

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

**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**

**ODR File Number:** 19139-16-17/KE

**Child's Name:** G. M.

**Date of Birth:** [redacted]

**Parents:**  
[redacted]

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**Date of Decision:** 11/20/2018

**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, (Student),<sup>1</sup> is a late pre-teenaged student in the Upper Perkiomen School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> based on a Specific Learning Disability. Student has attended school in the District since kindergarten and has been identified as eligible for special education since partway through the first grade year. After evaluations in the spring and summer of 2017 revealed more significant educational needs than had previously been identified, Student's Parents filed a Due Process Complaint against the District alleging procedural and substantive violations of Student's right to a free, appropriate public education (FAPE). The Parents asserted claims that the District denied Student FAPE under the IDEA, Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> and the Americans with Disabilities Act (ADA),<sup>4</sup> as well as the federal and state regulations implementing those statutes, for both past and current programming needs.

The matter was conditionally dismissed in August 2017 when the parties reported an agreement in principle; and extensions to the original deadline for seeking reinstatement were granted for good cause. Unfortunately, although the parties reached full agreement on the program for the 2017-18 school year and beyond, they were not able to finalize a resolution with respect to the past claims, and the matter was reinstated in early February 2018. Hearing

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision to the extent possible. 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).

<sup>2</sup> 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).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

<sup>4</sup> 42 U.S.C. §§ 12101-12213.

sessions were scheduled and at times rescheduled to accommodate various needs of the parties and their representatives,<sup>5</sup> ultimately concluding upon receipt of written closing statements. The scope of the claims began with the start of the 2014-15 school year and ended with the parties' agreement on the current programming issues in the fall of 2017 (with respect to reading and related needs) and March 2018 (with respect to assistive technology). The hearing was thus limited to the past claims, and evidence on whether to permit the Parents to go beyond the two-year statute of limitations was presented in conjunction with that on the substantive issues by agreement of the parties. The Parents sought to establish that the District failed to provide Student with FAPE with respect to certain needs throughout the time period in question, and sought compensatory education and reimbursement for a privately-obtained reading evaluation. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no remedy was warranted.

Following review of the record<sup>6</sup> including the parties' closing statements, and for the reasons set forth below, the Parents' claims must be granted in part and denied in part.

## **ISSUES**

1. Whether the scope of the Parents' claims should be limited to May 2015 or whether they should be permitted to expand the statute of limitations to the start of the 2014-15 school year;

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<sup>5</sup> Several unexpected but unavoidable events occurred over the course of the hearing that resulted in some delay in this final disposition. However, there was no dispute over the program as it was implemented beginning in March 2018 through the date of the final hearing session in October 2018.

<sup>6</sup> The hearing officer acknowledges with appreciation the participation of the parties and their counsel in the Electronic Exhibit Pilot. Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; and School District Exhibits (S-) followed by the exhibit number. The sole Hearing Officer Exhibit (HO-1) documented the conditional dismissal, subsequent extensions, and order of reinstatement. Citations to duplicative exhibits may not be to all copies. The term Parents is used in the plural when it appears that one or the other was acting on behalf of both.

2. Whether the District's programming for Student was appropriate to meet all of Student's needs, especially with respect to reading and related instruction and assistive technology;
3. If the District's programming was not appropriate for Student, should Student be awarded compensatory education; and
4. Whether the Parents should be reimbursed for the cost of an independent reading evaluation?

### **FINDINGS OF FACT**

1. Student is late pre-teenaged and is a resident of the District. Student is eligible for special education on the basis of a Specific Learning Disability. (N.T. 39; P-21; S-34.)
2. Student has attended school in the District since kindergarten (the 2012-13 school year). (N.T. 609-10.)
3. The District uses a benchmark assessment for all of its students three times each school year in order to guide instruction and to inform the division of students into guided reading groups according to levels obtained by that benchmark assessment. The instrument is not intended to be used to measure growth or progress, but the reading levels are provided to parents who are able to compare results over time. (N.T. 404-05, 470, 563-64, 570, 589-90, 1124.)
4. Student experienced significant difficulty with reading, writing, and spelling at home throughout Student's career in the District. The Parents spent considerably more time helping Student with homework, unlike Student's more independent siblings, through the end of the fourth grade (2016-17) school year. (N.T. 606, 612-13, 617, 620-23, 649, 659, 673.)

#### 2013-14 SCHOOL YEAR (FIRST GRADE)

5. Student entered first grade in the fall of 2013. (S-10 at 1.)
6. The Parents asked that the District evaluate Student at the start of the first grade year. District representatives suggested that they wait until Student had completed the first half of the school year, and the Parents agreed. (N.T. 618.)
7. Student was provided with an intensive (Tier Three) general education response to intervention reading program beginning in October 2013. That program focused on decoding. (N.T. 834-35, 957-60; P-2 at 7; S-2 at 9.)
8. The District conducted an evaluation of Student in the spring of 2014 with the consent of the Parents. The initial Evaluation Report (ER) issued in March 2014. (P-1; S-1; S-2.)

9. The ER incorporated input from the Parents that included their concerns with Student's reading and writing skills. (S-2 at 1-5.)
10. Teacher input into the ER reflected weaknesses with reading fluency, decoding, and reading comprehension of grade-level texts read by Student alone and with higher-level thinking; written expression skills including spelling; and speed and accuracy with mathematics facts; a need for prompts and redirection to task was also noted. In a classroom observation, however, Student was engaged at a slightly higher level than a peer. Teacher recommendations were for writing assistance/support, addressing reading deficits (phonics, sight words, and oral reading fluency), small group mathematics instruction, and learning support. (S-2 at 5-8.)
11. Cognitive assessment for the ER (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) yielded a Global Ability Index (GAI) score in the high average range (SS 110) with variability among the Composite scores. A relative strength was noted on the Perceptual Reasoning Index (high average range), and a relative weakness on the Processing Index (borderline range). (S-2 at 10-11.)
12. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) reflected below average range scores on the word reading subtest, a low range score on the oral reading fluency subtest, and average range scores on the pseudoword decoding and reading comprehension subtests; the Total Reading and Basic Reading Composite scores were in the below average range. Student similarly attained below average scores on the Written Expression Composite and each of its subtests with the exception of alphabet writing fluency (average range). Student's scores on the Mathematics Composite and its subtests were all in the average range. (S-2 at 11-12.)
13. The ER concluded that Student was eligible for special education on the basis of a Specific Learning Disability (basic reading skills, reading fluency, and written expression). Recommendations were for specially designed instruction for reading (including oral reading fluency and written expression); multisensory instructional strategies; repetition and practice; chunking of tasks; organizational support; and test and assignment accommodations. (S-2 at 15.)
14. An Individualized Education Program (IEP) developed in March 2014 identified needs to increase letter sounds, sight word recognition, reading fluency, and writing skills. Annual goals addressed nonsense word fluency (from a baseline of fifty sounds correct per minute at a first grade level with a goal for fifty eight sounds correct per minute at a first grade level); oral reading fluency (to begin after nonsense word fluency goal was mastered); reading first and second grade level sight words correctly; and written expression based on a rubric (from a baseline of earning four points out of twelve to a goal of earning ten points). Assistive technology was not noted as a need. (P-2; S-3, S-6.)
15. Program modifications/items of specially designed instruction in the March 2014 IEP included small group and individual instruction (learning support); pacing of instruction; drills/repetition/ review; multisensory instructional strategies; chunking of assignments;

test and assignment accommodations and modifications; and immediate feedback. This IEP was for supplemental learning support in the neighborhood elementary school. The Parents approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-3; S-4.)

16. A special education teacher worked with Student ninety minutes each day primarily on reading once the IEP was implemented. Student was provided with a replacement reading program, in addition to continuing with the Tier Three intervention with the special education teacher. A paraprofessional provided support during writing instruction. (N.T. 812, 820, 910-15.)
17. Student's progress on the nonsense word fluency, sight word, and written expression goals over the remainder of the 2013-14 school year was variable but generally followed a trend line of improvement well above the aim line. At the end of that school year, according to the report card, Student was reportedly reading at a mid-first grade level. (P-3; S-6; *see* P-13 at 1 and S-28 at 7.)
18. Student was not eligible for ESY during the summer after first grade. (N.T. 607; S-3 at 18.)

#### 2014-15 SCHOOL YEAR (SECOND GRADE)

19. The special education teacher continued to work with Student primarily on reading (phonics, decoding, and comprehension) in second grade for ninety minutes each day. Student worked with the regular education reading program, as well with a replacement reading program in addition to the same Tier Three intervention (focused on decoding) in a small group outside of the regular classroom. Toward the end of that school year, the special education teacher began to push in a portion of those services into the regular classroom during phonics instruction. (N.T. 812-13, 820-21, 834, 835-38, 917-18, 928-29, 933-34.)
20. Student worked on the writing goal in a variety of settings, and was supported by the special education teacher and paraprofessional in small groups. The rubric assessed spelling and punctuation, organization, and neatness/penmanship on untimed writing pieces. (N.T. 841-46; S-8 at 22.)
21. Student's IEP was revised in October 2014 after Student mastered the nonsense word fluency and sight word goals, so that the oral reading fluency goal would be implemented. At the time, Student was reading twenty three words correct per minute at a first grade level, with a goal to read fifty words correct per minute at the second grade level. (N.T. 821-23, 907, 918-19; P-2; S-3 at 14; S-5.)
22. A new IEP was developed for Student in March 2015. At the time, Student was reportedly reading at an early second grade level with 95% accuracy but with limited comprehension. Student's written expression skills showed improvement but organization and spelling remained as weaknesses. Student was not receiving special education for mathematics or content area classes but had supports including testing

accommodations for mathematics as needed. Assistive technology was not noted as a need in this IEP. (P-5; S-7; S-8.)

23. Parent input into the March 2015 IEP reflected concerns with reading and writing skills at grade level, including reading comprehension. (S-8 at 6-7.)
24. Needs identified in the March 2015 IEP were for improvement of reading fluency and written expression skills including spelling. Annual goals addressed oral reading fluency (reading first grade passages aloud at a rate of fifty words correct per minute from a baseline of thirty two words correct per minute) and written expression (maintaining the goal to score ten out of twelve on the writing rubric). (S-8 at 7, 14-15.)
25. Program modifications/items of specially designed instruction in the March 2015 IEP included small group instruction (learning support) for reading in addition to a research-based reading intervention; drills/repetition/review; multisensory instructional strategies; chunking of assignments and tasks; and test and assignment accommodations and modifications. This IEP was for supplemental learning support in the neighborhood elementary school, with reading/language arts instruction sixty minutes each day.<sup>7</sup> (S-8.)
26. Student's end of year second grade report card reflected continued needs in oral reading fluency and spelling. Progress reports reflected significant variability with words correct per minute and number of errors over the course of the school year at a first grade level but the May probes were at or near the aim line. Student's progress on the writing goal was similarly variable but with growth demonstrated especially toward the end of the school year (Student's last three end of the school year probes indicated seven points out of ten). Student was reportedly at a mid- to late-second grade instructional reading level by the end of that school year.<sup>8</sup> (P-6; S-59.)
27. Student was not eligible for ESY during the summer after second grade. (N.T. 616.)

#### 2015-16 SCHOOL YEAR (THIRD GRADE)

28. Student exhibited difficulties with reading fluency and decoding, and certain mathematics computations in third grade. (N.T. 969, 976, 1023, 1028.)
29. Student participated in the whole-class reading instruction in the regular classroom in third grade. Student did use lower level texts for the guided reading group (approximately second grade level) with another student at about the same reading level; and Student worked more on reading decoding than did other students because that was an area of need. (N.T. 977-78, 1019-20, 1023, 1027-28, 1030.)
30. A special education teacher continued to work with Student primarily on reading during third grade, but the learning support services were provided entirely outside of the regular

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<sup>7</sup> There is no accompanying NOREP in the record, but there does not appear to be any disagreement that the Parents approved the March 2015 IEP.

<sup>8</sup> It is not clear when the end of year instructional reading level was conveyed to the Parents (*see, e.g.*, P-13), but the end of school year level was a small increase over that reported in the March 2015 IEP.

classroom. Student was provided with the same replacement reading program as in second grade, a second replacement reading program focused on reading fluency and decoding, and also worked with the regular education reading program. The Tier Three intervention (focused on decoding) also continued outside of the regular classroom. (N.T. 812-13, 820-21, 833-34, 857-58, 861, 935-39, 941.)

31. By early November 2015, Student's oral reading fluency progress returned to the same level as that at the end of second grade after some regression over the summer. In January 2016, Student's oral reading fluency was reported to be forty three words correct per minute at a first grade level and thirty four words correct per minute at a second grade level, indicating that Student was meeting an end of first grade or beginning of second grade level benchmark on that skill. (N.T. 348-49; P-6; P-12)
32. A Reevaluation Report (RR) was issued in February 2016. That RR was a review of records supplemented by input from the Parents, who reported concerns with Student's reading skills. At the time, Student was reportedly below targeted end of year benchmarks in oral reading fluency and reading comprehension at the second and third grade levels. This RR nonetheless reflected that Student was reading at a third grade instructional level at the expected winter benchmark. Student was below benchmark expectations in mathematics computation but approaching expectations in mathematics concepts and applications for third grade students. (P-9; S-10.)
33. Teacher recommendations for the February 2016 RR were to address continued mathematics, reading, and written expression deficits; and to provide testing accommodations, checks for understanding, and prompts and redirection as needed. Needs were identified in the areas of reading fluency, written expression including spelling, and mathematics computation skills. This RR concluded that Student remained eligible for special education on the basis of a Specific Learning Disability, and the Parents agreed with its disability classification. (S-10.)
34. Present level information from the February 2016 RR was incorporated into the February 2016 IEP, in addition to the teacher input and Parents' concerns with spelling. At the time of this IEP, Student was receiving special education for reading and as well as support for writing. Student was in regular education for content area and special classes. Assistive technology was not noted as a need in this IEP. (P-10; S-12.)
35. Needs identified in the February 2016 IEP, as in the recent RR, were for improvement of reading fluency skills, written expression skills including spelling, and mathematics computation skills. Annual goals addressed oral reading fluency (reading second and third grade passages aloud at a rate of sixty five words correct per minute from a baseline of thirty four words correct per minute at a second grade level) and written expression (maintaining the goal to score ten out of twelve on the writing rubric from a baseline of a score of seven). (S-12 at 11, 16-17.)
36. Program modifications/items of specially designed instruction in the February 2016 IEP included small group instruction (learning support) for reading in addition to a research-based reading intervention; small group mathematics remediation;



drills/repetition/review; use of manipulatives and adapted materials; chunking of assignments and tasks; use of speech-to-text software; and test and assignment accommodations and modifications. This IEP was for itinerant learning support in the neighborhood elementary school, with the amount of special education outside of the regular classroom decreasing to forty minutes per day for reading and writing instruction and forty minutes per six-day cycle for mathematics remediation. The Parents approved the accompanying NOREP. (S-12, S-13.)

37. Student's list of weekly spelling words was decreased at the request of the Parents during third grade. (N.T. 985, 1025.)
38. Student used self-advocacy skills to ask for help when needed during third grade. (N.T. 1024.)
39. Toward the end of the 2015-16 school year after the February 2016 IEP, Student like all students had access to a speech-to-text program. Student benefitted from and sometimes used speech-to-text software for writing assignments in third grade. (N.T. 953, 969, 986, 988-90, 1031-32.)
40. At the end of third grade, the report card indicated that Student demonstrated satisfactory oral reading accuracy and comprehension at the expected benchmark level.<sup>9</sup> However, Student continued to exhibit needs in the areas of basic mathematics facts and writing conventions. (P-12; S-15; S-28 at 7.)
41. Student's performance on the spring 2016 Pennsylvania System of School Assessment (PSSA) was in the below basic range for English/Language Arts (but less than ten points shy of the basic range) and in the basic range for Mathematics. (S-14.)
42. Student was not eligible for ESY during the summer after third grade. (N.T. 616, 626; S-12 at 21.)

#### 2016-17 SCHOOL YEAR (FOURTH GRADE)

43. Student's fourth grade learning support teacher met with the Parents at their request in September 2016. (N.T. 330, 629-30; P-14.)
44. Student was initially placed into a guided reading small group in fourth grade in the regular education classroom. However, early in the school year, due to the significant deficits Student exhibited in reading, the regular education fourth grade teacher began to work with Student individually during that time. (N.T. 410, 1043-44, 1047, 1069-70, 1096.)

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<sup>9</sup> The details of Student's reading performance on benchmark measures over the 2015-16 school year, such as is reflected in an assessment protocol at S-15, is relatively sparse; however, the absence of such detail is not necessarily contrary to the publisher's instructions and does not render the results inaccurate. (N.T. 573-74, 580-82, 593.)

45. Student received reading instruction in the learning support environment for forty minutes each day in fourth grade during a schoolwide intervention/enrichment period. That instruction was initially in a small group, then with one other student, then individually due to Student's continuing needs in that area. (N.T. 408-09, 419, 436-37, 459-60.)
46. The District implemented a different reading program for Student in fourth grade learning support, one that is multisensory and based on Orton-Gillingham principles. This decision was made because of Student's deficits in decoding and fluency with comprehension remaining a relative strength. The new reading program targeted decoding and encoding and was provided three days each six-day cycle. (N.T. 135, 328, 352-53, 373, 377, 412-15, 437, 441-44.)
47. As a Tier Three regular education response to intervention, a computer program was also implemented for Student to provide practice with reading decoding and comprehension at Student's current level. That program was provided on the other three days per six-day cycle. (N.T. 352-53, 362-63, 377, 439.)
48. Student was not decoding words at grade level at the start of the 2016-17 school year, but the learning support teacher was not sure whether there was regression in skills after the summer break. The fourth grade learning support teacher spoke with the prior year teacher about Student's reading scores. The fourth grade teacher also asked that a team meeting convene. (N.T. 328, 346-47, 420-21.)
49. Student was given time limitations for completing writing tasks on probes assessing progress on that goal in the fall of 2016, based on the same rubric as in earlier years. (N.T. 368; S-28 at 9-10.)
50. On a benchmark reading level assessment administration later in the fall of the 2016-17 school year, Student exhibited frustration at the level above which Student had scored at the end of the third grade year, which is the typical starting point for the benchmark assessment. Student was also frustrational at the level at which Student had scored at the end of third grade and three levels below that. Student was instructional at the fourth level below where Student had been at the end of third grade, and was approximately at an end of first grade or beginning of second grade level based on that instrument. (N.T. 335-343, 422-23; S-22; S-23; S-24.)
51. Student was given the Wilson Identification and Spelling Test in December 2016 to measure decoding and encoding skills. Student's scores were below the first percentile in all norm-referenced areas assessed; informal assessment areas were similarly significantly below expectations. (N.T. 62-63; S-30)
52. On a different reading assessment instrument administered in November 2016, Student was instructional at a mid-first grade level. (N.T. 344-45; S-24 at 7-12; S-25)
53. The Parents had Student privately evaluated in the fall of 2016 for Attention Deficit Hyperactivity Disorder (ADHD). Student's teachers completed Connors Teacher Rating

Scales for that evaluation. However, the evaluation was not comprehensive and did not reach any definitive conclusion. (N.T. 636-37, 686; P-14 at 13-18; S-19; S-21.)

54. A private occupational therapy evaluation in October 2016 reflected fine motor skill weaknesses, and therapy was recommended. Student did receive private occupational therapy for a short period of time after that evaluation. (N.T. 690; P-16; S-20.)
55. Student at times exhibited distractibility and lack of initiating tasks during fourth grade, especially during large group instruction, but was easily prompted and redirected. (N.T. 360-61, 406, 1054, 1059.)
56. Student exhibited self-advocacy skills as needed during fourth grade. (N.T. 406.)

#### DECEMBER 2016 IEP REVISION

57. Student's IEP team convened in early December 2016, in part due to Student's decline in reading skills and scores. At that meeting, the team discussed the Parents' recent request for a reevaluation of Student and it was agreed that one would be completed. (N.T. 348, 527, 529-30; (P-14; S-26; S-27; S-31.)
58. At the December 2016 IEP meeting, the team decided to replace the computer-based reading program with a different computer-based program that drew on Student's strength in listening comprehension. (N.T. 378, 437-39, 460.)
59. An IEP was developed in conjunction with the December 2016 meeting. Present level information for the December 2016 [IEP] reflected that Student was receiving special education for reading and related writing skills, and as well as special education support for all classes. Student was in regular education for all classes with the exception of the reading interventions. Teacher input noted difficulty remaining on task but that Student was successful with prompts and redirection. Parental concerns in the December 2016 IEP were for reading, spelling, and overall academic skills. Assistive technology was not noted as a need in this IEP. (P-17; S-28 at 5, 6, 10.)
60. As additional present level information in the December 2016 IEP, Student was reportedly instructional at a late first grade reading level with 90% accuracy and satisfactory comprehension. On a Qualitative Reading Inventory (QRI) in the fall of 2016, Student was instructional at the primer, or first grade, level. A third reading assessment reflected well below benchmark expectations for oral reading fluency. (N.T. 363; P-17; S-28 at 6-8.)
61. As also reported in the December 2016 IEP, Student was below benchmark expectations in mathematics computation but meeting expectations in mathematics concepts and applications for fourth grade students. Student's written expression skills were below the baseline from the prior IEP; organization and spelling remained as weaknesses. (S-28 at 7, 9-10.)
62. Needs identified in the December 2016 IEP were for improvement in oral reading fluency and written language skills. Annual goals addressed oral reading fluency (reading second

grade passages aloud at a rate of eighty words correct per minute from a baseline of forty two words correct per minute) and spelling (earning a score of 90% on a ten-word list from a baseline of 88% on an eight-word list); the writing goal was removed.<sup>10</sup> (S-28 at 11, 18-19.)

63. Program modifications/items of specially designed instruction in the December 2016 IEP included small group, differentiated instruction (learning support) for reading; preferential seating; chunking of assignments and tasks; use of graphic organizers; reading support; an auditory reading program; use of manipulatives and organizing tools for mathematics; multisensory presentation of directions; guided notes; and test and assignment accommodations and modifications including a modified spelling list. This IEP was for itinerant learning support in the neighborhood elementary school. The Parents approved the accompanying NOREP. (S-28.)
64. Student was provided support with writing tasks, including extra time, during fourth grade as needed; support was also provided for reading and mathematics. Student, like all students, had speech-to-text programs available and used them at times. An instructional support assistant was also present in the regular classroom for the majority of the school day, and communicated with the learning support teacher about concerns she observed with Student's performance there. (N.T. 354-55, 357-58, 389, 411, 452, 1046-47, 1049, 1070-71, 1078-82, 1101, 1109.)

#### MARCH 2017 RR

65. Student was reevaluated in the spring of 2017 with the consent of the Parents, and an RR issued on March 4, 2017. A summary of educational history and records in addition to input from the Parents was included in this RR. Present level information, including classroom assessments from the recent IEP, was updated. (N.T. 480; P-18; P-21; S-34.)
66. As of February 2017, Student was reportedly instructional at an early second grade reading level with 92% accuracy and satisfactory comprehension. On new QRI in February 2017, Student was instructional at a first grade level. A third reading assessment reflected well below benchmark expectations for oral reading fluency (mid-first grade). (S-34 at 5-6.)
67. As also reported in the March 2017 RR, Student was below but approaching benchmark expectations in mathematics computation and mathematics concepts and applications for fourth grade students. Student's spelling progress reflected mastery of some words comprised of short and long vowels. (S-34 at 6-9.)
68. The District school psychologist who issued the March 2017 observed Student in the classroom using the Behavioral Observation of Students in Schools. Student's on- and off-task behavior was commensurate with that of peers. (S-34 at 10.)

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<sup>10</sup> The subsequent RR noted that the writing goal was removed because Student was not making progress and it was therefore "inappropriate". (S-34 at 9.)

69. Cognitive assessment (Fifth Edition of the WISC (WISC-V)) reflected scores that varied among the Composites with a GAI score in the average range (SS 109). The Verbal Comprehension Index score was a relative strength (high average range) while the Working Memory and Processing Speed Indices were relative weaknesses (very low and low average ranges, respectively). (S-34 at 14-16.)
70. A re-administration of the WIAT-III yielded below average range scores on the word reading and oral reading rate subtests, a low range score on the oral reading fluency and oral reading accuracy subtests, and average range scores on the pseudoword decoding and reading comprehension subtests; the Total Reading and Basic Reading Composite scores were in the below average range. Student attained below average scores on the spelling subtest with all other scores on the Written Expression Composite in the average range. Student's score on the Mathematics Composite was in the average range, but on the Math Fluency Composite in the below average range, with a number of subtests also in the below average range for mathematics (all of the Math Fluency subtests). (S-34 at 16-19.)
71. The District school psychologist administered the Process Assessment of the Learner – Second Edition (PAL-2) in order to gain additional information about Student's specific reading decoding skills. The results indicated that Student needed instruction for phonological, orthographic, and morphological skills. (N.T. 502, 540; S-34 at 21-22.)
72. Social/emotional/behavioral functioning for the March 2017 RR (Behavior Assessment System for Children – Third Edition) completed by both Parents and two teachers reflected concerns with attention problems, learning problems, social skills, and study skills (one or both teachers); leadership and functional communication (all raters); and activities of daily living and hyperactivity (one Parent). On the content scales, one or more rater indicated concerns with executive functioning, ADHD, probability of Autism, and functional impairment. Conners Rating Scales completed by the same raters reflected elevated concerns by at least one rater with learning problems, inattention, and hyperactivity. (S-34 at 24-26.)
73. The March 2017 RR concluded that Student remained eligible for special education on the basis of a Specific Learning Disability, but that attention and hyperactivity concerns were attributable to the learning disabilities. A number of recommendations were made in this RR including evidence-based explicit reading instruction, visual supports for mathematics and writing tasks, audio glossaries, and instruction in using outlines and graphic organizers. (S-34 at 27.)
74. A meeting convened in March 2017 to review the recent RR. The Parents indicated that they disagreed with the March 2017 RR to the extent that it concluded no further assessments were necessary. They requested an assistive technology evaluation, but one was not completed at that time. (N.T. 356, 644-46, 696-97; P-24 at 8-9; S-35; S-45; S-36.)
75. An occupational therapy evaluation was also conducted around the time of the March 2017 RR that reflected no school-based needs. (N.T. 544-45; S-78.)

## MARCH 2017 IEP

76. Student's IEP team met in March and April 2017 to develop a new IEP. Present level information for this IEP incorporated that from the March 2017 RR. Parent concerns continued to be with reading spelling, and overall academic needs. Assistive technology was not noted as a need in this IEP. (P-23; P-25; S-37; S-40; S-42.)
77. Needs identified in the March 2017 IEP were for improvement in oral reading fluency and written language skills including spelling. Annual goals addressed oral reading fluency (reading second grade level passages at a rate of eighty words correct per minute from a baseline of forty two words correct per minute); and spelling (earning 90% or greater on encoding multisyllabic words from a baseline of 70%). (S-40 at 14, 21-22.)
78. Program modifications/items of specially designed instruction in the March 2017 IEP included small group, differentiated instruction (learning support) focused on reading and spelling skills; preferential seating; chunking of assignments and tasks; use of graphic organizers; reading and writing support; math fact practice; auditory books; use of manipulatives and organizing tools for mathematics; multisensory presentation of directions with checks for understanding; guided notes; speech-to-text software or other computer program; and test and assignment accommodations and modifications including a modified spelling list. This IEP was for supplemental learning support in the neighborhood elementary school.<sup>11</sup> (S-40.)
79. The March 2017 IEP proposed increasing the Orton-Gillingham reading program introduced at the start of the school year to six days per cycle, eliminating the computer program that utilized Student's listening comprehension strength because Student was not exhibiting expected growth. (N.T. 385-86, 438-39.)
80. Progress monitoring of the IEP over the course of the 2016-17 school year reflected quite variable and inconsistent progress on the oral reading fluency goal. Student's progress on the spelling goal was also variable, but demonstrated progress on the encoding goal developed in March 2017. (P-29; S-47.)
81. Benchmark assessments of oral reading fluency over the 2016-17 school year reflected quite variable performance on second grade level probes with respect to number of words correct and numbers of errors, with the latter ranging from one to fifteen. Student reportedly remained at a second grade reading level. (N.T. 395; S-57.)
82. Student's performance on the spring 2017 PSSA was in the basic range for Mathematics and English/Language Arts and in the proficient range for Science. (S-62 at 15.)
83. Student was determined to be eligible for ESY services in the summer of 2017 for reading instruction to focus on the same reading and spelling goals in the March 2017 IEP. Student participated in ESY and was provided an Orton-Gillingham reading

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<sup>11</sup> The NOREP accompanying the March 2017 is not signed as approved or disapproved. (S-41.)

program. Student made some gains on the IEP goals that summer. (N.T. 396; P-31; S-33; S-40 at 26-27; S-43; S-46; S-49.)

#### PRIVATE READING EVALUATION

84. The Parents had Student privately evaluated by a certified reading specialist during the summer of 2017 and shared the report with the District. (N.T. 651, 653, 719, 720; P-30; S-50.)
85. The private reading specialist administered the Woodcock-Johnson Diagnostic Reading Battery – Third Edition, a Standardized Reading Inventory, the Comprehensive Test of Phonological Awareness – Second Edition, the Test of Silent Word Reading Fluency, and an earlier edition of the PAL. This evaluation identified weaknesses for Student with letter-word identification, decoding, reading fluency, and passage comprehension. Phonological awareness was a relative strength, but Student exhibited a poor ability to retrieve phonological information. Student was determined to be instructional at the second grade level. Recommendations by the private reading specialist were for a phonics-based, sequential, cumulative reading program (Wilson Reading); instruction in visualization; access to audiobooks; wait time; and a decreased focus on fluency; suggestions for developing new vocabulary and promoting reading were also given. (S-50.)

#### 2017-18 SCHOOL YEAR (FIFTH GRADE)

86. Student's IEP team met in August 2017 prior to the start of the school year to consider the independent reading specialist's report and other reading recommendations, and make revisions to the IEP with respect to reading and other areas. At that time, needs were identified for improving reading decoding and comprehension, writing, and executive functioning skills. A new provision for sixty minutes of daily small group reading instruction was added to the IEP with new goals: for reading comprehension (identifying passage details from a baseline of 75% correct on assessments to 80% accuracy) and decoding (from a baseline of twelve single-syllable words to a goal of thirteen out of fifteen multisyllable words). Two goals (for oral reading fluency) were removed but would be addressed by the new reading program. Other new goals addressed written expression (earning six of eight points on the PSSA writing rubric (from a baseline of two)); and executive functioning (improving organizational skills based on a daily checklist with baseline yet to be determined). Assistive technology was not noted as a need in this IEP. (N.T. 52-56, 138-39, 653, 740; P-33 at 12-13; S-52; S-56.)
87. Other changes were made to the specially designed instruction section of the August 2017 IEP to include additional test and assignment accommodations with a provision that all assessments would be untimed; daily check-outs for organization; visual checklists; use of visualization techniques; decodable books; re-reading of material; access to audio books and texts at grade level; note-taking support; guided outlines; and adequate wait time. Student's program was for supplemental learning support in the neighborhood elementary school. (S-56.)

88. The Parents approved the IEP as revised in August 2017 in order to begin the services outlined, but again expressed their desire for an assistive technology evaluation and other changes to the IEP content. (P-34; S-54.)
89. The WIST was re-administered in August 2017 to again measure decoding and encoding skills. The scores were not significantly discrepant from the prior administration. (N.T. 59-60; S-53.)
90. Student began receiving instruction using Wilson Reading program, which had been recommended by the private reading specialist, early in the 2017-18 school year by a learning support teacher who is certified in that program and is also certified as a reading specialist. Student had one hour daily instruction in a very small group. (N.T. 45, 56, 81-82, 122-25, 129; P-32 at 5-6; P-33 at 1)
91. The small group Wilson Reading program provided to Student during fifth grade was beneficial for Student, particularly due to its spiraling curriculum. Student demonstrated the ability to generalize reading skills from small group instruction to other settings during fifth grade. (N.T. 46-48, 58.)
92. Student began regularly using speech to text software to assist with writing in the fall of 2017 that included a spellcheck function. (N.T. 84, 156-57.)
93. Student had an English/Language Arts class during fifth grade that focused on reading comprehension and the writing process. Student required support for grade-level reading (including decoding, encoding, and comprehension) and writing tasks as well as reading grade-level content area texts. (N.T. 226-27, 230-33, 246-50, 252-54, 256-28, 260, 267-69, 271-72, 273-80, 287-93, 295-96)
94. The District initiated an assistive technology evaluation through the local Intermediate Unit (IU) in October 2017. Part of that process was to examine Student's need for increased independence particularly in light of the upcoming transition to the middle school. (N.T. 177-78, 188, 199, 215-16; S-55, S-71, S-73.)
95. Student's IEP was revised again in November 2017. Updates to the present levels section included information on recent reading and curriculum-based assessments. As of November 2017, Student was reportedly instructional at a late-middle second grade reading level with 95% accuracy and 100% comprehension. A second reading assessment reflected well below benchmark expectations for oral reading fluency (beginning of second grade). Student was also reportedly using speech-to-text support for writing tasks. Some progress on IEP goals was also reflected in this IEP. (P-36; S-56 at 7-8, 11-12.)
96. The November 2017 IEP contained a new goal for spelling (from a baseline of ten single-syllable words to a goal of fifteen multi-syllable words). New provisions in the specially designed instruction section provided support for organization. Student's program remained supplemental learning support in the neighborhood elementary school. (S-56.)



97. A meeting to review the SETT process for assistive technology (considering the Student, Environment, Tasks, and current and potential Tools) convened on January 11, 2018 after a short delay due to inclement weather. Needs for support with reading and writing, including organization of writing, were identified: drafting, editing, and revising written work; understanding word problems in mathematics; and accessing social studies and science text and materials. Suggestions were made to explore other avenues of speech-to-text in addition to text-to-speech options, audiobooks for texts and other written materials, and a dedicated computer device with access to assistive technology options. (N.T. 95, 180, 207-08; P-37; S-60.)
98. Student began completing homework mostly independently during the fifth grade school year. (N.T. 659, 703.)
99. Student developed and used self-advocacy skills during fifth grade. (N.T. 46-47, 125, 238.)
100. The WIST was re-administered in February 2018. Although there was a few point difference in a few of the standard scores, Student's performance was not significantly improved from prior administrations and remained below the first percentile in all areas. (S-61.)
101. A new IEP was developed in March 2018. Present level information for this IEP incorporated that from the previous IEP supplemented by the recent WIST results. Student's instructional reading level remained the same, at an early second grade level on two measures with comprehension somewhat more advanced than oral reading fluency. Student had reportedly made significant progress toward meeting or met the goals for reading comprehension, decoding, spelling, and executive functioning, but not on the oral reading fluency and writing goals. Parent concerns continued to be with reading spelling, as well as support for mathematics and continuation of use of assistive technology. For the first time, assistive technology was noted as a need in this IEP. (P-39; S-62.)
102. Needs identified in the March 2018 IEP remained the same (improvement in decoding, reading comprehension, written language, and executive functioning skills). Annual goals addressed written expression (responding to prompts using speech-to-text scoring six of eight points on the PSSA rubric with an emphasis on conventions and style, from a baseline of two of eight); reading comprehension (identifying specific passage details from a baseline of 75% correct on assessments to 80% accuracy); decoding (a mix of real and nonsense words at a second grade level from a baseline of twelve words to a goal of thirteen out of fifteen words); spelling (of the same words Student was decoding, from a baseline of ten to a goal of thirteen of fifteen); and oral reading fluency (reading second grade level passages with 95% accuracy and scoring four of six points on a fluency rubric from a baseline of two points with 90% accuracy). (S-62 at 21, 29-35.)
103. Program modifications/items of specially designed instruction in the March 2018 IEP included small group, differentiated reading instruction focused on reading and spelling skills; preferential seating; chunking of assignments and tasks; use of graphic organizers; reading and writing support; math fact practice; use of manipulatives and organizing tools

for mathematics; multisensory presentation of directions with checks for understanding; guided notes; daily check-outs for organization; visual checklists; use of visualization techniques; decodable books; re-reading of material; access to audio books and texts at grade level; note-taking support; guided outlines; adequate wait time; test and assignment accommodations and modifications; and additional assistive technology: a designated computer for school and home, speech-to-text and text-to-speech software with word prediction, dictation software, and access to a variety of writing tools. This IEP was for supplemental learning support in the neighborhood elementary school. (S-62.)

104. Student benefitted from the dedicated computer, speech-to-text and text-to-speech software, word prediction, and dictation tools. (N.T. 230-36, 239, 273-80, 658, 663-65, 667-68.)
105. Progress monitoring for the 2017-18 school year reflected that Student mastered the executive functioning goal by March 2018. Student continued to work on and struggle with the written expression and decoding goals, but made significant progress on the reading comprehension and spelling goals. (P-40.)
106. Student was determined to be eligible for ESY services in the summer of 2018 for reading and writing instruction to focus on some of the same reading and spelling goals in the March 2018 IEP. This instruction was to be by someone not employed by the District for ESY 2018 to remediate continued deficits. (N.T. 119, 159-60; S-62 at 42-43.)
107. Student was to enter the middle school at the start of the 2018-19 school year. (N.T. 45-46.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested 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. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of 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 T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, testifying to the best of his or her recollection; there was little if any inconsistency in the testimony. None of the testimony was accorded significantly more or less weight than that of any other witness. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' comprehensive yet succinct written closing statements.

#### GENERAL IDEA PRINCIPLES: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local educational agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.28, 300.101. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the 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" as requiring "significant learning" and "meaningful benefit" under the IDEA, based upon the child's individual needs and abilities.

*Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)(citing *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3d Cir. 1988)). An LEA complies with this FAPE obligation through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citing, among others, *Polk, supra*). As is also relevant to this matter, part of the IEP process is the consideration of “whether the child needs assistive technology devices and services.” 20 U.S.C. § 1414(d)(3)(B); *see also* 34 C.F.R. § 300.342(a)(2)(v).

Fairly recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it there observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] \* \* \* A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA.

*Endrew F.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted). The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. This standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit.

As *Endrew*, *Rowley*, and the IDEA make exceedingly clear, the IEP must be responsive to the identified educational needs of the child. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the law does not demand that LEAs provide services beyond those that are appropriate in light of a child’s unique circumstances, such as those that “loving parents” might desire. *Endrew F.*, *supra*; *Ridley School District. v. M.R.*, 680 F.3d 260, (3d Cir. 2012); see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). Nevertheless, educational professionals must monitor whether or not a child’s program is providing FAPE, and make changes as needed.

#### GENERAL IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays “a significant role in the IEP process.” *Schaffer*, *supra*, at 53. Indeed, 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).

## 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 under the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District, supra*, 680 F.3d at 282-283. 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.

## SCOPE OF THE CLAIMS

The IDEA expressly provides that a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C.

§ 1415(f)(3)(C); *see also* 34 C.F.R. § 300.511(e).<sup>12</sup> The IDEA also contains two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); *see also* 34 C.F.R. § 300.511(f).

“The IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint.” *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, \* 28-29, 2008 WL 2798306 (W.D. Pa. July 18, 2008). Hearing officers must “make determinations, on a case by case basis, of factors affecting whether the parent ‘knew or should have known’ about the action that is the basis of the complaint.” *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. 46540-01 at 46706 (August 14, 2006)). *see also E.G. v. Great Valley School District*, 2017 U.S. Dist. LEXIS 77920, \*25, 2017 WL 2260707 (E.D. Pa. 2017).

## EVALUATIONS

The IDEA and state and federal regulations obligate LEAs to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child

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<sup>12</sup> The IDEA statute of limitations also applies to claims under Section 504. *D.K. v. Abington School District*, 696 F.3d 233, 244 (3d Cir. 2012); *P.P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009).

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).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Here, the Parents disagreed with the March 2017 RR and thereafter obtained a private reading evaluation for which they seek reimbursement.

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education



and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

#### CLAIMS PRIOR TO MAY 2015

The first issue to be resolved is whether the Parents should be permitted to seek relief for a time period more than two years prior to the filing of the Due Process Complaint. They specifically seek a remedy for the entirety of the 2014-15 school year. (N.T. 18, 20; Parents’ Closing at 15.)

The District correctly observes that the Parents did not present evidence to support either of the exceptions to the statute of limitations. (District Closing at 4-5.) Based on the record as a whole, however, this hearing officer must agree with the Parents that they did not know, and had no reason to know, of the extent of Student’s language disabilities (reading and language arts skills) until late in the fall of 2016 when the District reported a substantial decrease in Student’s instructional reading level that contradicted all previous assessments and evaluations. This is particularly so in light of the variety of ways that Student’s reading skill levels were reported to the Parents, none of which actually or constructively suggested to them that Student’s deficits were as significant as they ultimately were determined to be following the fall 2016 benchmark assessments. Thus, even though the Parents had general knowledge of Student’s overall academic weaknesses on an ongoing basis, including how Student presented at home, they lacked the requisite knowledge of the true nature of Student’s disabilities and whether and how

the District was addressing them, *i.e.*, the actions that formed the basis for their Complaint, prior to late 2016. As such, with the Due Process Complaint filed before the end of the 2016-17 school year in which that knowledge is imputed, all of their claims are timely. Nevertheless, as discussed more fully below, the FAPE claims will be denied for a portion of the time period at issue, including the 2014-15 school year.

#### PROGRAM DEVELOPMENT AND IMPLEMENTATION

The next issue is whether the District's program, as developed and implemented, denied Student an appropriate education. The Parents' focus throughout the hearing, and in their Closing Statement, is on the interventions addressing reading (and related language arts skills) before the start of the 2017-18 school year, and the absence of adequate assistive technology until the spring of 2018.

With respect to reading and related needs, Student's Specific Learning Disability was identified in first grade after teachers noted deficits in reading fluency, decoding, and comprehension; writing (especially spelling); and mathematics facts. The IEP that was developed following Student's identification recognized and targeted each of Student's needs based on the information known.<sup>13</sup> By early in the second grade year, Student had mastered the nonsense word fluency and sight word goals, and the District began to implement an oral reading fluency goal as the team had agreed. In the spring of that school year, Student had made such sufficient gains that the team determined that Student should receive less special education instruction outside of the classroom, and push-in services provided some of the necessary reading support. Benchmark assessments suggested that Student's instructional reading level

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<sup>13</sup> To the extent that there may arguably be any claim regarding the 2013-14 school year, the evidence presented does not support any conclusion that the District deprived Student of FAPE during first grade.

increased over the course of the school year and was approaching expectations by year-end despite the learning disabilities. Although Student's progress on the IEP goals was somewhat variable in second grade, probes at the end of that school year reflected markedly positive trends. This hearing officer concludes that the record establishes meaningful educational benefit and progress based on Student's unique needs and abilities during second grade. The preponderant evidence simply does not support a finding that the District denied Student FAPE during the 2014-15 school year.

In third grade, Student exhibited similar weaknesses in reading fluency and decoding, and the District responded by increasing the amount of time Student was provided special education reading and language arts instruction and support, utilizing materials at Student's individual reading level. A new reading intervention focused on fluency and decoding was introduced to supplement the replacement and regular education reading programs. The IEP developed in February 2016 addressed the various needs that were identified,<sup>14</sup> particularly reading fluency and written expression skills. All students were exposed to speech-to-text software from which Student benefitted, and other strategies such as multisensory instructional approaches were used. Student continued to make variable but overall positive progress toward the IEP goals and was at benchmark levels for oral reading accuracy and comprehension. This hearing officer cannot conclude Student was denied FAPE in any respect during the 2015-16 school year, or that more intensive reading interventions should have been introduced.<sup>15</sup>

Fourth grade, of course, presented a completely different set of circumstances. The Parents contacted the District at the very start of the school year with renewed concerns, and

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<sup>14</sup> Although there was no goal for mathematics computation, Student was provided with small group mathematics remediation and practice.

<sup>15</sup> Notably, even the Parents' private reading specialist did not reach a contrary conclusion with respect to the 2014-15 and 2015-16 school years (N.T. 757-60, 773-79 785-86).

Student's struggles with decoding became immediately apparent. Student's benchmark instructional reading level had declined significantly from the spring of 2016, for no apparent reason,<sup>16</sup> and that decrease was confirmed by other instruments. The District responded by implementing a different reading program based upon Orton-Gillingham principles and adding two new Tier Three interventions. The WIST was administered for the first time in December 2016, reflecting that Student's decoding and encoding skills were very severely below expectations, and other measures confirmed those results. Use of that instrument strongly suggests that the District was considering the Wilson reading program for Student by the middle of the fourth grade school year. In addition, the Parents took the initiative of exploring the potential of an ADHD diagnosis which the District ultimately ruled out. Certainly by the start of the second semester of the 2016-17 school year, the District had sufficient notice that Student's reading and related language arts skills were not being adequately addressed and that immediate and significant changes to the special education program it was providing were necessary. While it cannot be considered inappropriate to have conducted a comprehensive RR in the spring of 2017, there is no reason that the IEP team could not have begun serious reconsideration of the instructional reading programs offered well before the RR was completed, particularly since a number of reading programs had already been implemented for Student without eliciting any marked success. Moreover, the IEP that followed that RR merely increased the time Student would be provided the same Orton-Gillingham reading program that had not yet proven to be effective, eliminating the computer program that had begun in December. Student was also in fourth grade, a year when students are generally expected to be reading to learn rather than

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<sup>16</sup> There is nothing in the record to indicate the reasons for the significant decline. Although the Parents suggest that the District's benchmark testing in the spring of 2016 was very likely flawed and not reliable (Parents' Closing at 6-8), the testimony did not support that contention.

learning to read, and faced the loss of substantial ground from the prior school year. Although the decision to find Student eligible for ESY 2017 was certainly appropriate, the inexplicable failure of the District to take meaningful steps to remedy the inadequacies in its program for Student by the second half of the 2016-17 school year, including the summer of 2017, unquestionably amounted to a denial of FAPE until implementation of the Wilson Reading program in the fall of 2017.

With respect to assistive technology and particularly how it could have and did provide support for reading and writing skill deficits, the record reflects that Student benefitted from the use of speech-to-text software as early as the 2016-17 school year.<sup>17</sup> The Parents' request for an assistive technology evaluation in the spring of 2017 was wholly reasonable, although the District's failure to arrange for such a focused inquiry was clearly not. No IEP prior to that in March 2018 indicated that the team actually considered whether assistive technology might be a necessary component of Student's educational program. The SETT process, and the assistive technology provided as a result, proved to be invaluable for Student to access the curriculum despite significant language disabilities, and provided a formal mechanism for exploring and trialing various options beyond what might be considered standard program modifications/specially designed instruction that were not necessarily available at all times or across environments (such as auditory books and generic computer programs (*see* District Closing at 12)). Here, while the District's initiation of the process and provision of the tools that have helped Student to be successful was appropriate, the delay in making those arrangements operated to deny Student FAPE based on the knowledge that it had as of the first day of the

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<sup>17</sup> This circumstance plainly undermines the testimony that many forms of assistive technology should not be considered prior to the fifth grade school year (N.T. 215-16, 222).

second semester of the 2016-17 school year through the date of the March 2018 IEP (when individualized assistive technology was included in the educational program).

The Parents also challenge other aspects of Student's various IEPs, such as the absence of details on the progress monitoring of the reading fluency and writing goals and the use of some timed assessments despite Student's relatively slow processing speed. (*See, e.g.*, Parents' Closing at 3-5.) As noted above, an IEP must be reasonably calculated to enable the student to receive meaningful educational benefit in light of the student's unique circumstances and potential. However, the law does not demand that an LEA provide a goal for, or particularized data on, "every single recognized need of a disabled student. [Rather,] a FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education." *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff'd*, 581 Fed. App'x 141 (2014). This hearing officer has concluded that the District did deny Student FAPE in several respects for a portion of the time period claimed, as discussed in detail above. With the benefit of hindsight, is entirely possible that different programming decisions could have been made at times. However, the record as a whole does not establish that each and every potential imperfection in the development or implementation of Student's program over time, based on information known as the District attempted to respond to Student's variable performance and skill deficits, was significant enough so as to amount to a denial of FAPE before late 2016. Nevertheless, the award of compensatory education is intended to remedy in total the deficiencies that operated to deny Student FAPE.

## REMEDIES

### COMPENSATORY EDUCATION

As a remedy for the FAPE denial, found above, the Parents seek compensatory education, which is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C.*, *supra*, 81 F.3d at 397 (3d Cir. 1996). This type of award may 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 more recently also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is designed “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) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award equal to the amount of the deprivation shall therefore be utilized.

As discussed above, this hearing officer concludes that the District denied Student FAPE with respect to addressing reading and related language arts needs, including assistive

technology, since the start of the second semester of the 2016-17 school year. That starting point provides a reasonable rectification period after the District discovered in November and December of 2016 that Student's language deficits were much greater than previously understood, and assistive technology needs were surely evident by that point. The one hour of special education reading instruction provided in the August 2017 IEP, combined with an estimated one hour per day that assistive technology would likely have been routinely available with significant benefit to Student, shall be the amount of compensatory education awarded. The period of the compensatory education for reading and language arts instruction shall extend to the end of that school year and for the days that ESY was in session in 2017, since the Wilson Reading program that was appropriate for Student did not begin until the start of the 2017-18 school year. The period of the compensatory education for assistive technology shall begin with the first day of the second semester of the 2016-17 school year through March 27, 2018, the date of Student's most recent IEP providing for such services and tools.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by



appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

#### REIMBURSEMENT FOR PRIVATE READING EVALUATION

Lastly, the Parents seek reimbursement for the evaluation conducted by their private reading specialist. Review of the District's March 2017 RR reflects that it utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student's strengths and weaknesses. There is nothing in that RR that suggests that it is anything other than sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability.

Although the Parents did disagree with the District's March 2017 RR, the private evaluation was quite narrow in scope and did not provide a wealth of new information; on the contrary, it was consistent with the District's most recent data including its administration of the latest version of the PAL (PAL-2). The March 2018 IEP did incorporate most if not all of the private reading specialist's recommendations; yet, as a whole, those were not novel suggestions that went beyond the District's own to any meaningful extent.<sup>18</sup> There is, simply put, nothing in the record to support a conclusion that reimbursement for that evaluation would be appropriate. Here, the District was required to, and did, consider its results, and doing so indicates that the IEP team participated in a collaborative process based on all available information in August

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<sup>18</sup> The private reading specialist did specifically recommend the Wilson Reading program (N.T. 731-33, 763) even though it was not named in the evaluation report itself described it in clear terms. However, as noted above, the District's administration of the WIST to Student during the 2015-16 school year suggests that it, or a similar intensive reading program, was already under the District's consideration.

2017. However, the evidence does not establish that the District should be required to fund the cost of that private reading evaluation.

## **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did deny Student FAPE with respect to its program for reading and language arts instruction, as well as assistive technology needs, for a portion of the time period in question. Student shall be awarded compensatory education to remedy the deprivation, but the Parents will not be reimbursed for the cost of the privately obtained reading evaluation.

## **ORDER**

AND NOW, this 20<sup>th</sup> day of November, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's programs as developed and implemented for the 2014-15 and 2015-16 school years were appropriate for Student.
2. For the 2016-17 and 2017-18 school years, the District denied Student appropriate programming with respect to reading and related language arts instruction and assistive technology as of December 2016. The denial continued through the end of the 2016-17 school year and ESY 2017 for reading and related language arts instruction, and through the date of the March 2018 IEP for assistive technology needs.
3. Student is entitled to compensatory education in the amount of one hour per day for each day that the District was in session from the first day of the second semester of the 2016-17 school year through the end of the 2016-17 school year, in addition to one hour per day for each day that ESY was in session in 2017, for reading and related language arts instruction; and one hour per day for each day the District was in session from the first day of the second semester of the 2016-17 school year through the end of the 2016-17

school year and from the first day of the 2017-18 school year through the date of the March 2018 IEP for assistive technology services. During the period of overlap (*i.e.*, the entire second semester of the 2016-17 school year), the total compensatory education is two hours per day. This award of compensatory education is also subject to the following conditions.

- a. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress.
  - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18).
  - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.
4. 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** and **DISMISSED**.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 19139-1617KE