

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28474-23-24

OPEN HEARING

Child's Name:

B.V.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Brian Jason Ford

Date of Decision:

02/09/2024

Introduction

This due process hearing concerns the special education rights of a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing, alleging that the Student's public school district (the District) violated the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504).

The Student attended the District's [redacted] program during the 2021-22 school year. The Student was evaluated and found eligible for special education in May 2022. The Parents allege that the District should have identified the Student sooner, and that the District's failure to do so constitutes a Child Find violation and a violation of the Student's right to a free appropriate public education (FAPE). The Parents demand compensatory education to remedy this violation.

After the District found the Student was eligible for special education, it offered an Individualized Education Plan (IEP). The Parents allege that the IEP was inappropriate. The Parents placed the Student at a private school (the Private School) starting in the summer of 2022. The Student attended the Private School's summer program and then attended the Private School for the 2022-23 school year ([redacted] grade). The Parents demand reimbursement for the summer 2022 program and the 2022-23 school year.

In the summer of 2023, the Parents rejected an ESY offer from the District and obtained several educational services for the Student privately. The Parents seek reimbursement for those services.

As discussed below, I find in part for the Parents and in part for the District.

Issues

These issues were presented for adjudication:¹

1. Is the Student entitled to compensatory education to remedy a violation of the Student's right to a FAPE during the 2021-22 school year?
2. Are the Parents entitled to reimbursement for the 2022 summer program at the Private School?

¹ See NT 27-31.

3. Are the Parents entitled to reimbursement for the Student's placement at the Private School during the 2022-23 school year?
4. Are the Parents entitled to reimbursement for services that they obtained for the Student in the summer of 2023?

Findings of Fact

The parties filed 20 joint stipulations. I adopt those stipulations as my own findings. In addition to those stipulations, I reviewed the record in its entirety but make findings of fact only as necessary to resolve the issues before me. I find as follows:

1. At all times pertinent, the District was the Student's Local Educational Agency (LEA) as defined by the IDEA. *Stipulation ¶ 3.*

The 2021-22 School Year [redacted]

2. The 2021-22 school year was the Student's [redacted] year and the Student's first year in the District. *Stipulation ¶ 4.*
3. In June 2021, prior to the start of the 2021-22 school year, the Student participated in a District-wide [redacted] readiness screening. The District found that the Student would "especially benefit from practice in ... identifying the initial sounds of words[,], naming letters (upper and lowercase)[,], identifying numbers 1-10 (out of sequence) [and] identifying relationship of quantities and numbers[.]" J-113.
4. The District offered to have the Student participate in a summer [redacted] readiness program in the summer of 2021. J-113. The Parents did not send the Student to that program but instead hired a private, Wilson-certified² tutor who met with the Student weekly during the summer. *See, e.g.* J-130 at 8.
5. The Student attended the District's [redacted] program during the 2021-22 school year as a regular education student. *See stipulation ¶ 5, 6, 7, 8.*

² Discussed below, Wilson is a reading program.

6. On September 15, 2021, the Parents sent an email to the District. Through that email, the Parents informed the District of many things (J-130 at 8):³
 - a. The Student attended a private [redacted] and [redacted] program. The Parents attached the Student's two most recent report cards from that program to the email.
 - b. In the [redacted] program, the Student struggled with letter and number recognition and formation.
 - c. The Student's frustration resulted in behaviors that interfered with the Student's learning (e.g. hiding under the desk).
 - d. The Parents reminded the District of the [redacted] screener, and informed the District that the Student received tutoring over the summer from a Wilson-certified teacher.
 - e. The Parent provided a copy of an initial Wilson assessment that the tutor administered to the Student in the summer of 2021.
 - f. The Parent told the District that the Student continued to receive weekly Wilson tutoring.
 - g. The Parents told the District the Student could not consistently recognize letters or numbers, that counting objects was a "challenge," and that learning to sing the alphabet song was a "years-long endeavor."
 - h. The Parents told the District that the Student's older sibling was a child with dyslexia and dysgraphia, that dyslexia "runs in families. And it absolutely runs in our family."
7. The September 15, 2021, email concluded with the Parents asking two questions: "What support will be available to [the Student] this school year? At what time would further evaluation be considered for learning support?" J-130 at 8.
8. On September 16, 2021, the District responded to the Parents' email. The District said that a reading teacher would assess the entire

³ Hearsay is admissible in this hearing but may not be used to form the basis of this decision. This finding concerns what information the Parents shared with the District.

[redacted] class, and that assessment would yield a "starting point" for the Student. J-130 at 9.

9. In the same email, the District also stated that, if more intervention was needed, the District would start the IST process (a regular education intervention), let that process run for six to eight weeks, collect data, and then determine if additional or different interventions were needed. *Id.*
10. In the same email, the District acknowledged the Parents' concerns about a family history of reading disabilities. *Id.*
11. In the same email, the District said, "We need to give [Student] time to try. We typically don't evaluate students in [redacted] because of their young age, but that is something that [other District personnel] can speak more to." *Id.*
12. On September 20, 2021, the Parents responded to the District expressing agreement to move forward with the District's plan to assess and then, if necessary, begin the IST process. J-130 at 10.
13. The parties continued to communicate frequently by email. By October 18, 2021, the District reported to the Parents that the Student was starting the Student in a "Pre-IST" process, meaning that the Student was receiving "the initial stages of IST with strategies and supports being added to the classroom." J-130 at 23.
14. The parties continued to talk by email and the Parents were supportive of the IST process but remained concerned about the Student's progress. On October 22, 2021, the Parents sent an email to the District with copies of the Student's school work, pointing to them as examples of why they were concerned. The Parents expressed uncertainty about the Student's ability to attend to the task, ability to understand the work, or both. J-130 at 25.
15. The District responded to the Parents the same day. The District shared information about the type of instruction that it was providing and urged the Parents to be patient. The District acknowledged the Parents' frustration and assured them that it "will take time, but [Student] has the supports moving forward." J-130 at 37.
16. The parties continued to communicate by email. The emails were all cordial and encouraging. As part of that back-and-forth, on October 27, 2021, the Parents sent an email to the District with a complete

educational history of the Student. The document included some new information but, for the most part, reiterated information that the Parents had previously shared. The document also placed all information in one, well-organized place. J-130 at 50-51.

17. The Parents' educational history email also referenced an Early Intervention Speech/Language evaluation. That evaluation did not find the Student eligible for services. *Id*, see also S-1 at 10-12.
18. The District assessed all [students of a specific grade level] using Aims-Web benchmark testing in the fall, winter, and spring of the 2021-22 school year. In the fall, the Student's Early Literacy Composite score was found to be in the 29th percentile, which is in the "average" range according to the test. Subtest scores for Initial Sounds (IS) was found to be "well below average," Letter Naming Fluency (LNF) was found to be "below average," and Letter Word Sound Fluency (LWSF) was found to be "average." J-55.
19. Winter Aims-Web benchmark testing found that the Student's Early Literacy Composite score had decreased from the 29th percentile to the 7th percentile, which is in the "well below average" range according to the test. In sub-tests, the Student's IS score increased from the "well below average" to "average" range, LNF score decreased from the "below average" to the "well below average" range, and LWSF score decreased from the "average" to "below average" range. Two new sub-tests were also administered based on the Student's age: Phoneme Segmentation (PS) and Nonsense Word Fluency (NWF). Both of those were found to be in the "well below average" range. J-55.⁴
20. Spring Aims-Web benchmark testing found that the Student's Early Literacy Composite score had moved from the 7th percentile to the 4th percentile. That is not a statistically significant change as the Student remained in the "well below average" range. The IS sub-test was not readministered. On other sub-tests, the Student's LNF score remained in the "well below average" range, the LWSF score decreased from the "below average" to the "well below average" range, the PS score increased from the "well below average" to the "average" range, and the NWF score remained in the "well below average" range. J-55.

⁴ The Aims-Web benchmark testing is standardized and normative. This means that a regression in percentile score between the fall and winter of 2021 may or may not mean that the Student skills. The regression does establish that the Student fell behind peers to a significant degree. It is, of course, possible to move forward while still falling behind same-age peers.

21. The District uses a multi-tier system of support (MTSS) model for regular education interventions. Within that model, students at Tier III have the greatest need and receive the most support. Tier III support is not, however, special education or specially designed instruction. *Passim* (see, e.g. NT at 419).
22. The District provided reading intervention program in a small group three times per six-day cycle. The District also provided math intervention three times per six-day cycle. J-11, J-51, J-52.
23. While receiving IST supports, the Student was a Tier III student. The District also provided the "Foundations" reading program, which is a reading program developed by the Wilson company designed to supplement general education reading programs. While information concerning the efficacy of Foundations is not part of the record of this case, the record supports a finding that Wilson does not recommend Foundations for Tier III students. See, e.g. NT at 419.⁵
24. In addition to Foundations, the Student received IST supports in reading and math. These were intensive general education interventions. *Passim*.
25. The Parents privately obtained a "Language and Literacy" evaluation in October 2022 (the L&L Evaluation).⁶ In addition to reading problems, the L&L Evaluation found several social and pragmatic language deficits, yielding diagnoses of mixed receptive-expressive language disorder and social pragmatic communication disorder in addition to reading and writing disabilities. The evaluator made recommendations to improve the Student's oral language, although the clear focus of the report and its recommendations was the Student's reading and writing abilities. J-35.
26. The L&L Evaluation was conducted in a way that violated testing protocols established by the tests' publishers and was conducted by a person who is not licensed in Pennsylvania. J-35, NT 101, 158, 956-958.
27. On February 18, 2022, the Parents requested that the District conduct an evaluation to determine the Student's eligibility for special education. See, e.g. S-1 at 21-25.

⁵ It is only with great care that I do not substitute my own understanding for what is substantiated by the record of this case.

⁶ The Language and Literacy evaluation is not dated other than "October 2022." Assessment dates are reported as October 13, 18, 19, 24, and 26, 2022. J-35.

28. The Parents privately obtained a Neuropsychological Evaluation of the Student (the Private Evaluation). While the private evaluation is not dated, testing was completed on March 31 and April 4 and 11, 2022. The Private Evaluator also observed the Student in school on April 4, 2022. J-32.
29. The Parents gave a copy of the Private Evaluation to the District and asked the District to evaluate the Student. See J-11.
30. On May 9, 2022, the District issued an Evaluation Report (the 2022 ER) finding that the Student was eligible for special education as a child with a Specific Learning Disability (SLD) and Other Health Impairment (OHI). *Stipulation* ¶ 7, 8; J-11.
31. The 2022 ER incorporated the findings of the Private Evaluation. See J-11 at 5-13.
32. The findings of the Private Evaluation and the findings of the 2022 ER were similar. Both used standardized, normative testing and found that the Student's intellectual functioning was in the average range. Both found that the Student's academic achievement was below expectations based on the Student's intellectual functioning. The degree to which the Student's academic achievement fell below IQ-based expectations varied between the Private Evaluation and the 2022 ER, but both concluded that the difference was statistically significant and indicative of a learning disability. C/f J-11, J-32.
33. The 2022 ER included a Speech/Language evaluation that found the Student to be in the average range in nearly all domains assessed by standardized tests. J-11.
34. The 2022 ER included an Occupational Therapy evaluation that focused on areas highlighted for further assessment in the Private Evaluation. The Student was found to be within the average to low average range in the domains assessed and school-based OT was not recommended. J-11, J-37.
35. Regarding the SLD classification, the District found weaknesses in reading, written expression, and math concepts and applications. *Stipulation* ¶ 8.
36. Regarding the OHI classification, there was some discrepancy between the Private Evaluation and the 2022 ER. Behavior rating scales

completed by teachers and the Parents as part of the 2022 ER did not rise to a level consistent with a medical ADHD diagnosis.⁷ However, the District recognized attention concerns reported by teachers and accepted an ADHD diagnosis in the Private Evaluation. The District found the Student eligible as a child with an OHI for these reasons. See, e.g. J-11 at 62.

37. The key difference between the Private Evaluation and the 2022 ER is that the Private Evaluation recommended a private school placement. Specifically, the Private Evaluation recommended that the Student be educated “in a specialized school setting” that provides “an integrated educational program,” delivered in “a very small classroom with a very low student to teacher ratio” and by teachers “trained and experienced in working with children with language-based learning disabilities.” J-32 at 3.

The 2022 IEP

38. On June 2, 2022, the parties met at an IEP team meeting. The District offered an IEP (the 2022 IEP). *Stipulation* ¶ 9; J-12.
39. The 2022 IEP included a summary of the testing, including the Private Evaluation and the 2022 ER, the Student’s progress towards IST goals, and the Parents’ concerns. J-12 at 6-14.
40. The 2022 IEP contained an annual phonics goal. The annual phonics goal was somewhat confusing as written but makes sense when viewed along with short term objectives drafted into the goal. Those objectives called for the Student to demonstrate progressive phonics skills by reading real or nonsense words.⁸ J-12 at 22, 23.
41. The 2022 IEP included a sight word goal. This goal called for the Student to read on sight from a standardized list of irregularly spelled words and included short-term objectives. J-12 at 24-25.
42. The 2022 IEP included a math goal that targeted the Student’s ability to add and subtract within 100. As with the reading goals, the math goal included short-term objectives. J-12 at 26.

⁷ The District does not make medical diagnoses, but rather uses medical (DSM) criteria as a mark against which the Student’s symptomatology can be measured.

⁸ A “nonsense word” is a made up word used to test a student’s ability to use phonics skills, as opposed to a student’s ability to memorize words to know on sight.

43. The 2022 IEP included a writing goal. The ultimate purpose of the goal was for the Student to “independently write a structured, phonetically readable sentence with appropriate sequencing, capitalization, and punctuation with 80% accuracy” as scored on a rubric. Short term objectives drafted with that goal linked the Student’s writing expectations to the Student’s phonics goal. J-12 at 28-29.
44. The 2022 IEP included two goals that are not quite math goals but are linked to the Student’s ability to know and understand numbers. One goal called for the Student to demonstrate an ability to count to 120 starting from a “given decade number less than 120.” The other called for the Student to read and write numbers from zero to 120. The reading and writing numbers goal included several short-term objectives. J-12 at 30-33.
45. The 2022 IEP included 30 elements of program modifications and specially designed instruction (SDI). Not all of those, however, guaranteed anything to the Student. The first element provides an example: “Access to self-regulation strategies in the classroom, as needed, including but not limited to...” – the SDI goes on to list five examples, some of which are meaningless because they could mean almost anything (e.g. “alternative seating options”). Those accommodations were to be provided “daily as needed.” As such, this SDI specifies little and guarantees nothing. A few others are similarly vague and non-committal. J-12 at 34-36.
46. In contrast, several SDIs provide detailed descriptions of what special education the District would provide to enable the Student to achieve the IEP’s goals. The fourth SDI on the list is a good example of something specific that is truly promised: “Structured, multi-sensory literacy approach that provides explicit, systematic instruction in the components of phonological awareness and decoding.” The Student was to receive this instruction daily for 30 to 45 minutes. J-12 at 34. Most other SDIs and modifications provide a similar level of specificity and a true promise of implementation. J-12 at 34-36.
47. While no brand-name programs are drafted into the 2022 IEP, the parties understood that the reading program referenced by the language above was the Souday System (Souday). Like Wilson Reading, Souday is an Orton-Gillingham-based reading program, approved by the International Dyslexia Association, “with explicit systematic and cumulative diagnostic instruction providing letter and sound relationship instruction along with phonemic awareness skills and sight words.” NT at 487-489, 562.

48. Through the 2022 IEP, the District concluded that the Student was not eligible for ESY services. The basis of that conclusion is not stated in the 2022 IEP. J-12 at 38.
49. The 2022 IEP placed the Student in Learning Support at the supplemental level. Supplemental means that the Student would receive supports and services from special education personnel for more than 20% but less than 80% of the school day. Consistent with that, Penn Data Reporting that is part of the IEP calculated that the Student would spend 55% of the school day inside of a regular classroom. J-12 at 40-41.
50. Had the 2022 IEP been implemented, the Student would have received reading instruction in a small group of three to eight students within a Learning Support classroom with two to three adults. NT at 783, 813.
51. The 2022 IEP offered no related services including OT, but did provide consultation with an Occupational Therapist for 15 minutes per month as a support for school personnel. J-12.
52. Similarly, the 2022 IEP did not provide S/LT, but included an SDI for school personnel to “encourage correct sound production by looking at the teacher’s mouth, real-time models and correction for [th]; opportunities for repetition and practice of novel words in the curriculum to address concerns with [Student’s] attempting to say words that are unfamiliar or have complex structures (e.g. multisyllabic words).” J-12 at 36.
53. On June 9, 2022, the District finalized the IEP and offered it to the Parents with a Notice of Recommended Educational Placement (NOREP). In this context, a NOREP is primarily a form for parents to provide or withhold consent for the IEP. J-14.
54. On June 10, 2022, the Parents rejected the IEP via the NOREP and returned the NOREP to the District. The Parents wrote that their reason for rejecting the 2022 IEP was that the “proposed program and placement is inappropriate and does not meet [Student’s] needs.” J-14; *see also Stipulation ¶ 10, 11.*
55. Also on June 10, 2022, the Parents sent a letter to the District by email, telling the District that they intended to place the Student at the Private School and reserving their right to seek tuition reimbursement. J-15; *see also Stipulation ¶ 10, 11; J-15.*

Summer 2022 – Private School Summer Program

56. The Student attended the Private School’s extended school year (ESY)⁹ program in the summer of 2022. *Stipulation ¶ 12.*
57. In the summer of 2022, the Student took writing, math, and an “interactive humanities” class at the Private School. NT at 523-525; J-57, J-58, J-59.

The 2022-23 School Year – [redacted] Grade at the Private School

58. The Student attended the Private School during the 2022-23 school year. *Stipulation ¶ 12.*
59. The Private School is a small, private school that specializes in teaching children with “language-based learning disorders such as dyslexia, dysgraphia, [and] dyscalculia.” NT at 507.
60. The Private School uses the Wilson Reading Program to teach reading. All teachers at the private school are Wilson-trained. Speech therapy and occupational therapy are also available at the Private School. NT at 510, 512-522.
61. As a function of the size of the Private School, the Student receives most instruction in what would be considered a small group setting within the District. During the 2022-23 school year, there were six students in the Student’s class with two teachers. NT at 513.
62. During the 2022-23 school year, the Student received Occupational Therapy and Speech Therapy at the Private School. NT at 526-527.
63. The Private School runs on trimesters and reported the Student’s progress on report cards at the end of each trimester. The report cards contain a detailed, narrative description of the Student’s progress and a numerical representation of the Student’s progress. While neither representation comports with the type of progress monitoring associated with IEP goals, the report cards establish that the Student derived a meaningful educational benefit from the Private School’s program. J-60, J-61, J-62.

⁹ Extended school year or ESY is a term of art. However, the parties refer to the Private School’s summer program as an ESY program, and I adopt their terminology.

64. In addition to report cards, the Private School also used Aims-Web benchmarking to monitor the Student's progress in several domains. Taken collectively, these probes indicate that the Student made at least as much progress as same-age peers, regardless of disability, in most of the domains assessed. In some domains, the Student advanced at a faster rate, which reduced the gap between the Student's performance and that of same-age peers. J-66 through J-107 (inclusive).
65. On January 24, 2023, the Parents (via counsel) contacted the District to inquire about what programming the District had available for the Student for the upcoming 2023-2024 school year. *Stipulation ¶ 13.*
66. On February 28, 2023, the parties met at an IEP team meeting and the District offered an IEP (the February 2023 IEP). *Stipulation ¶ 13.*
67. On March 16, 2023, the Parents rejected the February 2023 IEP. *Stipulation ¶ 14.*
68. During the spring of 2023, the District reevaluated the Student. See *Stipulation ¶ 16.*
69. On May 5, 2023, the District issued a reevaluation report (the 2023 RR). *Stipulation ¶ 16.*
70. Through the 2023 RR, the District found that the Student remained eligible as a child with SLD and OHI, but also found that the Student now qualified as a child with a Speech or Language Impairment (S/LI) as well. *Stipulation ¶ 17; J-22.*
71. On May 22, 2023, the parties met again at an IEP team meeting and the District offered an IEP (the May 2023 IEP). *Stipulation ¶ 18; J-23.*
72. The 2023 IEP included two math goals (single digit addition and subtraction and a continuation of the 2022 IEP math goal), a phonics goal (reading real and nonsense words – similar to the goal in the 2022 IEP), a phoneme detection goal, a sight word goal (also similar to the goal in the 2022 IEP), a written expression goal (calling for the Student to write four, grammatically correct sentences and achieve a set score on a rubric), a spelling goal, an attention goal (calling for the Student to complete tasks independently with a level of success as measured by a rubric), an oral reading fluency goal (calling for the Student to read at unfamiliar [redacted] grade material at a WCPM

rate commensurate with “average” peers), and three speech/language goals. J-23.

73. The modifications and SDI offered through the 2023 IEP were robust. They included 60 minutes per day of the Soliday program, an additional 15 minutes per day of reading interventions, small group instruction for all ELA and math, direct instruction of executive functioning skills and social skills twice per six day cycle and a host of other specific, clear, and guaranteed special education for the Student. J-23.
74. On June 2, 2023, the Parents rejected the May 2023 IEP. The Parents advised the District that they were going to keep the Student at the Private School for the 2023-2024 school year, and that they would be seeking reimbursement for all expenses incurred for the Private School placement and for ESY at the Private School. *Stipulation* at 19, 20.¹⁰

Summer 2023 – Private School Summer Program

75. Prior to the summer of 2023, the District reviewed the information it had and determined that the Student did not meet criteria for ESY eligibility. Regardless, the District offered an ESY program so that the Student could transition back to a new school building within the District. *Passim*.
76. The District offered a five-week summer program, meeting four days per week, four hours per day, delivering Wilson instruction, ELA, math, social skill, group OT (five, 30-minute sessions), group Speech (five, 30-minute sessions), and lunch and recess with peers. J-20.
77. The Parents rejected the District’s 2023 ESY offer. Student did not attend the Private School’s ESY program in the summer of 2023 either. Instead, the Parents obtained private services for the Student consisting of Speech/Language Therapy twice per week, Occupational Therapy once per week, and Wilson Reading tutoring provided by a Wilson tutor and by one of the Parents. NT at 93; J-38 through J-41, J-132.

Witness Credibility

¹⁰ No claims or demands are presented concerning the 2023-24 school year. *See Complaint*; see also NT 27-31.

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).

Except as noted, I find that all witnesses testified credibly. To whatever extent that witnesses contradicted each other, the differences are attributable to genuine differences in recollection or opinion.

The L&L Evaluation was administered in contradiction to test-publishers’ protocols by a person who is not licensed to conduct such evaluations in this state. That evaluation reaches broad conclusions based on suspect data that conflicts with information from more reliable sources – including the Private Evaluation. I find that the L&L Evaluation is not reliable evidence.

Applicable Laws

The Burden of Proof

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

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

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, 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.

Child Find

The IDEA’s Child Find provision requires states to ensure that “all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated.” 20 U.S.C. § 1412(a)(3). For LEAs, the Child Find duty creates a “continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.” *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3). LEAs must evaluate children who are suspected to be children with disabilities within a reasonable period of time after the school is on notice of academics or behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). An LEA’s failure to evaluate a child suspect of having a learning disability constitutes a substantive FAPE violation.

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 almost always taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

The District Complied With Its Child Find Obligation

Both parties, to varying degrees, conflate the IDEA's Child Find obligation with the District's obligations in response to parental request for evaluations. I address the District's obligations when parents request evaluations briefly, and then turn to Child Find.

Under the IDEA, when parents request a special education evaluation, the District must either seek the parents' consent and then conduct the evaluation or must place the parents on notice that it is rejecting their request. See 20 U.S.C. § 1414, 1415. The Parents are not required to use 'magic words' to request a special education evaluation. Similarly, the Parents' knowledge of how to request a special education evaluation is not relevant in this case.¹¹

The Parents argue that the District ignored their requests to evaluate the Student. That argument is not supported by the record of this case. The Parents point to their email of September 15, 2021, and say that constitutes a request for a special education evaluation. I disagree. The Parents provided a large amount of information about the Student and wrote, "What support will be available to [the Student] this school year? At what time would further evaluation be considered for learning support?" J-130 at 8. That is not a request for an evaluation. That is an inquiry as to whether an evaluation would be appropriate. That question started a lengthy and ongoing dialogue between the parties in which the District told the Parents that an evaluation was not warranted but the IST process should start. Email after email shows the Parents were in complete agreement. The Parents did not ask the District to evaluate the Student until February 2022.

¹¹ The District argues that the Parents are highly knowledgeable and there is good evidence to support that position. However, the Parents' understanding of their rights does not alter the District's IDEA obligations.

The District's obligation to respond to evaluation requests and its Child Find obligation are separate and distinct. Even if the Parents never asked the District to evaluate the Student, the District had an obligation to propose an evaluation if Child Find was triggered. Unfortunately, testimony from District personnel – across the board and at all levels – reveals a fundamental misunderstanding of its Child Find obligation. Collectively, the District operates under the mistaken belief that a kindergartener who may have a SLD cannot qualify for special education, and that special education eligibility should not be considered until a student completes the IST process.¹²

In fairness to the District, its position is not without merit. Many psychometric tests are not available for children younger than six years old, and the reliability and validity of the available tests is not strong for children that age. Also, a classification of Specific Learning Disability requires a determination that the child's poor performance is not a function of a lack of appropriate instruction in reading. See 20 U.S.C. § 1414(b)(5)(A). At the beginning of kindergarten, most children are receiving their first exposure to research-based curriculum. Applied to this case, District personnel took the position that, at the start of kindergarten, it would be impossible to rule out the Student's lack of time in a regular education reading program. Broadly, District personnel testified that it would be unnecessary and potentially harmful to the Student to subject the Student to testing only to be unable to reach an SLD classification because the Student had only just started school.

The District's pedagogically sound position does not completely square with its IDEA obligations. While I "may not substitute my notions of sound educational policy for those of the school authorities," I must determine if the District's actions comply with the IDEA. *T.M. on behalf of T.M. v. Quakertown Cmty. Sch. Dist.*, No. CV 16-3915, 2017 WL 1406581, at *3 (E.D.Pa. Apr. 19, 2017) quoting *Andrew F., supra*. If the District's Child Find obligation was triggered, the District was obligated to propose an evaluation even if it believed that it would ultimately be unable to reach an SLD determination. Jumping to concerns about the Student's lack of time in school before an evaluation puts the cart before the horse.

¹² Some district personnel went so far as to testify that eligibility testing for such a young student would be "illegal." NT at 930-931. Despite some noble attempts at rehabilitation through cross examination, the District's testimony concerning its position that the IST process is a prerequisite to consideration for special education eligibility is also alarming. The IDEA, its regulations, and OSEP guidance all say that a child's progression through regular education interventions cannot be used to delay special education evaluations and eligibility. See OSEP Policy Memorandum of January 21, 2011 (entered as evidence at J-133).

The District argues that Child Find was not triggered before February 2022. The Parents argue that Child Find was triggered shortly after the Student entered [redacted]. The District's argument is supported by the record and the Parents' argument is not. The District knew that the Student was recommended for a [redacted] readiness program before starting in the 2021-22 school year. That, by itself, does not trigger child find. Then, at the start of the school year, the District received a large amount of information from the Parents about the Student's preschool difficulties and a family history of learning disabilities. The District responded to that information by keeping a close eye on the Student and communicating frequently with the Parents. Next, the District conducted benchmark testing in the fall of 2021. That testing revealed that the Student was performing commensurate with "average" peers. While the District had every reason to be vigilant, it had no information triggering child find.

In the winter of 2021-22, benchmark testing reveals that, at best, the Student stood still while peers advanced. The winter Aims-Web benchmark results were not just a red flag, they were a klaxon. The District argues that Aims-Web sub-test reveal progress in the domains that were the focus of the Student's IST program. That argument misses the broader point: the IST interventions were not improving the Student's overall ability to read and the Student had fallen substantially behind same-age peers.

Child Find was triggered by the Student's winter benchmarking in conjunction with the Parent's concerns and some teacher concerns as well. From that point, the District had a reasonable amount of time to propose an evaluation. During that period, the Parents requested an evaluation in February 2022, and the District agreed. There is no dispute concerning the timeliness of the resulting 2022 ER. The District, therefore, discharged its Child Find obligation by evaluating the Student and making an eligible determination within a reasonable period after its Child Find obligation was triggered.¹³

The District's compliance with its Child Find obligation precludes the Parents' demand for compensatory education during the 2021-22 school year. From the start of the 2021-22 school year through February 2022, the District functionally predetermined the Student's ineligibility and actively dissuaded the Parents from requesting an evaluation by pressing hard for the IST process. Those factors, while troubling, are not outcome-determinative.

¹³ I recognize that the 2022 ER was prompted by the Parents' request. It cannot be known if the District would have proposed an evaluation without the Parents' request. Child Find, however, concerns the District's obligation to evaluate. If Child Find is triggered simultaneously with a parental request for an evaluation, the Child Find obligation is satisfied by the evaluation itself regardless of who asked first.

Rather, on the record of this case, the District had no obligation to evaluate the Student before it did so. Once that evaluation started, it was concluded within the IDEA's timeline at the very end of the 2021-22 school year. From there, the District initiated the IEP development process. That resulted in an IEP that the District offered for the 2022-23 school year. I find that, despite itself, the District complied with its IDEA obligations during the 2022-23 school year and, therefore, does not owe compensatory education to the Student.

The Parents Are Not Entitled to Reimbursement for the Summer 2022 ESY Program at the Private School

Under Pennsylvania law, IEP teams must consider seven factors to determine ESY eligibility. 22 Pa Code 14.132(a)(2), see also 34 C.F.R. § 300.106. The 2022 IEP does not say why the District found the Student ineligible for ESY, but it is the Parents' burden to prove that the Student was eligible. There is no preponderant evidence in the record establishing any of the seven factors. At best, there is some evidence suggesting that children with profiles similar to the Student's profile may be at a higher risk in domains related to Pennsylvania's ESY factors. That is not proof that the Student was entitled to ESY.

The Parents' demand for reimbursement for the Private School in the summer of 2022 is denied.

The Parents are Entitled to 2022-23 School Year Reimbursement

The Parents are entitled to reimbursement for the 2022-23 school year at the Private School if they meet all three prongs of the *Burlington-Carter* test, set forth above. Applied to this case, the Parents are entitled to reimbursement if 1) the 2022 IEP was not appropriate for the Student, 2) the Private School was appropriate for the Student and 3) equitable factors do not warrant reduction or elimination of a tuition reimbursement award. Discussed below, I find that the Parents have proven all three factors.

The 2022 IEP Was Insufficient

In this case, the first factor is also the most difficult. Both parties present meritorious arguments but I ultimately agree with the Parents that the 2022 IEP was not appropriate under the standard that I must apply.

By the end of the 2021-22 school year, there was no doubt that the Student had a specific learning disability in reading. Despite some variability in testing between the Private Evaluation and the 2022 ER, the Student's

reading disability was significant and impeding the Student's global ability to learn. By all objective measures, the Student had fallen behind peers and required intensive intervention not just to keep moving forward, but to close the gap.

The 2022 IEP did not go far enough. Mastery of the 2022 IEP's goals would represent some amount of progress for the Student in discrete, targeted domains. However, mastery of those goals over an entire school (which is what the IEP calls for) would not represent meaningful progress for the Student. All testing reveals that the Student's intellectual ability is intact. Given the Student's young age, an appropriate IEP must put the Student in a position where the Student will be able to transition from 'learning to read' to 'reading to learn.' While it would be unreasonable to require the District to completely remediate the Student within one school year, the record of this case does not reveal how targeting discrete skills would or could foster that objective. An "appropriately ambitious" IEP for the Student must not only move the Student forward, it must also work to close the gap between the Student and peers. It is not clear how mastery of the 2022 IEP goals would close that gap.

While reaching this conclusion, I consider and reject many of the Parents' arguments. Much of the Parents' arguments boil down to a single point: the Student must be educated in the Private School or a similar kind of school to receive a FAPE. That argument is not supported by the record. The best evidence in support of that argument is the Private Evaluation. While the Private Evaluator's conclusion that the Student requires small group instruction is well-supported, the Private Evaluator testified to a broad lack of knowledge of the District's programming. There is no preponderance of evidence in the record that the District cannot provide a FAPE to the Student within its own program. However, I do not judge the District's overarching ability to educate the Student. I only judge the program that the District offered through the 2022 IEP. I find that program was necessary but insufficient, and therefore inappropriate.

I also reject the Parents arguments concerning the differences between Wilson and Sonday. Both of those programs are research-based reading programs derived from Orton-Gillingham principles.¹⁴ Both are consistent with the type of reading program recommended in all evaluations. Courts in the Third Circuit draw a distinction between educational methodologies and IEP components like related services, and the District has broad discretion to

¹⁴ Orton-Gillingham is a methodology in which teachers provide reading instruction through multisensory methods that focus on phonics skills to improve decoding. Wilson and Sonday are both curriculums that use the Orton-Gillingham methodology. See, e.g. *In re: M.S., a Student in the Upper Darby School District*, ODR No. 23355-1920 (June 15, 2020).

choose methodologies to accomplish IEP goals.¹⁵ See *Case v. Allegheny Intermediate Unit*, No. 2:07-cv-374, 2007 U.S. Dist. LEXIS 87721 (W.D. Pa. Nov. 29, 2007); *L.G. v. Wissahickon Sch. Dist.*, No. 06-0333, 2011 U.S. Dist. LEXIS 476 at *8-9 (E.D. Pa. Jan. 4, 2011).

Further, I reject the Parents arguments that the 2023 IEP somehow establishes that the 2022 IEP was inappropriate at the time it was offered. In this regard, I completely agree with the District: I must judge the 2022 IEP on its own, and relative to the Student's needs at the time it was offered. The inclusion of services in the 2023 IEP is not proof that the same services were needed when the 2022 IEP was offered.

The Private School Was Appropriate

Moving to the second part of the *Burlington-Carter* test, I find that the Private School was appropriate. I note that the term "appropriate" in this part of the *Burlington-Carter* test does not mean the same thing as "appropriate" for an IEP. For example, all specialized private placements are more restrictive than public school placements *per se*. The comparative restrictiveness of the Private School is not, and cannot be, a deciding factor in a tuition reimbursement analysis.

At the time that the Parents chose the Private School, it perfectly matched the recommendations not only in the Private Evaluation but the recommendations in the 2022 ER as well. Intensive, Orton-Gillingham based reading intervention is the hallmark of the Private School's program. The Private School specializes in educating children with profiles like the Student's profile.

Similar to my finding concerning the 2022 IEP, I reject much of the Parents' argument concerning the Private School's appropriateness. The Parents characterize the Private School as a place where Wilson instruction is "imbedded" or "integrated" into all areas of instruction is confusing at best and misleading at worst. This characterization is misleading because (with apologies for the odd phrasing) the Student receives Wilson Reading lessons only during Wilson Reading lessons. Wilson Reading is highly structured to the point of almost being scripted. Wilson Reading also happens during discrete lessons. The record supports a finding that the Student's teachers at the Private School are Wilson trained and can help the Student to use Wilson skills to decode subject-specific materials (i.e. a word problem in a math

¹⁵ The IEP does not say "Sunday" but there is no dispute about what program the District would have provided. Nothing in the IDEA requires schools to specify methodologies in an IEP. *W.D. Wat'chung Hills Regional Highschool Bd.*, 602 F. Appx. 563, 568 (3d Cir. 2015) (quoting 71 Fed. Reg. 46,540, 46,665 (August 14, 2006)).

book). But it is not as if the Student receives Wilson instruction during math. Rather, there is a concerted effort to apply Wilson skills across subjects.

I also agree with the District that my analysis does not concern which program is “better” for the Student. I consider the Private School’s appropriateness on its own merits and not in relation to the 2022 IEP. This does not change the conclusion: evidence that the Private School was appropriate for the Student under the *Burlington-Carter* standard at the time that the Parents selected it is beyond preponderant.

Equitable Considerations

Nothing in the record warrants a reduction or elimination of a tuition reimbursement award. The large volume of email in the record of this case demonstrates that the parties worked cooperatively with each other from the start of the 2021-22 school year through February of 2022. During that time, the Parents consistently expressed concerns and frustration, but also an overall willingness to go along with the District’s recommendations. In February 2022, the Parents requested an evaluation from the District and very quickly sought an independent evaluation as well. The Parents desire to move quickly at that point makes sense but – more important to the analysis – none of their actions give rise to an equitable reduction.

The Parents clearly pursued parallel paths and had already identified the Private School as a potential placement for the Student when the District issued the 2022 IEP. Nothing in the IDEA prohibits that. The IDEA requires only that the Parents place the District on notice of their intent to enroll the Student and seek reimbursement. The Parents did that, and so I do not reduce or eliminate reimbursement.

The Parents Are Not Entitled to Reimbursement for Services Obtained in the Summer of 2023

As with the summer of 2022, there is no preponderant evidence in the record establishing the Student’s entitlement to ESY services in the summer of 2023. Rather, the evidence supports a finding that the District offered an ESY program to the Student to help the Parents overcome concerns about the Student’s potential transition back to the District. Therefore, the *Burlington-Carter* analysis is not the correct analysis for this component of the Parents’ claim. The question hinges on the Student’s entitlement to ESY in the summer of 2023, not on the appropriateness of the District’s proposal.

There is no proof in the record of this case that the factors listed at 22 Pa Code 14.132(a)(2) were met. Again, evidence concerning children with

profiles like the Students is not evidence of the Student's ESY eligibility. The Parents' demand for reimbursement for the hodgepodge of services that the obtained for the Student in the summer of 2023 is denied.

Section 504 Claims

An LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination under Section 504 and must receive appropriate accommodations to access to school programming.

Similarly, the scope of my jurisdiction under Section 504 is confined to education claims arising under state implementing regulations at 22 Pa. Code § 15 (Chapter 15). Chapter 15 does not apply to IDEA eligible students. See 22 Pa Code § 15.2 (definition of "protected handicapped student" at iii).

Above, I find that the Parents proved some of their IDEA claims and did not prove others. To the extent that the District satisfied its IDEA obligations, it also satisfied its Section 504 obligations. To the extent that the District fell short of its IDEA obligations, it also fell short of its Section 504 obligations. However, the IDEA remedies awarded above completely rectify any Section 504 violation arising from the same actions. I award no additional relief.

Summary and Legal Conclusions

The Student attended the District's [redacted] program during the 2021-22 school year. The District's Child Find obligation triggered in the winter of that year and, by February 2022, the Parents requested an evaluation and obtained a private evaluation as well. The evaluation was completed within IDEA timelines, the Student was found eligible, and the District convened an IEP team and offered an IEP for the 2022-23 school year.

I reject the Parents' claims that the District was obligated to evaluate the Student sooner than it did. I deny the Parents' demand for compensatory education accruing during the 2021-22 school year for the same reason.

The Student attended the Private School's ESY program in the summer of 2022. The Parents demand reimbursement for that program. The Parents did not establish the Student's entitlement to ESY in the summer of 2022, and so I deny their demand for ESY reimbursement.

The Student attended the Private School for the 2022-23 school year. The Parents demand reimbursement for that placement. I find that 1) the 2022 IEP was not appropriate for the Student under the *Andrew F.* standard, 2) the Private School was appropriate for the Student under the *Burlington-Carter* standard, and 3) no equitable factors require a reduction or elimination of a reimbursement award. The Parents are, therefore, entitled to reimbursement for the Private School during the 2022-23 school year.

The Parents then secure an assortment of services for the Student during the summer of 2023 and demand reimbursement for those services. As with the summer of 2022, the Parents did not establish the Student's entitlement to ESY in the summer of 2023, and so I deny their demand for ESY reimbursement.

I also deny the Parents demand for additional relief under Section 504. The IDEA remedies provided herein are complete for both claims.

ORDER

Now, February 9, 2024, it is hereby **ORDERED** as follows:

1. The District shall reimburse the Parents for the cost of the Student's placement at the Private School during the 2022-23 School Year.
2. Within 14 days of this Order, the District shall send written notice to the Parents of its reimbursement practices and procedures. Such notice shall inform the Parents of any documentation that they must submit, where or to whom that documentation must be submitted, and the District's payment terms if greater than 30 days.
3. The District may either reimburse the Parents through direct payment to them, or by payment to Private School for outstanding invoices, if any.

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

/s/ Brian Jason Ford
HEARING OFFICER