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

CLOSED HEARING

ODR File Number:
26134-21-22

Child's Name:
A.S.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Charles W. Jelley, Esq.

Date of Decision:
09/09/2022

INTRODUCTION

This matter concerns the educational rights of a now [redacted] preschool Student (Student).[1] The Parties agree the Student is eligible to receive special education preschool services under the Individuals with Disabilities Education Act (IDEA) 20 USC §1401 *et seq.* (commonly called Part B services). The Parties further agree the Student is a person with a disability within the meaning of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities (ADA) Act. The Parents filed the Complaint alleging the Pennsylvania Department of Education (PDE), the Secretary of Education (Secretary), and/or the MCIU violated the IDEA, the ADA, and Section 504 when they failed to pay for and offer the Student a free appropriate public education (FAPE), in the least restrictive environment (LRE), at a typical preschool, with nondisabled peers. The Parents have continued to pay all costs for the Student to attend the typical preschool. MCIU, the Secretary, and PDE deny any violations. MCIU seeks declaratory relief, contending that they complied with each statute at all times.[2]

After reviewing the record, the testimony, and the exhibits, I now find in part for the Parents and in part for the MCIU on the IDEA Part B and Section 504 FAPE claims. To the extent the Parents seek additional relief, I now find the IDEA, ADA, and Section 504 discrimination claims are now exhausted.

[1] All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parent also makes denial of education claims under Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.,), Parent Exhibits (P- p.) followed by the exhibit number, School District Exhibits attached to the Motion to Dismiss will be marked as (Motion to Dismiss Exhibit A- p.) followed by the exhibit letter, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

[2] PDE and the Secretary, in a companion case at ODR FILE #26134-21-22 seek an immediate dismissal. PDE and the Secretary argue, at ODR FILE #26134-21-22, that the Parents have failed to state a state a viable claim under each Act. In particular PDE and the Secretary argue that the IDEA and the Section 504 procedural safeguards do not authorize a "failure to supervise" claim. A separate Decision granting the Secretary and PDE's Motion to Dismiss follows at ODR FILE #26134-21-22.

Finally, I find in favor of MCIU on the discrimination claims. An appropriate Final Order follows.

Issues

The issues presented in this matter are:

1. Are the Parents entitled to tuition reimbursement for the Student's placement at the typical integrated preschool?
2. Is MCIU required to provide the Student with transportation to the typical preschool?
3. Did MCIU's refusal to fund the typical preschool violate Section 504 by failing to provide the Student with a FAPE?
4. Did MCIU's refusal to fund the typical preschool violate the anti-discrimination provisions of Section 504 or the ADA?
5. Should the hearing officer Order MCIU to provide compensatory education and tuition reimbursement?
6. Should the hearing officer Order MCIU to provide transportation?

FINDINGS OF FACT

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

1. [redacted] (N.T. 72).
2. [redacted] (S-3).
3. The Student is nonverbal. (N.T. 39).
4. In April 2019, the Student began receiving birth through three services (Part C) through the MCIU. (N.T. 40).
5. Birth through three services are provided through an Individualized Family Service Plan ("IFSP"). (N.T. 103).
6. Beginning in September 2021, Parents unilaterally placed the Student in preschool while still receiving birth through three services. (N.T. p. 72, S-3).
7. Birth through three services are separate and individual programs from three through five services. (N.T. p.96).

8. Students who receive birth through three services are evaluated before their third birthday to determine eligibility for three through five services. Not all children who qualify for birth through three services will qualify for three through five services. (N.T. p.96).
9. Three through five services (Part B) are provided through an Individualized Education Plan ("IEP"). (N.T. 103).
10. The Student was evaluated for eligibility for three through five early intervention services by the MCIU, memorialized in the Evaluation Report dated October 29, 2021. (S-3).
11. The Student Evaluation Team was comprised of a speech pathologist, an occupational therapist, a physical therapist, a behavior specialist, and a school psychologist and overseen by a Case Manager. (N.T. 138).
12. The Evaluation Report found the Student eligible for Early Intervention services [redacted] as a child with a Developmental Delay. (-3, p.28).
13. As part of the initial evaluation, the Student preschool teacher completed a Teacher Questionnaire. (S-14).
14. Concerning communication skills, the Student's teacher indicated the Student does not speak and has no vocabulary. (S-14).
15. With respect to social/emotional skills, the Student teacher indicated she does not engage with peers as easily as other children. S-14.With respect to fine motor skills, the Student's teacher indicated that the Student was the slowest in the class, had trouble keeping up with her peers and that the teacher often carried the Student. (S-14). Parents did not object to the evaluation report's testing, assessment results, or findings. (S-3). An initial IEP was drafted and presented to Parents on November 16, 2021. (S-4).
16. The Student would become eligible for three through five services on December 10, 2021. (S-4). All staff who either evaluated the Student and would work with the Student concluded that typical peers are not necessary to receive specially-designed instruction (SDI) or necessary to make

meaningful progress. (N.T. pp.165-170, N.T. pp.175-190, N.T. pp.197-205, N.T. pp. 201-202, N.T. 205, N.T. 217. N.T. pp.228-229, N.T. p.230, N.T. 231-234).

17. The initial IEP offered the following services: 30 minutes of Speech Therapy, 2 times/week, with a 15-minute monthly consult with the family; 30 minutes of Occupational Therapy, 2 times/week, with a 15-minute monthly consult with the family; Specialized Instruction, 30 minutes, 1 time/week, with a 15 minute monthly consult with the family; 45 minutes of Physical Therapy, 1 time/week, with a 15 minute monthly consult with the family; and 90 minutes of Behavior Support, 1 time/week, with a 15 minute monthly consult with the family. (S-4).
18. A NOREP dated November 17, 2021, for the initial provision of preschool early intervention services accompanied the initial IEP was not returned by Parents. (S-5).
19. The November 17, 2021, NOREP notes that for the initial provision of service, "the preschool early intervention program may not proceed without your written consent…" (S-5).
20. The November 17, 2021, NOREP was reissued on November 22, 2021, and was returned by Parents on November 28, 2021, indicating they did not approve the initial recommendation and requested a meeting to discuss the proposed action. (S-6).
21. On November 28, 2021, Parents sent correspondence to MCIU, requesting a continuation of services through what would have been a break between the end of the Student's birth through three services and the inception of three through five services. The correspondence also demanded that MCIU "reimburse us for the portion of the Student preschool day which is spent on working on goals as laid out in [redacted] IEP which require [redacted] to be in a typical preschool setting." Parents further asserted that Goals 1, 2, 3, 9, and 10 required access to typical peers. (S-7p.3).

22. On December 6, 2021, a phone conference was held to discuss Parents' requests, and the IEP was revised to note Parents' requests, including that they wished to retain "The Student birth through three team up to and through the winter break for consistency in service." After listening to the Parents, MCIU did not revise the IEP to include tuition reimbursement. (S-8).
23. A NOREP, dated December 7, 2021, was sent to Parents for review, proposing the initiation of preschool early intervention services as shown in the Student IEP. Parents both approved the recommendation and, at the same time, did not approve the four and one-half hours of reimbursement and requested mediation. (S-9).
24. Parents again sent correspondence to the MCIU regarding their request for tuition reimbursement, noting it was communicated to them that reimbursement was denied because the Student goals do not state the need for peer interactions. This correspondence requested that MCIU pay for full tuition at the Student preschool. (S-11).
25. At the Parents' request, the parties engaged in mediation. P-16.
26. After the mediation concluded with no resolution, MCIU revised the Student's initial IEP to include reimbursement to Parents for four and one half (4.5) hours/week of preschool tuition, as discussed at the mediation. The mediation offer was the equivalent of half of the Student's nine (9) hour preschool tuition. Another NOREP was issued on February 10, 2022. (N.T. 104, S-12).
27. Parents returned the NOREP approving the program and placement. This time they did not approve the funding action and requested an immediate Due Process hearing. (S-12).
28. Parents have no complaints about the amount of direct speech therapy and consult time in the offered IEP. (N.T. 81).
29. Parents have no complaints about the amount of direct occupational therapy and consult time in the offered IEP. (N.T. 82).

30. Parents have no complaints about the amount of direct physical therapy and consult time in the offered IEP. (N.T. 82).
31. Parents have no complaints about the amount of specialized instruction in the offered IEP. (N.T. 82).
32. Parents have no complaints about the amount of behavior support in the offered IEP. (N.T. 83).
33. Parents rejected the initial provision of preschool early intervention services because MCIU indicated they would not fund full tuition at the private preschool. (S-6, S-7, S-9, S-10, S-11, S-12, S-13).
34. Preschool is not mandatory, and the Pennsylvania regulations and federal regulations do not define the term "preschool." (N.T. 113, *passim)*.
35. Three, four, and five-year-old students may receive Early Intervention services in a variety of settings, including the home, educational sites, preschools, and daycare centers. (N.T. pp.113-114, p.143).
36. MCIU does not operate typical preschools. (N.T. p.144).
37. MCIU operates free, at no charge, special education classrooms for students requiring a more restrictive and intensive setting. (N.T. 117). This Student was not offered an MCIU special education classroom because the Student does not require would not benefit from full-time services in a restrictive setting. Although MCIU denied funding, it also concluded that the typical preschool was the LRE. MCIU staff also concluded that this Student would not make meaningful progress towards the goals in a restrictive setting. (N.T. p.143, *passim*).
38. Decisions about whether the IU will pay for typical preschool tuition are made on an individualized basis. (N.T. p.108).
39. The Student is currently receiving services under the IFSP from Part C early intervention. MCIU personnel believe nothing in the proposed IEP and NOREP can be implemented unless the parents agree to everything that MCIU put in the IEP and NOREP. MCIU's belief and position are contrary to

20 U.S.C. § 1415(j) and the corresponding regulations at 34 CFR §300.300 (b) and 34 CFR §300.518(c) ["then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency']. Under these provisions, it is possible for the parties to a dispute to change the services in the previous plan while the dispute is pending. (N.T. pp.68- 69, p.36). The parents have continued to pay the Student's tuition at the preschool. (N.T. p.90. p.37).

40. The November 2021 NOREP the Parents received from MCIU states that "MCIU recommends that [redacted] should receive [redacted] services at [redacted] parent provided preschool if possible to provide her with teaching and therapy in the least restrictive environment." (S-12).
41. The MCIU program administrator for Early Intervention stated that MCIU, after the mediation, took the position that it "certainly" would consider paying a greater portion of the Student's tuition in the future after [ready] is "ready" to begin generalizing the goals. (N.T. 101. 39). MCIU has no policy concerning payment for a student in the Intermediate Unit to attend a typical private preschool. N.T. 107. 40.
42. MCIU has "guidelines" concerning payment of preschool tuition based on a child's need for socialization and the presence of peers to meet EP goals, but those guidelines are not written down anywhere. (N.T. 108-109, p.8, p.41). MCIU staff discuss their guidelines for payment of preschool tuition only when it is appropriate to do so. The MCIU guidelines were not shared with the parents before an IEP meeting, the mediation, or the due process hearing. (N.T. p.111. p.42).
43. MCIU will consider paying more of the Student's tuition once the Student develops "foundational" skills. (N.T. p.118, p.43). The MCIU program administrator did not identify what foundational skills the Student needs to learn before the Student can practice the skills with peers. Across the board, the MCIU staff and administrators took the position that the Student's IEP

goals were written to learn all skills with adults. Once skills were learned, the Student would then apply or practice the foundational skills with peers. (N.T. 119). The Parents did not present expert testimony that the proposed learning strategy would not provide meaningful benefit. (N.T. *passim).*

44. Placement in a typical preschool placement is necessary for the Student to receive an appropriate education in the least restrictive environment. The Student's current placement in preschool is the Least Restrictive Environment (LRE) necessary to fulfill the IEP goals and receive a free and appropriate education (FAPE). (S-12).
45. Since December 10, 2021, due to the delay in implementing the approved February 2022 NOREP and IEP, the Student has missed the following services: (1) 1.5 hours a week of behavioral support; (2) 30 minutes of Speech Therapy, 2 times/week, with a 15 minute monthly consult with the family; (3) 30 minutes of Occupational Therapy, 2 times/week, with a 15 minute monthly consult with the family; (4) Specialized Instruction, 30 minutes, 1 time/week, with a 15 minute monthly consult with the family; (5) 45 minutes of Physical Therapy, 1 time/week, with a 15 minute monthly consult with the family; and (6) 90 minutes of Behavior Support, 1 time/week, with a 15 minute monthly consult with the family. (S-4).
46. The Parents asked, and MCIU refused to provide the behavioral support. (S-12).
47. Before filing this Complaint, the parents first sought mediation. (N.T. 108).
48. This decision on whether a preschool child requires access to typical peers to meet any or all of the goals is made by the IEP team. (N.T. 108).
49. The Student Evaluation Team determined the Student did not require access to typical peers to make meaningful progress toward any goal. (N.T. 168, 171-172, 188-190, 200-202, 219, 231)**.**
50. At the first IEP meeting, the Parents agreed with the level of services MCIU offered and the added behavioral support. (N.T. 58).

51. Parents consented to services and returned the February 10, 2022, NOREP on or about February 14, 2022. Returning the NOREP in February 2022, they also requested a due process hearing. Section 2 of the NOREP offers the following services: " 2. A description of the action proposed or declined by the preschool early intervention program: Based on the evaluation report, [redacted] was determined to be an eligible young child in need of public preschool special education services. [The Student's] services in her Individualized Education Plan (IEP) are outlined as follows: Tele-intervention will be offered if in-person therapy is unavailable due to COVID-19-related issues for either the therapist or the child. If the family chooses not to utilize the approved prescheduled tele-intervention service, make-up services will not accrue with the following services, - goals and specially designed instruction outlined in the IEP -Speech Therapy 2x per week for 30 minutes per session -Speech Therapy Consult 1x per month for 15 minutes per session -Occupational Therapy 2x per week for 30 minutes per session - Occupational Therapy Consult 1x per month for 15 minutes per session - Physical Therapy 1x per week for 45 minutes per session - Physical Therapy Consult 1x per month for 15 minutes per session -Specialized Instruction 1x per week for 30 minutes per session -Specialized Instruction Consult 1x per month for 15 minutes per session -Behavior Support 1x per week for 90 minutes per session - Behavior Support Consult 1x per month for 15 minutes per session. (S-6, S-10, S-12).
52. The February 10, 2022, NOREP then included the following statement "Mediation was held on 1.28.2022. The MCIU proposes to reimbursement the family for 4.5 hours per week for [redacted] to have access to typical peer in order to make meaningful progress." (S-12 p.2)
53. Section 3 of the February 2022, NOREP includes the following description: ". . . explanation of why the preschool early intervention program proposed or declined to take the action: "[Redacted] is a young child eligible for public

preschool special education services under the disability category of Developmental Delay. [Redacted] attends a parent-provided typical preschool for three half days each week. MCIU recommends that [redacted] should receive [redacted] services at [redacted's] parent-provided preschool if possible to provide [redacted] with teaching and therapy in the least restrictive environment. Due to the limited time that [the Student] attends her parent-provided preschool, services may be offered at an educational site, if needed." (S-12 p.2)

54. Section 7 of the NOREP stated that MCIU found "the educational placement recommended for your child is: Early Childhood Environment(S-12 p.2).
55. At the initial Due Process hearing session, the Parents also requested MCIU transport [the Student] to her typical preschool for the first time. This request was never brought to MCIU for a response. (N.T. p.107).
56. Throughout the dispute, the Student continued to receive services from the MCIU under Part C IFSP in the Parent funded typical preschool placement. (N.T. p.69).

LEGAL STANDARDS

WITNESS CREDIBILITY

One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. During a due process hearing, the hearing officer is responsible for judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." [3] In this hearing, almost none of the dispositive facts are in dispute. Instead, the parties interpret the relevant facts differently and reach opposite conclusions about what the law requires. To the extent that an explicit credibility determination is necessary, I find that all

[3] *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).

witnesses testified credibly, as to their beliefs, differences in memory, and opinion here were not outcome determinative. When necessary, I will explain how I made individual credibility determinations.

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. [4] The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.[5] In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

MCIU IS SUBJECT TO PDE'S GENERAL SUPERVISION

According to an agreement with PDE, the MCIU is the Student's designated preschool provider. Under the PDE agreement, commonly called the Mutually Agreed Upon Written Arrangement (MAWA), the MCIU agreed to take on the role of the MAWA holder. MAWA holders are primarily responsible for providing a FAPE in the least restrictive environment (LRE). Under the Agreement, PDE provided general supervision and funds to the MAWA holder, and the MAWA holder provided direct services. The IDEA general supervision duty requires PDE to assume responsibility for a Student's FAPE if and when PDE determines that the MAWA holder is unable to establish, provide or maintain a FAPE in the LRE.[6]

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 USC §1412. The term "free

[4] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

[5] *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).

[6] Special Education Compliance, https://www.education.pa.gov/Policy Funding/BECS/PACode/Pages/SpEdCompliance.aspx

appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. 20 USC § 1401(9). Public entities like schools and MAWA holders must provide related services and educational services. Related services can include transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.[7] MAWA holders meet the obligation of providing a FAPE to eligible students through the 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.'"[8]

The *Rowley* Court found that an entity 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. Substantively IEPs must be responsive to each child's individual educational needs.[9] The Third Circuit's application of the *Rowley* "reasonably calculated" standard is consistent with the United States Supreme Court decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The Third Circuit's *Rowley,* like the approach in *Endrew,* requires that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential and circumstances.[10] *Endrew F.,* like the *Rowley* decision, does not require a school district to maximize a child's

[7] 34 CFR § 300.34.

[8] *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982), *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

[9] 20 USC § 1414(d); 34 CFR § 300.324.

[10] *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).

opportunity or provide the best; covered entities must provide a basic floor of opportunity.[11] The meaningful benefit standard requires more than "trivial" or "de minimis" benefit.[12] An IDEA-eligible student is not entitled to the best possible program, the type of program preferred by a parent, or a guaranteed outcome in terms of a specific level of achievement.[13] All the IDEA and Section 504 guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'"[14]

TRANSITION FROM PART C TO PART B-SCHOOL AGE SERVICES

A MAWA holder must ensure that an IEP is in effect for an infant or toddler who had previously received IDEA Part C services by the child's third birthday.[15] No fewer than 90 days -- and, not more than nine months -- before the toddler's third birthday, the lead agency must establish a transition plan in the student's individual family service plan.[16] If a child's third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin.[17]

For a child transitioning from Part C to Part B, the Part B agency must ensure that an IEP, or an Individual Family Service Plan (IFSP) as appropriate, has been developed and is being implemented for the child by the child's third birthday

[11] *Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[12] *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995).

[13] *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

[14] *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

[15] 34 CFR 300.101 (b)(1)(ii).

[16] 34 CFR 303.209 (d)(2), and 34 CFR 303.209 (d)(2). For most part the individualized family service plan is functional equivalent of the IEP developed for children who receive early intervention services under Part C as well as those students who are in the process of transitioning from Part C to Part B (school-age).

[17] 34 CFR 300.101 (b)(2), *D.L. v. District of Columbia*, 67 IDELR 238 (D.D.C. 2016), *aff'd,* 70 IDELR 59 (D.C. Cir. 2017) (ruling that the District of Columbia violated the IDEA when it failed to timely implement Part B services for almost 30 percent of children with disabilities who received Part C services in the district), and *Portage Twp. Schs.*, 117 LRP 52413 (SEA IN 10/26/17) (concluding that although a district wanted to wait until after a child's ear surgery to develop her IEP, the delay violated the IDEA because the district was unable to develop or implement the IEP until after the child's third birthday).

consistent with 34 CFR 300.101 (b) and 34 CFR 300.124 (b).[18] Hearing officers and courts may require public agencies to reimburse parents for a private placement or compensatory education if they fail to offer a FAPE.[19]

Suppose a three-year-old child is eligible for special education and related services under Part B, and the parent consents to the initial provision of special education and related services under 34 CFR 300.300 (b). In that case, the public agency[20] "must" provide those special education and related services that are not in dispute between the parent and the public agency.[21]

LEAST RESTRICTIVE ENVIRONMENT

The IDEA and the Section 504 LRE requirements apply to all children, including preschool children with disabilities aged three through five, who are served under Part B of the IDEA.[22] The LRE requirements establish a strong preference for educating children with disabilities in "regular classes" alongside their peers without disabilities. The term "regular class" includes a preschool setting with typically developing peers. The entity responsible for providing a FAPE to a preschool child with a disability must make available a full continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, to meet the needs of all preschool children with disabilities for special education and

[18] *See, In re Student with a Disability*, 12 ECLPR 68 (SEA IL 2015); *Indian River Sch. Dist.*, 8 ECLPR 62 (SEA DE 2011), *Brandywine Heights Area Sch. Dist. v. B.M.*, 69 IDELR 212 (E.D. Pa. 2017).

[19] *See In re Student with a Disability*, 12 ECLPR 68 (SEA IL 2015); *Indian River Sch. Dist.*, 8 ECLPR 62 (SEA DE 2011); and *Brandywine Heights Area Sch. Dist. v. B.M.*, 69 IDELR 212 (E.D. Pa. 2017).

[20] 34 CFR § 300.33 the term "public agency" includes the State educational agency, LEAs, educational service agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. 22 Pa Code Chapter § 14.123.

[21] 34 CFR 300.518 (c). *See Letter to Harris*, 20 IDELR 1225 (OSEP 1993); *Letter to Klebanoff*, 28 IDELR 478 (OSEP 1997); *R.C. and S.C. v. Carmel Cent. Sch. Dist.*, 48 IDELR 71 (S.D.N.Y. 2007); and *Charleston County Sch. Dist.*, 70 IDELR 55 (SEA SC 2017).

[22] 20 U.S.C. 1413(a)(1) - LRE requirements.

related services. [23]

In selecting the LRE, consideration must also be given to any potential harmful effect on the child or the quality of services the child needs. 34 CFR § 300.116(d).[24] Pursuant to 34 CFR 300.116 (a), in determining the educational placement of a child with a disability, *including a preschool child with a disability*, each public agency must ensure that the placement decision: (1) Is made by a group of people, including the parents and other people knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) is made in conformity with the least restrictive environment provisions of this subpart, including 34 CFR 300.114 through 34 CFR 300.118 (emphasis added).[25] Removing a child with a disability from the general education regular classroom is appropriate only if the nature and severity of the child's disability prevents them from receiving a satisfactory education, even with supplementary aids and services.[26] Preschool IEPs, like school-age IEPs, must also explain the extent to which the child will not participate with nondisabled children in the regular class. 34 CFR § 300.320(a)(5).[27]

[23] Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46666 (August 14, 2006).

[24] 34 CFR § 300.33 the term "public agency" includes the State educational agency, LEAs, educational service agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. 34 CFR §§ 300.114 through 300.118.

[25] B*oard of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 30 IDELR 891 (7th Cir. 1999) (holding that the parents of a 3-year-old with Down syndrome were entitled to reimbursement for the child's unilateral private placement because the district failed to offer him an appropriate public placement in the LRE).

[26] 34 CFR 300.114 (a)(2), *See, e.g., Redlands Unified Sch. Dist.*, 10 ECLPR 61 (SEA CA 2012), *Baltimore City Pub. Schs.*, 10 ECLPR 53 (SEA MD 2012).

[27] 34 CFR 300.17 (a); and 34 CFR 300.39 (a)(1). See, Dear Colleague Letter, 69 IDELR 106 (OSEP 2017), See also, 64 Fed. Reg. 12,639 (1999), *Letter to Neveldine*, 22 IDELR 630 (OSEP 1995), *Dear Colleague Lette*r, 69 IDELR 106 (OSEP 2017), *Irvine Unified Sch. Dist.*, 12 ECLPR 24 (SEA CA 2014) (concluding that because a 5-year-old with speech-language deficits required instruction in a classroom setting to receive FAPE, the district violated the IDEA when it discontinued the student's Head Start placement, See also, Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46589 (August 14, 2006).

If no appropriate preschool program is available for a student with a disability, the public agency must fund a private school placement.[28] The child's placement must be based on the child's IEP and determined at least annually.[29]

TUITION REIMBURSEMENT

A three-part test determines whether parents are entitled to reimbursement for special education services.[30] The first step determines whether the IEP and placement are 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.[31] Id. The steps are taken in sequence, and the analysis ends if any step is not satisfie*d.*

SECTION 504 FAPE STANDARDS

IDEA-eligible students are protected from discrimination and can utilize Section 504 to advance discrimination claims. A MAWA holder may completely discharge its duties to a student under Section 504 by complying with the IDEA Part B. Consequently, when the MAWA holder satisfies its IDEA FAPE obligations, no further specific Section 504 FAPE analysis is necessary.[32] Section 504 and the ADA discrimination require a different analysis.

SECTION 504 DISCRIMINATION STANDARDS

To make out a prima facie case of discrimination, a parent must show that: (1) the

[28] Letter to Anonymous, 50 IDELR 229 (OSEP 2008)

[29] 34 CFR § 300.116(b)(1) and (2).

[30] *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).

[31] *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

[32] *Redlands Unified Sch. Dist.*, 10 ECLPR 61 (SEA CA 2012) (finding that the parents of a unilaterally placed private preschooler were entitled to tuition reimbursement because the district violated the IDEA's LRE requirements by placing the child in a special day class). *But see L.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 65 (3d Cir. 2012, *unpublished*) (holding that because a preschooler with autism had difficulty following directions, engaged in self-stimulatory behaviors, and failed to notice other children in an inclusion program, the child's placement in an autism preschool program was appropriate and the parents were not entitled to tuition reimbursement) and *Ka.D. v. Nest*, 58 IDELR 244 (9th Cir. 2012, *unpublished*), *cert. denied*, 112 LRP 56816, 133 S. Ct. 650 (2012) (4-year-old girl's difficulties with transitions and large groups demonstrated that the part-time general education placement proposed by her IEP team was inappropriate).

student "is a qualified individual with a disability"; (2) the public agency/MAWA holder "receives federal aid"; and (3) the student "was denied the opportunity to participate in or benefit from the public agencies' services, programs, or activities, or was otherwise discriminated against by reason of [his] disability."[33] This third element is satisfied where a parent plausibly pleads "failure to make reasonable accommodation" to the known limitations of an individual with a disability.[34] In the alternative, a parent can also claim intentional discrimination. Proof of intentional discrimination requires a showing of deliberate indifference.[35] A showing of deliberate indifference requires a showing greater than negligence or bureaucratic inaction. *Deliberate indifference requires "(1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that likelihood." Id.*[36]

THE ADA DISCRIMINATION STANDARDS

Title III of the ADA provides that: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

A complaint asserting a claim of disability discrimination pursuant to Title II must allege "'(1) discrimination on the basis of a disability; (2) in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation; (3) by the public accommodation's owner,

[33] *Harris v. Mills*, 572 F.3d 66, 73-74 (2d Cir. 2009) (citation omitted).

[34] *M.M. v. New York City Dep't of Educ.*, No. 15-cv-5846, 2017 U.S. Dist. LEXIS 47812, 2017 WL 1194685, at *13 (S.D.N.Y. Mar. 30, 2017) (internal quotation marks and citation omitted). To plead a failure to accommodate, a plaintiff must allege "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Shaywitz v. Am. Bd. of Psychiatry & Neurology*, 675 F. Supp. 2d 376, 390 (S.D.N.Y. 2009) (internal quotation marks and citations omitted).

[35] *Sch. Dist. of Phila v. Kirsch*, 722 Fed.Appx. 215, 228 (3rd Cir. 2018).

[36] *Doe v. Lower Merion Sch. Dist*. 729 F.3d at 263 (quoting *Duvall v. Cnty. Of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

lessor or operator.'"[37]

THE CAUSATION STANDARDS BETWEEN THE ADA AND SECTION 504 DIFFER

The discrimination causation standards under the ADA and Section 504 are different.[38] The ADA and Section 504 assure disabled individuals receive the same access rights to benefits otherwise provided to nondisabled peers. Section 504 allows recovery if a disabled person has been deprived of an opportunity to participate in a program, receiving federal dollars "solely" on the basis of disability. While the ADA, on the other hand, covers discrimination "on the basis of disability," even if there is another cause as well. To satisfy either causation requirement, students must prove that they have been treated differently based on the protected characteristic, namely the existence of their disability. Both statutes also prohibit discrimination against one subgroup of disabled people compared to another if the characteristic distinguishing the two subgroups is the nature of their respective disabilities.[39] Accordingly, while the IDEA does not restrict a student's ability to pursue claims under the ADA and Section 504, at the same time, compliance with the IDEA does not automatically immunize a party from liability under the ADA or Section 504. *id.*

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy. Compensatory education is an appropriate FAPE remedy where the agency knows, or should have known, 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. [40] 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,

[37] *Giterman v. Pocono Med. Ctr.,* 361 F. Supp. 3d 392, 404 (M.D. Pa. 2019) *(quoting Anderson v. Franklin Inst.,* 185 F. Supp. 3d 628, 642 (E.D. Pa. 2016)).

[38] 42 U.S.C.S. § 12132; 29 U.S.C.S. § 794(a).

[39] *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) citing K.*M. v. Tustin Unified Sch. Dis*t., 725 F.3d 1088, 1102 (9th Cir. 2013).

[40] *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990).

students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional* endorses this method. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright.[41] These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position they would be in, but for the denial of FAPE. This more nuanced approach, called the *Reid* method, was endorsed by the Pennsylvania Commonwealth Court[42] and several Pennsylvania federal courts.[43] Applying equitable principles, hearing officers and the courts apply both methods. Compensatory education is not an available remedy when a student has been unilaterally enrolled in private school."[44]

DISCUSSION AND APPLICATION OF LEGAL PRINCIPLES

OVERVIEW OF THE DISPUTE

While styled as a tuition reimbursement dispute, the Parties agree that the program and the typical preschool placement are appropriate. These agreements satisfy the first two *Burlington-Carter* factors. The third equity prong is not at play as MCIU now concedes that some but not all demanded reimbursement is due. MCIU's change in position essentially transforms the dispute into a "free" or "at no cost" dispute. Stated another way, when, if ever, can a MAWA holder expect the parent to pay for all or a portion of the Student's typical preschool environment? The answer to this question requires me to decide if MCIU's February 2022 offer to fund four and one half (4.5) hours a week, rather than the total of nine (9) hours demanded, violates the IDEA "at no cost" to the parent requirement. For all of the following reasons, I now find in favor of MCIU.

MCIU issued the permission to evaluate on September 1, 2021; the Parent

41 R*eid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005).

42 *B.C. v. Penn Manor Sch. Distric*t, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and J*ana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014).

43 *G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601 (3d Cir. Pa. 2015)

44 Swope v. Cent. York Sch. Dist., No. 1:10-CV-2541, 2012 U.S. Dist. LEXIS 54, at *16 n.1 (M.D. Pa. Jan. 3, 2012) citing *P.P. v. West Chester Area School Dist.*, 585 F.3d 727, 739 (3d Cir. 2009).

returned the notice on September 2, 2021. MCIU issued the evaluation report on October 29, 2021. [redacted] Since August 2021 and continuing to the present, MCIU staff have provided the Student with Part C services at the preschool. The IDEA requires MCIU to have an IEP in effect no later than December 10, 2021, [redacted]. MCIU made its first, without funding, offer of a FAPE on November 17, 2021, and repeated the offer on November 22, 2022. The November 2021 IEP included a Notice of Recommended Placement (NOREP) calling for "… all MCIU services to take place at the "parent provided typical preschool. . . to provide [redacted] with teaching and therapy in the least restrictive environment."
On November 28, 2021, the Parents consented to initial services and requested that MCIU partially fund the preschool. In February 2022 Parent consented for the second time and requested a hearing. Although MCIU refused to implement the consented-to services, pending the outcome of this funding dispute, MCIU did agree to provide Part C services.

THE PARENTS' LEGAL ARGUMENT IS ACCEPTED IN PART

The Parents relying on the IDEA definition of a FAPE argue that refusing to pay for the entire nine hours of privately funded preschool services violates the IDEA's "free" means "without charge" or "at no cost" provision. Essentially, Parents contend that the phrase "preschool," like the state-defined terms "elementary school" or "secondary school," requires MCIU to pay for the special education services and a full-day preschool setting. Next, Parents argue that MCIU's refusal to fund the entire nine hours disproportionally favors placement in all-day self-contained, all-handicapped classrooms over placements in the LRE.
MCIU makes two standalone arguments. First, they contend they are not required to fund the requested typical preschool. Second, they contend the February 2022 offer of a FAPE is appropriate. (MCIU Closing pp.9-12).[45]

THE NOVEMBER 2021 FAPE OFFER VIOLATED THE FREE MANDATE

[45] Although MCIU's final FAPE offer included partial funding, they continue to assert they are not otherwise required to fund any part of the preschool tuition. Therefore, to preserve the issue for review I will make Findings of Fact and Conclusions of Law regarding each offer of a FAPE.

After carefully reviewing the record, the regulations, and the case law, I now find that MCIU's proposed interpretation of the intertwined FAPE-LRE mandates is unworkable. MCIU's truncated reading, separating the "specially-designed instruction" from the LRE requirement, requires me to ignore the plain language of the interlocking terms "specially-designed instruction" in the "LRE" to "the maximum extent appropriate." MCIU's strained interpretation ignores long-standing persuasive USDOE guidance, applicable regulations, and case law interpreting these two interlocking provisions. These interlocking FAPE components, provided through an IEP in the LRE, represent a consolidated bundle of interlocking non severable substantive rights.[46] MCIU's initial refusal to pay for the preschool was a per se violation of the Student's and the Parents' substantive and procedural rights.[47] Therefore, their first funding argument is rejected. Once this MAWA holder, MCIU, agreed with the Parent that the program was appropriate and typical preschool was the LRE, MCIU was required to pay for the early childhood preschool experience by law.[48] An appropriate Order directing MCIU to reimburse Parents follows. The initial conclusion of law, however, has limits. Now that the threshold payment issue is decided, the analysis shifts to whether MCIU must pay for all nine hours the Student spends in the typical preschool setting or something less.[49]

After a careful review of the record, I now find that MCIU's partial tuition funding approach satisfies the IDEA "fee" requirement.

THE MCIU FEBRUARY 2022 FAPE OFFER, WITH PARTIAL TUITION REIMBURSEMENT, IS APPROPRIATE

The Parents' funding demand sidesteps the requirements found at 22 Pa Code Chapter § 14.155. 22 Pa Code Chapter § 14.155 calls for the IEP team to individually tailor, prescribe and define the early childhood preschool experience.

[46] Supra footnotes 18 through 29.
[47] Schaffer v. Weast, 546 U.S. 49 (2005).
[48] Supra footnote footnotes 18 through 29.
[49] Although MCIU's final FAPE offer included partial funding, they continue to assert they are not otherwise required to fund any part of the preschool tuition. Therefore, to preserve the issue for review I will make Findings of Fact and Conclusions of Law regarding each offer of a FAPE.

22 Pa Code Chapter § 14.155 requires that the IEP team set the "duration" of early intervention services, the "terms" of the program, and "accommodations" needed to meet the student's circumstances. 22 Pa Code Chapter § 14.155 next requires the IEP team to consider if the child could lose skills over breaks and have difficulty in regaining these skills, as evidenced through child performance data. Therefore, the team is free to define the duration of the school day, week, and year. Finally, 22 Pa Code Chapter § 14.155 requires the IEP team must consider whether services should be provided during service breaks to maintain skills. I see no reason to redefine the term "preschool," as requested beyond the requirements at 22 Pa Code Chapter § 14.155.

The record is preponderant that by February 2022, MCIU satisfied the requirements found at 34 CFR 300.116 (a) in determining the educational program and placement. MCIU ensured that the placement decision was made by a group of people, including the parents and others knowledgeable about the child, the meaning of the evaluation data, and the placement options. MCIU's offer to partially fund the preschool placement advances the Act's LRE preference to educate children with disabilities in "regular classes" alongside their peers without disabilities.[50] The February 2022 FAPE offer corrected and cured the November 2021 substantive "free" violation.[51]

Accordingly, I now find that the February 2022 program, placement, and limited funding actions procedurally track the FAPE in the LRE requirements found at 34 CFR 300.114 through 34 CFR 300.118.

THE PARENTS FAILED TO PROVE ANY ACTS OF DISCRIMINATION

After carefully reviewing the nontestimonial and extrinsic evidence, I now find the Parents failed to prove any acts of intentional discrimination. The record does not establish that MCIU's actions were "deliberately indifferent" or violated Section

[50] 34 CFR § 300.114(a)(2), *Dear Colleague Letter: Preschool Least Restrictive Environments,* 69 IDELR 106 (January 17, 2017). While not binding I find the Dear Colleague letter persuasive.

[51] Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46666 (August 14, 2006).

504's causation "solely based on disability" standard. For the same reasons, I also find that the Parents failed to prove that MCIU violated Title II's anti-discrimination restrictions or causation "by reason of such [a] disability" standard.[52] An appropriate **ORDER** denying the Parent's dual discrimination claims follows.

TRANSPORTATION IS A RELATED SERVICE

Under the IDEA, transportation is a related service.[53] The Parents relying on this regulation argue that MCIU must make an individualized determination as to whether transportation is necessary for the Student to receive a FAPE. The Parties agree that no such individualized determination was made. MCIU further argues that the transportation claim was not raised in the Complaint, at the Resolution Session, or in the mediation session. Therefore, they suggest that the issue is either not ripe for review or is otherwise waived for this hearing. Finally, the record is clear that MCIU did not consent to include the transportation claim in this action.[54] Therefore, for now, I find in favor of MCIU on this claim. The failure to mention the claim in the Complaint, at the Resolution Session or the mediation, is a bar.

Procedurally, although the claim is barred, once MCIU offered partial reimbursement, I now conclude it was incumbent on the IEP team to decide whether transportation is a necessary related service. MCIU did not do so. Stated another way, the Parents' burden is to prove that transportation is a necessary component of FAPE for the Student – not just that MCIU's decision-making process was flawed. Accordingly, to correct this standalone harmless non-substantive procedural violation, MCIU must convene an IEP meeting within ten (10) days of this **ORDER** to determine if transportation is a necessary related service.

MCIU'S REFUSAL TO IMPLEMENT THE CONSENTED TO PART B

[53] 34 CFR §300.34(c)(16).
[54] 34 CFR 300.508(d)(3)-(4).

SERVICES VIOLATED THE PARENTS' AND STUDENT'S SUBSTANTIVE FAPE RIGHTS

Pointing to the February 2022 NOREP, 34 CFR §300.300 (b), and 34 CFR §300.518(c), Parents assert that MCIU denied the Student a FAPE or otherwise interfered with their parental rights when they refused to implement the consented to February 2022 NOREP. 34 CFR §300.518 (c) requires that the MAWA holder – MCIU- "must" provide "consented to" special education and related services that are not in dispute.[55] The Parents 'actions and the facts track the plain language of 34 CFR §300.518(c). Parents - consented to initial services- and Parents requested a hearing. MCIU staff strictly applied the consent requirements at 34 CFR §300.300 (b) without understanding the counterbalancing procedural due process protections at 34 CFR §300.518(c). In other words, MCIU lost sight of the requirement that by operation of law - 34 CFR §300.518(c) - MCIU "must" provide the consented to services pending a final decision. I read the "must" language as creating an affirmative duty to provide the services.[56] MCIU's refusal to provide the agreed-on services also violated the Student's substantive right to a FAPE. That same violation interfered with the Parents' procedural and substantive FAPE right to participate in the IEP process.

Accordingly, I now find, under these facts, that MCIU's refusal to provide the consented-to services during the hearing process caused a substantive FAPE violation. Although the violation is substantive, I must now determine if, under

[55] 34 CFR 300.515 (c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency **must** provide those special education and related services that are not in dispute between the parent and the public agency. (emphasis added)

[56] *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 436 (6th Cir. 2016) "Words such as "must" ordinarily "creat[e] an obligation impervious to . . . discretion," citing, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998), (nothing in plain language gives school districts the option to decline to act).

existing law, I may award compensatory education.

THIRD CIRCUIT CASELAW BARS APPROPRIATE RELIEF

In P*.P. v. West Chester Area Sch. Dist.,* 585 F.3d 727, 739-40 (3d Cir. 2009), the court, citing with approval, adopted an ODR Appeals Panel Decision holding, without analysis, that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school."[57] As this holding is the state of the law, I will apply *P.P.* and deny the Student make-whole relief. I find this outcome odd; while the tuition reimbursement will cure the Parent's substantive "without charge" violation, the Student's substantive FAPE loss lacks a remedy. A Final Order denying compensatory education follows.

ORDER

And, **now**, this September 9, 2022, it is hereby **ORDERED** as follows:

1. Within 10-days of this **ORDER**, the Parents shall submit a demand for payment for out-of-pocket preschool expenses incurred from December 10, 2021, [redacted] until the date of this **ORDER.**

[57] *See P.P.* citing, "20 U.S.C. § 1412(a)(10); 34 C.F.R. §§ 300.137, 300.138, 300.148(c), and *In re The Educational Assignment of J.D.*, Spec. Educ. No. 1120, at 14 (Pa. Spec. Educ. Appeals Panel 2001), *available at http://odr.pattan.net/ODRapps/App1120.pdf* [link now broken] (" [T]uition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time." (citations omitted)).

2. Within 10-days of receipt of the demand, MCIU shall reimburse the Parents for four and one-half (4.5) hours of preschool expenses for each week, from December 10, 2021, [redacted] until the date of this **ORDER.**
3. Going forward, by the last day of the month, the Parents should submit a limited request for payment consistent with the agreed-on hours stated in the IEP. MCIU should then reimburse the Parents within 10-days of receipt of the Parents' demand.
4. The Parent's Section 504 denial of FAPE claim is limited to the relief described above and **ORDERED** in Paragraphs 1 through 3 above.
5. Within 10-days of the **ORDER,** MCIU must hold an IEP meeting, at which time the team will decide if transportation is a necessary related service.
6. The Parents' IDEA and Section 504 claim for full-day preschool reimbursement are exhausted and **DENIED**.
7. The Parents' Section 504 discrimination claim is otherwise exhausted and **DENIED.**
8. The Parents' ADA discrimination claim is otherwise exhausted and **DENIED.**
9. The Student's claim for compensatory education is exhausted and **DENIED**.
10. Any timeline in the above **ORDER** is otherwise modifiable by agreement of the Parties. If the Parties cannot agree, PDE should strictly enforce all deadlines vis-à-vis their general supervisory powers.

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

September 9, 2022 **/s/ Charles W. Jelley, Esq. LL.M.**

HEARING OFFICER