

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

Pennsylvania Special Education Hearing Officer Final Decision and Order

ODR No.

26957-22-23

CLOSED HEARING

Child's Name:

G.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

01/13/2023

Introduction

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

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

Issues

These issues were submitted for adjudication:

1. Must the District reimburse the Parents for the cost of the Private School's tuition for the 2020-21 school year?
2. Must the District reimburse the Parents for the cost of the Private School's program for the 2021-22 school year?

Findings of Fact

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

Background and Pre-Enrollment

1. There is no dispute that the Student is a child with a disability, as defined by the IDEA.
2. There is no dispute that Student enrolled in the District [redacted] for the 2016-17 school year. There is no dispute that the District is the Student's Local Educational Agency, as defined by the IDEA.
3. Prior to enrollment, the Student was identified and received early intervention (EI) services. The District evaluated the Student before the Student entered [the district]. That evaluation resulted in an Evaluation Report (the 2016 ER). J-2, J-3.

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

4. Through the 2016 ER, the District determined that the Student qualified as a child with a disability under the primary category of Speech or Language Impairment (SLI) and the secondary category of Specific Learning Disability (SLD). J-3.²
5. On August 31, 2016, the Student's IEP team met to draft an IEP based on the 2016 ER (the 2016 IEP). J-6.³ The IEP included goals for letter naming, letter sound fluency, number identification, one to one correspondence of object-number identification, and Speech. *Id.*

The 2016-17 School Year [redacted] and the 2017-18 School Year [redacted]

In their complaint, the Parents raise no issues concerning the appropriateness of the Student's program during the 2016-17 and 2017-18 school years. The Parents do not allege that the District violated the Student's right to a FAPE during this period, and so I decline to provide a detailed analysis. However, some facts concerning this period put later facts into context and are provided for that reason.

6. During the 2016-17 school year, the District ran a [redacted] program [redacted]. The Student, however, attended [school] for a full day in accordance with the 2016 IEP. Specifically, the Student attended a learning support classroom in the morning and a regular [redacted]class in the afternoon. *Passim; see, e.g.* J-6.
7. On September 26, 2016, the IEP team revised the Student's Speech and Language goals. J-6 at 211.
8. On November 3, 2016, the Student received an Occupational Therapy evaluation and was found eligible for Occupational Therapy (OT). J-5.
9. On December 6, 2016, the IEP team revised the 2016 IEP again to include OT. J-6.
10. On March 1, 2017, the IEP team revised the 2016 IEP again to reflect the Student's progress and mastery of some goals. J-6.

² The Parents do not challenge the appropriateness of the 2016 ER, and so I decline to describe it in depth.

³ J-6 includes both the 2016 IEP and revisions to that IEP on September 9, 2016, December 6, 2016, and March 1, 2017.

11. During the 2016-17 school year, the Student received specialized reading instruction using a program called "Foundations." Foundations is a literacy program for young children developed by, and related to, the Wilson reading system. Wilson, in turn, is a published reading curriculum based on the Orton-Gillingham (OG) reading methodology. See, e.g. NT at 162-69.
12. On May 15, 2017, the IEP team met to draft an IEP for the remainder of the 2016-17 school year and the 2017-18 school year (the 2017 IEP). J-7. The resulting IEP included twelve (12) goals (3 reading goals, 1 writing goal, 2 math goals, 4 speech and language goals, 2 OT goals) J-7.
13. The 2017 IEP included SDI similar to the 2016 IEP, maintaining SLT, OT, and Foundations. J-7.
14. The Student started the 2017-18 school year under the 2017 IEP and received the services detailed therein (there is no claim to the contrary).
15. On October 17, 2017, the IEP team met and revised the 2017 IEP to reflect the Student's progress. J-7.
16. On January 31, 2018, the IEP team met again and revised the 2017 IEP to reflect the Student's progress. Mastered goals for nonsense word fluency and quantity discrimination were removed and new goals for reading fluency and math computation were added. J-7.
17. On April 4, 2018, the IEP team met to develop a new annual IEP for the Student (the 2018 IEP). The District offered an IEP which placed the Student in supplemental learning support with goals for reading fluency, math computation, correct writing sequences, Speech, and OT. J-11.
18. On April 19, 2018, the Parents sent an email to the District raising questions about IEP goals from the 2017 IEP that were not mastered but were discontinued and about how progress towards the 2018 IEP goals would be monitored. The District incorporated that email into the 2018 IEP at the Parents' request. The District offered to reconvene the IEP team to address the Parents' concerns, but the Parents declined the meeting. J-11 at 13.
19. On May 23, 2018, the Parents obtained a private neuropsychological evaluation of the Student (the 2018 Private Evaluation). J-8.

20. The private neuropsychologist who completed the 2018 Private Evaluation concluded that the Student had a FSIQ in the average range. The private neuropsychologist also found that the Student's academic achievement in math, spelling, written expression, and reading comprehension were all in the average range as well. J-8.
21. The 2018 Private Evaluation found that working memory and processing speed were comparative weaknesses for the Student (both in the low average range compared to an average FSIQ). The private neuropsychologist found comparative weaknesses in decoding and executive functioning skills as well. J-8.
22. The 2018 Private Evaluation concluded that the Student met diagnostic criteria for Developmental Dyslexia. Educational recommendations in the 2018 Private Evaluation were generally consistent with services that the District was providing. However, the private neuropsychologist urged that the Student's IEP should better reflect the amount of service that the Student received, particularly Foundations. J-8.

The 2018-19 School Year [redacted]

As with the 2016-17 and 2017-18 school years, the Parents raise no claims concerning the 2018-19 school year. Again, I decline to provide a detailed analysis. However, some facts concerning this period put later facts into context and are provided for that reason.

23. The private school for which the Parents seek tuition reimbursement (the Private School) has developed its own OG-based reading program called "Pathways to Structured Literacy Orton-Gillingham Approach" (the Private School Program) There is no dispute that the Private School trains educators to teach using the Private School Program. Educators who successfully complete this training receive a certificate from the Private School. The same teacher who instructed the Student in Foundations was trained by the Private School and is certified by the Private School to provide the Private School Program. *Passim*.
24. Starting in the 2018-19 school year, the District discontinued Foundations and began to implement the Private School Program. The Student also continued to receive OT and Speech services. *See, e.g.* J-7, J-11; NT 43, 210-211, 380, 417.
25. The Parents shared the 2018 Private Evaluation with the District.

26. On September 5, 2018, the District reconvened the Student's IEP team. The private neuropsychologist and the District's own psychologist attended the meeting. Generally, the 2018 IEP was revised to reflect the Student progress, address the Parents' concerns, and implement recommendations from the 2018 Private Evaluation. More specifically, the team added goals for phoneme segmentation, sights words, and math concepts and applications. SDI was revised to more clearly reflect the Private School Program and the amount of time that the Student would receive that program daily (45 minutes, consistent with the recommendation in the 2018 Private Report). Progress monitoring was also made more robust. J-11.
27. On September 14, 2018 the District issued a Notice of Recommended Educational Placement (NOREP) offering the revised 2018 IEP. The Parents approved the NOREP on September 26, 2018. J-12.
28. On September 5 and 14, 2018, the District sought the Parents' consent to evaluate the Student. The Parents provided consent. This was, in part, a technical mechanism for the District to incorporate the 2018 Private Evaluation and to conduct new testing and observations. See J-10, J-13.
29. The District issued a Reevaluation Report dated November 2, 2018 (the 2018 RR). J-14. Through the 2018 RR, the District broadly concurred with the 2018 Private Report. The 2018 RR continued the same conclusions as the prior evaluation: that the Student qualified for special education as a child with SLD and SLI. The 2018 RR included educational recommendations for the IEP team to consider. J-14.⁴
30. On November 14, 2018, the District reconvened the IEP team to revise the Student's IEP to include information from the 2018 RR and to update the Student's present education levels. Consistent with the 2018 RR, goals were revised to include decoding, correct writing sequences, and Speech. Changes to SDI and related services reduced OT to the consultative level. J-20.
31. On November 20, 2018, the District sent a NOREP to the Parents, proposing the changes to the 2018 IEP. The Parents approved the revisions on December 5, 2018.

⁴ The Parents do not challenge the procedural or substantive appropriateness of the 2018 RR, and so a more detailed analysis is not necessary.

32. On April 12, 2019, the District reconvened the IEP team. At that point, the Student's reading had improved, and the Student was now performing at grade level in reading accuracy and comprehension. The District recommended placement in general education for language arts, which would also change the Student from supplemental to itinerant learning support (based on the amount of time in regular education classes). Despite the change in the Student's reading placement, the Student continued to receive reading instruction through the Private School Program as well. See J-20.
33. When the District proposed the April 12, 2019, IEP revisions, the Parents expressed concerns about maintaining the Student's progress in reading and math. The District addressed those concerns with assurances of progress monitoring through IEP goals. Consequently, on April 22, 2019, the Parents signed a NOREP approving the revisions. J-17, J-20, NT at 220.
34. On May 22, 2019, the parties met by phone to revise the IEP again. The parties agreed to update the IEP to reflect the Student's independent reading level, and a goal was added to monitor the Student's reading comprehension. J-20. The District issued a NOREP for these changes the next day, and the Parents approved the changes on May 26, 2019.

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

As with the 2018-19 school year, the Parents raise no claims about the 2019-20 school year prior to the COVID-19 school closure in May 2020. Like before, in the absence of any claim that the District violated the Student's right to a FAPE during this period, I decline to make a detailed analysis. Facts concerning this period put later facts into context and are provided for that reason.

35. The 2019-20 school year started under the revised IEP from May 2019. This included both placement in the general education language arts program and continuation of the Private School Program for 45 minutes per day. See J-20.
36. On October 18, 2019, the parties participated in a phone conference. At this point, the Student was reading on grade level and had met the decoding and reading comprehension goals. The District proposed updating baselines and increasing the IEP's goals. J-20, NT 220-221.

37. On October 21, 2019, the District issued a NOREP proposing the IEP revisions. The Parents approved the revisions on October 24, 2019.
38. On November 7, 2019, the District reconvened the IEP team to draft a new, annual IEP for the Student (the 2019 IEP). J-23. In substance, the 2019 IEP was a continuation of the prior, revised IEP – but updated and elevated to reflect the Student’s progress. The proposal continued the Private School Program for 45 minutes per day. J-23.
39. On November 13, 2019 the District issued a NOREP proposing the 2019 IEP. The Parents approved the NOREP on November 18, 2019.

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

40. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.
41. During the 2019-20 school year, the Student’s performance on IEP goals, district-wide assessments, and benchmarking, all showed that the Student was developing or demonstrating grade-level skills across academic domains. This in no way suggests that the Student was completely remediated or no longer required special education. By all objective measures, however, the Student was progressing both in generally and specifically towards IEP goals. See, e.g. J-23, J-25, J-26, J-27, J-30.
42. When the District closed, the mode of the Student’s instruction evolved over time. All instruction from the school closure through the end of the 2019-20 school year was remote, but the form of remote instruction changed. The record does not reveal exact dates, but the District shifted first to asynchronous instruction. Then, the District added pre-recorded videos from the Student’s teachers to the asynchronous instruction. Then, the District shifted to synchronous remote instruction via video conference. See NT 227-230; J-28, J-30.
43. On April 14, 2020, the District issued to Parents a “Flexible IEP Implementation Plan.” J-28. The purpose of that document was to explain how the District would implement the 2019 IEP during the mandatory school closure. See *id.*
44. In June 2020, the Pennsylvania Department of Education (PDE) and the Health Department of the county in which the District is located

issued guidelines for the reopening of schools. Those guidelines permitted the District to reopen and provide either hybrid instruction (children would receive instruction in school on some days at remotely on other days) or fully remote. *See, e.g.* J-30.

45. On June 8, 2020, the District sent the Parents an IEP Progress Report. The report noted that limited progress monitoring data could be collected, particularly during the period of asynchronous instruction. However, the District stated that progress monitoring would resume as soon as possible, and that progress would be reassessed at that time and that IEP goals would be updated as necessary. *See, e.g.* J-30.
46. On June 9, 2020, the IEP team reconvened by phone. At this meeting, the Parents expressed concerns about whether livestreamed lessons were beneficial to the Student, and concerns about the Student's writing, reading comprehension, and tendency to rush through work. The team discussed writing supports, summer resources, and options to reconvene once there was more certainty about possible modes of instruction for the 2020-21 school year. J-31, NT at 53, 234.

Summer 2020

47. On June 27, 2020, the Parents declined the District's Extended School Year (ESY) program. J-33.
48. On July 19, 2020, the District's School Board approved and adopted the PDE and county Health Department's school reopening plan. *See, e.g.* J-39 at 8.
49. On July 30, 2020, the Parents applied for the Student to attend the Private School for the 2020-21 school year. J-34.
50. On August 19, 2020, the District invited the Parents to an IEP team meeting. The Parents responded by asking to meet on a different day. J-36.
51. On August 20, 2020, the Parents sent what is commonly called a "10-Day Letter" to the District. They told the District that the IEP did not adequately address the Student's "Specific Learning Disability, Speech issues, attentional issues, and executive functioning issues," and that they intended to place the Student at the Private School and seek reimbursement. J-37; NT at 56-57, 237-238, 242-243, 470-471.

52. On September 4, 2020, the IEP team reconvened. At the meeting, Parents expressed concerns with virtual instruction. The District reviewed plans regarding how the Student's IEP would be implemented depending on whether the District opened under a remote or a hybrid model. The District also discussed its plan to reassess the Student after in-person instruction resumed to determine any need for COVID Compensatory Services (CCS).⁵ J-39; NT at 241, 243, 474-479.
53. The IEP developed during the September 4, 2020, meeting (the 2020 IEP) continued the Student's placement in itinerant learning support and included information about the District's reopening plan. Under that plan, the Student would receive virtual instruction at least until October 30, 2020. However, the 2020 IEP planned for both remote and in-person instruction by included sets of SDI for both models. See J-39.
54. Functionally, the 2020 IEP was a continuation of the prior IEP, but updated to reflect the Student progress (with an acknowledgement that the most current progress data was incomplete as a result of the COVID-19 school closures), and changed to include contingencies for different modes of instruction (which were likely to change over the course of the upcoming school year). See J-39.
55. On September 4, 2020 – the same day as the IEP team meeting – the Parents signed an enrollment contract with the Private School. J-40
56. On September 11, 2020, the District issued a NOREP offering the 2020 IEP.
57. On September 22, 2020, the Parents rejected the NOREP and sent another 10-day letter notifying the District that they would seek reimbursement for the Private School.

2020-21 School Year [redacted]

58. The Student began attending the Private School at the start of the 2020-21 school year. *Passim*.
59. While it is obviously impossible to say what would have happened had the Student returned to the District for the 2020-21 school year, the

⁵ CCS is a framework put in place by the Pennsylvania Department of Education so that public schools could assess baseline and progress changes resulting from COVID-19 school closures and then offer compensatory services if needed to remediate regression. In this case, the District put that reassessment plan into the Student's IEP.

District's reopening plan – as put into practice – establishes where the Student would have been educated (See, e.g. NT 239-240, 475-479).

- a. The 2020-21 school year started with fully remote instruction.
 - b. In late September, the District began providing in-school instruction to some children with disabilities. The record does not reveal if the Student would have fallen into this group.
 - c. By mid-October, the District began providing hybrid instruction to students with disabilities who had similar educational profiles to the Student in this case. Under this model, the Student would have received in-school instruction two days per week, instruction via video conference two days per week, and remote asynchronous instruction one day per week.
60. On October 16, 2020, the District sent a second response to the Parent's 10-Day Letter. In this response, the District stated its belief that the 2020 IEP was an offer of FAPE for the Student, but also offered to convene an IEP team meeting to address any deficiencies that the Parents perceived in that IEP. J-43.
 61. On February 2, 2021, Parents, through counsel, contacted the District about programming for 2021-2022 school year. J-45; NT at 243.
 62. On February 9, 2021, the District sought the Parents' consent to evaluate the Student so that it could program for the Student if the Student returned to the District. J-46.
 63. On February 21, 2021, the Parents' provided consent for the District's evaluation. J-46.
 64. On February 24, 2021, the Parents signed a release so that the Private School could share the Student's educational records with the District. J-47.
 65. On March 1, 2021, the District invited the Parents to an IEP team meeting scheduled for May 6, 2021. The Parents replied that they would attend. J-48.
 66. On March 15, 2021, the Parents signed an enrollment contract for the Student to attend the Private School during the 2021-22 school year. J-49.

67. On April 15, 2021, the Parents signed another contract with the Private School for private Speech and OT services provided at the private school. The Private School assessed the Student's need for those services prior in the school year. J-44, J-50, J-51.
68. On April 22, 2021, the District completed its reevaluation and issued a reevaluation report (the 2021 RR). J-52.
69. The 2021 RR was thorough and comprehensive. The Parents reference this evaluation in their complaint but raise no issues with it. Even so, some details from the report are necessary (J-52):
 - a. The Student's FSIQ was found to be in the low-average range, a decline from the average range in prior testing. The record does not provide analysis as to whether the change is statistically significant. The Student's processing speed, however depressed the FSIQ. The Student's GAI, which compensates for that depression, was measured in the average range.
 - b. Tests of executive functioning found difficulties with sustained attention and impulse control.
 - c. The Student's academic achievement was measured with a test designed to be compared to the test of the Student's cognitive abilities. On the whole, the Student performed in the average range academically with some variation in sub-tests.
 - d. The Student scored in the very high range on measures associated with dyslexia (meaning that the Student could perform tasks that dyslexia tends to inhibit) and the Student's reading fluency score was in the high average range.
 - e. Multiple assessments of the Student's behavioral, emotional, and executive functioning abilities showed a need for supports with hyperactivity, impulsivity, peer relations, and symptoms typically associated with ADHD.
 - f. OT and Speech needs were also identified.
70. Ultimately, through the 2021 RR, the District determined that the Student remained eligible for special education, but with a primary category of Other Health Impairment (OHI) relating to attention and sustained focus issues and a secondary category of SLI. The District

found that the Student no longer met criteria for SLD because the Student was demonstrating age-appropriate academic skills. J-52.

71. On May 6, 2021, the District proposed an IEP that would place the Student in itinerant learning support for the remainder of the 2020-21 school year and in supplemental learning support for the 2021-22 school year in the District's middle school (the 2021 IEP). J-55.
72. The 2021 IEP included the Private School Program, and the District employs a teacher in its middle school who is certified by the Private School to teach that program. J-55.
73. The 2021 IEP included goals for resiliency, social skills, correct writing sequences, and organization. As before, the IEP also included Speech, OT goals. All the goals except for Speech and OT had baselines to be determined within three weeks of the Student's return to the District's schools. The Speech and OT goals were baselined using data from the 2021 RR. J-54.
74. The 2021 IEP included individualized SDI and related services that are directly connected to the goals. J-54.
75. On May 14, 2021, the District issued a NOREP seeking the Parents' consent to implement the 2021 IEP. J-56.
76. On May 24, 2021, the Parents rejected the NOREP and sent another 10-Day Letter advising the District that they would keep the Student at the Private School for the 2021-22 school year and seek reimbursement. The Parents wrote that the 2021 IEP did not "adequately address [Student's] issues in reading, math, and writing, handwriting, attention, executive functioning, emotional regulation, Speech/language, social skills, visual motor skills, fine motor skills, and sensory processing." The Parents expressed their belief that the Student required "access to additional educational/remedial services, a more intensive special education program, a placement in a smaller classroom setting". J-57.
77. On May 27, 2021, the District responded to the 10-Day Letter. Like before, the District expressed its belief that the 2021 IEP was appropriate, but was willing to convene an IEP team meeting. J-60.

The 2021-22 School Year [redacted]

78. The Student attended the Private School for the 2021-22 school year with OT and Speech services for an additional fee. J-49, J-61, J-62, J-77, J-78, J-79.
79. On March 29, 2022, the District invited the Parents an IEP team meeting to draft a new annual IEP for the Student. J-67.
80. On April 25, 2022, the IEP team met. The team considered current information about the Student's progress provided by the Private School. At this time, the Parents were intermediating communications between the District and the Private School. Also, the District asked the Parents to bring the Student to the District for updated progress monitoring, but the Parents did not bring the Student to the District. J-69; NT at 323-329.

The Private School

81. There is no dispute that the Private School has a policy that it will not testify at special education due process hearings. The Private School makes it known to its families, including and especially the Parents in this case, that any effort to compel the testimony of its employees will result in the Student's dismissal.
82. The Private School assessed the Student using both subjective and objective measures during the 2020-21 and 2021-22 school years. On the objective measures, which were benchmark tests, the Student consistently scored in the average to above average range based on national norms in oral reading fluency (J-63, J-75), Number sense fluency (J-68, J-76), and math (J-74).

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D.

Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

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

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

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

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

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

The Parents' second "expert" witness did not have any direct knowledge of any portion of the Student's programming, never observed the Student in the District or at the Private School, never spoke with teachers from the District or the Private School, never attended IEP team meetings, and never evaluated the Student. Giving this witness the benefit of the doubt, she knew the Student only from her work on this case. The witness testified authoritatively as to the program that the Student received at the Private School despite a lack of first or even second-hand knowledge, relying instead on her memories of working at the Private School eight years ago. The witness testified that the Student made progress or maintained skills at the Private School based on little more than a review of the Student's Private School report cards. The witness also testified about the District's programming despite a near complete lack of foundation about that program. This witness's testimony had no probative value and, in nearly any other forum, would have been highly prejudicial.

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

Applicable Laws

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision is no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute

indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Tuition Reimbursement

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

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

Discussion

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

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

For purposes of this analysis, I will assume that the various program offers from the District were inappropriate; that they were not reasonably calculated to provide a FAPE at the time they were offered.⁶

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

I give no weight to the testimony from the Parents' two not-credible witnesses. Other testimony about the Private School came from the Student's mother. While the Student's mother had no serious credibility problems, she had no first-hand knowledge of the Student's program in either the District or Private School setting.⁷ The best evidence of the Student's programming at the Private School comes from documents that the Private School gave to the District as part of the District's effort to develop IEPs for the Student. None of those documents preponderantly establish in any detail what services the Student received at the Private School.

It appears that the Student received OT and Speech services while attending the Private School, but that information comes from contracts for services, not service records. Also, it is a near certainty that the Student received the Private School Program while attending the Private School but, shockingly, there is no direct, non-hearsay evidence of that in the record. Discounting witnesses who were not credible, there is nothing in the record that enables me to determine what special education the Student received at the Private School. Without that information, I cannot possibly conclude that the Private School was appropriate for the Student at the time the Parents chose to place the Student there.

Progress data that the Private School collected and reported to both parties does not alter this analysis. By the time that the Student left the District, the Student was performing on grade level and improving across academic domains. Data collected by the Private School and relied on by the District for IEP development generally shows that the Student maintained that academic progress while attending the Private School. That progress maintenance does not establish "appropriateness" under the *Burlington-Carter* test.

⁶ This assumption, along with the absence of any claims as to the appropriateness of prior programs, makes detailed findings concerning the District's offers and the Student's needs unnecessary.

⁷ The Student's mother had first-hand knowledge of the Student's presentation while attending remote, asynchronous instruction.

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

Applied in this case, the record does not permit any other option but to look at the Student's actual progress. The Parents did not create a reliable, preponderant record of whether the Private School was appropriate at the time of enrollment. The Private School's documentation does not show stagnation below expected levels or regression. Rather, it shows maintenance of the progress that the Student achieved in the District's programs. This prong of the *Burlington-Carter* test, however, assumes that the District did not offer an appropriate placement. If actual progress data is the only measure of appropriateness (legally, a bad measure), the test requires something more than a flat line.⁸

To be clear, this analysis applies for both school years in question.

Summary and Conclusions

For all the reasons above, the Parents have not proven by a preponderance of evidence that the Private School is appropriate. Assuming that the District's offers were inappropriate, I must determine if the Parents proved by preponderant evidence that the Private School is appropriate. I find that the Parents have not met their burden. It is more likely than not that the Private School's refusal to participate in this due process hearing contributed to the Parents' inability to meet their burden. I understand the Parents' decision to not press the issue with the Private School, but that decision

⁸ Here, again, the Parent's efforts are thwarted by the Private School. With no credible testimony about the Private School's documents from anybody other than District personnel who used those documents to craft in-district programming, it cannot be known how Private School personnel would have contextualized those documents. It is theoretically possible that maintaining the level that the Student achieved in the District required appropriate special education at the Private School – but I cannot make that assumption and I have no good evidence of what the Private School provided. My duty is to resolve the case on the record before me.

does not alter the necessary analysis. Under the *Burlington-Carter* test, I cannot award the relief that the Parents demand.⁹

ORDER

Now, January 13, 2023, it is hereby **ORDERED** as that the Parents' demands for tuition reimbursement are **DENIED** and **DISMISSED**.

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

/s/ Brian Jason Ford
HEARING OFFICER

⁹ I know of nothing that requires me to take the *Burlington-Carter* test in order, but the outcome is the same either way. I begin with the assumption that the District's offer was inappropriate. If I could not make that assumption and were required to complete the first prong of the analysis, I most likely would not reach the second step. No dispute concerning the appropriateness of the District's evaluations and reevaluations is raised in the complaint, there is no claim that any of the IEPs and revisions are inconsistent with those evaluations. There was hardly a direct attack against any of the IEPs. The only discernable challenge to the appropriateness of the District's special education offers was the amount of time that the Student would receive remote instruction. The Parents' claim that the Student requires OG instruction embedded across all academic domains throughout the school day is not supported, and there is scant evidence that the Student receives such intervention at the Private School. Evidence concerning the Student's alleged lack of ability to derive a FAPE from remote instruction is also not preponderant. The Private School's policy was a significant impediment to the Parents' case.