

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

Closed Hearing

ODR No. 28711-23-24

Child's Name:

K.L.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Frederick Stanczak, Esq.
Law Offices of Fred M. Stanczak
59 Creek Drive
Doylestown, PA 18901

Local Education Agency:

Lower Moreland Township School District
555 Red Lion Road
Huntingdon Valley, PA 19006

Counsel for LEA.

Maria B. Desautelle, Esq.
Swee Stevens Katz Williams
331 E. Butler Ave.
New Britain, PA 18901

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

April 11, 2024

INFORMATION AND PROCEDURAL HISTORY

The Student is a [redacted] resident of the District, in the [redacted] grade, but attends a private school (Private School).¹ The Student is eligible for special education as a child with a specific learning disability (SLD) pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973³ and the Americans with Disabilities Act (ADA).⁴

The Student attended school in the District through the [redacted] grade; however, during the summer preceding the 2023-2024 school year, the Parents enrolled the Student in the Private School. They filed a due process Complaint seeking compensatory education for alleged past violations and tuition reimbursement and related expenses for the 2023-2024 school year. The District denied the Parent's claims and asserted it has fulfilled its legal obligations to the Student, and no relief is due.

Based on the evidence of record, the claims of the Parents are granted in part and denied in part.

ISSUES

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and the applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15)

⁴ 42 U.S.C. §§ 12101-12213

- 1) Did the District deny the student FAPE from October 27, 2021, until the end of the 2021-2022 school year and 2022-2023 school year? ⁵
- 2) If the District denied the Student a FAPE, is compensatory education the appropriate remedy?
- 3) Did the District offer the Student an appropriate programming and placement for the 2023-2024 school year?
- 4) If the District's program, as proposed for the 2023-2024 school year, was not appropriate for the Student, should the Parents be reimbursed for private school tuition and related expenses?

FINDING OF FACTS

1. In [redacted], the Student received Title 1 reading and math intervention services. ⁶(J-1, p. 2-3)

2018-2019 School Year – [redacted]

2. During the 2018-2019 school year, the Student was enrolled in the [redacted] grade in the District and received intervention from a Title I reading specialist with daily reading reinforcement. (J-1, P-8)
3. In October 2018, the Student's Fountas & Pinnell (F&P) level was G, an early first-grade level. The benchmark was J/K. In reading comprehension, the Student's F & P level was F, below first grade, the benchmark was J/K. (J-1, p. 4)
4. In December 2018, after an Occupational Therapy (OT) evaluation of the Student, a 504 service agreement was recommended to address

⁵ The parties agreed that the scope of the parents' claim for compensatory education relates back to two years prior to the commencement of this due process hearing. As the complaint in this matter was filed on October 27, 2023, the claim for compensatory education begins as of October 27, 2021. (N.T. 9)

⁶ Title I math services ceased early in the [redacted] grade. (J-1; N.T. 587-598)

visual-motor deficiencies, convergence insufficiency and eye fatigue.⁷
(J-1, p. 6, 8)

5. In March 2019, the District requested permission to evaluate the Student because of concerns about limited progress in reading despite layered interventions through the instructional support team (IST). (J-1, J-2; N.T. 518-519)
6. For inclusion in the evaluation, the District administered aptitude and achievement testing, measures of social-emotional functioning, conducted an observation of the Student and obtained Parent and teacher input. The KTEA-3 was administered to assess reading, math, listening and writing skills. (J-1)
7. On the WISC-V, the Student earned a full-scale IQ score of 98, classifying intellectual ability in the 45th percentile. (J-1)
8. On the letter and word recognition skills subtest of the KTEA-3, the Student earned a below-average score in the 9th percentile, a standard score of 80. For nonsense word decoding, the Student attained a standard score of 78, in the 7th percentile. On the oral reading fluency subtest, the Student performed below average, at the 9th percentile, with a standard score of 80. (J-1)
9. On the KTEA-3 phonological processing subtest to assess sound blending, segmenting, and deletion. The Student's performance was

⁷The Student has a diagnosis of [redacted] and is [redacted]. The treating pediatric ophthalmologist indicated the Student had appropriate visual acuity and had no treatment or intervention recommendations. (N.T. 238)

regarded as within the average range, with a standard score of 94 in the 34th percentile. (J-1, p. 10)

10. On the written expression subtest, the Student scored in the 25th percentile and spelling at the 30th percentile. (J-1, p. 10, 12)
11. For inclusion in the evaluation, the District administered the KTEA-3 orthographic processing subtests. On the letter naming facility subtest to assess encoding, the Student received an average range score of 98 in the 45th percentile. On the word recognition fluency task, the Student performed in the average range, with a standard score of 83, at the 13th percentile. The Student's orthographic processing composite was determined to be at the 19th percentile. (J-1, p. 10-11)
12. The Student's reading comprehension was also determined to be affected by deficiencies in oral reading. Although not identified with a specific disability in writing, the evaluating school psychologist recommended accommodations. (J-1, p. 27-28; NT 201, 241, 248-249, 556)
13. The Student's performance in terms of listening skills was below average. The Student's math skills were adequate and regarded as a strength (problem-solving- 30th percentile (computation-63rd percentile). (J-1, p. 11)
14. The Conners-3 rating scales administered to assess the Student's behavioral needs determined no significant concerns. (J-1, p. 16)

15. The ER determined the Student had areas of weakness in basic reading skills (phonics/decoding and word reading) and oral reading fluency. The ER concluded that the Student was eligible for special education as a child with a specific learning disability and needed specially designed instruction to address basic reading, listening comprehension and oral reading fluency. (J-1, p. 19)

16. On April 4, 2019, the IEP team met to develop special education programming for the Student. The proposed IEP offered goals to address oral reading fluency, spelling, reading comprehension, and copy writing. The SDI included supplementation to spoken directions, graphic organizers, thirty minutes of small group reading instructions six times per cycle, visual breaks, chunking, preferential seating, adapted paper for writing, and noise-cancellation headphones. Offered related services included occupational therapy (OT). (J-2)

17. On April 4, 2019, the District issued a NOREP that proposed the provision of special educational programming (itinerant-learning support) to the Student. The Parents declined the implementation of special education services for the Student, citing the desire to continue services with the Title 1 teacher with whom a favorable rapport had developed. (J-3; NT 222, 478-480, 518-519)

2019-2020 School Year- [redacted] Grade

18. During the 2019-2020 school year, the Student was enrolled in regular education programming in the [redacted] grade in the District. The Student's section 504 plan for OT remained in effect. (NT 223-224)

2020 2021 School Year – [redacted] Grade

19. During the 2020-2021 school year, the Student was enrolled in the [redacted] grade in the District and received education through a hybrid schedule with both in-person and virtual instruction. (J-5; NT 262)

20. In October 2020, because of concerns with reading progress, the District requested consent from the Parents to evaluate the Student. No new testing occurred. The evaluation included Parent and educator input, IST data collection, and a review of previous evaluative data and records. (J-4, J-5; N.T. 259)

21. On a third-grade AIMSweb fluency probe, the Student scored at the 46th percentile. On a fourth-grade probe, the Student scored below grade level, at the 12th percentile. (J-6, p. 10, 16)

22. Educator input indicated the Student had very good reading comprehension at the determined instructional level, and math performance was proficient; however, weaknesses in basic reading skills affected oral reading fluency, creating a barrier to independent participation for reading grade level material within the classroom. (J-5, p. 16)

23. To address listening comprehension and writing weaknesses, the ER recommended accommodations for incorporation into the IEP (J-5, p. 17; NT 257-258)

24. The ER concluded that the Student qualified for special education and needed specially designed instruction as a child with a specific learning disability (SLD) in basic reading skills and oral fluency. Continued OT services were also recommended. (J-4, J-5)

December 2020 IEP

25. On December 23, 2020, the IEP team met to develop programming for the Student. The December IEP contained goals for oral reading fluency, writing, and OT⁸ (J-6, p. 27-29)

26. The fluency goal expected the Student to read a third-grade passage at 103 wcpm with fewer than three errors on three out of four probes. (Baseline: 66 wcpm, with five errors) (J-6, p. 27)

27. The writing goal expected the Student to write 30 correct sequences in three minutes as measured in three out of four samples. (Baseline: 12 cws). (J-6, p. 28)

28. The team determined the Student was not eligible for ESY (J-6, p. 34; NT 602-603)

29. The SDI outlined in the IEP included 120 minutes a week of systematic, intensive, multi-sensory instruction in decoding, encoding, and reading fluency, repetition, positive reinforcement, visuals/graphic organizers, adapted reading comprehension assessments, testing accommodations, small group intervention, listening comprehension accommodations, hi-write paper, reading and writing software, preferential seating. The Student was offered OT as a related service. (J-6, p. 30-33; N.T. 434)

30. According to the June 14, 2021, progress reporting, the Student made significant progress toward the reading fluency, writing and OT goals. (J-9)

2021-2022 School Year- [redacted] grade

⁸The Student's OT services through the 504 Service Plan initiated in the [redacted] grade ceased with implementation of the IEP in the [redacted] grade. (J-1 p. 3; J-2 p. 7; N.T. 202-203, 209-210)

31. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the District. (J-6, J-8 p. 30, 35, J-10; N.T. 381, 421, 424, 431-434)

32. In [redacted] grade, the learning support teacher pushed into core content every other day for reading and writing support, served as the “what I need”, (WIN), teacher and provided a Wilson-affiliated, research-based, multi-sensory reading instruction, “Just Words” four days a week. (NT 387-388)

33. During the regular education “WIN” resource period, the Student received scheduled OT, every other week. (NT 277-278, 329, 424)

34. To address the reading fluency goal, the reading intervention program was used to improve the Student’s encoding, decoding, and fluency skills. The reading program was comprised of computer-based instruction and small group teacher-led instruction, and it provided opportunities for independent reading. (P-11; NT 387-390, 426, 550)

35. An aide pushed into the Student’s math class. Through math accommodations, grade-level texts (word problems) were read to the Student. (J-10, p. 6; NT 379-380, 424, 434)

36. According to Fall 2021 Aimsweb benchmark data, the Student earned a composite score in the 6th percentile (below average) in reading. The Student’s vocabulary was in the 31st percentile (average), silent fluency was in the 30th percentile (average), comprehension was in the 2nd percentile (below average), and oral reading fluency was in the 8th percentile (below average). The Student’s Lexile score was determined to be 440. (J-10, p. 6)

37. From August to November 15, 2021, the Student made significant progress toward the reading fluency goal, could read 75 wcpm with three

errors, limited progress toward the writing goal, and limited progress toward the OT goal. (J-11; NT 391)

38. During the first half of [redacted] grade, the Student received support from a reading specialist twice a week, in addition to the special education support provided by the learning support teacher. (NT 408-409)

DECEMBER 2021 IEP

39. On December 20, 2021, the IEP team developed educational programming for the Student. The December IEP indicated that on a [redacted] grade level, the Student could read 101 wcpm, resulting in an oral fluency level at the 39th percentile. On the current grade level [redacted] the Student read 75 wcpm at the 7th percentile. (J-10, p. 6)

40. The Student's December 2021 IEP offered goals to address needs in writing, oral reading fluency, and OT (J-10, J-14)

Because of the progress made, the Student's writing goal was adjusted to a grade level expectation. (J-10, p.12; N.T. 336)

41. Because of progress made, the reading fluency goal was adjusted from a third to a fourth-grade level and expected the Student to independently read aloud passages at a rate of 118 wcpm, with three or fewer errors on three out of four probes, measured every ten days. (Baseline: 75 wcpm) (J-10, J-14, p. 16, J-16; N.T. 284-285, 334, 388)

42. The OT goal expected the Student to far/near point copy five sentences with appropriate letter alignment 80% of the time, with three out of four opportunities. (Baseline: 71%) (J-10, p. 14)

43. The SDI provided through the December 2021 IEP included an explicit, multi-sensory reading program at least four times a week for thirty minutes a session to address spelling and fluency, movement breaks, organizational

assistance, graphic organizers, forty-five minutes of daily (WIN) support, grade level texts read aloud by staff or recorded, and preferential seating. Additionally, the Student received support and strategies for time management and check-in for comprehension. (J-10, p. 14-16, J-14; N.T. 286-287, 429)

44. The team recommended a change to the reading intervention program. The updated research-based, multi-sensory program was introduced to improve the transfer of the Student's reading knowledge to core content courses. (NT 427-428)

45. Through a NOREP, the District offered the Student an educational placement in itinerant learning support. (J-12)

46. By April 2022, the Student's oral reading fluency progressed from 75 to 87 wcpm. The goal was 118. The Student mastered the written expression goal. (J-16, p.1; N.T. 394)

47. Spring 2022 Aimsweb benchmark data indicated the Student earned a composite reading score in the 10th percentile, vocabulary-7th percentile, silent fluency-28th percentile, comprehension-12th percentile and oral fluency-12th percentile. (J-17, p. 7)

48. On May 2, 2022, the Student's IEP was updated to provide two additional reading periods a week (30 minutes a session) in a learning support setting in place of social studies to improve reading comprehension and fluency. The change began the week of May 5 and ended the week of June 6. (J-14, p. 7)

49. During the 2021-2022 school year, from November to June, the Student's oral fluency on [redacted]-grade level passages increased from 75 to 92 wcpm. The Student did not meet the IEP goal of 118 wcpm. (J-11, J-16; N.T. 285, 394-395)

50. From September 2021 to June 2022, the students' F & P reading levels increased from L in the [redacted] grade to O in the [redacted] grade. (J-28, P-11, p. 10, S-11, p. 10; N.T. 401-402)

51. By the end of the 2021-2022 school year, the Student earned "As" and "Bs" in core content classes and mastered writing and OT goals. (J-10, p. 7, J-16, p. 4, P-2; N.T. 461-462)

52. Although ESY was offered to the Student, on June 10, 2022, the Parent advised the District that the Student would not attend ESY. The Parents requested advice regarding summer computer work. (P-11, p. 10, S-1, p. 1; N.T. 396-398)

2022-2023 School Year- [redacted] Grade

53. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the District. (J-13)

54. During the [redacted] grade, the Student received two periods (90 minutes) of daily, multi-sensory research-based ELA intervention with online work, teacher-led small group textbook instruction, independent and whole class guided reading, grammar and writing instruction. The implemented reading program focused on reading fluency, comprehension, vocabulary skills, synonyms, antonyms, decoding/phonetics, and writing and spelling. (J-23, S-3; NT 282-283, 324, 344-348, 403, 567-569, 614-616)

55. During the "WIN" period, the Student received additional reading support and interventions. The Student no longer received direct OT services. (NT 277-278,324, 326-327)

56. On a September 22, 2022, District administered i-Ready Math diagnostic, the Student received a fourth grade score in the 25th percentile.

To improve math skills, the District suggested the Student participate every other day in math club to bolster skills.⁹ (J-13, p.2, J-17, p. 8)

57. On September 29, 2022, the IEP team met to discuss the Parents' concerns about the Student's comprehension of vocabulary words in social studies and the Student's over-reliance on supports. No revisions were made to the IEP, but the team discussed classroom strategies to assist the Student. (J-14, p. 7; N.T. 336-338)

58. Fall 2022 Aimsweb benchmark data indicated the Student earned a composite reading score in the 8th percentile, vocabulary-24th percentile, silent fluency-19th percentile, comprehension-11th percentile and oral fluency-7th percentile. (J-17, p.7)

59. According to November 2022 progress reporting, in oral reading fluency, on a fourth-grade level, the Student's wcpm ranged from 77 to 107 with two to four errors across four probes. (goal: 118 with 3 or fewer errors.) (J-16; NT 289)

December 2022 IEP

60. On December 5, 2022, the IEP team to develop educational programming. (J-17, p. 30)

61. According to reading benchmark testing, from the Spring of [redacted] grade to the Fall of [redacted] grade, the Student's composite score declined from the 10th percentile (well below average) to the 8th percentile (well below average). (J-17, p. 30; N.T. 310)

⁹ By December 2022, the Student mastered grade level math concepts and discontinued math club participation. (J-17, p.8)

62. Although the Student met the previous writing goal the team added a new goal to the IEP (J-17, p.7-8)

63. The December 2022 IEP offered goals to address writing, (write 5 complete sentences to earn 20 points out of 27) (Baseline: 14 out of 27), oral reading fluency on a fourth-grade passage (goal: 118 wcpm with 3 or fewer errors on a 4th grade level; baseline: 78 wcpm with 4 errors) and reading comprehension (goal: increase Lexile score from 524 to 650; baseline: 524). (J-17, p. 36-38)

64. Offered SDI in the December 2022 IEP included daily resource WIN instruction, breaks, graphic organizers, staff support for brain storming/editing, reading app, two periods of daily reading and writing intervention in learning support with a multi-sensory, research-based intensive reading program, visual tracking support, testing accommodations, grade level texts read aloud by staff read, write, speech to text, adapted assignments. The Student was determined eligible for E.S.Y. (J-17, p. 17-18)

65. On December 5, 2022, through a NOREP, a Parent approved the recommendation that the Student receive supplemental learning support through the December 2022 IEP (J-18)

66. By April 2023, the Student mastered the December 2022 writing goal. In reading fluency, the Student achieved an oral fluency reading rate of wcpm of 102.¹⁰ The goal was 118. The Student's Lexile score improved from 524 to 540 (J-19, p. 3, J-21, S-1, p. 5; NT 294, 359)

67. On May 3, 2023, the Student's IEP was updated with a new writing goal. (J-20, p. 7, 17, J-21, N.T. 300, 352)

¹⁰ On January 24, 2023, the Student achieved a wcpm rate of 116., (J-19, p. 3)

68 The District assessed the Student's reading fluency, every ten days. According to progress reporting, from December 2022 until June 2023, the Student increased oral reading fluency ability on fourth grade passages from a baseline of 78 wcpm to 111 wcpm. The goal was 118 wcpm. (J-21, p. 3; N.T. 296)

69. In reading comprehension, from December 2022 until June 2023, the Student's Lexile score ranged from 524 to 540. The final score obtained was 533.¹¹ (J-21, p. 5; N.T. 297-298)

70. For [redacted] grade, the Student earned final grades of "A" and "B" in all core content classes where grade-level content and instruction occurred. (P-3 p. 1; NT 365-366)

71. On June 14, 2023, the Parents requested a reevaluation of the Student. On June 28, 2023, the District advised the Parent that upon the return to school, a records review would occur in preparation for the Student's triennial reevaluation scheduled for December 2023. (S-1, p.4)

July 2023, Private Reading Assessment

72. On July 26, 2023, the Parent obtained a private reading assessment of the Student.¹² (J-24; NT 62)

73. Based on the results of the San Diego quick assessment, the private evaluator concluded the Student's independent reading level to be at the third-grade level and instructional at the fourth-grade level. On the CORE

¹¹ In February 2023, the Lexile was 538, in April it was 540. The notes from June progress reporting indicated the Student had to be re-directed three different times which may have impacted the score of 533. (J-21, p. 5)

¹² The private evaluator is a reading specialist in a nearby school district and friend of the Parents.

phonics survey, the Student had needs for explicit instruction in basic reading skills, syllable types and division, affixes, and phonemic awareness.

74. The private evaluator determined the Student had needs in basic reading skills, particularly phonemic awareness, consonant sounds, and multisyllabic word reading. Further testing for a language-based learning disability, ADHD screening, and vision screening. (J-24, p-3-4)

75. The private evaluation recommended instruction using research-based, systematic, explicit, multisensory programs, preferably ones that use the Orton Gillingham method. (J-24)

76. The private evaluation recommended strategies taught during multisensory instruction should be carried over and encouraged across the curriculum, audiobooks and print material, teachers' notes, preferential seating, extended time, and teacher check-in after reading assignments. (J-24)

77. Before the assessment, the private reading specialist did not review the District's previously administered evaluations or the IEP that provided special education programming. (N.T. 64-66)

78. On August 21, 2023, through counsel, the Parents requested payment for tuition and related expenses at the Private School on the grounds the District failed to offer appropriate programming for the 2023-2024 school year. Through counsel, the District replied, and discussions followed to schedule an IEP to discuss available programming for the Student. (P-4, S-2,p. 15-27)

2023-2024 School Year

79. The first day of school in the District was September 5, 2023. The Student attended school in the District for the first week of school and, on September 11, 2023, transferred to the Private School. (NT 94. 508, 571)

80. On October 5, 2023, the IEP team met to discuss the Parents' programming concerns. The Parents provided the District with the July 2023 privately obtained reading assessment that day. (J-24, J-25, p.7; N.T. 312, 512-513, 625)

October 2023 IEP Revision

81. On October 12, 2023, the team met informally and revised the Student's IEP, adding thirty minutes of daily, systematic phonics instruction (decoding and encoding). (J-25, p. 18; N.T. 308, 626)

82. On October 25, 2023, the District issued a NOREP proposing programming consistent with the October 2023 IEP (J-26)

83. On October 27, 2023, the Parents filed a due process Complaint. (J-27)

The Private School

84. The Private School serves children who learn differently. Most but not all of the students have a diagnosis. The most common diagnosis is specific learning disability in reading, writing, and written expression. (N.T. 92-93)

85. The Private School has a typical class size capped at 15 for grades 6 - 12. The classes that have the most students are non-academic. Other classes are as small as one student. Staffing is one teacher for each class and a reading specialist circulating through the classrooms to observe and provide support. (N.T. 106-107)

86. After the administration of a Wade assessment, the Private School indicated the Student needed intervention through the Wilson program to address decoding, encoding and phonemic awareness. The Wilson Reading

System provides direct, explicit, multisensory instruction based on the science of reading. (P-5, P-6; N.T. 97, 99)

87. At the Private School, the Student is enrolled in Art, Music, Reading, Science, US History, Writing, Math, Metacognition and Wilson reading instruction classes. The Student receives one to one daily instruction in the Wilson program and has made progress. The Student received quarter-one grades that ranged from A to B+. (P-7, P-8; NT 97, 113-114)

88. Wilson instruction is embedded into the teaching of core subjects. The teachers meet as a team and collaborate on the strategies to support each student. (N.T. 113-114)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 US 49, 62 (2005); *LE v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint that led to this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58

Special education hearing officers, in the role of fact-finders, are responsible for making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *TE v. Cumberland Valley School District*, 2014 US Dist.

LEXIS 1471 *11-12 (MD Pa. 2014); *AS v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014). This Hearing Officer found each of the witnesses to be generally credible as to the facts. Any conflicting testimony between the witnesses can be attributed to poor recall and differing perspectives. All testifying District witnesses were involved in Student's programming by either evaluating, teaching, or attending IEP meetings. Each testified credibly and consistently regarding the District's persistence in offering special education. They provided clear testimony about the Student's progress once Parents agreed to special education, and each time the District revised programming to reflect needs. The testifying Parent was also credible and provided believable justification for their sometimes questionable programming decisions.

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

General IDEA Principles: Substantive FAPE

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 US 176 (1982), the US Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase free appropriate public education (FAPE) to require

“significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. NE*, 172 F.3d 238, 247 (3d Cir. 1999).

Through local educational agencies (LEAs), states meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *PP v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the US Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 500 US 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

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

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a

significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE 20 USC § 1415(f)(3)(E).

General IDEA Principles: Parental Placements

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). This is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 US 10 (1993); *School Committee of Burlington v. Department of Education*, 471 US 359 (1985); *Mary Courtney T., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. TA*, 557 US 230 (2009); *CH v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

General IDEA Principles: Evaluation

Substantively, the IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i). Certain procedural requirements are set forth

in the IDEA and its implementing regulations that are designed to ensure that all of the child's individual needs are appropriately examined.

In Pennsylvania, parents may request an evaluation at any time, and that request must be in writing. If a request is made orally to any professional employee or administrator of the school entity, that individual must provide a copy of the permission to evaluate form to the parents within ten calendar days of the oral request. 22 Pa. Code, Section 14.123 (c). A school district is required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1)

General Section 504 and ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g.,*

Swope v. Central York School District, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parents' Claims

In their Complaint, the Parents contend that District denied the Student a FAPE during the 2021-2022 and 2022-2023 school years through inadequate programming that resulted in a failure to make meaningful reading progress. They additionally contend that a requested evaluation was not performed, and the IEP offered after they enrolled the Student in the Private School was untimely. The Parents seek compensatory education for the past years claims and tuition reimbursement for the Student's attendance at the Private School for 2023-2024 school year. Based on the evidence adduced through this due process hearing, the Parents have met their burden of proof regarding claims related to most of the 2022-2023 school year and for the entirety of the 2023-2024 school year.

The first issue is whether the District programming implemented during [redacted] and [redacted] grades, in the 2021-2022 and 2022-2023 school years was appropriate for Student under the IDEA and its case law interpretations. In support of its contention that a FAPE denial occurred, the Parents allege the District's programming overly focused on reading fluency and was devoid of needed decoding, encoding and phonological awareness goals. As a result, they claim, specially designed instruction was inappropriate, the Student's reading progress was not accurately measured, and gains made were not meaningful.

In the [redacted] grade, after a comprehensive District initiated evaluation, this Student was determined eligible for special education on the grounds of a specific learning disability (SLD) with needs primarily in reading. However, the Parents declined to consent to the implementation of special education programming, at that time. After a second District initiated evaluation of the Student while in the [redacted] grade, the Parents agreed to the needed programming.

Upon transition to [redacted] grade, the IEP developed the previous school year, in December 2020, remained in place, slightly updated to reflect gains made. The December 2021 IEP, like its December 2020 predecessor was appropriate. It was developed after a review of records and reached the same conclusions as the evaluation performed two years before. The Student had weaknesses in basic reading skills (phonics/decoding and word reading) which detrimentally impacted fluency. Although the corrective action came through a goal that appeared only to address reading fluency, the record evidence has established that multiple domains of the Student's literacy weaknesses were addressed through the delivered programming and were effective. The collected evaluative data justified the emphasis, at that time, on an IEP reading goal to address fluency. The team determined that strengthening Student's reading fluency would impact the ability to decode words accurately and reading for understanding would be similarly enhanced. This approach was based on information obtained from past comprehensive evaluations as well as contemporaneous review of regularly obtained reading probe data. That information, regularly monitored, indicated the Student had a favorable and consistent response to the implemented interventions. Through the December 2021 IEP, the Student received specially designed instruction that included 120 minutes a week of research-based reading instruction focused on multiple areas of reading, including fluency, comprehension and decoding. Consistent progress

monitoring occurred throughout the school year, and the Students' status was fully tracked. The programming decisions were team-based and followed the collection and review of evaluative data, classroom performance, and the Students' progression and response to implemented programming.

In support of their contention that the Student failed to make meaningful educational progress during the 2021-2022 school year, the Parents point to assessment data, some obtained and provided through quarterly progress reports. However, the evidence presented contradicts the Parents' claims. By the time of the annual IEP meeting in December 2021, the Student's oral reading fluency had increased from the third to fourth grade level. Between January 2022 and June 2022, Student's reading level continued to increase, with improvement in fluency rate but short of the IEP goal. Although still below grade level, progress was made. During this same timeframe, the Student mastered established writing and OT goals. This progress was also reflected in data collected through AIMSweb, which indicated that the Student's grade level composite reading achievement slightly improved from the 6th percentile in the fall of 2021 to the 10th percentile in the spring of 2022. The District's IEPs in place during the 2021-2022 school year were reasonably calculated to enable the Student to receive meaningful educational benefit in light of intellectual potential. Even though the Student did not achieve the fluency goal, this does not render the IEPs inappropriate or legally inadequate.¹³ Interestingly, although ESY was offered for the summer following [redacted] grade to further strengthen language arts skills, the Parents declined to have the Student participate.

¹³ "[I]t cannot be determined whether an IEP was appropriate solely by evaluating a child's progress or lack of progress under that IEP. Instead, a court should determine the appropriateness of an IEP as of the time it was made and should use evidence acquired subsequently to the creation of an IEP only to evaluate the reasonableness of the school district's decisions at the time that they were made". *Colonial Sch. Dist. v. G.K. by & through A.K.*, No. 17-3377, 2018 WL 2010915 (E.D. Pa. Apr. 30, 2018), *aff'd*, 763 F. App'x 192 (3d Cir. 2019).

Based on the evidence presented, the programming provided during the timeframe at issue was appropriate, and the implemented programming met the Student's identified needs. No denial of FAPE occurred.

2022-2023 Claims

The Student entered the [redacted]-grade with the IEP carried over from the preceding school year. At the annual December 2022 meeting, the team updated the Student's IEP. The December 2022 IEP, like its predecessor, attempted to address the Student's reading, writing, and OT needs through measurable goals with baseline data and a multitude of SDI. The Student's impressive progress continued toward the writing and OT goals during the 2022-2023 school year. By April 2023, the Student mastered the December 2022 writing goal and met most grade-level written expression expectations. Similarly, the OT goal was mastered.

To reflect progress, a new writing goal was incorporated, and a reading comprehension goal was added with progress monitoring to occur using the Student's Lexile score. However, in December 2022, at the time this IEP was offered, the Student's oral fluency goal remained at the fourth grade level. Curiously, the baseline in the fluency goals was altered from 75 to 78 wcpm, although the Student reportedly reached 92 wcpm, the previous school year and 107 wcpm in November 2022, the previous month. This reporting was challenging to follow and, in some ways, masked tracking of the actual progress the Student made during the [redacted] grade.

This record compels the conclusion that by the time of the annual IEP meeting in December 2022, the District knew of should have been on notice that the Student's reading skills required more intensive individualized intervention. A major focus in *Andrew* centers on the child's unique circumstances when the IEP is drafted. Although the December 2022 IEP increased reading intervention to two periods a day, which was more support

than the December 2021 IEP, the programming approach was not targeted and focused the instruction generically on reading and writing. The Student's writing progress and goal mastery were well-documented; however, the Student's reading needs required a more individualized approach with commensurate goals and programming. The Student's failure to make adequate reading progress during the 2022-2023 school year was apparent through the frequent probes administered. The District reported that between December 2022 and June 2023, the Student's oral reading fluency increased from 78 words per minute to 111 correct words per minute. However, my review of the evidence indicated that between November 2021 and December 2022, the Student's fluency rate decreased from 107 wcpm to 78 wcpm. Alternatively reviewed, between November 2022 and June 2023 the Student's oral fluency rate only increased from 107 wcpm to 111 wcpm. Similar improvement was tracked through the Student's Lexile score, which increased from a baseline of 524 in December 2022 to 540 by June 2023, far short of the goal of 650. Furthermore, a comparison of the Aimsweb data from Spring 2022 to Fall 2022, also illustrated a decline in various reading skills.

By the time of the annual IEP meeting in December 2022, the Student's lack of progress in reading was evident, and a programming change was warranted. Earlier in this Student's academic programming, the focus on reading fluency appeared justified by the explanation that other compatible areas (decoding, encoding, comprehension) would be simultaneously bolstered as skills improved. That approach was successful to a point. However, that programming decision disregarded other weaknesses in this Student's profile. The data regularly collected and used for programming decisions focused on fluency and later comprehension without any concrete acknowledgment that other factors crucial for the acquisition of reading skills may have been deficient. As a result, by the end of [redacted]

grade, the Student made only trivial progress in reading with the expectation that more complex reading demands lie ahead. Through argument, the District pointed to the Parents election to decline special education services during the [redacted] grade and bypass ESY after the [redacted] grade for this lack of progress. However, I am not convinced that those factors are solely responsible. In December 2022, the Student's special education program needed revision to increase the amount of interventional reading support. Although the Student appeared to be an academically functional [redacted]-grader managing various general education classes, grade-level texts were read to the student in those classes. As this bright Student moves from grade to grade, reading needs will become more demanding and intense. The time for aggressive intervention is before the demands of high school limit academic choices because of inadequate reading skills. Based on the evidence presented, the Parents have established by a preponderance of evidence that the December 2022 IEP was not calculated to address this Student's unique needs and denied the Student a FAPE.

The next issue concerns an evaluation request made by the Parents. A few days before the school year ended, the Parents requested a reevaluation of the Student. Within ten days of receiving this request, the District should have either agreed to reevaluate the Student and issue a PTRE or decline the request and issue a NOREP with the reason for refusal. Instead, the District advised ae Parent that upon the return to school, a records review would occur in preparation for the Student's triennial reevaluation scheduled for December 2023. The following month, the Parents obtained a private evaluation of the Student by a reading specialist. Although procedurally improper, the District's actions did not impede this Student's right to FAPE or significantly interfere with meaningful decision-making by the Parents.¹⁴ At

¹⁴ 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2)

this point in the summer, an evaluative process would not have started until school resumed for the 2023-2024 school year. It likely would not have been completed until early fall.¹⁵ The Parents embarked in a different direction and before the school year resumed notified the District to enroll the Student in the Private School.

Finally, the last offered programming must be reviewed to determine its appropriateness. The Parents contend the last offered IEP, for purposes of the *Burlington-Carter* determination, was drafted and implemented in December 2022, revised in May 2023, and in place at the commencement of the 2023-2024 school year. The District contends the programming offered in October 2023 was the last offer of FAPE. I disagree with the District. The Parents provided their ten-day notice in August, and the Student began attending the Private School on September 11. The notice clearly indicated it was based on the last offered programming though the December 2022 IEP and 2023-2024 programming would have been a “continuation of the approach to instruction” unsuccessful for the Student. Although Parents participated in meeting, ostensibly to discuss programming revisions, it was already mid-October, well after the Student started at the Private School. I determine that the programming in place when the Student started the 2023-2024 school year, the December 2022 with the May revision constituted the District’s last offer of FAPE. Since that programming has been determined inadequate, the next step is to discuss whether the Private School is appropriate.

The Private School is appropriate. The Private School serves children who learn differently; however, most but not all of the students have a diagnosis, usually a specific learning disability in either reading or writing and written expression. The Private School class sizes are capped at fifteen

¹⁵ 22 Pa Code §§ 14.123(b), 14.124(b)

middle and high school students. Staffing is one teacher for each class, and a reading specialist circulates through the classes to observe and provide support. At the Private School, the Student is enrolled in Art, Music, Reading, Science, US History, Writing, Math, Metacognition and Wilson reading instruction classes. To address reading needs, the Student receives daily one-to-one intervention through the Wilson program to address decoding, encoding and phonemic awareness. The Student received quarter one grades that ranged from A to B+. Since attending the private school, the Student has made progress in reading.

The final consideration is whether equitable considerations mandate a reduction or denial of tuition reimbursement. Statutorily, the IDEA permits the reduction or denial of tuition reimbursement if: 1) if the parents did not inform the school that they were rejecting the IEP proposed by the school; 2) if the parents did not make the child available for a requested reevaluation prior to removal of the student from public school; or 3) upon a finding of unreasonableness concerning actions taken by the parents. § 1412(a) (10) (C) (iii). *Council Rock Sch. Dist. v. M.W. ex rel. Marc W.*, Civ. A. No. 11-4824 (E.D. Pa. July 26, 2012); *Aja N. v. Upper Merion Area Sch. Dist.*, No. 21-4234 (E.D. Pa. Aug. 16, 2022). In this matter, all equitable factors do not weigh in the Parents' favor. The District urges a reduction of tuition reimbursement on the grounds the Parents have failed to consistently cooperate with the District through their denial of services for the Student and delay in disclosing a privately obtained reading evaluation. In this case, a reduction in the award of tuition reimbursement is justified. However, I do not determine that the decisions to decline initial services in the [redacted] grade and ESY after the [redacted] grade were unreasonable and uncooperative with the IEP development process.¹⁶ The IDEA clearly

¹⁶ *C.G. and B.S. v. Five Town Community School District*, 49 IDELR 93 (1st Cir. 2008), the 1st U.S. Circuit Court of Appeals held that the parents acted unreasonably by not

provides that the parents have a right to accept or decline an initial offer of an IEP. 20 U.S.C. § 1414(a) (1) (D) and 1414 (c), 34 C.F.R. § 300.300 (b) (1). The law is also clear as to the consequences flowing from a parental denial of consent. Similarly, the Parents' choice to decline ESY does not undermine their claim for tuition reimbursement. However, an award of tuition may be reduced if parents fail to share an expert report or otherwise withhold information from a school district. After [redacted] grade, the Parents had the Student privately evaluated in July 2023. They did not disclose that report until months later, during an October meeting, well after they disenrolled from the District. Their actions in failing to provide the District with this reading evaluation and then attending an IEP meeting when their program and placement decision concerning their child was predetermined was unreasonable. Based on these actions, a reduction of forty percent (40%) of the tuition reimbursement award is warranted.

Under Section 504 and Chapter 15, the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here—the District denied the Student FAPE from December 6, 2022, through the end of the 2022-2023 school year, under the obligations of Section 504.

Compensatory Education

participating in the IEP development process and denied tuition reimbursement. See also *Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200*, 31 IDELR 211 (7th Cir. 2000); *Andress v. Cleveland Indep. Sch. Dist.*, 22 IDELR 1134 (5th Cir. 1995), cert. denied, 111 LRP 25313, 519 U.S. 812 (1996); *Schoenfeld v. Parkway Sch. Dist.*, 27 IDELR 846 (8th Cir. 1998); *C.S. v. Governing Bd. of Riverside Unified Sch. Dist.*, 52 IDELR 122 (9th Cir. 2009, unpublished); and *I.G. v. Linden City Bd. of Educ.*, 78 IDELR 273 (D.N.J. 2021).

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

The Student's IEP was legally insufficient from December 2022 until the end of the 2022-2023 school year. I find it equitable to award thirty (30) minutes of special education compensatory education for each day that the Student attended school from December 6, 2022, through the end of the 2022-2023 school year. The Parent may use the compensatory education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that the District should appropriately

provide through Student's IEP to assure meaningful educational progress. Services and products obtained through compensatory education shall not exceed market rates in the District's geographic area. Any compensatory education not used by the time the Student graduates or until the end of the school year in which the Student turns 21 years old, whichever is sooner, is forfeited.

ORDER

AND NOW, this 11th day of April 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District failed to provide the Student with FAPE from December 6, 2022, through the end of 2022-2023.
 - a. In accordance with the foregoing decision the Student is awarded thirty (30) minutes of compensatory education for each day that the Student attended school from December 6, 2022, through the end of the 2022-2023 school year.

2. The District failed to offer the Student FAPE for the 2023-2024 school year.
 - a. The District is ordered to reimburse the Parents for sixty-percent (60%) of the Student's tuition at the Private School for the 2023-2024 school year.

- b. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all current invoices and receipts for tuition and related expenses for Student for the 2023-2024 school year.

- c. Within thirty calendar days of the date of receipt of such documentation, the District shall reimburse the Parents for sixty percent (60%) of the full amount of invoices and receipts provided, less any awarded financial aid.

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

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

April 11, 2024