

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:

26735-22-23

Child's Name:

C.J.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

October 21, 2022

INFORMATION AND PROCEDURAL HISTORY

The Student¹ is an elementary school-aged child residing in the District, parentally placed in a private school (Private School). The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with a Specific Learning Disability (SLD).

The Parents filed a due process complaint that asserted the District failed to offer the Student a free appropriate public education (FAPE) during the summer of 2022 (ESY) and the 2022-2023 school year. As remedies, the Parents sought reimbursement for private school tuition, compensatory education, and other expenses. During the due process hearing, the Parents sought to establish that the District did not comply with its FAPE obligations.³ The District maintained that its educational programming, as offered to Student, was appropriate under the applicable law and that no remedy was due.

During the hearing, the Parents offered testimony from a Parent and a representative from the Private School. The District offered testimony from an Intermediate Unit (IU) consultant and the District's Director of Pupil

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2)

² 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 are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

Services. S-1 through S-11 and P-1 through P-51 were admitted into the hearing record. The District objected to the admission of P-52 through P-54 on grounds they were not disclosed five business days in advance of the hearing. The District's request to exclude is granted. (N.T. 253, 256, 303)

Following review of the record and for the reasons set forth below, the Parents' claims are granted in significant part.

ISSUES

- 1) Did the District's June 6, 2022, IEP, proposed for implementation during the 2022-2023 school year, offer Student a FAPE?
- 2) If the June 2022 IEP failed to offer a FAPE, are the Parents entitled to reimbursement of tuition transportation, books, fees, and tutorial expenses at the Private School?
- 3) Did the District deny Student a FAPE through its failure to offer appropriate ESY services to the Student during the summer of 2022?
- 4) If the District failed to offer appropriate ESY services, is the Student entitled to compensatory education?

FINDINGS OF FACT

1. The Student is an elementary school-aged child residing in the District, parentally placed in a Private School. The Student eligible for special education under the IDEA as a child with a SLD. (S-8)
2. The Student attended school in the District for [three grades in early elementary school.] (S-1)

3. In February 2021, [redacted], the District evaluated the Student. After the evaluation, the team concluded that the Student was eligible for and in need of specially designed instruction as a child with a specific learning disability (SLD) in the area of reading fluency. (S-1)
4. For the remainder of the 2020-2021 school year, the Student received itinerant learning support with 30 minutes of daily reading instruction.
5. In July 2021, the Parents obtained an independent education evaluation.⁴ After extensive testing, the evaluator concluded that Student was dyslexic and should be classified as a student with a SLD with deficits in basic reading skills, reading comprehension, reading fluency, spelling, written expression, and math calculation. (P-25, S-2)
6. To improve basic reading skills, the independent evaluator recommended that Student receive a synthetic, phonetic, code-emphasis literacy skill-building program as the basis for specially-designed instruction. Specific methods suggested included the Orton-Gillingham method, the Wilson Reading System® (Wilson) and the Lindamood-Bell Program for Reading, Spelling and Speech. (S-2, p. 24)
7. For the 2021-2022 school year, the Parents enrolled the Student in the Private School. In November 2021, Parents and the District entered into a settlement agreement that established a compensatory education fund for Parents' use in paying Student's tuition. (P-31, S-5; N.T. 94-95)

⁴ The private evaluator selected by the Parents has been in practice since 1980 and holds a doctorate in education. The evaluator is a PA and DE licensed psychologist, a PA and nationally certified school psychologist, a fellow of the American Board of Psychological Specialties with forensic specialization in educational and school psychology and is credited with numerous publications, trainings and presentations.

8. In February 2022, the District reevaluated the Student. For inclusion in the RR, the District examined Student's cognitive profile, academic achievement in reading, written expression, math, oral language, language, fine motor development, parent and teacher reports, notes from a classroom observation, educational records and the findings from an independent evaluation. (S-6)
9. The RR determined that based on the Stanford Binet- Fifth Edition (SB-5), the Student's general cognitive ability was within the high average range of intellectual functioning (FSIQ = 112). (P-32, p. 11).
10. For inclusion in the RR, the District administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to assess Student's reading, math, written language and oral language skills. The Student demonstrated below-average development on all rapid naming and decoding tasks. On the phonological processing subtest, Student's performance indicated high development. The Student demonstrated average development of reading comprehension skills. (S-6)
11. Student's written expression performance indicated average development of spelling skills and writing composition. Individually administered assessments of Student's math performance indicated average development in math fluency, math computation, and math concepts and applications. (P-32, p. 12)
12. On the Gray Oral Reading Tests, Fifth Edition (GORT-5), the Student's scores indicated below-average development in oral reading, accuracy and fluency. (P-32, p. 14)
13. On the Wechsler Individual Achievement Test, 4th Edition (WIAT-4), the Student was determined to have average development in math

fact fluency (addition, subtraction, multiplication), math computation, and math problem-solving skills. Student's performance indicated average development of listening comprehension skills and oral expression. (P-32, p. 16)

14. The Behavior Assessment System for Children, Third Edition (BASC-3) was administered to assess the Student's behavioral and emotional functioning in the home and school settings. Parents and teacher ratings did not suggest atypical social, emotional, or behavioral functioning. The Student did not report any at-risk or clinically significant ratings on the self-report. (P-32, p. 18)
15. After a speech-language evaluation, the RR concluded that the Student displayed articulation, receptive language, and expressive language skills within the normal range. On an assessment of oral language skills, Student's performance indicated average development of listening comprehension skills and oral expression. (S-10, p. 17)
16. Results of occupational therapy assessments concluded that the Student's scores did not qualify for services. (S-6)
17. The RR concluded The Student's performance indicated the presence of a specific learning disability (SLD). Deficits were found in rapid naming, reading decoding, and reading fluency, concluding that those weaknesses impacted the Student's ability to efficiently apply decoding skills to accurately read words and encode or spell words. (S-6)
18. The RR concluded that a severe discrepancy existed between the Student's actual academic achievement and the expected level of achievement based on estimated cognitive ability in reading decoding and fluency. (P-32, S-6)

19. The RR concluded that the Student continued to have eligibility and needed special education services under the educational disability category of a specific learning disability. (P-32, S-6)
20. The RR concluded that Student needed direct, explicit instruction in a researched-based program to improve reading decoding, fluency, encoding/spelling. Instructional recommendations included 50% extended time on assessments and assignments; written directions presented orally; individual words, phrases, directions read aloud; small group testing; assistance reading grade level material; extra time to read lengthier reading assignments during class; chunking; prompting with tracking finger; opportunity to use a spell-check device; a sight word book or personal word wall; daily sight word practice; and repeated readings to increase fluency. (P-32, p. 25)
21. On February 22, 2022, the IEP team met to discuss proposed educational programming and ESY for the Student. On March 1, 2022, through a NOREP, the Parents rejected the District's offered program and placement. (P-34, S-10)
22. In April 2022, the Parents obtained a follow-up evaluation from the private evaluator to review the Student's academic achievement to determine the appropriateness of the District's proposed program and placement. (P-36, S-8)
23. After administration of assessments, the evaluator concluded that since April 2021, the Student made measurable progress at the Private School. Areas of improvement included word identification, reading comprehension, reading fluency, creative writing, math fluency and facts recall, and math calculation. (P-36, p. 15, P-37)

24. Based on history, performance in the classroom and current test results, the evaluator concluded that Student should be classified as a student with an SLD with needs in basic reading skills and reading fluency. (P-36, p. 16)
25. The April 2022 follow-up private evaluation recommended that Student receive literacy skill instruction using an Orton-Gillingham-based synthetic/phonetic code emphasis instructional approach to improve reading skills. Examples of Orton-Gillingham methodology cited in the evaluation included the Wilson Reading System® and RAVE-O®, delivered by fully qualified teachers who meet the training requirements of these programs. (P-36, p. 16)
26. The evaluator concluded that if the Wilson Reading System® was chosen, the Student should receive from three to five individualized tutorial sessions per week for approximately 40 to 60 minutes per session in a one-to-one or small group setting with a fully qualified level 1 Wilson instructor. (P-36, p. 16)

May 2022 IEP

27. On May 25, 2022, the IEP team met to consider the supplemental private evaluation and discuss educational programming for the Student. The team determined the Student had academic needs in reading fluency, comprehension, decoding, encoding and written expression (spelling, content, organization). (P-38, p. 19)
28. The May 2022 IEP offered reading fluency, decoding, encoding, comprehension, and written expression goals. (P-38)
29. The May 2022 IEP offered 110 minutes of daily, direct, explicit instruction using a research-based multi-sensory reading and language

curriculum (such as Wilson Reading), one-to-one reading instruction, including decoding, encoding, and reading fluency, extended time, support for math and other content areas when reading is required, and chunking of lengthy reading assignments. During the ELA block, the Student would receive instruction in a small group setting with six to eight students. (P-38, S-10 p.30-32; N.T. 265-266)

30. The May 2022 IEP proposed that the learning support and general education teachers meet weekly to discuss reading strategies implemented throughout the day; and monthly fidelity checks with the special education teacher and classroom para-educators to ensure Wilson implementation occurred with fidelity. (S-10, p. 32-33)
31. The learning support teacher identified to provide Wilson reading instruction to the Student has an instructional II certificate, a Masters's degree in reading and language and is a certified reading specialist. The learning support teacher is not Wilson-certified. (N.T. 264-267)
32. The District proposed that the Wilson one-to-one instruction would occur through a station-rotation model. The Student would receive individual instruction from the learning support teacher and then move around the classroom supported by paraprofessionals and staff to address other skills. (N.T. 266)
33. The Director of Pupil Services for the District testified that the teacher identified to provide Wilson instruction received training in a previous school district and would attend a three-day workshop to obtain certification if Student reenrolled in the District. (N.T. 284)

34. On June 6, 2022, the District issued a NOREP that recommended the Student receive supplemental learning support consistent with the May 2022 IEP and offered ESY for the summer of 2022. The team recommended an increase in ESY to three hours a day, four days a week for five weeks of instruction in fluency, decoding, reading comprehension, written expression and encoding. (S-10, p. 45)
35. On June 8, 2022, the Parents rejected the offered educational programming because it did not offer Student a FAPE. (P-39)
36. Although the team determined that Student qualified for extended school year services (ESY), the Student did not attend and instead, the Parents arranged for private in-home tutoring. (S-10, p. 34; N.T. 114-115)
37. In June 2022, through a letter provided to the District, the private evaluator recommended that the teacher providing Wilson reading instruction to the Student must possess, at a minimum, a Level I certification. Attached to the letter were the Wilson level I certification requirements.⁵ (P-40, P-41)
38. The District occasionally receives input from an IU special education consultant and literacy specialist about recommendations for reading programs. The consultant received training in the Wilson reading programs through a three-day training in the early 2000s. According to

⁵ Certification requirements include a comprehensive online course, a 1:1 instruction with a practicum student for a minimum of 65 lessons with a lesson plan written for each lesson, an be observed five times teaching the practicum student.

- the consultant, a three-day training is still needed to obtain Wilson Level I certification. (N.T. 234-235, 242-247, 258)
39. According to the reading consultant, Orton-Gillingham (OG) is the gold standard for reading instruction for children with disabilities. The Wilson reading program is based on OG. Although Wilson certification is helpful, a specific level of training is not required to deliver its programming. (N.T. 237-241, 243-244, 247)
 40. The Parents enrolled the Student in the Private School for the 2022-2023 school year. During the 2021-2022 school year, the Student made a positive adjustment to the Private School and experienced meaningful educational gains. (P-10, P-18, P-36, P-37; N.T. 100-101, 191-192)
 41. The Private School has a lower and upper division. The school is designed for students in south-central Pennsylvania with learning differences. All of the teachers at the Private School are trained in the Orton-Gillingham method. The Private School groups students by ability instead of grade level. All students meet individually with a tutor at least three times per week (N.T. 172-173)
 42. The Student is enrolled in the lower division of the Private School. The Student receives two hours of daily reading and writing instruction and an hour of math, science or social studies. Each class has four to five students. The Student also receives daily art and PE, a computer course and a language development course with vocabulary instruction. (N.T. 173-176, 199-202)
 43. The Private School instructs using multi-sensory math instruction and specialized writing programs. (N.T. 171-178)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. 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). Accordingly, the burden of persuasion, in this case, must rest with the Parent who filed for this administrative hearing. Yet, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, who assume the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *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). During the hearing, the Parents offered testimony from two witnesses. They included a Parent and a representative from the Private School. The District offered testimony from an Intermediate Unit (IU) consultant and the District's Director of Pupil Services. Oddly, neither party sought to elicit testimony from the learning support teacher with assigned responsibility to implement the critical provisions of the proffered IEP and ostensibly obligated to acquire future Wilson training. Instead, the IU consultant attempted to explain the training and certification options of the Wilson Reading System, which differed significantly from the requirements

appended to the Parents' private evaluator's report. The other District witness attempted to vouch for the preparedness of the learning support teacher to implement the offered reading program and how the Student would be supported within the classroom. Neither witness had direct experience with the Student, and their testimony was unpersuasive.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of the witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

GENERAL IDEA PRINCIPLES

Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's

"intellectual potential. "*P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances and not necessarily those that his or her "loving parents" might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also*, *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also*, *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); *see also* 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment where each

student can receive a FAPE. See 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. See *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993)

Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Reimbursement for Tuition

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs

associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *see also C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The Parents' Claims

The Student struggled with reading skills and mid-way through second grade, a District evaluation concluded that specially designed instruction was necessary because of a specific learning disability (SLD) in the area of reading fluency. That summer, the Parents obtained a private educational evaluation that confirmed the District's conclusions but determined Student was dyslexic and should be classified as a student with a SLD with deficits in basic reading skills, comprehension, fluency, spelling, written expression, and math calculation. After the unilateral placement of the Student in the Private School for third grade, the Parents and District entered into a settlement agreement, that partially funded that enrollment. After a series of additional District and private evaluations, the Parents again

enrolled the Student in the Private School for the 2022-2023 school year. The Parents now seek tuition reimbursement.

The initial issue in a case involving tuition reimbursement is whether the District's proposed program and placement offered Student a FAPE. The Parents, in this matter, allege fatal deficits concerning the District's last offer in May 2022 that are addressed below. The overarching contention advanced by the Parent in support of this FAPE claim is that the learning support teacher identified to provide reading instruction during the 2022-2023 school year to the Student lacked Wilson certification. The Parents have established by a preponderance of the evidence that the May 2022 IEP failed to offer the Student a FAPE.

The most recent District RR and an IEE obtained by the Parents concluded that Student needed an intensive reading program delivered with fidelity in a small group and with one-to-one instruction. The District's February 2022 RR concluded that Student required direct, explicit instruction in a researched-based program to improve reading decoding, fluency, encoding and spelling. Months later, in April 2022, a follow-up IEE noted Student's progress at the Private School during [redacted] grade. The IEE recommended that Student receive literacy skill instruction using an Orton-Gillingham-based synthetic/phonetic code emphasis instructional approach to improve reading skills and cited examples that included the Wilson Reading System. The private evaluator stressed that reading instruction for the Student should be delivered by fully qualified teachers who meet the training requirements of the selected program.⁶

⁶ Under the IDEA and its implementing regulations, if parents obtain an IEE and that IEE is shared with the district, the district must consider the results of the evaluation when making decisions involving the provision of FAPE to the child. 34 C.F.R. §300.502(c).

The District's FAPE offer through the May 2022 IEP offered goals responsive to identified needs and an array of targeted, individualized, specially designed instruction. However, the District's plan for special education reading implementation was flawed. Although the District offered 110 minutes of daily one-to-one and group reading instruction using a research-based, multi-sensory program (such as Wilson Reading), the learning support teacher who would implement this aspect of Student's programming lacked the credentials the private evaluator recommended and tacitly acknowledged by the District as likely necessary. The Parent's IEE and supplemental recommendations were clear that the Student required instruction from a trained Wilson reading instructor with at least a Level I certification. Attached to one of the private evaluator's reports were the training requirements needed to obtain Wilson certification. Although the evaluator did not testify, the comprehensive reports admitted into evidence fully outlined the Student's academic weaknesses and offered persuasive recommendations that the District unsuccessfully contradicted.⁷ Although formal Wilson certification is not required to teach using this program, the District acknowledged the value of formal training because it offered to enroll the learning support teacher in a three-day program if the Student returned to District. The District's attempts to refute the private evaluator's information about the necessity and time required to obtain Wilson certification were unpersuasive. The IU reading expert presented by the District testified about Wilson credentialing requirements that were in place years ago. However, that information was soundly contradicted by documentary evidence, submitted by the Parent, that outlined the various steps and time commitment needed to obtain Wilson Level I certification. The remaining District witness could only offer that the selected learning support teacher, a reading specialist, was not Wilson-certified but had some

⁷ ODR Prehearing guidelines permit the introduction of an expert report without testimony.

experience using the program from employment in a former district. Where and when this training occurred and, more importantly, how that purported experience without Wilson certification would be used to deliver this Student's reading programming with fidelity were not available through this witness.

Because of Student's extensive reading needs and current grade level, the window of opportunity to remediate the identified deficits is not indefinite. As both the District and Parents agree, this Student needs intense, consistent reading instruction provided by trained, experienced educators. The District's May 2022 IEP was appropriate in many respects, but the proposed implementation plan was inadequate and not calculated to afford Student with meaningful educational progress.

Having determined that the District did not meet its FAPE obligations to Student for the 2022-2023 school year, it is necessary to undergo an analysis of the second prong of the *Burlington-Carter* test, which is an examination of the appropriateness of the private placement, which the Parents have selected. Here, the private placement is appropriate. The private placement provides services to students with special education needs and, with a full range of instruction and services individualized for the Student's needs. Furthermore, the Student is making academic progress. The Parents have met their burden at step two of the analysis that the private placement is appropriate for the student.

When a school district has proposed an inappropriate program and parents' unilateral placement in a private setting provides an appropriate program, both being the case here, the third step of the *Burlington-Carter* analysis involves a balancing of the equities between the parties to see if the equities between the parties should impact the award of tuition

reimbursement. Here, the equities do not significantly weigh for or against either party. Accordingly, the Parents are entitled to tuition reimbursement

Finally, Parents allege that the District denied Student a FAPE because it failed to offer sufficient extended school year (ESY) services during the summer of 2022. Although the proposed IEP offered the Student the equivalent of sixty hours of instruction over five weeks during the summer, the Parents elected to secure private in-home tutoring. The Parents request for reimbursement for expenses related to the private tutoring is denied. ESY services are intended for the maintenance of skills rather than the acquisition of new skills and reimbursement for tutoring; no remedy is owed.⁸

The record was preponderant that the District failed to offer Student a FAPE. The record is also preponderant that the private school can meet the Student's educational needs. Accordingly, this hearing officer grants Parents' request for tuition reimbursement. A Final Order awarding the Student appropriate relief for the 2022-2023 school year now follows.

⁸ See, Extended School Year Services in Pennsylvania, Pennsylvania Department of Education (2020)(available at <https://www.pattan.net/Publications/Extended-School-Year> Services-in-Pennsylvania.

ORDER

AND NOW, this 21st day of October 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District failed to offer Student FAPE for the 2022-2023 school year

2. The Parents are entitled to reimbursement for tuition, transportation, and related expenses for Student's attendance at the Private School for the 2022-2023 school year. Within fifteen calendar days of its receipt of an itemized invoice for all expenses associated with Student's attendance at the Private School, the District shall provide the reimbursement to the Parents.

3. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

October 21, 2022