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Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR File Number 19721-1718

Child's Name: S. D.

Date of Birth: [redacted]

Dates of Hearing:¹

11/7/2017, 12/20/2017, 1/3/2018, 1/17/2018, 3/5/2018, 3/15/2018

Parents:

[redacted]

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Hearing Officer: Michael J. McElligott **Date of Decision:** 5/1/2018

¹ The hearing convened with opening statements at the November session. Inclement weather involving closure of the school district necessitated cancelling hearing sessions in January and March.

INTRODUCTION

Student (“student”)² is a pre-teen age student who resides in the Perkiomen Valley School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)³ as a student with specific learning disabilities.

Parent claims that the student was denied a free appropriate public education (“FAPE”) in the 2015-2016, 2016-2017, and 2017-2018 school years related to alleged deficiencies in the student’s programming over that period. Parents seek compensatory education as a remedy for the 2015-2016 and 2016-2017 school years. After unilaterally enrolling the student in a private placement, the parents seek tuition reimbursement for the 2017-2018 school year. Analogously, parents assert these claims and requests for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴ Parents also seek reimbursement for a May 2017 independent evaluation report, obtained at parents’ expense.

² The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

³ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

⁴ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 (“Chapter 15”).

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parents are not entitled to any remedy.

For the reasons set forth below, I find in favor of parents in part and the District in part.

ISSUES

Did the District deny the student FAPE during the 2015-2016, 2016-2017, and/or 2017-2018 school years?

If so, is remedy owed to the student, and in what form?

Are parents entitled to reimbursement for an independent evaluation report obtained at parents' expense?

Did the District discriminate against the student, acting with deliberate indifference toward the student in light of the student's disabilities?

FINDINGS OF FACT

Private Schooling/Private Evaluation

1. In February 2012, in the student's kindergarten year while in private schooling, the student was privately evaluated. (School District Exhibit ["S"]-1).
2. The February 2012 private evaluation contained results from an early-childhood cognitive-ability assessment which found the student's full-scale IQ to be 84. (S-1).
3. Based on the student's full-scale IQ, the student's achievement testing in the February 2012 private evaluation did not indicate a significant discrepancy in results (achievement test sub-scores ranged from 75-108) although the student's language-based learning measures, and certain aspects of mathematics, were low. (S-1).

4. The February 2012 private evaluation included a number of speech and language and language processing assessments. (S-1).
5. The February 2012 private evaluation contained a behavior assessment administered to the student's mother, grandmother, teacher, and speech therapist. (S-1).
6. The student's mother did not rate the student as clinically significant in any domain. The student's grandmother rated the student as clinically significant on the social skills and functional communication sub-tests. The student's teacher rated the student as clinically significant on the attention-problems, functional communication, learning-problems, and study skills sub-tests, as well as the school-problems composite. The student's speech and language therapist rated the student as clinically significant in the withdrawal, adaptability, and study skills sub-tests, as well as the adaptive skills composite. (S-1).
7. The February 2012 private evaluation contained an executive functioning assessment (to gauge planning, organizing, sequencing, task-completion) administered to the student's mother, grandmother, teacher, and speech therapist. (S-1).
8. The student's mother did not rate the student as clinically significant in any domain. The student's grandmother rated the student as clinically significant on the planning/organizing and monitoring sub-tests. The student's teacher rated the student as clinically significant on the emotional control, initiation, planning/organizing, and monitoring sub-tests, as well as the behavioral regulation and metacognition indices, and the global executive functioning composite. The student's speech and language therapist rated the student as clinically significant on the inhibition and shift sub-tests, as well as the behavioral regulation index. (S-1).
9. The February 2012 private evaluation identified the student's needs as rooted in a language-based learning disability (dyslexia, as identified by the evaluator), with implications for written expression, and with additional needs in expressive language and language retrieval/memory, and organization. (S-1).
10. The February 2012 private evaluation provided multiple educational and speech/language recommendations. (S-1).

Enrollment in District

11. After private schooling, the student enrolled in the District in the 2014-2015 school year, the student's 3rd grade year. (S-2, S-3).
12. In the spring of 2015, anticipating that the student might be enrolled in the District, the student was evaluated by the District. (S-2, S-3).
13. In May 2015, the District issued an evaluation report ("ER"). (S-3).
14. The May 2015 ER contained data and conclusions from the February 2012 private evaluation. (S-2, S-3; NT at 1481-1581).
15. The May 2015 ER contained input from the student's parents. (S-3).
16. The May 2015 ER included documentation from the student's private schooling as of the spring of 2015. The student was being instructed in the Wilson reading program. (S-3).
17. In the first trimester of the 2014-2015 school year at the private school, the student's reading accuracy was reported at 85% at the pre-primer level. The student was reported to be at an instructional level at step 1.3 in the Wilson Reading System ("Wilson program") and at step 2.1 with nonsense words. In the second trimester, the student's reading accuracy was reported at 90% at the pre-primer level and 80% at the primer level. The student was reported to be still at step 2.1 with nonsense words and was "beginning to develop with teacher support" at step 2.2.⁵ (S-3).
18. The May 2015 ER contained the results of a cognitive-ability assessment. The student's full-scale IQ was scored at 84. (S-3).

⁵ The Wilson program is a proprietary, "highly-structured remedial program that teaches the structure of the language to students who have been unable to learn with other teacher strategies, or who may require multisensory language instruction". Parents' Exhibit ["P"]-10. The Wilson reading program has twelve steps. Each step contains four to seven sub-steps. For example, step 1 contains six sub-steps (1.1 – 1.6), step 2 contains five sub-steps (2.1 – 2.5), and so on, the number of sub-steps depending on the concepts being worked on at that particular step. The program is sequential, with students working to master sequentially each sub-step, ultimately resulting in mastery of that step, with the student then moving on to the next step, working through its sequential sub-steps, and so on, through all twelve steps of the Wilson program. (S-19 at page 15).

19. The May 2015 ER contained updated assessments that tracked the areas assessed in the February 2012 private evaluation, including achievement testing, behavioral assessments (the student's mother and grandmother only), and speech/language assessments. The achievement and behavioral assessments largely mirrored the results of the February 2012 private evaluation. The student's expressive and receptive speech and language results showed marked improvement but some articulation errors were noted. (S-1, S-3).
20. Based on the student's performance in reading, mathematics, spelling, and writing, the May 2015 ER recommended that the student be identified as a student with specific learning disabilities in reading, mathematics, and written expression. The May 2015 ER also recommended speech and language services for the student's articulation needs. (S-3).
21. In June 2014, the student's individualized education program ("IEP") team met to craft the student's IEP. (S-4).⁶

4th Grade/ 2015-2016

22. In May 2015, at the end of 3rd grade, at the student's annual IEP team meeting, the student's IEP was revised. The May 2015 IEP was the IEP in place in September 2015 at the outset of the 2015-2016 school year, the student's 4th grade year. (S-6).
23. In the present levels of academic achievement in the May 2015 IEP, on the student's Aimsweb reading assessment in reading fluency at the 3rd grade level (the student's current grade level), the student's median score for words-correct-per-minute was 38. (S-6).

⁶ The parents' claims in this matter are limited to compensatory education claims for the 2015-2016 (4th grade) and 2016-2017 (5th grade) school years, and a tuition reimbursement claim for the 2017-2018 school year (6th grade). Questions of FAPE which arose prior to September 2015 are not considered as a matter of fact-finding or determination through this decision. The student's IEPs for 3rd grade (S-4, S-5) and the student's 3rd grade teacher testified (NT at 323-479), but that evidence was not weighed in reaching this decision. It is this hearing officer's understanding through internal communications at the Office for Dispute Resolution that a subsequent complaint was filed by parents' counsel on behalf of parents. That complaint is under the jurisdiction of another hearing officer. Whether, and if so to what extent, that complaint seeks remedy for alleged FAPE-related claims prior to September 2015 (*see also* Notes of Testimony at 1318-1321), this hearing officer does not know as the follow-on complaint, and the allegations in that complaint, have not been shared in any way with the undersigned hearing officer. But to the extent that the follow-on complaint may implicate fact-finding as to the student's educational programming prior to September 2015, the undersigned hearing officer wishes it to be clear that he has not made findings of fact, or drawn legal conclusions, as to such programming.

24. In the same section, on the same assessment at the 2nd grade level (the student's instructional level), the student's median score for words-correct-per-minute was 58 (reported as 56, 58, 68). An expected level of achievement at that grade level is 106. (S-6).
25. In the present levels of academic achievement in the May 2015 IEP, on the student's Aimsweb reading assessment in reading comprehension at the 3rd grade level (the student's current grade level), the student answered 8 of the probe questions correctly. (S-6).
26. In the same section, on the same assessment at the 2nd grade level (the student's instructional level), the student's scores for correct answers were 6, 6, and 11. An expected level of achievement at that grade level is 15. (S-6).
27. In the present levels of academic achievement in the May 2015 IEP, on the student's Aimsweb writing fluency assessment at the 3rd grade level (the student's current grade level), in response to the prompt, the student wrote 20 correct writing sequences, the student spelled correctly 33 words, and the student wrote 44 total words. (S-6).
28. In the present levels of academic achievement in the May 2015 IEP, on the student's Aimsweb mathematics assessment in mathematics concepts and applications at the 3rd grade level (the student's current grade level), the student scored 8 points. (S-6).
29. In the same section, on the same assessment at the 2nd grade level (the student's instructional level), the student scored 10, 14, and 17 points across three probes. An expected level of achievement at that grade level is 21 points. (S-6).
30. In the present levels of academic achievement in the May 2015 IEP, on the student's Aimsweb mathematics assessment in mathematics computation at the 3rd grade level (the student's current grade level), the student scored 37 points. (S-6).
31. In the same section, on the same assessment at the 2nd grade level (the student's instructional level), the student scored 22, 30, and 35 points across three probes. An expected level of achievement at that grade level is 40 points. (S-6).
32. In the present levels of academic achievement in the May 2015 IEP, the student's scores on measure of speech articulation were reported, with a recommendation for continued services in that area. (S-6).

33. The May 2015 IEP contained six goals: One goal in oral reading fluency on 3rd grade probes, one goal in reading comprehension on 2nd grade probes, one goal in written expression (correct writing sequences, correct spellings, and total words), one in math concepts/applications (problem-solving), one in math computation, and one in speech articulation. (S-6).
34. Goal progress on the five academic goals in the May 2015 IEP was written in terms of the student's Aimsweb scores in the various goal areas as documented in the present levels of academic performance in the May 2015 IEP. (S-6).
35. For the 2015-2016 school year, beginning in September 2015, the May 2015 IEP recommended supplemental learning support in the student's neighborhood elementary school, with 62% of the student's time spent in regular education. (S-6 at pages 35, 38).
36. In the 2015-2016 school year, the student began instruction in the Wilson program at the District. The student began the Wilson program at the District at step 3.1 and, as of December 2015, was on step 3.2. (S-7).
37. In December 2015, the student's IEP team met to update certain aspects of the student's present levels of performance and specially designed instruction/program modifications. (S-7).
38. In December 2015, in reading fluency, the student was reported to be at 80 words-correct-per-minute on 2nd grade probes (although the reading fluency goal was written for 3rd grade probes). (S-7 at pages 11, 22).
39. In December 2015, in reading comprehension, the student achieved 11 correct answers on 2nd grade probes. (S-7 at pages 11).
40. At the December 2015 IEP meeting, the parents shared concerns about the student's progress and instruction, and aspects of the student's programming in reading and mathematics were revised. Assistive technology for organization needs was also explored. (S-7).
41. In January 2016, the student's IEP team met to update certain aspects of the student's present levels of performance—related to curriculum—and specially designed instruction/program modifications—related to the curriculum changes, the results of the assistive technology evaluation, and strategies for organization and focus. (S-8).

5th Grade/2016-2017

IEP – Beginning of 2016-2017 School Year

42. In May 2016, at the end of 4th grade, at the student’s annual IEP team meeting, the student’s IEP was revised. The May 2016 IEP was the IEP in place over the summer of 2016 (for extended school year [“ESY”] services) and in September 2016 at the outset of the 2016-2017 school year, the student’s 5th grade year. (S-9).
43. In the present levels of academic achievement in the May 2016 IEP, on the student’s Aimsweb reading assessment in reading fluency at the 4th grade level (the student’s current grade level), the student’s median score for words-correct-per-minute was 87 (S-9).
44. In the same section, on the same assessment at the 2nd grade level (the student’s instructional level), the student’s median score for words-correct-per-minute was 96. (S-9).
45. Over one academic year, since May 2015, the student remained on the 2nd grade instructional level and, at that level, the student’s reading fluency went from 58 to 96. By May 2016, the student’s IEP goal from May 2015 called for the student to exhibit a fluency score of 127 words-correct-per-minute on 3rd grade probes. (S-8 at page 26, S-9).
46. In the present levels of academic achievement in the May 2016 IEP, on the student’s Aimsweb reading assessment in reading comprehension at the 4th grade level (the student’s current grade level), the student answered 8 of the probe questions correctly. An expected level of achievement at grade level is 20 correct answers. (S-9).
47. In the same section, on the same assessment at the 3rd grade level (the student’s instructional level), the student’s scores for correct answers was 13. (S-9).
48. Over one academic year, since May 2015, the student remained at the 3^d grade instructional level and the number of correct answers on a 3rd grade probe increased from 8 correct answers to 13. By May 2016, the student’s IEP goal from May 2015 called for the student to answer 16 questions correctly on 3rd grade probes. (S-6, S-8, S-9).
49. In the present levels of academic achievement in the May 2016 IEP, on the student’s Aimsweb writing fluency assessment at the 4th grade level (the student’s current grade level), in response to the prompt,

the student wrote 20 correct writing sequences, the student spelled correctly 38 words, and the student wrote 57 total words. (S-6).

50. Over one academic year, since May 2015 and by May 2016, the student's IEP goal in written expression from May 2015 called for the student to write 38 correct writing sequences, 35 correctly spelled words, and 45 total words. (S-8 at page 28, S-9).
51. In the present levels of academic achievement in the May 2016 IEP, on the student's Aimsweb mathematics assessment in mathematics concepts and applications at the 4th grade level (the student's current grade level), the student scored 13 points. An expected level of achievement at grade level is 18 points. (S-9).
52. In the same section, on the same assessment at the 3rd grade level (the student's instructional level), the student scored 13 points. (S-9).
53. Over one academic year, since May 2015, the student went from a score of 8 points on a 3rd grade instructional level to a score of 13 on a 3rd grade instructional level. By May 2016, the student's IEP goal from May 2015 called for the student to answer 17 questions correctly on 3rd grade probes. (S-6, S-8, S-9).
54. In the present levels of academic achievement in the May 2016 IEP, on the student's Aimsweb mathematics assessment in mathematics computation at the 4th grade level (the student's current grade level), the student scored 39 points. An expected level of achievement at grade level is 57 points. (S-9).
55. In the same section, on the same assessment at the 3rd grade level (the student's instructional level), the student scored 41 points. An expected level of achievement at that grade level is 56 points. (S-9).
56. Over one academic year, since May 2015, the student went from a score of 37 points on a 3rd grade instructional level to a score of 41 points on a 3rd grade instructional level. By May 2016, the student's IEP goal from May 2015 called for the student to score 56 points on 3rd grade probes. (S-6, S-8, S-9).
57. At the outset of the 2015-2016 school year, the student began the Wilson program at step 3.1. As of May 2016, the student was on step 4.2 of the Wilson program. (S-9 at page 13).
58. In the present levels of academic achievement in the May 2016 IEP, the student's scores on measure of speech articulation were reported. The student showed improvement in certain areas of

articulation and continued needs in other areas. The May 2016 IEP recommended continued services on a reduced schedule. (S-9).

59. The May 2016 IEP contained six goals: One goal in oral reading fluency on 3rd grade probes, one goal in reading comprehension on 4th grade probes, one goal in written expression, one in math concepts/applications (problem-solving) on 3rd grade probes, one in math computation on 4th grade probes, and one in speech articulation. (S-9).
60. Goal progress of four of the academic goals in the May 2016 IEP was written in terms of the student's Aimsweb scores in the various goal areas as documented in the present levels of academic performance across the student's IEPs to that point. (S-6, S-8, S-9).
61. The written expression goal in the May 2016 IEP was written in terms of a scoring rubric with sub-scores in spelling, grammar/sentence sequencing, organization, word choice/vocabulary, capitalization, and punctuation. (S-9).
62. The May 2016 IEP indicated that the student was eligible for ESY services in the summer of 2016 in all six goal areas. (S-9).
63. For the 2016-2017 school year, beginning in September 2016, the May 2016 IEP recommended supplemental learning support in the student's neighborhood elementary school, with 62% of the student's time spent in regular education. (S-9 at pages 42-42, 45-46).

March 2017 IEP Revision

64. In March 2017, the student's IEP team revised the student's IEP. (S-11).
65. In the March 2017 IEP revision, the student's reading comprehension goal was revised to remove the Aimsweb reading comprehension measure of goal progress and substitute goal-progress on the number of questions answered correctly on main idea, plot, problem/solution, setting, and vocabulary. (S-11 at page 33).
66. In March 2017, the student had moved from step 4.2 in the Wilson program to step 5.3. (S-11).
67. The March 2017 also included information related to curriculum/instruction in certain areas, assistive technology, an upcoming District re-evaluation process, and concerns about potential bullying (concerns which the IEP team felt did not need to be considered at that time). (S-11).

May 2017 Re-Evaluation

68. In May 2017, the District issued a re-evaluation report (“RR”), the mandatory triennial re-evaluation of the student. (S-13).
69. The May 2017 RR contained extensive data from the student’s prior evaluations to that point, including the February 2012 private evaluation and the District’s May 2014 ER. (S-13).
70. The May 2017 RR contained a District curriculum-based reading assessment administered in winter and spring of 4th grade and fall of 5th grade. In the winter of 4th grade, the student was instructional at level J (in an alphabetized progression beginning with level A) with level K noted as “hard” for the student. In the spring of 4th grade, the student was instructional at level L with level M noted as “hard”. In the fall of 5th grade, the student was instructional at level N, with level O noted as “hard”. (S-13 at pages 8-9).
71. The IEP team agreed that further testing and assessment were not necessary as part of the May 2017 RR. (S-13).
72. The May 2017 RR recommended that the student continue to be identified as a student with specific learning disabilities and speech/language impairment (articulation needs). (S-13).

Private Evaluation – May 2017

73. In May 2017, the student’s parents obtained a private evaluation. (S-14).
74. The May 2017 private evaluation contained numerous assessments, including cognitive testing, achievement testing, assessment of learning and memory, visual processing, vocabulary/expressive language, and behavior. (S-14).
75. On cognitive testing in the May 2017 private evaluation, the student’s full-scale IQ was determined to be 81. (S-14).
76. The assessments largely align with the comprehensive testing/assessments from the February 2012 private evaluation and the District’s May 2014 ER, although the behavior measures show improvement, especially from school-based raters as compared to the February 2012 results. Only one clinically significant rating (anxiety sub-scale, as scored by one of the student’s teachers). The same teacher rated the student as borderline-clinical in the anxiety/depression sub-scale. A

second teacher rated the student as borderline-clinical in the anxiety/depression, anxiety problems, and attention-deficit/hyperactivity sub-scales. The student's mother and father did not rate any sub-scale as elevated. (S-14).

77. The private evaluator recommended that the student be identified as a student with specific learning disabilities in reading and mathematics and needs in language and written expression. (S-14).

June 2017 IEP

78. In June 2017, at the end of 5th grade, at the student's annual IEP team meeting, the student's IEP was revised for implementation largely in the 2017-2018 school year, the student's 6th grade year. (S-15).
79. In the present levels of academic achievement in the June 2017 IEP, on the student's Aimsweb reading assessment in reading fluency at the 4th grade level was not reported (even though it had been reported in the May 2016 IEP as part of the present levels in that document). The student's median score for words-correct-per-minute at the 3rd grade level was 99 (reported scores 84, 101, 106,107), up from 38 words-correct-per-minute at the 3rd grade level from two years prior, in the May 2015 IEP. (S-6, S-9, S-15).
80. From the period from May 2016 through June 2017, there is no way to judge the student's progress in reading fluency on a consistent basis between 3rd grade probes and 4th grade probes. (S-6, S-9, S-15).
81. The June 2017 IEP contained present levels of academic performance for reading comprehension. Before the reading comprehension goal-progress measurement changed in March 2017, the student's Aimsweb scoring did not include any 4th grade probes (even though it had been reported in the May 2016 IEP as part of the present levels in that document). The student's score on 3rd grade probes went from 13 probe questions answered correctly (May 2016) to 15 probe questions answered correctly (March 2017). (S-9, S-15).
82. The new goal-progress measure for reading comprehension had established a baseline of 4 correct answers out of 10. Probes since March 2017 were 5 correct answers out of 10, 7 out of 10, and 4 out of ten. (S-11, S-15).
83. The June 2017 IEP contained present levels of academic performance for written expression goal in terms of the written expression rubric from the May 2016 IEP. The student scored an average across three probes as follows (with baselines – goal levels from the May

2016 IEP): spelling 8.33 (7 – 7), grammar/sentence structure 5.66 (4 – 7), organization 6.66 (3 – 7), word choice/vocabulary 4.33 (3 – 7), capitalization 8 (7 – 7), punctuation 6 (6 – 7). (S-9, S-15).

84. In the present levels of academic achievement in the June 2017 IEP, on the student's Aimsweb mathematics assessment in math concepts and applications at the 4th grade level, the student's score increased from 13 points in May 2016 to 23 points in June 2017. (S-9, S-15).
85. In the present levels of academic achievement in the June 2017 IEP, on the student's Aimsweb mathematics assessment in math computation at the 4th grade level, the student's score increased from 39 points in May 2016 to 51 points in June 2017. (S-9, S-15).
86. The June 2017 IEP reported that the student was at step 5.4 in the Wilson program, progressing from step 5.3 in March 2017. (S-11, S-15).
87. In the present levels of academic performance in the June 2017 IEP, the IEP reported that in May 2017 the student was administered the letter-based District curriculum-based reading assessment administered. In the fall of 5th grade, the student was reported to be instructional at level N, with level O noted as "hard". The May 2017 scores showed that student to be instructional at level P. (S-15).
88. In the present levels of academic achievement in the June 2017 IEP, the student's scores on measure of speech articulation were reported. The June 2017 IEP recommended continued services for articulation needs. (S-15).
89. Based on recommendations in the May 2017 private evaluation, the June 2017 IEP proposed consultative occupational therapy services twice monthly in the 2017-2018 school year, but there was no occupational therapy goal added to the June 2017 IEP. (S-15).
90. The June 2017 IEP contained six goals: One goal in oral reading fluency on 4th grade probes, one goal in reading comprehension on 4th grade probes, one goal in written expression based on the rubric areas, one in math concepts/applications on 5th grade probes, one in math computation on 5th grade probes, and one in speech articulation. (S-15).
91. Certain aspects of the June 2017 IEP included revisions that would be operative in September 2017 when the student would begin 6th grade in the District's middle school. (S-15).

92. The June 2017 IEP indicated that the student was eligible for ESY services in the summer of 2017 in all six goal areas. (S-15).
93. For the 2017-2018 school year, beginning in August 2017, the June 2017 IEP recommended supplemental learning support in the student's neighborhood middle school, with 48% of the student's time spent in regular education. (S-15 at pages 44, 46-47).
94. Father's emotions ran high at the June 2017 IEP meeting, including raising his voice and loudly hitting the table, along with the student's father accusing a District employee of allegedly manufacturing a writing sample offered as work product of the student. (Notes of Testimony at 137-261, 263-306, 485-586, 1310-1476).

Private Enrollment – 2017-2018

95. At some point between mid-July and mid-August 2017, the family undertook a unilateral private enrollment at a private placement. (S-22).
96. The private placement serves students with language-based learning disorders, with a special emphasis on students who are diagnosed with dyslexia. The private placement designs instruction to meet its students' needs, with the literacy strategies infused across the curriculum. (NT at 688-796).
97. The witness from the private placement and the student's mother testified to the student's adjustment to the private placement and the student's academic achievement at the private placement. (NT at 688-796, 1310-1476).
98. The student's parents transport the student to the private placement on a daily basis. (NT at 1310-1476).

August 2017 IEP

99. In early August 2017, in light of parents' intent to enroll the student in the private placement, the student's IEP team met. (S-17).
100. The August 2017 IEP contained revisions to the student's class size for special education programming, and increased consultation among teachers. (S-17).
101. The goals in the August 2017 IEP remained the same as those goals were contained in the June 2017 IEP. (S-17).

102. The student did not return to the District and has attended the private placement for the 2017-2018 school year. In September 2017, the parents filed the complaint which led to these proceedings. (Hearing Officer Exhibit 1; NT at 688-796, 1310-1476).

WITNESS CREDIBILITY

All testimony was reviewed and weighed in light of the witnesses' participation in the hearing during their testimony and in light of the documentary evidence specifically reviewed by them and, where applicable, in general. All witnesses testified credibly, and no one witness's testimony was accorded materially more or less weight than any other witness.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982).

'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁷

⁷ While in some parts of the United States the U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Endrew F. has been the longstanding legal standard enunciated by the Third Circuit Court of Appeals and, consequently, has

Here, the record is very complex in terms of determining whether the District met its obligations to provide FAPE. By and large, it did. Looking at the goal progress across the IEPs operative in the period under consideration (the May 2015 IEP, with its baseline data, the May 2016 IEP, and the June 2017 IEP), the student made progress across most goals. Granted, the progress was not marked. But in four of the five academic goal areas (the speech articulation goal never entered into this record as an area of contention), the student made progress: The [student] made meaningful progress, and exhibited significant learning, in the areas of reading comprehension, written expression, math concepts/applications, and math computation. As indicated, the progress was not always marked, although in some cases it was clearly significant, but in all, these goal areas show steady progress from IEP to IEP over the 2015-2016 and 2016-2017 school years, 4th and 5th grade.

In reading fluency, however, the student did not make progress. In the May 2015 IEP, the student's present levels of academic performance in reading fluency reported that the student was being instructed on 2nd grade probes and reported scores on 3rd grade probes as well. (Finding of Fact ["FF"] 24, FF 25). The goals in the May 2015 IEP were written for 3rd grade probes. (FF 34). As of December 2015, in the middle of the school year, the student's updated progress at that point was still on 2nd grade probes. (FF 39). And in May 2016, when the student's present levels of performance were reported, the student's

been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

performance on 2nd grade probes had increased, but the student did not progress to 3rd grade probes (as the IEP goal had intended). (FF 45, 46).

At some point in the 2015-2016 school year, not necessarily by December 2015 when there was 2nd grade probe progress but certainly by May 2016, when the annual IEP meeting was held, the District should have realized that a reading fluency goal written for 3rd grade probes was not being attempted. Yet the reading fluency goal in the May 2016 IEP was still written for 3rd grade probes. (FF 60). Even as the District included 3rd grade probe data for reading fluency in the May 2016 IEP, goal-progress was written for 4th grade probes, and there is no 4th grade probe data to serve as a baseline for the May 2016 IEP goal. (FF 60, 81). This has prejudicial follow-on effects for the June 2017 IEP because the reading fluency goal for the 2017-2018 school year is written for 4th grade probes, but there is no 4th grade reading fluency data reported as a baseline for that goal. (FF 80, 91). In sum, then, holes in the reading fluency goal-progress data do not allow a reader, and here more specifically does not allow parents, to follow the student's goal progress in reading fluency from year to year. This is a prejudicial denial of FAPE.

Having said that, the record taken as a whole points to overarching progress in reading, especially in the Wilson reading program data and the District's curriculum-based reading assessments. So what does one do when there is a significant, prejudicial denial-of-FAPE in the District's handling of a fundamental area of reading—fluency—but data exists to show that the student made progress, and gained from significant learning as a general

backdrop in reading. This conundrum will be resolved in the remedy portions of this decision as set forth below.

For the reasons set forth above, however, the District denied the student FAPE, and more precisely barred the parents from meaningful participation in understanding the student’s programming due to holes in the reading fluency goal-progress data, in its handling of reading fluency in the student’s educational programming. In all other academic goal areas, the District met its FAPE obligations.

Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁸ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but 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 under the obligations of

⁸ Pennsylvania’s Chapter 14, at 22 PA Code §14.101, utilizes the term “student with a disability” for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term “protected handicapped student” for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term “student with a disability” will be used in the discussion of both statutory/regulatory frameworks.

Section 504/Chapter 15 in an analogous way as to reading fluency and met its Section 504/Chapter 15 FAPE obligations as to all other academic goal areas.

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district. (S.H., *infra*). Here, the District has not in any way discriminated against the student, or taken actions against the student with deliberate indifference in light of the student's disabilities.

Accordingly, the District denied the student FAPE under the provisions of Section 504/Chapter 15 as to reading fluency, met its FAPE obligations to the student in all other academic goal areas, and did not discriminate against the student under the anti-discrimination provisions of the same statutory/regulatory frameworks.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls

Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE.

(Ridgewood; M.C.).

In this case, the District's clear denial of FAPE in one regard—reading fluency—is counter-balanced by the general progress in reading, resulting in significant learning in reading. As set forth below, parents are entitled to remedy for tuition reimbursement (primarily related to the flawed reading fluency goal in the June 2017 IEP—a goal written for 4th grade probes without any reported 4th grade baseline to gauge goal-progress). Therefore, as a matter of equity, the parents will receive, deservedly so, a remedy directly related to the District's denial-of-FAPE as to reading fluency. And, equally equitable, the District's successful efforts to improve generally the student's reading will not support an award of compensatory education.

Accordingly, based on these considerations and as a matter of equity, the student will be not be awarded compensatory education.

Tuition Reimbursement

Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v.

Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C.). In this case, regarding the tuition reimbursement claim, the June 2017 IEP proposed by the District is inappropriate in terms of the reading fluency goal, written for probes at the 4th grade level without any 4th grade probe data as a baseline for the goal. On its face, the omission renders the reading fluency goal unmeasurable and inappropriate.

When a school district program is found to be inappropriate at step one of the Burlington-Carter analysis, as is the case here, step two of the analysis is an examination of the appropriateness of the private placement which the parents have selected.

Here, the private placement is appropriate. The unilateral private placement funded by parents provides individualized instruction that directly addresses the student's needs. The student's acclimation to the private placement and performance at the private placement is allowing the student to make meaningful educational progress. Therefore, the private placement in the current 2017-2018 school year is appropriate.

Where the school district has proposed an inappropriate program and parents' unilateral placement in a private setting provides an appropriate program, both being the case here, the third step of the Burlington-Carter analysis involves a balancing of the equities between the parties to see if the equities between the parties should impact the award of tuition reimbursement. Here, the equities do not significantly weigh for, or against, either party.

Accordingly, the parent is entitled to tuition reimbursement.

Reimbursement for Private Evaluation

The parents assert a claim for reimbursement for the May 2017 private evaluation. The May 2017 private evaluation is comprehensive and thorough. The evaluator testified quite credibly as to evaluation process and report. Yet the May 2017 private evaluation does not add materially to the IEP team's understanding of the student's educational profile or needs. If it did, in other words if parents had undertaken a private evaluation that assessed the student in a way that was necessary and ignored by the District, or the results of the private evaluation uncovered new dimensions of the student's needs, or the private evaluation contained significantly different recommendations that the IEP team recognized were not part of the student's necessary programming—any or all of these types of issues might undergird a finding that parents should be reimbursed for privately undertaking a process that altered the team's understanding of the student and/or the student's needs and

programming. But that is not the case here. The May 2017 private evaluation reinforced the IEP team's understanding of the student's long-identified needs and did not add materially to the student's programming.

Accordingly, the parents are not entitled to reimbursement for the May 2017 private evaluation.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education in the student's education for, and the parents' understanding of and participation in programming for, needs in reading fluency. The School District met its obligations to provide a free appropriate public education to the student in the other goal areas in the student's programming.

Compensatory education is not awarded. The parents are entitled to tuition reimbursement for the enrollment of the student in the private placement for the 2017-2018 school year as follows:

To the extent that the parent has been placed in a position to absorb out-of-pocket payment(s) for tuition and fees at the private placement for the 2017-2018 school year, the School District is ordered to reimburse parent. Upon presentation to the District by the parents of proof(s) of payment for the 2017-2018 school year, the exchange of documentation to take place through counsel, reimbursement shall be made to parents within 60 calendar days of

the date the parents' counsel presents the documentation to school district counsel. Upon presentation to the District by the parents of any unpaid outstanding balance for the student's 2017-2018 school year at the private placement, again with the exchange of documentation to take place through counsel, payment shall be made directly by the school district to the private placement within 90 calendar days of the date parents' counsel presents the documentation to school district counsel.

Additionally, the School District shall reimburse parents for transportation to the private placement, either by receipt and/or by using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates for the day(s) in question. The reimbursement for transportation shall be only for the days the student attended the private placement and shall not include any day(s) the student was absent from the private placement. The exchange of documentation regarding transportation costs shall take place through counsel, and reimbursement shall be made to parents within 60 calendar days of the date(s) that parents' counsel presents the documentation to school district counsel.

The School District did not discriminate against the student on the basis of the student's disability.

The parents are not entitled to reimbursement for any costs, fees, or hourly rate associated with the May 2017 evaluation process, including any fee or payment for the evaluator's appearance in these proceedings.

Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree thereto in writing.

Any claim not specifically addressed in this decision and order is denied and dismissed.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

May 1, 2018