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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

23355-19-20

Child's Name

M.S.

Date of Birth

[Redacted]

Parent(s)/Guardian(s)

[Redacted]

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Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

06/15/2020

Introduction

This special education due process hearing concerns the educational rights of a student (the Student). This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

At the time of the hearing, the Student was completing [redacted] grade in the Student's local, public school district (the District). The parties agree that the Student is a student with disabilities and that the District is the Student's Local Educational Agency (LEA) as those terms are defined by the IDEA.

The Student's parent (the Parent) alleges that the District has denied the Student a free, appropriate public education (FAPE) in violation of the IDEA, and that the District's most recently offered Individualized Educational Placement (IEP) continues that violation. The Parent demands compensatory education and prospective placement in a private school to remedy the alleged violations.

Below, I find that the District offered an inappropriate program for a period of the time in question resulting in a denial of FAPE. I award compensatory education to the Student to remedy that denial. I find, however, that the Parent has not substantiated a claim for prospective placement and deny that particular remedy. Finally, I give the parties choice and flexibility to come to their own agreement about how to move forward. If the parties fail to come to their own agreement, I order specific actions to develop an appropriate program for the Student.

Findings of Fact

I frequently express my opinion that due process hearing session are an inefficient, ineffective way to present evidence that is *not* in dispute and that, in most cases, the underlying facts are *not* in dispute. Parties to due

process hearings almost always view the facts from different perspectives and reach different legal conclusions. Disagreements about what actually happened, however, are comparatively rare.

This case is no exception. In their closing briefs, both parties propose nearly identical facts. The parties come at those facts from different angles and highlight different subsets of those facts (i.e. one party may note that a report was completed while the other describes the report in detail). The parties also use those facts to support different conclusions (i.e. whether the quantum of the Student's progress was meaningful).

Despite the general lack of disputed facts, I reviewed the entire record. I make findings of fact only as necessary to resolve the issues presented. I find as follows:

Background and Contextual Facts

1. The Student enrolled in the District's kindergarten program and remained in the District through [redacted] grade. NT 439-441.
2. The 2015-16 school year was the Student's [redacted] grade year. The Parent withdrew the Student from the District and enrolled the Student in a parochial school (the Parochial School) for [redacted] grade. NT 441.
3. The Intermediate Unit (IU) in which the District is located evaluated the Student during the 2015-16 school year and prepared an Evaluation Report on March 21, 2016 (the 2016 ER). S-3.
4. The 2016 ER was completed at the Parochial School's request with the Parent's consent. The IU sent copies of the 2016 to the Parent and the Parochial School, but not the District. *See* S-3.

5. The IU found that the Student met the IDEA's definition of a child with Autism, would benefit from specially designed instruction (SDI), direct Speech-Language Therapy, and Occupational Therapy on a consultative basis. S-3.
6. Regarding SDI, the IU recommended reducing the amount of academic work assigned to the Student, increasing the amount of time that the Student had to complete work, a few methods for engaging the Student and maintaining the Student's attention, and direct social skills instruction. S-3
7. Regarding Speech-Language Therapy, the IU recommended one, 30-minute small group session per week to address supralinguistic and pragmatic language skills. S-3.[1]
8. Regarding Occupational Therapy, the IU recommended classroom accommodations and adaptations that could be implemented by a classroom teacher with consultation by an Occupational Therapist. S-3.
9. Following the 2016 ER, the Parent did not attempt to obtain, and the Student did not receive Speech-Language Therapy, and the Student would not comply with Occupational Therapy interventions. *See, e.g.* NT 445.
10. Following the 2016 ER, the Student received behavioral health services at home from a third-party agency. NT 445.

[1] Supralinguistic skills are the ability to understand words in context beyond their literal meaning. Pragmatic language skills are the ability to use language to communicate (often juxtaposed with the physical ability to produce language).

11. The Student continued to attend the Parochial School in[redacted] grade (2016-17) and a portion of [redacted]grade (2017-18). *Passim*. The Student did not have an IEP while attending the Parochial School. *See, e.g.* NT 521.

12. In the spring of 2018, the Student engaged in an inappropriate behavioral incident while attending the Parochial School. The incident prompted a conversation between the Parent and the Parochial School about the incident, the Student's overall behavior, and academic difficulties. That conversation resulted in the Parent withdrawing the Student from the Parochial School and homeschooling the Student for the remainder of [redacted] grade school year. NT 446-446, 520-521.

13. While the Parent was homeschooling the Student, the Parent had a private evaluator (the Private Evaluator) evaluate the Student. The evaluation occurred over three sessions in late May and early June 2018. The Private Evaluator then drafted a report and presented the report to the Parent shortly thereafter (the Private Evaluation). S-4.

14. The Private Evaluation included a summary of the 2016 ER, the Private Evaluator's observations of the Student, a battery of normative assessments of cognitive ability and academic achievement, and a battery of standardized rating scales to assess emotional and cognitive domains. S-4.

15. Regarding the ratings scales, the Private Evaluator asked one of the Student's Parochial School teachers to rate the student. The Private Evaluator did not otherwise solicit information from the Parochial School. S-4, NT 116-119.

16. The Private Evaluator concluded that the Student satisfied DSM-5 diagnostic criteria as a child with a specific learning disorder with impairment in oral word reading accuracy, decoding, and reading comprehension, specific learning disability with impairment in written expression, Autism Spectrum Disorder (ASD), Attention Deficit Hyperactive Disorder (ADHD), and general anxiety. The Private Evaluator found no math disability. S-4, NT 61-65, 87.

17. The Private Evaluator drafted several recommendations into the Private Evaluation. Regarding reading, the Private Evaluator recommended specially designed, individualized instruction in reading using an explicit, highly structured, systematic, sequential, cumulative, and multi-sensory approach. S-4 at 23.

18. In the overall context of this case, I find that the language used by the Private Evaluator in the Private Evaluation's reading recommendation is code for the Wilson Reading System. The Wilson Reading System (Wilson) is an off-the-shelf reading curriculum based on the Orton-Gillingham methodology. *Passim.*

19. The Private Evaluator also recommended an Occupational Therapy evaluation for the Student. S-4.

20. The Private Evaluator also recommended assistive technology to accommodate the Student's reading. S-4

21. At the time of the Private Evaluation, the Parent intended to place the Student in a private school for the 2018-19 school year. After receiving the Private Evaluation, the Parent sent applications to three private schools. The Student was accepted into one of those, but the Parent could not afford the private school. Seeing "no other options," the Parent enrolled the Student in the District for the 2018-19 school year. NT 113, 449-452, 524.

The 2018-19 School Year ([Redacted] Grade)

22. The Parent provided copies of the 2016 ER and Private Evaluation to the District during the enrollment process, and the District assigned a special education case manager to the Student.[2] *See, e.g.* NT 453.

23. The District reviewed the 2016 ER and Private Evaluation and scheduled an IEP team meeting. The IEP team convened on September 11, 2018. S-8. The Parent attended the IEP team meeting with a non-attorney advocate (Advocate 1). S-9.

24. During the September 11, 2018 IEP team meeting, the District proposed an IEP for the Student. S-10, S-17.[3] The 2016 ER and the Private Evaluation formed the bases of the IEP. NT 245.

25. The District treats evaluations completed by the IU as its own evaluations. However, before September 11, 2018, the Student had never received special education pursuant to an IEP. The District, therefore, treated the September 11, 2018 IEP team meeting and resulting IEP as the initial provision of special education services for the Student. *See, e.g.* S-10.

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[2] The Parent initially provided portions of the Private Evaluation and then provided the document in full upon the District's request prior to the initial provision of special education services. *See* NT 452.

[3] S-17 is a revised IEP with revisions dated October 11, 2018. The un-revised portions of that document are the IEP that the District offered on September 11, 2018.

26. Through the September 11, 2018 IEP and NOREP, the District proposed an itinerant learning support placement for the Student with social skills instruction once per week for 30 minutes per session, speech therapy once per week for 30 minutes per session, and monthly consultation between teachers and an occupational therapist.[4] S-10, S-17.

27. The District did not propose assistive technology. S-10, S-17.

28. The District issued the September 2018 IEP with a Notice of Recommended Educational Placement (NOREP).[5] The Parent signed the NOREP, approving the IEP, either during or immediately after the September 11, 2018 IEP team meeting. S-10.

29. As part of the learning support placement, the District offered a reading intervention class with a reading specialist using a program called Corrective Reading. *See, e.g.* NT 245-246.

30. After the first semester of the 2018-19 school year, the District transferred the Student to a different reading support classroom where the Student received instruction using a program called Rewards Plus. NT 858-859.

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[4] In this context, "itinerant" describes the amount of time that the Student would receive learning support. The term "itinerant learning support" by itself does not refer to a classroom or other physical placement.

[5] NOREPs are form documents used in Pennsylvania by which LEAs provide prior written notice and parents may provide or withhold consent for special education or changes in special education placements.

31. During the September 11, 2018 IEP team meeting, the District also issued a Permission to Re-Evaluate (PTRE) form. The District sought the Parent's consent to conduct a re-evaluation. Specifically, the District sought consent to consider previous evaluation reports, teacher and parent input, and student observations. S-12.[6]

32. The Parent requested another IEP team meeting shortly after the September 11, 2018 meeting to discuss concerns. The District reconvened the IEP team on October 11, 2018. The Parent and Advocate 1 attended the October 2018 meeting. The IEP team agreed to revise the Student's IEP to update the Student's present education levels and add additional supports. The additional supports included assistive technology, albeit not the same assistive technology recommended in the Private Evaluation. S-16, S-17.

33. The IEP team also agreed to consult with an Occupational Therapist concerning the Student's handwriting. S-16.

34. The revisions were drafted into the IEP, and the District offered the revised IEP with a NOREP. The Parent approved the IEP through the NOREP on October 19, 2018. S-18.

35. To complete the reevaluation that the Parent approved during the September 2018 IEP team meeting, the District collected written input from the Parent, reviewed the 2016 ER and the Private Evaluation, observed the Student in Science and Transitional Math classes (one observation in each class), and collected input from teachers. S-23.

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[6] The disconnect between the District's use of the 2016 ER and Private Evaluation to develop the Student's initial IEP and this request for parental consent to review those same documents is discussed below.

36. The Parent's written input for the 2018 RR covers just over two typed pages and is dated November 5, 2018. The Parent described the Student's determination and willingness to help others as the Student's biggest strengths, but that the Student's difficulties understanding social cues and understanding the perspective of other people as persistent difficulties. The Parent was also concerned that the Student viewed any form of attention as something positive. S-21.

37. The Parent also described the Student's struggle to accept the Student's own differences and ask for help. S-21.

38. Academically, the Parent described math as a strength and reading comprehension as a weakness. The Parent described the Student's reading comprehension difficulties both in relation to the Student's difficulty to understand the perspective of others (i.e. an inability to understand why characters do what they do resulting from the Student's difficulty in understanding other's perspectives) and in relation to decoding difficulties (i.e. difficulty reading the words interrupting comprehension). S-21.[7]

39. The Parent also expressed concerns about the Student's handwriting and executive functioning. S-21.

[7] The Parent described the Student as having Dyslexia. Neither the 2016 ER nor the Private Evaluation use that particular diagnostic term.

40. The District wrote up the classroom observations in the form of a Functional Behavioral Assessment (FBA) dated November 6, 2018. S-22.[8] According to the FBA, the Student's teachers were concerned about the Student's failure to complete classwork and homework, and off-task behaviors in school (looking around the room, talking to peers at inappropriate times, fidgeting with objects, paying with a cell phone). S-22.

41. According to the FBA, the Student's behaviors resulted in deficits in academic skills, social skills, communication skills, organizational skills, self-regulation skills, and study skills. S-22.

42. The District administered reading probes to all students at the start of the school year and considered the Student's reading probes in the 2018 RR. According to those probes, the Student entered [redacted] grade with reading comprehension at the 4th grade level. NT 344.

43. The 2018 RR also included the results of an Occupational Therapy consultation, per the parties' agreement at the second IEP team meeting. The Occupational Therapist assessed the Student's handwriting across several domains, found that the Student's handwriting abilities were average based on the Student's grade level, and concluded that a full Occupational Therapy evaluation was unnecessary. S-23.

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[8] Pennsylvania has no guidelines or restrictions concerning who may conduct an FBA. The District employee who observed the Student and wrote up those observations in the form of an FBA has none of the formal training typically associated with individuals who conduct FBAs.

44. Through the 2018 RR, the District found that the Student continued to be a child with disabilities. The Student qualified for special education under three disability categories: Autism, Other Health Impairment (OHI), and Specific Learning Disability (SLD) in reading and writing. S-22, 2-23.

45. The District concluded that the Student required special education to support and develop social skills, work completion, reading comprehension, reading fluency, and writing. S-22, S-23.

46. On one behavioral rating scale, a teacher gave the Student clinically significant ratings in markers for depression. The District did not offer special education in response to that rating but did offer services through its Student Assistance Program (SAP). The District completed an SAP assessment and offered services in school. The Parent declined those services because accepting them would terminate the services that the Student received at home from a third-party agency. S-23, NT 346, 471-472.

47. The IEP team reconvened on December 4, 2018. The purpose of the meeting was to review the 2018 RR, a Positive Behavior Support Plan that the District developed using the FBA, and a proposed IEP. The Parent attended the IEP team meeting with Advocate 1 and another "Parent Advisor" (Advocate 2). S-24, S-26, S-36, NT 347.

48. The District brought a draft IEP to the meeting. That IEP continued the goals in the prior IEP and added a reading comprehension goal. S-36.

49. During the meeting, the Parent requested assistive technology. The District agreed to refer the Student to the IU for an assistive technology assessment. S-27.

50. A dispute between the Parent and the District arose during the December 4, 2018 IEP team meeting. The Parent and the Advocates requested Wilson.[9] The District believed that Rewards Plus was a better choice for the Student. *See, e.g.* NT 352-354.

51. During the December 2018 IEP team meeting, the District explained that Rewards Plus includes a significant reading comprehension component while Wilson's primary focus was on decoding by developing phonics skills. *See, e.g.* NT 352-354.

52. As a compromise, the District agreed to administer the Wilson Assessment of Decoding and Encoding (WADE) to the Student.[10] The WADE is a test made by the publishers of Wilson. The WADE is not a placement test because Wilson requires all students to start at the beginning of the program's sequence. Rather, the WADE is used to see if a student knows the skills that are taught through the Wilson program. NT 352-354, S-27.

53. The District issued a NOREP during the December 2018 IEP team meeting so that the Parent could approve the draft IEP that the District brought to the meeting. S-27. In addition to adding a reading comprehension goal, the IEP added a Language Arts support class and continued the Student's placement in itinerant learning support with weekly 30-minute social skills, and a weekly 30-minute Speech-Language Therapy session. S-27.

54. The NOREP also captured the parties' agreements concerning the WADE and assistive technology assessment. S-27.

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[9] District personnel uniformly described this request as a forceful demand. *Passim*.

[10] In very broad generalities, decoding skills are the ability to convert letters into sounds and words and encoding skills relate to spelling.

55. The Parent approved the NOREP on December 19, 2018. S-27.

56. During the 2018-19 school year, the Student developed a peer conflict with another student resulting from the other student stepping on the Students shoes. As a result of the December 2018 NOREP, the District changed the Student schedule, placing the Student in a Language Arts support class to receive the Rewards Plus program. The other student was already attending the new Language Arts support class. This prompted the Parent to request an IEP team meeting. *Passim*.

57. The District convened the IEP team on January 11, 2019. The meeting convened for the limited purpose of discussing the Student's placement with the other student. At this time, the WADE was complete and reported to the Parent, but was not discussed at the meeting. The Parent attended with Advocate 1. S-28.

58. During the January 11 meeting, the parties came to an agreement concerning the Student's schedule. The Student was assigned to a different Language Arts support class to avoid placement the other student, but the change would come after a program break. The District also updated the present education levels in the Student's IEP to reflect the peer conflict and issued that IEP with a NOREP on January 15, 2019. S-28, S-29, S-36.

59. The Parent reviewed the January 11, 2019 IEP revisions and concluded that they did not accurately capture the incident with the other student. The Parent rejected the January 15, 2019 NOREP for that reason. This did not substantively alter the Student special education because the only proposed change was to the IEP's present education levels. The Student continued to receive Language Arts support and Rewards Plus. S-29, S-36.

60. A District-employed, Wilson-certified teacher (the Wilson Teacher) administered the WADE to the Student over two sessions on December 12 and 13, 2018. The District reported the results of the WADE to the Parent on January 9, 2019. The IEP team convened to discuss the WADE on January 16, 2019. P-1, S-46.

61. The WADE called for the Student to read consonant sounds in isolation (i.e. the teacher presented a consonant and the Student was asked what sounds the consonant makes). According to the WADE, the Student knew all consonant sounds, including multiple sounds made by the same letter, except for the "S" sound that the letter "Z" can make. This resulted in a score of 96% in the consonants domain. P-1.

62. The WADE called for the Student to read vowel sounds in isolation (i.e. the teacher presented a vowel, double vowel, or "r controlled" vowel, and the Student was asked what sounds the vowel makes). According to the WADE, the Student knew all long and short vowel sounds except for the long "U," 61% of double vowel sounds, and 75% of "r controlled" sounds. The smaller number of vowels in the English language means that missing a vowel sound results in a greater percentage score decrease. The Student scored 54% in the vowels domain. P-1.

63. The WADE called for the Student to read "additional sounds" in isolation to assess the Student's knowledge of particular rules. Silent letters are one example (the Student is presented "kn" in isolation and expected to make only the "n" sound). The Student scored only 27% in this domain. P-1.

64. The WADE called for the Student to read digraphs and trigraphs (two or three letters that combine to form a single sound, as in "ph") in isolation. The Student scored 67% in this domain. P-1.

65. The WADE called for the Student to read welded sounds in isolation (vowels combined with consonants that produce sounds that are slightly different from those letters in isolation or in other combinations). The Student scored 68% in this domain. P-1.

66. The Student's overall score in the "Sounds" domain, which combines all of the other sounds sub-sets, was 62%. P-1.

67. In addition to assessing knowledge of sounds in isolation, the WADE assessed the Student's ability to read words. These are divided into "high frequency" words that the Student should know on sight and "real words." P-1.

68. Of the high frequency words, the Student missed three but self-corrected one. This resulted in a score of 95%. P-1.

69. The real words are grouped into 12 types based on the skills required to read the word. The Student read with 100% accuracy in eight of those groups, 90% accuracy in two of those groups, and 80% in two of those groups. In both of the 90% groups and one of the 80% groups, self-corrections were counted as inaccurate responses. P-1

70. Across all real words, the Student read 6 words incorrectly and self-corrected three of those. Counting the self-corrections as incorrect responses, the Student's total real word reading was assessed at 95%. P-1.

71. The WADE also called for the Student to read "pseudowords." A pseudoword is not a real word, but rather a combination of letters presented as a word that the Student can sound out if the Student has the requisite skills. P-1.

72. The pseudowords are divided into the same 12 groupings as the real words. The Student read with 100% accuracy in two of those groups, 90% accuracy in one group, 80% accuracy in four groups, 60% accuracy in two groups, 40% accuracy in one group, and 20% accuracy in two groups. P-1.

73. The Student's scores were significantly discrepant between real words and pseudowords within the same group. For example, the Student read 100% of real words with long vowels in open syllables but 20% of pseudowords requiring the same skill. P-1.

74. The WADE assessed the Student's spelling by having the Student write high frequency words until the Student spelled five words wrong in a row, and write sentences until the Student made three or more spelling, punctuation, or capitalization errors in the same sentence. P-1.

75. The Student completed nine words out of 60 before the test protocol stopped the word spelling component. The Student's ability to spell words that were not assessed is unknown. The Student completed three sentences out of 24 before the test protocol stopped the sentence spelling component. The Student's ability to correctly complete sentences that were not assessed is unknown. P-1.

76. The Wilson Teacher generally described the Student's performance on the WADE as inconsistent with students who typically benefit from Wilson because the Student's decoding skills were stronger than most students who take the WADE. More specifically, the Wilson Teacher explained that the Student's ability to read words was strong, but that the Student's comparative difficulties with pseudowords flowed from an unfamiliarity with Wilson-specific skills. The Wilson Teacher was also concerned about the Student's reading comprehension needs, given Wilson's treatment of comprehension as secondary to decoding. *See* NT 559, 564-571, 578-579, 597-599.

77. The Wilson Teacher's testimony was specific, credible (see below) and not contradicted by preponderant evidence.

78. During the January 16, 2019 IEP team meeting, the Parent and Advocate continued to request Wilson and the District maintained its position that Rewards Plus was appropriate.[11] *See, e.g.* S-46. The District also revised the Student's present education levels. *See* S-36.

79. The IEP team reached no consensus about the Student's reading program on January 16, 2019. The District issued NOREPs on January 16 and January 23, 2019, seeking the Parent's approval for revisions made during the January 16 meeting. The Parent rejected those NOREPs. *See* S-31.

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[11] As with the prior meeting, District employees describe the Parent and Advocate 1's requests for Wilson as forceful demands, resulting in a truncated meeting.

80. The Parent rejected the January 23, 2019 NOREP on January 31, 2019. In doing so, the Parent noted that an IEP team meeting scheduled for January 25, 2019 was "canceled on site," and that the team was scheduled to reconvene on February 1, 2019. S-31. It appears that the February 1, 2019 meeting was postponed to February 15, 2019.

81. The IU completed its assistive technology evaluation and issued a report on January 17, 2019.[12] S-30.

82. The IEP team reconvened on February 15, 2019 to continue discussing the Student's reading program and the assistive technology evaluation. S-46. The Parent attended with Advocate 1.

83. During the February 15, 2019 IEP team meeting, the parties agreed that the Student would continue in the Language Arts support class program but also receive Wilson instead of Rewards Plus. The District did not hide the fact that it was offering Wilson instead of Rewards Plus only to placate the Parent and Advocate. *Passim*.

84. More specifically, during the February 15, 2019 IEP team meeting, the District explained that it interpreted the WADE to indicate that the Student did not need Wilson, and that Rewards Plus was appropriate because of its reading comprehension focus, and that Wilson was inappropriate for its lack of reading comprehension focus. *Passim*, *see, e.g.* NT 531-532, 363, 371-372; S-46.

85. Regarding assistive technology, the District agreed to trial an iPad with pre-loaded software for the Student to use in school. NT 350-351.

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[12] Both parties describe the IU's assistive technology evaluation as an evaluation, and so I use that term as well. I note, however, that the IU initiated the SETT framework which, to my knowledge, is intended to be an ongoing, evaluative process – as opposed to an evaluation with a finite end point.

86. The Student refused to use the iPad. *Passim*.

87. The IEP team also discussed Extended School Year (ESY) during the February 15, 2019 IEP meeting. The District determined that the Student did not qualify for ESY in the summer of 2019 but would collect data and reassess that determination after spring break. NT 363; S-46.

88. Following the February 15, 2019 IEP team meeting, the District revised the Student's IEP to include Wilson, and issued the revised IEP with a NOREP on February 25, 2019. S-32, S-36.

89. The Parent approved the February 25, 2019 NOREP on March 5, 2019. S-32.

90. During the February 15, 2019 IEP team meeting, the Parent raised concerns about the Student's handwriting and told the team that the Parent would take the Student for a private Occupational Therapy evaluation. S-46. The District expressed its view that the Student's handwriting was grade and age appropriate, and that handwriting problems were a function of rushing and the Student's refusal to use paper with specialized handwriting guides. S-46; NT 366-367.

91. In April 2019, the Parent obtained a private Occupational Therapy evaluation (the Private OT Evaluation) for the Student. Following the Private OT Evaluation, the Student received roughly eight weeks of private Occupational Therapy outside of school. The Parent did not tell the District about the Private OT Evaluation or that the Student received private Occupational Therapy until this due process hearing. NT 498, 516-520.

92. Following the March 5, 2019 NOREP approval, the Student received Wilson instruction. Per publisher guidelines, the Student started at Wilson level 1.3. NT 581. Wilson levels, sometimes referred to "book" levels during this hearing, do not correspond to grade levels. Rather, Wilson levels correspond to skills within the Wilson program.

93. By the end of the 2018-19 school year, the Student had mastered all Wilson level 1 and level 2 skills and had satisfied all criteria to move to Wilson level 3. NT 589.

94. The Student's IEP contained six goals. With the exception of the reading comprehension goal discussed above, the goals remained unchanged throughout the 2018-19 school year. *See* S-36.

95. The IEP included a work completion goal, calling for the Student to complete 80% of class work or more, each day, for two consecutive marking periods. When the goal was drafted, the Student's baseline was reported as "completing 80% or more of [Student's] classwork each day an average of 60% of the time." By the end of the 2018-19 school year, the Student's progress was reported as "80% or more … an average of 66% of the time." S-38.

96. The IEP included an attention goal, calling for the Student to remain focused and on task for 90% of class periods for two consecutive marking periods. When the goal was drafted, the Student's baseline was reported as 71%. By the end of the 2018-19 school year, the Student's progress was reported as 87%. S-38.

97. The IEP included a speech goal. The goal, as written, was (S-38):

> *[Student] is able to state [Student's] opinion and provide supporting details for the weekly debate question. [Student] will continue to expand [Student's] expressive language for non-preferred topics by responding to a*

variety of topics and engaging in conversational rallies with peers at least three volleys in 8 out of 10 opportunities over three consecutive sessions.

98. Criterion indicating mastery of the speech goal, as written, was (S-38):

    3 conversational volleys in 8 out of 10 opportunities.

99. The Speech goal had no baseline. Progress was reported as a narrative summary of the Speech-Language therapy sessions. Those narratives say nothing about conversational volleys, providing no substantive, objective information in relation to the goal. Instead, they document the Student's responses to debate questions and worksheets. S-38.

100. The IEP included a reading comprehension goal. The goal called for the Student to improve reading comprehension when presented reading passages at the 4th grade level. When the goal was drafted, the Student's baseline was reported as answering reading comprehension questions with 60% accuracy. S-38.

101. The Student's reading comprehension was assessed many times throughout the 2018-19 school year. Results were highly variable, but 61% was reported most frequently. In the final reading comprehension probe taken during the 2018-19 school year (May 30, 3019), the Student scored 83% on comprehension questions after reading text at the 4th grade level. That was one of only two scores above 80%. S-38.

102. The IEP included a reading fluency goal.[13] The goal called for the Student to improve reading fluency when presented reading passages at the 6th grade level. When the goal was drafted, the Student's baseline was reported as an ability to "read an average of 125 words correct per minute (WCPM) with 4 errors on a 6th grade, timed one minute reading fluency probe." S-38.

103. The criterion for mastery of the reading fluency goal was 141 WCPM in four out of five probes over two consecutive marking periods. S-38.

104. The Student's reading fluency probes were variable throughout the 2019-20 school year, but less so than the reading comprehension probes. The Student scored 141 WCPM on five separate probes. Four of those probes were consecutive in the District's fourth marking period. S-38.

105. The IEP included a written expression goal. The goal called for the Student to improve paragraph writing as measured against a state-wide, standardized rubric. The goal called for the Student to earn three of four points for content on the rubric in four out of five writing probes over two consecutive marking periods.[14] When the goal was drafted, the Student's baseline was reported 0/4 as scored against the rubric. S-38.

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[13] Reading fluency describes the rate and accuracy of the Student's reading, without regard for comprehension. I note, however, that impaired reading fluency often yields poor reading comprehension.

[14] Formulations such as this are common but can be confusing. The goal states the desired score (3/4 in content), how often that score must be achieved (4/5 probes), and how long that level of success must be maintained (2 consecutive marking periods).

106. Progress towards the written expression goal was variable and related to the Student's willingness to accept help.[15] The Student achieved the threshold content score in three probes over the course of the year. Two of those were the final two probes administered during the 2018-19 school year. Those two were the only consecutive probes in which the Student reached the threshold score. S-38.

107. The IEP team reconvened on June 3, 2019. During that meeting, the District maintained its determination that the Student did not require ESY in the summer of 2019. The team revised the IEP to reflect that determination. The District then issued a NOREP on June 4, 2019, for the Parent to approve the revision. The Parent approved the revision on June 11, 2019. S-36, S-39.

108. The Student completed the 2018-19 school year passing all classes with grades based on the Student's work with IEP accommodations. The District promoted the Student to [redacted] grade. *See* S-64.

The 2019-20 School Year ([redacted] Grade)

109. The Student started the 2019-20 school year under the IEP revised in June 2019, receiving the same services that were provided after Wilson was added to the IEP. S-36.

110. The District replaced the Student's iPad with a Chromebook that had pre-installed software. The Student refused to use the Chromebook but would use Chromebooks distributed to the entire class when teachers called for that. Both parties generally agree that the Student declines interventions that make the Student stand out (regardless if the difference real or perceived). *Passim*.

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[15] The goal as written is silent about whether the Student's work must be independent.

111. The Parents requested an IEP team meeting. The IEP team convened on October 8, 2019. The Parent brought an attorney to the meeting.

112. During the meeting, the IEP team discussed the Student's services but did not change the Student's IEP in any way. *See, e.g.* S-46.

113. After the meeting, the District issued a NOREP dated October 9, 2019. Portions of that NOREP are confusing in context but, as a whole, the NOREP is the District's written notice that the team made no changes. The Parent did not sign and return that NOREP. S-47.

114. The Student continued to participate in Wilson, starting level 3 at the start of the 2019-20 school year. By December 2019, the Student reached level 3.5. NT 595.

115. By December 2019, the Student's reading fluency had improved to 146 WCPM on timed, one-minute probes at the 8th grade level, but the Student's reading comprehension at the 4th grade level had not improved. S-50.

116. The District reconvened the IEP team for an annual IEP team meeting on December 11, 2019. S-56. The Parent attended with the Student but did not bring an advocate or attorney. S-53, S-54.

117. During the meeting, the Parent and Student shared frustration with the Student's math placement, expressing that the placement was not challenging enough. S-54. The Student scored poorly on a criterion-based math test earlier in the year, although uncontested testimony from the District explains that the test in question is not a reliable indicator of the Student's math ability or achievement regardless of publishers' guidelines.[16] *See, e.g.* NT 838-839.

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[16] The question of why the District uses an assessment that it views as invalid is beyond the scope of this hearing.

118. During the meeting, the District recommended discontinuing Wilson and starting Rewards Plus. The District explained that its recommendation was based on the same factors as in the prior school year: The Student's strong reading fluency and poor reading comprehension. S-54.

119. During the meeting, the Parent objected to discontinuing Wilson and expressed a belief that the Student's progress in Wilson was too slow. S-54.[17]

120. The District issued an IEP dated December 2, 2019. This date reflects the date that the document was created. This is the IEP that the District brought as a draft to the December 11, 2019 IEP team meeting. The IEP replaces Wilson with Rewards Plus. The IEP is otherwise substantively identical to the prior IEP except for the reading fluency goal, which was revised to reflect the Student's fluency at the 8th grade level. S-56.

121. The District issued the December 2019 IEP with a NOREP on December 17, 2019. The Parent did not return the NOREP. The District then began to implement the December 2019 IEP on January 3, 2020.

122. The Parent sought admission for the Student at a private school. The private school accepted the Student on January 21, 2020. S-61.

123. The private school is a very small school that provides a small student-to-teacher ratio and embeds Wilson-like instruction into the curriculum throughout the day. *See* NT 143-196.

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[17] The Parent's position regarding the rate of the Student's progress through Wilson is supported only by hearsay, which may not form the basis of this decision. I make this finding only to illustrate what was said during the meeting.

124. The Parent requested this due process hearing, via counsel, on February 4, 2020, demanding compensatory education and prospective placement in the private school.

125. The Student typically eats lunch in the case manager’s office. On March 4, 2020, the Student had lunch in the cafeteria. Another student claimed that the Student threw food (this is disputed). The other student then student scratched the Student’s arm (this is not disputed). The District investigated the incident. The Student was not disciplined. Consequences for the other student, if any, are not part of the record of this case. P-3, P-4, P-5; NT 202-222, 474-476, 509-512, 884-912.

126. On March 11, 2020, the District requested the Parent’s consent to reevaluate the Student to determine if the Student continues to need speech and language support. S-63.

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).

While I cite to testimony as the bases of some of the facts that I found, few if any of those facts were ever truly in dispute. Nevertheless, to the extent that an explicit credibility determination is necessary in all due process hearings, I find that all witnesses testified credibly despite strong differences in opinion and memory.

Applicable Legal Principles

The Burden of Proof

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

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d

389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

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

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process

hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> *"… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."*

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No.

3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

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

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Prospective Private Placement

In this case, the Parent does not seek tuition reimbursement. Rather the Parent demands a prospective private placement. This type of remedy is extremely rare, but not unheard of. *See, e.g. A.D. v. Young Scholars – Kenderton Charter School*, ODR No. 15202-1415KE (2014).

The Parent correctly argues that prospective placement was at issue in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) and is permissible under Third Circuit precedent. *See D.S. v.*

Bayonne Bd. of Educ., 602 F.3d 553 (3d Cir. 2010) (upholding a New Jersey ALJ's order of prospective placement).

Like Hearing Officer Skidmore in *Young Scholars*, I conclude that prospective placement is a remedy within my jurisdiction to order. As Hearing Officer Skidmore reasoned: hearing officers enjoy broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C., supra*, at 718. Case-specific analysis is, therefore, required to determine whether it is appropriate for the hearing officer to use discretionary powers to issue extraordinary remedies. *See, e.g., School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

I further agree with Hearing Officer Skidmore that, while the tuition reimbursement test may not be directly applicable, its prongs provide guidance for evaluating this type of claim. Tuition reimbursement (a vastly more common remedy in comparison to prospective placement) hinges on the three-part "*Burlington-Carter* test," named for *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).

The first step in applying the *Burlington-Carter* test 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. *See also, 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.

Prospective placement in a private school, however, requires something more. Unlike parents in tuition reimbursement cases, parents in prospective placement cases do not face the same risk of financial loss – a factor that courts consider in many of the tuition reimbursement cases cited above.[18] More importantly, the cases cited above concerning compensatory education illustrate the well-established remedies for denials of FAPE: compensatory education to remedy past denials and IEP changes to stop ongoing denials. Setting tuition reimbursement as a particular remedy with a particular test aside, past and ongoing denials of FAPE can be fully remedied without prospective placement. Prospective placement is an extraordinarily remedy for this reason.

To support such an extraordinary remedy, the record must establish that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. This does not mean that the Parent must establish that the LEA cannot "in theory" provide an appropriate program. *Draper, supra*, at 1285 (quoting *Ridgewood, supra*, at 248-49). Such standards are impossible. Rather the nature of prospective placement must be a heavier burden for parents than tuition reimbursement under current case law. Parents seeking prospective placement must prove both that the District has failed to offer a FAPE and that the time it would take for the District to provide a FAPE would compound the harm in a way that requires unique relief. *See Ferren C., supra* (discussing hearing officers' authority to award unique relief).

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[18] That fact that current case law favors parents who are in a position to risk financial loss is beyond the scope of this case.

Discussion

The District Failed to Provide the Student a FAPE and the Student is Owed Compensatory Education

The District is not responsible for the fact that the Student came into [redacted] grade with significant deficits. The Student had spent all of [redacted] and [redacted] grade, and most of [redacted] grade, in the Parochial School – over which the District had no control. While the Student's reading levels entering the Parochial School is unknown, it is as if the Student's reading comprehension progress stopped for three years.

The District's obligations began upon the Student's re-enrollment in [redacted] grade. The Parents shared the 2016 ER with the District and portions of the more recent Private Evaluation, prompting the District to start the special education process.

Initially, the District did exactly what the IDEA requires: it built a team around the Student, developed an IEP based on the available information, and sought whatever information it knew was missing (e.g. the entire Private Evaluation).

I find no flaw in the District's initial process or in its initial IEP, offered on September 11, 2019, or the revisions implemented on October 19, 2018. The District took the information at hand and collaborated with the Parent to put services in place while its own evaluation was pending. Nothing in the record suggests that the District failed to offer an IEP that was reasonably calculated to provide a FAPE based on what the District knew about the Student at that time.

It was also appropriate for the District to seek consent to conduct its own evaluation. While the Private Evaluation was recent and comprehensive, it was reasonable for the District to want more information about the Student's performance and presentation in school. The Private Evaluation

contained information about the Student's presentation in school only in the form of a Parochial School teacher's input on rating scales. The school environment in the District is different, and the Student had not received instruction from the District in years.

The process by which the District sought parental consent for a reevaluation was flawed, but those flaws did not result in substantive harm to the Student.

Although it is a common practice, LEAs need not generate extra paperwork to simply review and act on what parents give them. In this case, it was unnecessary for the District to seek the Parent's consent to review the 2016 ER and the Private Evaluation because 1) the Parent gave the District those documents, and 2) the District had already reviewed those documents to draft the initial IEP. Similarly, it was inappropriate for the District to call that review an evaluation. Calling such reviews "evaluations" unnecessarily starts a 60-school day clock evaluation timeline.

In addition to unnecessarily seeking parental consent to review documents, the District conducted evaluations that are not reflected in its request. The District's conversion of observations into an FBA and PBSP are an example of this. Under current Pennsylvania law, that decision has no legal consequence. Such choices, however, are the type of action that build mistrust. The District is cautioned that it must obtain parental consent in accordance with IDEA mandates at 20 U.S.C. §§ 1414, 1415 and corresponding federal and Pennsylvania regulations before evaluating any student.

Despite these flaws, the District did gather information about the Student that was important for IEP development, including the Occupational therapy screening and significant parental input. The parental input was, on the whole, consistent with and validated by the Private Evaluation and the

District's own evaluations. The District completed its evaluation within the IDEA's evaluation timeline. The Parent raises no claims concerning consent for evaluations, or the timeliness of the District's 2018 evaluation.

After the initial provision of special education in September 2018 and the October 2018 revision, the IEP team met again in December 2018 to review the District's evaluation and develop the Student's IEP. Having known the Student for about half a school year and with its own evaluation in hand, the District came to the conclusion that the Rewards Plus program was appropriate for the Student. The Parent reached a different conclusion and requested Wilson. The District's responses to the Parent's request laudably started with reasonable compromises.

Initially, the District agreed to conduct the WADE and the Parent agreed to placement in a Language Arts support class. The Student continued to receive the Rewards Plus program while the WADE was pending. This included the time that the District changed the Student's Language Arts support class in response to the Parent's concerns about another student.

The District then completed the WADE and the IU completed an assistive technology assessment. The District and reconvened the IEP team to discuss the results of both in a series of meetings (some canceled and rescheduled) between January 16 and February 15, 2019. Unfortunately, the District's reasonable compromises devolved into a pattern of acquiescence and placation during the February 15, 2019 IEP team meeting.

After reviewing the WADE, the District concluded that Wilson was both unnecessary and contraindicated. The District understood that Wilson was unnecessary because of what the WADE revealed about the Student's decoding and fluency. The District understood that Wilson was contraindicated because it would not address the Student's significant

reading comprehension needs. Despite this, the District offered to discontinue Reading Plus and start Wilson because the Parent and Advocate 1 were insistent.

As a technical point (and strictly speaking) it does not matter if the District offered Wilson to placate the Parent. Any reason for offering one program instead of another is irrelevant unless the reason is linked to the Student's needs. Yet, every District witness to testify about this was unequivocal: The District's decision to offer Wilson had nothing to do with the District's assessment of the Student's needs. The District's analysis supported Rewards Plus, not Wilson, but the District offered Wilson in acquiescence to parental demands.

Acquiescence to parental demands does not constitute an IDEA defense. Resolution of the Parent's denial of FAPE claim hinges on a comparison of the District's offer to the Student's needs. If the District violated the Student's right to a FAPE because the Parent told the District to do so, the District still violated the Student's right to a FAPE, and the Student is still owed a remedy. As said better by Hearing Officer McElligott: "Simply put, 'making parents happy', instead of 'let us program appropriately given the student's needs', almost always leads to flawed programming." *N.M. v. Fairview School District*, ODR No. 19810-1718KE (2018).

There are ways for LEAs to offer programming just to please parents without running afoul of IDEA obligations. For example, it is permissible for LEAs and parents to enter contracts in which parentally demanded services are offered in lieu of FAPE. The District did not use any of those methods. Instead, it added a contraindicated service to the Student's IEP while removing a necessary service. Unfortunately, this produced the exact result that the District predicated. The Student's reading fluency – which was already strong – became stronger while the Student's reading

comprehension stagnated. The Student scored at or above mastery criteria at the 4th grade level just twice over the course of [redacted] grade. This failure was not just predictable, it was predicted.

The reading fluency and schoolwork completion goals were the only two goals that the Student mastered during the 2018-19 school year. The Student did not make meaningful progress towards any other goal, including Speech.

Testimony concerning the Student's progress in Speech was genuine. However, the lack of any objective measures of the Student's progress that relate in some way to the Speech goal as written, the presentation of progress monitoring that does not relate to the goal, the Student's persistent inability to take the perspective of others, and the Student's apparent difficulties navigating the cafeteria's social environment, all constitute preponderant evidence of a lack of speech and social skills development. Both domains were targeted in the evaluations and IEP.

In sum, the District offered an IEP that was reasonably calculated to provide a FAPE from the Student's enrollment at the start of the 2018-19 school year until February 15, 2019. By February 15, 2019, the District had enough information to conclude that 1) Wilson placement was not supported, 2) Rewards Plus placement would target the Student's most significant reading deficits, and 3) the Student was not making progress towards other IEP goals. Instead of continuing Rewards Plus, the District stopped that program to start Wilson and did nothing in regard to the other stagnant domains. This inappropriate program persisted through December 16, 2019.

The District owes the Student compensatory education to remedy a denial of FAPE from February 15, 2019 through December 16, 2019. The Parent argues that the educational harm during this period of time "resulted

in a pervasive loss of education benefit to the student." *Jana K.,* 39 F. Supp.3d at 610. I cannot completely agree because the Student made progress in both reading fluency and schoolwork completion, and I find no preponderant evidence in support of the Parents claims that the Student required direct Occupational Therapy or ESY. Apart from those specific domains, the Student suffered a board-based educational harm. According to the Student's IEPs, a full school day in the District is 6.66 hours. I award the Student 4.66 hours for each day that the Student attended school between February 15, 2019 and December 16, 2019.

On December 17, 2019, the District attempted to mitigate by offering an IEP that discontinued Wilson and restarted Rewards Plus. I commend the District for trying to fix its reading comprehension error, but the District's offer does not address the Student's lack of progress in other domains. The December 2019 IEP is, therefore, reasonably calculated to improve the Student's reading comprehension (the Student's biggest skill deficit) but remains inappropriate for all of the same reasons that the prior IEP was inappropriate. To remedy this, I award the Student two (2.00) hours of compensatory education for each day that school was in session between December 17, 2019 and the date of this decision and order. Days that school did not convene during the District's COVID-19 closure are excluded from this order because the appropriateness of services offered to the Student, if any, while the District was closed to mitigate the spread of COVID-19 is not before me.

The Parent may decide how the hours of compensatory education are spent within the following limitations: Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device, purchased at or below prevailing market rates in the District's geographical area. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that

should appropriately be provided through the Student's IEP. Compensatory education shall not be used to purchase transportation, products or services that are primarily recreational in nature, or products and services that are used by persons other than the Student except for group or family therapies.

The Student is Not Entitled to Prospective Private School Placement

I find that the Parent has not satisfied the standard stated above for prospective private school placement. Above, I find that the District replaced a necessary program with a contraindicated program to placate the Parent. While that decision violated core IDEA principals, nothing in the record of this case substantiates a finding that the District cannot correct flaws in the Student's IEP and offer an appropriate program. Nothing establishes that an order correcting the Student's IEP will extend the harm in such a way that extraordinary relief is required.

In addition, to whatever extent the *Burlington-Carter* standard applies, the Parent has selected a school that is built around Wilson principals. The Parent cannot prevail at the second prong of the *Burlington-Carter* test by demanding a placement that perpetuates the most significant deficiency of the District's program.

Future Programming

Leaving the parties at the same impasse that brought them to this hearing is contrary to the IDEA's purposes. Finding that the Student's current placement is improper and that the Student is not entitled to the Parent's preferred placement leaves the parties at square one. The remainder of this decision resolves this problem.

The most recent comprehensive, District-adopted evaluation of the Student is the 2016 ER. The District proposed a limited scope evaluation in March 2020. I find that a new comprehensive evaluation is necessary, and

order one *sua sponte*. Absent a waiver, students with disabilities must be evaluated every three years, and so my authority to order a comprehensive reevaluation is found at 20 U.S.C. 1415(f)(3)(E)(iii).

The parties may come to their own agreement concerning the specific assessments to be performed but, at a minimum, the evaluation must include:

1. Broad based, standardized, co-normed measures of the Student's cognitive functioning and academic achievement and
2. Assessments to determine the extent to which the Student's behavioral profile (including Autism and OHI) impact upon the Student's educational needs.

The parties may also come to their own agreement about whether the District or an independent evaluator will conduct the evaluation. In the absence of an agreement, the District shall conduct the evaluation. If the District conducts the evaluation, nothing herein diminishes the Parent's right to request an independent educational evaluation in accordance with all IDEA rules concerning that subject.

This decision is released just after the end of the 2019-20 school year. In-person instruction ended prematurely this school year as a result of the COVID-19 pandemic. In this case, it is not clear that completing the evaluation quickly will yield a valid result, given the Student's time outside of regular programming. Therefore, the parties may come to their own agreement about when the evaluation must be complete.

In the absence of an agreement about the evaluation timeline, the District shall issue a permission to evaluate form within 15 calendar days of this decision. The form shall state clearly and with specificity what assessments are proposed. District's 60 school-day clock for completing the evaluation begins either on the first day that the District reopens any of its

buildings for any amount student instruction or upon the Parents provision of consent, whichever is *later.* My intent is for the clock to start when school reopens in whole or in part, even if the Parent immediately provides consent. Again, this sets the default if the parties cannot agree. The Parties can come to their own agreement.

If the District finds that different or additional assessments are necessary as the evaluation moves forward, the District may propose those in subsequent consent forms. The timeline for the additional assessments shall be controlled by ordinary IDEA timelines. However, a report of the originally proposed evaluation must be produced on the timeline described in the paragraphs above even if additional assessments are necessary. Any such report must note that additional assessments are pending.

If a third party evaluates the Student, the parties must instruct the third party to distribute evaluation reports to both parties simultaneously.

The parties must reconvene the Student's IEP team as soon as practicable after the evaluation report is distributed to both parties. Nothing herein precludes any form of IDEA dispute resolution should the parties continue to disagree about the Student's programming after the IEP team reconvenes.

ORDER

Now, June 15, 2020, it is hereby **ORDERED** as follows:

1. I award the Student 4.66 hours of compensatory education for each day that the Student attended school between February 15, 2019 and December 16, 2019.

2. I award the Student two (2.00) hours of compensatory education for each day that school was in session between December 17, 2019 and the date of this decision and order, excluding days that the District did not provide in-school instruction to Students as a result of the COVID-19 school closure.
3. The Parent may direct the use of compensatory education hours in accordance with the accompanying decision.
4. The Student is not awarded prospective placement at a private school.
5. The parties are ordered to evaluate the Student and reconvene the IEP team in accordance with the accompanying decision.

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

/s/ Brian Jason Ford
HEARING OFFICER