuition at the Private School for [redacted] (the 2020-21 school year). The Parents signed the extension on July 5, 2020, and the District signed the extension on September 14, 2020. S-19.
8. The extension contemplated the Student's return to the District for the 2021-22 school year. The extension established an agreed-to process by which the District would evaluate the Student and offer an Individualized Education Program (IEP) to the Student for the 2021-22 school year. S-19.
9. The District evaluated the Student and offered an IEP for the 2021-22 school year. *Passim*. The evaluation and IEP are discussed below.
10. The Parents disagreed with the District's evaluation and proposed IEP. The Parents maintained the Student's enrollment in the Private School at their own expense during [redacted] (the 2021-22 school year). *Passim*.

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<sup>1</sup> COVID-19 school closures are discussed below.

### ***The 2018 Private Evaluation***

11. In the fall of 2018, the Parents retained a doctoral-level private neuropsychologist (the Private Evaluator) to evaluate the Student. The Private Evaluator assessed the Student and drafted a private Confidential Neuropsychological Evaluation report (the 2018 Private Evaluation). While the Private Evaluation is undated, the dates of testing were September 27 and October 3, 2018 (shortly after the Student began attending the Private School). S-26.
12. The 2018 Private Evaluation included a significant number of assessments. See S-26 at 1. Those assessments included information provided by the Parents, multiple standardized and non-standardized tests that are generally accepted as measures of intellectual ability and academic achievement, multiple executive functioning and ADHD assessments, and broad-based behavioral rating scales. The 2018 Private Evaluation included no information from the District (apart from the Private Evaluator’s review of the Student’s educational records) or from the Private School – despite the use of rating scales that are typically completed by both parents and teachers.<sup>2</sup>
13. The 2018 Private Evaluation included test results and the Private Evaluator’s assessment of those results. The 2018 Private Evaluation also included the Private Evaluator’s educational recommendations. The Private Evaluator also explicitly supported the Student’s placement in the Private School, calling out the Private School by name: “[The Student] has made the move to the specialized [Private School], a school for students who have language-based learning disabilities, and I believe that this move is entirely appropriate for [the Student].” S-26 at 8.

### ***The 2020 Reevaluation, 2020 IEP, and Settlement Agreement Extension***

14. I take judicial notice that on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools to mitigate the spread of COVID-19. The record of this case does not reveal when the District closed, but there can be no dispute that the District closed on March 13, 2020, at the latest.

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<sup>2</sup> The Private Evaluator relied in part on the Behavior Assessment Scale for Children- 3 (BASC-3), which typically calls for parents and teachers to rate the frequency with which children exhibit particular behaviors. The Private Evaluator gave the Parents the “parent version” of the BASC-3, but did not give the teacher version of the form to the Private School teachers or the Student’s prior teachers in the District. However, the BASC-3 assumes that the rater knows the child well and the Student had only recently started the Private School.

15. On March 13, 2020, the District sought the Parents' consent to reevaluate the Student so that it could offer programming for the 2020-21 school year. S-4. The Parents consented to the reevaluation.
16. On April 15, 2020, the District concluded its reevaluation and issued a Reevaluation Report (the 2020 RR). S-5.
17. The 2020 RR includes an extensive review of the Student's educational history and prior testing. The 2020 RR also includes a report of the Student's performance on AIMSweb and MAP benchmark assessments, and extensive input from the Student's teachers at the Private School.<sup>3</sup> S-5.
18. Through the 2020 RR, the District concluded that the Student remained in need of special education with a primary disability category of Other Health Impairment (OHI) and a secondary disability category of Specific Learning Disability (SLD). S-5 at 47. The District also determined that there was a need for additional data and that it would seek the Parents' consent for additional evaluations. *See id.*
19. On April 27, 2020, the District invited the Parents to an IEP team meeting. The meeting convened on May 6, 2020. The District prepared a draft IEP for the meeting (the 2020 IEP). S-6. At the time of the meeting, the District had not sought the Parents' consent to conduct the additional evaluations that the 2020 RR indicated were necessary. S-5, S-6, S-8.
20. On May 7, 2020, the District issued a Notice of Recommended Educational Placement (the 2020 NOREP), proposing the 2020 IEP for the 2020-21 school year. The District explicitly withdrew support for the Student's continued placement in the Private School through the 2020 NOREP. S-7.
21. On May 28, 2020, the Parents rejected the 2020 NOREP. S-7.
22. On July 5, 2020, the Parents signed the settlement agreement extension. The District signed the extension on September 14, 2020. S-19.

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<sup>3</sup> The Private School's teacher input was taken from the Student's Private School report cards and from the District's own teacher input form. The report cards include narrative input from teachers and non-standardized, subjective assessments of the Student's progress.

### ***The 2020 Private Evaluation***

23. The Parents brought the Student back to the Private Evaluator in December 2020 for a new private Confidential Neuropsychological Evaluation (the 2020 Private Evaluation). S-3.
24. The 2020 Private Evaluation included a repetition of most of the same assessments used in the 2018 private evaluation with updated teacher input and behavior rating scales completed by multiple raters. S-3.
25. The Private Evaluation reports tests scores in summary, providing some, but not all, tests results. See S-3 at 13-15.
26. The 2020 Private Evaluation found significant reading deficits, math deficits, executive functioning deficits, processing speed deficits, and speech and language deficits. S-3.
27. The 2020 Private Evaluation did not find any significant social or behavioral problems but did find that the Student was frequently distracted as a result of ADHD (“cannot use neurological resources to refrain from being distracted”) and experiences anxiety in relation to academic tasks. S-3.
28. In the 2020 Private Evaluation, the Private Evaluator again found that the Private School was appropriate for the student, calling it out by name: “[The Student] has such significant language and learning needs that [the Student] continues to be appropriately placed at [the Private School], where class sizes are small, teachers have specific training in learning disability, and all instruction can be modified for students whose language comprehension is poor.” S-3 at 9 (there are other similar passages in the 2020 Private Evaluation too).
29. At the same time, the Private Evaluator could not decide if the Student was an appropriate candidate for the Orton-Gillingham reading program that is embedded into, and forms the hallmark of, the Private School’s program: “[The Student’s] reading decoding skills, even in an untimed testing format, were much poorer than age and grade expectations. It is unclear whether [the Student] would be a good candidate for the Orton-Gillingham program that [Private School] provides, but [the Student] should have a decoding assessment based on the principles of the approach and direct reading decoding intervention should be provided to [Student], based on the results of that evaluation.” S-3.

30. The academic achievement tests used in the 2020 Private Evaluation are not co-normed with the intellectual ability tests in the same evaluation. S-3.

### ***The 2021 Reevaluation***

31. On January 15, 2021, the District sought the Parents' consent to conduct additional evaluations. S-8. The Parents provided consent.
32. The District evaluated the Student and drafted another reevaluation report (the 2021 RR). The District issued the 2021 RR on March 27, 2021. S-5.
33. The 2021 RR includes all the 2020 RR and adds new information. *C/f* S-5, S-9.
34. In addition to the information in the 2020 RR, the 2021 RR includes a copy of the Private Evaluator's testing, updated AIMsweb and MAP testing, updated teacher input from the Private School, and a new psycho-educational evaluation from the District's Certified School Psychologist (the CSP). S-9.
35. As with the 2018 Private Evaluation, the psycho-educational evaluation conducted as part of the 2021 RR included a battery of standardized assessments of intellectual ability, academic achievement (some of which are co-normed), behaviors, executive functioning, anxiety and depression.<sup>4</sup> The psycho-educational evaluation also considered the updated AIMsweb testing, and incorporated both a Speech and Language evaluation conducted by a Speech and Language Pathologist who holds a Certificate of Clinical Competence (CCC-SLP) and a Occupational Therapy evaluation conducted by a Licensed Occupational Therapist (ORT/L). S-9.<sup>5</sup>
36. The 2021 RR includes descriptions of the assessments that went into the psycho-educational evaluation, and the CSP's analysis of the test results, all of which is well-supported. S-9. More specifically, the District found:

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<sup>4</sup> Like the Private Evaluation, this portion of the 2021 RR included a BASC-3. Unlike the Private Evaluation, the District obtained ratings from the Parents, two of the Private School teachers, and a self-report from the Student.

<sup>5</sup> As written in the report, the Speech and Language and Occupational Therapy tests are grouped with the Psycho-educational evaluation. They are also referred to as separate evaluations, which is more accurate. Regardless, all three are part of the 2021 RR.

- a. The Student had needs in reading fluency (rate), math concepts, applications, and computation, and executive functioning needs. S-9 at 65.
  - b. The Student did not have needs rising to the level that specially designed instruction was needed for basic reading skills or reading comprehension. S-9 at 66.<sup>6</sup> However, the CSP acknowledged both the Student's reading fluency needs and the Student's inconsistent reading profile over time. The CSP concluded that the Student's reading fluency was more directly related to the Student's ADHD than a reading disability. *Id.* See *also* NT at 249.
  - c. The Student's reading composite score, a broad-based measure of reading ability, was in the average range and the Student was able to answer reading comprehension questions at grade level. S-9.
  - d. The Speech and Language evaluation found that the Student had a listening comprehension deficit that was unrelated to any reading deficit. S-9; NT at 369-370.
  - e. Nothing in the 2021 RR supported the depression findings in the 2018 Private Evaluation. S-9. See *also* NT at 371.
37. In the 2021 RR, the District concluded that the Student remained eligible for special education under the same categories that were found in the 2020 RR: OHI and SLD. The OHI reflects the Student's need for special education as a result of ADHD and the SLD is the result of a statistically significant discrepancy between the Student's intellectual ability and math skills. S-9.
38. The 2021 RR included numerous recommendations to the IEP team. S-9.

### ***The 2021 IEP***

39. The Student's IEP team reconvened on April 22, 2021. The District prepared a draft IEP for that meeting and, ultimately, offered that IEP

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<sup>6</sup> Reading rate and fluency often negatively impacts upon reading comprehension. In this case, the Student had reading fluency needs. However, the Student demonstrated an average reading comprehension ability for the Student's age based on multiple assessments (AIMSweb, EasyCBM, WIAT-III). This supports the CSP's conclusion that the Student's reading fluency issues are primarily a function of the Student's ADHD.

as the Student's placement and program for the 2021-22 school year (the 2021 IEP). S-11.

40. The 2021 IEP includes information about the Student's present levels of academic achievement and functional performance, mostly taken from the 2021 RR. S-11 at 6-36.<sup>7</sup>
41. The 2021 IEP includes a section regarding post-school transition services that notes the Student intends to attend a two- or four-year postsecondary university and secure competitive employment. Taken as a whole, this section of the IEP indicates that the special education provided through the IEP and the District's postsecondary transition services provided to all students are appropriate relative to the Student's needs and postsecondary goals. S-11 at 37-40.
42. The 2021 IEP includes a math computation goal. This goal is objective, measurable, and baselined. This goal calls for the Student to reach specified score on an 8<sup>th</sup> grade math probe, but also includes short term objectives to increase the Student's scores on 7<sup>th</sup> grade math probes. The goal provides baseline information for the Student's performance on both the 7<sup>th</sup> and 8<sup>th</sup> grade levels. The goal also says how frequently progress will be reported to the Parents and by what method. S-11 at 46-47.
43. The 2021 IEP includes a math concepts and applications goal. Like the math computation goal, this goal is objective, measurable, baselined, and says how frequently progress will be reported to the Parents and by what method. S-11 at 48. Unlike the math computation goal, this goal expects the Student to reach a certain level of performance on a 6<sup>th</sup> grade assessment and has no short-term objectives. However, the Student's baseline scores reveal that the math concepts and applications goal is at least as ambitious as the math computation goal.<sup>8</sup> C/f S-11 at 46-47, S-11 at 48.
44. The 2021 IEP included a "Planning" goal related to the Student's executive functioning needs. This goal calls for the Student to use a District-supplied planner to break assignments into smaller parts, set

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<sup>7</sup> The wisdom of a 30-page present levels section, nearly all of which comes from a reevaluation report, is questionable in a document that should be functional in a classroom setting.

<sup>8</sup> The computation goal called for the Student to improve from a score of 8 to a score of 17 at the 8<sup>th</sup> grade level as measured by the District's standards-based assessments. The short-term objective in the same goal called for the Student to improve from a score of 13 to a score of 19 at the 7<sup>th</sup> grade level. In contrast, the concepts and applications goal called for the Student to improve from a score of 3 to a score of 13 at the 6<sup>th</sup> grade level, indicating a more significant deficit to remediate.

deadlines for those smaller parts, and demonstrate knowledge of materials are needed for each part. Through this goal, the District would monitor the completeness of the Student's planning, not the completion or final grades of the assignments or projects themselves. Although less straightforward than the math goals, this goal is measurable, objective, and says how frequently progress will be reported to the Parents and by what method. The District acknowledges that this goal is not baselined, as baseline data for the goal did not exist when the District wrote the IEP. Instead, the District wrote into the goal that baseline data would be "determined and reported within two weeks of receiving instruction in the [District.]" S-11 at 49, 69.

45. The 2021 IEP includes an oral reading fluency goal. This goal is objective, measurable, and baselined, calling for the Student to increase Words Correct Per Minute (WCPM) on one-minute, cold, timed oral reading assessments at the 7<sup>th</sup> grade level. This goal also says how frequently progress will be reported to the Parents and by what method. S-11 at 51.
46. The 2021 IEP includes four "Speech Goals." These target vocabulary, listening comprehension, social skills, and grammar. All of these are objective and baselined and, like the Planning goal, call for the establishment of baselines within two weeks of the Student receiving instruction in the District. S-11 at 52-55.
47. The 2021 IEP includes many program modifications and specially designed instruction (SDI). Some of those, like preferential seating, are generic.<sup>9</sup> Most, however, flow directly from the 2021 RR and are linked to the Student's needs and IEP goals. These include multiple tools and accommodations to aid the Student's executive functioning and modifications so that the Student's tests and assignments will reflect the Student's knowledge, not the Student's test-taking ability. S-11 at 56-61.
48. Coupled with the accommodations and modifications, the SDI calls for direct instruction in executive functioning, math, study skills, and reading fluency. S-11 at 56-62.

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<sup>9</sup> I have seldom if ever seen an IEP that did not include preferential seating. The Pennsylvania Department of Education reports that roughly 18% of all students qualify for special education some way. With those numbers, I wonder what seats are truly "preferential" and how many of those are left.

49. The direct instruction would be provided through a daily special education math program, a study skills program, an executive functioning program, a reading comprehension program linked to the Student's fluency needs, and additional math program to focus on calculation and problem-solving. The daily special education math program would meet for 48 minutes every day. All the other programs would meet for 48 or 49 minutes on three days per six-day cycle. S-11 at 66.
50. Everything offered through the 2021 IEP falls under the umbrella of supplemental learning support. 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. The District calculated that the Student would be inside a regular education classroom for 66% of the school day. S-11 at 66.
51. On April 27, 2021, the District offered the 2021 IEP to the Parents with a NOREP. The Parents rejected the NOREP on April 29, 2021, and notified the District of their intent to maintain the Student's enrollment in the Private School and seek tuition reimbursement. S-12.
52. On May 8, 2021, the District reconvened the IEP team in response to the Parents' notice (called a "10 day notice" or "10 day letter" in the record of these proceedings) and revised the IEP (the Revised 2021 IEP). S-13. During that meeting, the District revised the IEP to include parental concerns, written in emails from the Parents to the District. S-13 at 39. The District also added two new items in the SDI section: a scheduled visit to the District's high school before school starts to meet with teachers and walk through a daily schedule, and a commitment to reconvene the IEP team within the first four weeks of school to discuss how the Student's transition would have been going. S-13 at 66. The District also amended the educational placement section of the IEP to reflect that a purpose of the study skills program is to generalize skills across settings. S-13 at 70.
53. On May 21, 2021, the District offered the Revised 2021 IEP to the Parents with a NOREP. The Parents rejected the NOREP. S-14.
54. The Student continued to attend the Private School during the 2021-22 school year. *Passim*.
55. On November 22, 2021, the Parents requested this hearing.

## **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

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

This does not mean that I give all testimony the same weight. For example, when expert opinions formed from four-year-old evaluations are not reconcilable with expert opinions formed from present day evaluations, the opinion that is based on the most current information is given more weight if everything else is equal.

## **Legal Principles**

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

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

2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

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

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies 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. Rather, I must consider the totality of a child’s circumstances to determine whether the LEA offered the child a FAPE.

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.

### ***Evaluation Criteria***

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

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

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

### ***Tuition Reimbursement***

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

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

### **Discussion**

Both parties correctly frame this matter as a tuition reimbursement case, and correctly argue that matter is resolved through application of the *Burlington-Carter* test. The parties, of course, reach different conclusion about whether the facts of this case pass that test.

As described above, the first prong of the *Burlington-Carter* test requires me to determine if the 2021 IEP was appropriate for the Student at the time it was offered. For purposes of the *Burlington-Carter* test, I find that the 2021

IEP and the 2021 Revised IEP are substantively identical. The revisions were minor and did not change the District's programmatic offer.

The Parents argue that two factors preponderantly establish that the District's offer was inappropriate: the Private Evaluations and the Student's prior experience in the District's programs. I will address the Private Evaluations first.

Assuming that the 2018 Private Evaluation is an accurate snapshot of the Student's needs four years ago, it has little probative value as evidence of the Student's needs at the time that the District offered the 2021 IEP. The 2020 Private Evaluation is more probative. The 2020 Private Evaluation, however, cannot be reconciled with the 2021 RR, and I give the 2021 RR more weight for several reasons.

The 2020 Private Evaluation paints a picture of a child who has little to no ability to read; a child who reads [four grade levels below their grade]. Such a child should have little to no ability to read a grade level passage silently, and then correctly answer reading comprehension questions about the passage – which is exactly what the Student did during the District's testing. Further, unlike the tests in the 2020 Private Evaluation, the 2021 RR relied in large part on tests that were designed to be used together to determine if the Student's reading skills match what should be expected of a child with Student's intellectual ability.

Reading is the product of multiple skills. Taken together, the 2020 Private Evaluation and the 2021 RR suggest that the Student has difficulty demonstrating mastery of those skills in isolation, but that the Student can derive meaning from written text. The 2021 RR provides a more credible explanation of the source of this difficulty. A significant factor in this determination is that, after finding serious reading problems in 2018 and recommending the Private School in part because it specializes in the Orton-Gillingham reading method, the Private Evaluator found similar if not worsening reading problems in 2020, could not conclude that the Orton-Gillingham method used throughout the Private School was appropriate for the Student, but continued to recommend the Private School anyway.

In fairness, while testifying the Private Evaluator explained that her recommendation for the Private School in 2018 was based on her assessment of the Student's decoding difficulties (decoding is a reading skill). That recommendation turned lukewarm in 2020 because of new data. The Private Evaluator was candid – on recross examination by the District, she said (NT at 100):

Q. Why did you make the change in your recommendation from 2018 to 2020?

A. Because I had new data, right. I know they were providing that [Orton-Gillingham based] program. I had new data to show that that was not looking like a particularly effective way to teach [the Student] reading decoding... My expectation is that students with this particular profile, you have to take an empirical approach to programs like this, because they're very metacognitive in nature. And that could have actually made it more difficult for [the Student] that [Student] was not a particularly good match for that particular way of decoding.

And yet, despite that, the Private Evaluator continued to recommend the Student's placement at the Private School. While I commend the Private Evaluator's candor on the stand, and I very much appreciate the Private Evaluator's ability to explain concepts in neuropsychology and psychometric testing, I cannot give her recommendation for the Private School much weight.

Additionally, the District's CSP did not disregard the 2020 Private Evaluation. In fact, the CSP accepted and adopted many of the Private Evaluator's assessments. The CSP reached different conclusions, and those conclusions have better support on the record of this case.

After the Private Evaluations, the Parents point to the Student's prior experience in the District as evidence that the 2021 IEP is not appropriate. I must reject this argument as well.

The Student attended the District's programs from kindergarten through [redacted] (the 2017-18 school year). At that point, there was a dispute between the parties concerning the appropriateness of the special education that the District had provided and was providing to the Student, and the Parents unilaterally enrolled the Student in the Private School for [the 2018-2019 school year]. The parties resolved their dispute through a settlement agreement. Under the terms of that agreement, the District funded the Student's placement in the Private School through the end of [redacted] (the 2019-20 school year). The parties then extended the settlement agreement to cover [redacted] (the 2020-21 school year). When the extension expired and the Parents were not satisfied with the District's special education placement offer, the Parents maintained the Student's enrollment in the Private School without an agreement in place and requested this due process hearing. As a result, the Student attended the Private School during [redacted] (the 2021-22), but at the Parents' expense.

I do not accept the Parents' argument that the 2021 IEP is substantively identical to the Student's [2017-2018] program. *C/f* S-1, S-14. However, even if I did accept the Parent's argument, logic dictates that the Parents either cannot be entitled to the relief that they demand, or that the District's offer cannot be inappropriate *per se*. This is because one of two things must be true: either the Student made some amount of progress over the past four years in the Private School, or the Student made *de minimis* or no progress at all.

If the Student made *de minimis* progress or no progress at all (or regressed, for that matter), the Parents would fail at the second prong of the *Burlington-Carter* test. While private schools are not held to the same level as public schools at the second prong of the *Burlington-Carter* test, the absence of progress over four school years would constitute a preponderance of evidence that the Private School is not appropriate for the Student.

If the Student made some amount of progress over the past four years, then the Student's current needs cannot be the same as they were when the Student left the District's programs. Therefore, even if I were to assume that 2021 IEP offered the same program that the Student had in [2017-2018 school year], and further assume that the [2017-2018] program was inappropriate, that program may be appropriate now because the Student's needs are different now.

In either circumstance, as applied in this case, any similarities between the Student's [2017-2018] special education program and the District's proposed IEP are not relevant to the Parents' demand for [the 2021-2022] tuition reimbursement. Instead, the Parents' claim must be analyzed under the three prongs of the *Burlington-Carter* test. The first prong of that test requires me to determine if the District offered an appropriate placement under the *Andrew F.* standard. The *Andrew F.* standard requires me to consider the appropriateness of the District's program relative to the Student's current needs, not relative to the Student's needs four years ago.

Applying the *Burlington-Carter* test to the record of this case yields the conclusion that the 2021 IEP was appropriate. To start, the 2021 RR was appropriate, satisfying all IDEA evaluation criteria. The District then used the 2021 RR to draft the 2021 IEP, which was reasonably calculated to provide a FAPE at the time it was offered.

There can be no doubt that the 2021 RR was appropriate. There is no need to re-list the IDEA's reevaluation criteria twice in this opinion, and those

criteria are all satisfied. It is striking that the Parents make no argument about the appropriateness of the 2021 RR in their brief, focusing instead on the 2021 IEP.

Regarding their objections to the 2021 IEP, the Parents were candid both on the stand and in their arguments: "The principal deficiency in the District's proposed programming is that it has [the Student] in regular education classrooms of 20 to 25 students for 66 percent of the school day." *Parents' Closing* at 28-29. The Parents believe, perhaps with good reason, that the Student benefits from the Private School's small, nurturing environment. They fear that the District's high school will be too large for the Student, and that the Student will not receive the level of attention and care that the Student receives at the Private School. The Parents' belief in what is best for their child is genuine, but that belief (even if it were supported by the record) does not render the 2021 IEP inappropriate.

A preponderance of evidence establishes that, through analysis of the 2021 RR, the IEP team reached detailed, nuanced conclusions about what goals are appropriate for the Student, and what special education, accommodations, and related services will enable the Student to reach those goals. Importantly, the 2021 IEP does not simply accommodate the Student's disabilities. Rather, the 2021 IEP provides special education, purposefully targeted to remediate the educational impact of the Student's disabilities. Evidence to the contrary not preponderant and, in relation to the over-arching appropriateness of the 2021 IEP, comes down to nit-picking that is often contrary to the evidence.

An example illustrates the theme: the Private Evaluation includes an opinion that the Student cannot benefit from instruction without the use of manipulatives. The Private Evaluator rendered that opinion in 2018. Parents challenge the 2021 IEP on the bases that it provides for use of manipulatives only in math class. The Parents' argument ignores the facts that the Student does not use manipulatives in all classes at the Private School (see, e.g. NT at 165), and that by 2020, the Private Evaluator recommended manipulatives in specific relation to math classes (see S-3 at 10).

Similarly, the Private Evaluator opined in 2018 that the Student requires substantial modifications to derive any benefit from a regular education classroom. The Private Evaluator did not repeat that recommendation in the 2020 Private Evaluation and the Parents acknowledge that the District is proposing co-taught and supported regular education in academic courses. Even so, the Parents argue that "those classes include at least 20 to 25 students and the [2021 IEP] does not include substantial modification in the way information is delivered." While the word "substantial" may be

subjective, the Parents argument is not supported by the record and again comes down to their preference for a smaller school.

Such arguments – and the Parents raise many – miss the forest for the trees, present the Parents preferences as evidence of the Student’s needs, and ignore the bulk of the record of this case.

For all the reasons discussed above, I find that the 2021 IEP was appropriate for the Student at the time it was offered. As such, the District has prevailed at the first prong of the *Burlington-Carter* test, no further analysis is needed, and the Parents are not entitled to tuition reimbursement.

### **Summary and Legal Conclusions**

Under the IDEA, parents of a child with disabilities are entitled to tuition reimbursement from their LEA if the LEA 1) failed to offer an appropriate special education program, 2) the parents’ chosen private school is appropriate for the child, and 3) equities favor reimbursement. Analysis stops at any of these prongs if the parents do not meet their burden.

In this case, a preponderance of the evidence supports a finding that the 2021 IEP (or the substantively identical 2021 Revised IEP) was reasonably calculated to provide a FAPE to the Student when it was offered. The District, therefore, offered an appropriate special education program and the Parents are not entitled to tuition reimbursement.

The Parents sincerely believe that the Private School is the best option for their child. I understand the Parents’ belief, but I cannot accept it as evidence. Even if I could, I cannot judge the District’s offer in relation to the Private School’s program. I must judge the District’s offer in relation to the Student’s needs. The record of this case compels the conclusion that the District’s offer was appropriate in relation to the Student’s needs. An appropriate order follows.

### **ORDER**

Now, June 3, 2022, it is hereby ORDERED that the Parents’ demand for tuition reimbursement for the 2021-22 school year is **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

[redacted]