

*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: 19416-16-17**

**Child's Name:** R.F.

**Date of Birth:** [redacted]

**Dates of Hearing:**

9/8/2017, 12/7/2017 and 12/8/2017

**Parent:**

Redacted

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**Hearing Officer:** Charles W. Jelley Esq.

**Date of Decision:** 01/26/18

The Parents submit that at all relevant times the District failed to timely and appropriately evaluate or provide the Student with an appropriate educational program and placement, as required by the Individuals with Disabilities Education Act (IDEA) or Section 504 (Section 504) of the Rehabilitation Act.<sup>1</sup>

In 2016, after providing the District with the results of an Independent Education Evaluation (IEE) and participating in a series of Individualized Education Program (IEP) or Section 504 meetings, the Parents unilaterally placed the Student in a private school. To remedy the alleged denial of a free appropriate public education (FAPE), the Parents are seeking compensatory education and tuition reimbursement.<sup>2</sup> The District counters that at all times relevant, consistent with the IDEA and/or Section 504, the Student received necessary services, accommodations, and/or specially-designed instruction, along with ambitious goals. The hearing was concluded after three lengthy sessions.

After reviewing all of the exhibits and hearing all of the testimony from multiple witnesses, I find the Parents failed to meet their burden of proof.<sup>3</sup> Therefore, all of the Parents' IDEA and Section 504 denial of FAPE claims are denied.

## Issues

1. During the 2014-2015 school year, did the District provide the Student with an appropriate education; if not, should the hearing officer award compensatory education?
2. During the 2015-2016 school year, did the District provide the Student with an appropriate education; if not, should the hearing officer award compensatory education?
3. During the 2016-2017 school year, did the District provide the Student with an appropriate education; if not, should the hearing officer award compensatory education and/or tuition reimbursement?
4. During the 2017-2018 school year, did the District offer the Student an appropriate education; if not, should the hearing officer award tuition reimbursement?

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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. The Parents filed the action pursuant to the Individuals with Disabilities Education Act 20 U.S.C. §§ 1400-1482 and Section 504 of the Rehabilitation Act 29 U.S.C. § 794.

<sup>2</sup> Student's Parents filed the complaint and the Parents both participated throughout the proceedings.

<sup>3</sup> References to the record will be made as follows: Notes of Testimony (N.T.), Joint Exhibits (J), Parent Exhibits (P-), School District Exhibits (S-), and Hearing Officer Exhibits (HO-).

## Findings of Fact

### Background

1. Prior to enrolling in the District in January 2014, the Student attended elementary school out of state for kindergarten until 2nd grade (N.T., at 40-41).
2. The Student transitioned into the District with an Individualized Education Program (“IEP”) from the out of state district (P-3).
3. The out of state IEP included a variety of classroom modifications and eight goals that broke down the Student’s speech needs into several distinct speech and language skill areas. The out of state IEP included articulation, grammar/writing, auditory memory and processing skills, social/pragmatic language and listening skills, handwriting, posture, and daily living skills goals (P-3). The out of state IEP provided for an hour per week of speech and language therapy, an hour per week of occupational therapy and an hour per week of physical therapy (P-3).
4. The records noted that the Student had difficulty making friends and the records indicate that a social group was suggested (S-6, S-7). The records also noted that the Student had difficulty with motor planning, and gross and fine motor skills (P-3, S-6, S-7).
5. The previous school district’s and Parent’s private evaluations note that the Student had also been diagnosed with an Auditory Processing Disorder (APD) and visual processing deficits that, at that time, impacted reading. The District agreed with the Parents that the Student’s APD is a disability (P-1, P-2).
6. The Student has a history of other educationally related disabilities/diagnoses including an Unspecified Communication Disorder, Developmental Coordination Disorder, and deficits in working memory and executive control (P-1, P-2, P-27, S-6, S-7; N.T., at 40-48).

## **The 2014-2015 School Year - The District's First Evaluation**

7. At the start of 3rd grade, during the 2014-2015 school year, the Student continued to receive services from the District under the out-of-state IEP with the classification of Speech and Language Impairment ("SLI") . In early to mid-September 2014, the District issued a Permission to Evaluate ("PTE"), and began to prepare a comprehensive Evaluation Report (ER). (P-5, P-10, P-11).
8. To assess the Student's cognitive functioning, the evaluator administered the Kaufman Brief Intelligence Test ("KBIT-2") which noted an average full-scale composite IQ of 104. To assess academic achievement the evaluation included several, but not all, of the Wechsler Individual Achievement Test-Third Edition ("WIAT-III") subtests. The limited WIAT-III testing noted below-average Early Reading skills. The WIAT-III also indicated average Total Reading, Average Basic Reading, Average Reading Comprehension and Fluency, Average Written Expression and Above Average Mathematics (P-10 pp.3-4).
9. Overall, the Student was performing in the average ranges across reading, math and writing skills. The Student's reading level, as a 3<sup>rd</sup> grader, was on grade level and was above benchmarks on 3<sup>rd</sup> grade DIBELS Oral Reading Fluency and Comprehension assessments (P-10 p.21).
10. Consistent with previous assessments from the other school district, the District's assessments showed no significant ongoing academic achievement concerns (S-10 pp.3-4, S-6 pp.8-9).
11. To assess the Student's speech and language skills, the District administered the Test of Narrative Language, the Comprehensive Assessment of Spoken Language (CASL), the Prosody Screening Test and the Arizona Articulation Proficiency Scale-3 (AAPS-3) (P-10 pp.8-9).
12. On the CASL the evaluator administered the Core Composite subtests. On the Antonyms subtest, the Student earned an Average Standard Score (SS) of 116. On the Syntax Construction measure, the Student earned an Average SS of 104. On the Nonliteral Language Scale, the Student earned an Average SS of 110. On the Paragraph Comprehension measure the Student earned a SS of 131. On the Pragmatic judgment measurement

- of knowledge and use of pragmatic language rules application the Student earned a SS of 98 (P-10 p.6).
13. On the AAPS-3, an assessment of speech sound production at the word level, the Student exhibited reduced speech intelligibility and accuracy of speech sound production as sentence length and complexity increased. The Student also exhibited low voice volume, syllable reduction difficulties within multisyllabic words, irregular verbs, irregular speech rate, slurred speech and monotone speech that often began loud and trailed off to a murmur. The evaluator also noted the Student's thoughts, during speaking, were often disorganized (P-10 p.6).
  14. On the Prosody<sup>4</sup> Screening Test, the Student demonstrated the ability to modify voice volume in social situations. The Student demonstrated reduced ability to stress words within sentences with natural tone. The Student demonstrated the ability to detect sarcasm, determine emotions in expressive and receptive language and understand how to group words and phrases together using light pauses to indicate where one word, phrase or sentence ends and another began (P-10 p.7).
  15. The Student's speech and language assessments indicated the Student had average performance on expressive and receptive language measures; however, the ER also noted the Student had difficulties with organization, sequencing and decreased speech intelligibility (P-10 p.21).
  16. The evaluation included multiple measures of Auditory Processing, which indicated a weakness in that area (P-10 p.12).
  17. On the Wide Range Assessment of Visual Motor Abilities, the Student's SS ranged from a low of 99 to a high of 119 (P-10 p.16).
  18. The OT assessment indicated the Student had Above Average Visual Spatial skills and Average Motor skills. However, the OT assessment also found that the Student used an awkward grasp pattern that affected

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<sup>4</sup> Prosody is the study of the tone and rhythm of speech and how these features contribute to meaning. Prosody is the study of those aspects of speech and language that typically apply to a level above that of the individual phoneme and targets the sequences of words. Introduction to Prosody - Speech Resource Pages - Macquarie ... [clas.mq.edu.au/speech/phonetics/phonology/intonation/prosody.html](http://clas.mq.edu.au/speech/phonetics/phonology/intonation/prosody.html) Jul 23, 2015

the Student's writing endurance. The evaluation team recommended the Student continue to receive OT support in school (P-10 p.21).

19. The 2014 testing did not include any social or emotional testing (P-10).
20. The team concluded that the Student had an Auditory Processing Disorder and recommended that Student continue to receive Speech and Language Support (P-10 p.21).
21. The District's first evaluation team and the IEP team initially found the Student was eligible under the IDEA as a person with a speech impairment (P-5, P-10, P-11).

### **The 2014-2015 School Year – The District's First IEP**

22. In December 2014 the IEP team developed an IEP, with specially-designed instruction to address speech and language needs (P-5, P-10, P-11). The IEP also included specially-designed instruction to address the Student's APD needs (P-5, P-10, P-11).
23. The IEP included two speech and language goals and five short-term instructional objectives, rather than the eight goals in the transfer out-of-state IEP (P-11 pp.17-19).
24. The IEP included 12 different forms of specially-designed instruction (P-11 pp.19-20).
25. The specially-designed instruction targeted listening, frequent breaks, thought organization for narrative language communication skills, and repetition of instruction, along with pragmatic and prosodic aspects of speech to increase intelligibility and address Student's APD. The IEP also contained a number of accommodations designed to address Student's auditory processing disorder (S-10 p.8, P-11 pp.17-20).
26. The Student continued to receive speech and language therapy throughout the third grade and the start of fourth grade (S-11 pp.18-19).

## October 2015 - Testing by a Private Evaluator

27. Early in the 4th grade, the Parents began having concerns about Student's reading (N.T. pp.66-68; P-14).
28. In October 2015, the Student's reading achievement was privately evaluated. The private evaluator used portions of the Woodcock Reading Mastery Test to assess reading. The Student's reading scores ranged from well below average to below average, with standard scores ranging from a low of 55 to a high of 76. For example, the Student earned a SS of 68 in Word Identification, a SS of 64 in Word Attack, a SS of 61 in Word Comprehension, a SS of 55 in Passage Comprehension, a SS of 55 in Listening Comprehension, a SS of 65 in Basic Skills Cluster, a SS of 56 in Reading Comprehension and a SS of 76 in Oral Reading Fluency.<sup>5</sup> The assessor suggested a speech and language evaluation to build language skills (P-14 p.2, N.T. pp.66-68).
29. According to the private evaluation, as a 4<sup>th</sup> grader, the Student's grade equivalent reading scores ranged from a low of K.1 to a high of 2.0, with most scores in the 1st-grade range. Overall, Student's Woodcock Reading Mastery Test III (WRMT III) indicated the Student was performing two grades below the then current grade level (P-14 p.1).<sup>6</sup>
30. A copy of the results of the private Woodcock Reading Mastery Test was provided to the District. Although the District received the results of the private testing the District did not administer any further norm-referenced assessment of the Student's reading levels to attempt to resolve the discrepancy with its own previous testing and that of the out-of-state district. (N.T. at 72-73).

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<sup>5</sup> These scores were widely divergent from normed assessment scores Student earned the previous year, and from Student's classroom performance, as well as from data from the previous school district. The parties did not address this anomaly on the record, and the hearing officer can only speculate about the reason for the divergence.

<sup>6</sup> See above.

## **Speech Therapy Services, Review of Existing Data, and a Proposed**

### **Reevaluation**

31. After implementing the IEP for several weeks and after reviewing the existing data during the fall of the 2015-2016 school year, the speech therapist determined that the Student had mastered the IEP speech goals (P-15, P-16, P-17).
32. On November 16, 2015, the speech therapist sent a PTE to the Parents (P-15). When the Parents did not return the PTE, the therapist made several calls to the Parents. When the Parents still did not return the PTE the therapist completed and forwarded a reevaluation consisting of a record review and progress data to the Parents (P-16).

### **The District's Second IEP – December 2015**

33. Another IEP was generated in December 2015. As the Parents did not approve a speech/language reevaluation the IEP did not include any updated speech/language present levels; the IEP also did not consider or include any discussion of the October 2015 privately administered Woodcock Reading Mastery Test results. The IEP team considered the Student's fourth-grade Proficient Reading score on the Pennsylvania System of School Assessment (PSSA) and the Student's English and Language Arts (ELA) passing "B-" grade (P-16 p.3, S-25, N.T. 577).
34. The December 2015 IEP reduced the level of speech instruction from one (1) hour per week to 30 minutes per week; reduced occupational therapy services from one (1) hour per week to 15 minutes per month, and removed altogether the hour per week of physical therapy provided under the out-of-state IEP (Compare P-3, at 1 to P-11, at 30).
35. The District issued a Notice of Recommended Educational Placement (NOREP) that proposed that all specially-designed instruction, including speech and language instruction supports that had been in the fourth grade IEP, stop (S-19). However, at the same time, in light of the Student's APD, the District offered to continue to support the Student's APD needs by providing a Section 504 Agreement, with accommodations rather than specially-designed instruction (P-16).



36. The District then prepared and offered a Section 504 Agreement (P-11 to P-25; N.T. at 187-196).
37. When the Parent disagreed with the District's proposed action to eliminate speech and language instruction, the District issued another PTE (P-19).

### **The March 11, 2016, Reevaluation Report**

38. On March 11, 2016, the District issued a Reevaluation Report (P-21).
39. The Parents had enrolled the Student in private speech/language therapy and private occupational therapy. The March 11, 2016, RR summarized assessments from the private providers. On the Test of Auditory Processing Skills, the Student's Scaled Scores ranged from a low of 2 to a high of 10. A Scaled Score on the Test of Auditory Processing Skills of 8 or above is within normal limits. On the Word Discrimination, Phonological Segmentation and Memory assessment the Student earned a Phonological Blending SS of 78. A SS of 85 is deemed within normal limits (P-21 p.6 and 7).
40. When the Student was assessed with the Arizona Articulation Proficiency Scale-3<sup>rd</sup> Edition, the Student earned a Total Score of 100, indicating the test results were within "Normal Limits" (P-21 p.7).
41. The private occupational therapist recommended the Student receive OT 1 time a week for 6 months (P-21 p.8).
42. The March 2016 RR included teacher observation, along with input and statements from the Student's teachers that the Student is "off task frequently and needs to be redirected," "struggles to complete assignments . . . [and] does not finish assignments in class," "struggles to pay attention," "struggles a bit socially," "doesn't always pick up on social cues," "speech tone is not always appropriate," "doesn't really say please or thank you," and "has no problem just interrupting to say what [Student] wants to say" (P-11 p.14).

43. The District again concluded that Student was not eligible for special education services under the IDEA. Shortly following the issuance of the March 2016 RR, the School District ceased providing special education services to Student. (N.T., at 94, 197-198).
44. Although the District members of the March 2016 reevaluation team concluded that the Student was no longer eligible for speech and language services, the team did, however, conclude that many of the IEP SDIs should continue as Section 504 Service Agreement accommodations (compare P-11 to P-25; N.T., pp.187-196, P-21, N.T., at 292).
45. On April 8, 2016, the District issued a NOREP, which discontinued the direct speech and language supports, specially-designed instruction and OT (P-25 p.6).
46. On or about April 8, 2016, the District offered the Student a Section 504 Service Agreement (P-25).
47. Although the Parents did not believe the 504 Service Agreement was appropriate, and believed that Student was still eligible for special education under the IDEA, they agreed to its implementation while they sought a privately funded IEE (P-24, N.T., at 84-85, 94).

### **Parent-funded Independent Evaluation**

48. On July 14, 2016, and again on July 21, 2016, a private evaluator administered a variety of standardized assessments including the Differential Abilities Scales-Third Edition (DAS III). The DAS-III is a comprehensive and flexible instrument that assesses conceptual and reasoning abilities (P-27 p.10).
49. On the DAS III, the Student exhibited average Verbal Reasoning, earning a standard score (SS) of 105. On the Nonverbal Reasoning and the Spatial Measurements assessments the Student earned an average SS of 108 and of 102 respectively. The Student earned a borderline Working Memory SS of 78. The Student earned a DAS III Processing Speed score of 85 which is in the low average range (P-27 p.11).

50. On the DAS-III Visuospatial assessment measurements, the scores were mildly variable across tasks. For example, while the Student was able to reproduce simple abstract line drawings, the Student struggled with working memory, retrieval and graphomotor planning skills which impeded performance to recall and execute complex drawings with many parts. The evaluator noted that the Student lacked basic pragmatic skills and at times reached for items and blocks in an impulsive manner which reflected weakness in social awareness and perspective taking/monitoring (P-27 p.13).
51. In terms of attention, the Student earned low average and below age expectations scores on the auditory digits span forward assessment (DAS-III Recall of Digits Forward T=43). The Student's attention and executive functioning scores were in the average to the low average range (P-27 p.13-14).
52. The Student received average Information Processing scores, but at the same time, performed at the borderline ranges in terms of overall completion time. When asked to divide attention and label two (2) characteristics of a presented object, the Student's SS of 85 was in the low average range (P-27 p.14-15).
53. To assess the Student's articulation and social conversation skills the evaluator used the Developmental Neuropsychological Assessment (NEPSY –II). The Student reportedly earned a low average SS of 6 on the Comprehension of Instruction scale and a below age expectation Oromotor Sequences score of 11. The Oromotor Sequence Score indicates the Student was unable to maintain oromotor control or repeat a sequence over time. The Student struggled with the /r/, /i/ and /th/ sounds as well as some consonant combinations. In terms of verbal fluency, word generation on timed letter fluency tasks, the Student earned between the borderline and very low range on the DKEFS Letter Fluency (P-27 p.11).
54. On the Comprehensive Assessment of Spoken Language (CASL) the Student's basic language and pragmatic skills were assessed at a SS of 98, in the average range, while on the Syntax Construction subtest the Student earned a SS of 89, in the low average range. The Student lost points due to weak working memory and struggled with auditory

- processing and comprehension tasks. Overall, the Student's CASL scores were very similar to the scores recorded in the 2016 RR (P-27 pp.12-13).
55. When asked to learn and recall up to 14 items presented over multiple trials on the CMS Word List subtest, the Student performed below age expectation with a SS of 4. The Student exhibited weaknesses regarding auditory processing and organized encoding strategies. On the Stories subtest, from the CMS, the Student's verbal comprehension and oral narrative memory skills were below average. The Student received a below average score when asked to recall a story after a 25-second delay (P-27 p.15).
56. The Student's overall academic achievement skills were privately assessed using a variety of instruments such as the Woodcock-Johnson Tests of Achievement, Fourth Edition ("WJ-IV") – which is similar to the WIAT-III administered by the District – the Comprehensive Test of Phonological Processing-2 ("CTOPP-2"), the Test of Written Language-4 ("TOWL-4"), the Gray Oral Reading Test – 5 ("GORT-5"), and the Test of Word Reading Efficiency ("TOWRE") (P-21, at 16-18).
57. The Student's overall WJ-IV Broad Reading SS of 87 is at the high end of the low average range and was variable across tasks. The Student's Letter Word Identification SS of 87, on single word reading skills falls within the low average range. The Student's Word Attack SS of 88, assessing phonological awareness and decoding skills is in the low average range. The Student's reading comprehension skills, SS of 92, as assessed on the Passage Comprehension subtest is in the low average range. The Student made numerous errors due to the confusion of long/short vowel sounds and displayed incorrect retrieval of sound skills and similar errors sequencing multiple phonemes and morphemes. The Student showed mild difficulty on demanding high level reading passages and struggled to identify meaning and identify missing words. The Student's Sentence Reading Fluency SS of 88 is at the higher end of the low average range (P-27 pp.16-17).
58. With regard to reading efficiency, the Student scored at the lower end of the average range on the Test of Word Reading Efficiency - Second Edition (TOWRE-2). The Student lost points due to skipped items and reduced retrieval skills. The Student's SS of 87 represents an overall phonemic decoding efficiency in the below average range. The Student

made errors due to incorrect retrieval/processing of vowels, and added and at the same time omitted consonants (P-27 p.17).

59. To determine the Student's reading-related phonological processing skills, the evaluator administered the Comprehensive Test of Phonological Processing—Second Edition (CTOPP-2). The CTOPP-2 is designed to assess phonological processing and naming speed. The Student earned a SS of 5 in Ellison and a SS of 4 on Phoneme Isolation, both in the borderline to the very low range. The Student has trouble with sounds in the middle of longer words to form new words and has working memory weaknesses. The Student's scores are in the borderline range, in comparison to peers when asked to blend orally presented sounds in words. The Student had similar scores in the low average to the borderline range when required to rotely repeat presented non-words. The Student's low average skills were also noted on sustained attention tasks related to the Memory for Digits subtest (P-27 p.17).
60. Overall, the CTOPP-2 identified significant weaknesses and delays with regard to phonological awareness -SS 76- and working memory -SS 79- along with delays in Rapid Symbolic Naming-SS 73. This set of scores indicates that the Student struggles with working memory, information processing and organizational/retrieval skills (P-27 p.17).
61. The Gray Oral Reading Tests-Fifth Edition (GORT-5) was administered to evaluate the Student's reading fluency and comprehension skills. On this particular measure, the Student's oral reading fluency was in the borderline range (P-27 pp.17-18).
62. On the GORT-5 the Student's reading rates were in the below average range and the Student made numerous accuracy errors, such as, "you" for "we," "and" for "then," and "father" for "farmer". Likewise, the Student omitted and added some words when reading. The Student's reading comprehension was in the low average range and in the below age/grade expectations range. Overall the Student had trouble with identifying main ideas, and mood/feeling, along with difficulties with verbal retrieval (P-27 p.17).
63. The Student's WJ-IV- Broad Math skills SS of 117 is in the above average range, noting strengths in Broad Math (P-27 p.18).

64. The Student's spelling and written language standard scores on the WJ-IV are in the low average range -Spelling SS 86, Writing Samples SS 80 and Written Language SS 82. The Student's Sentence Writing Fluency SS of 87 is within the low average range. When asked to write a story to accompany a theoretically complex picture the Student produced a single brief paragraph; TOWL Contextual Convention SS =6, Story Construction SS =6. The Student's story lacked clear beginning/middle/ending, and omitted emotion, theme and character development. Also, numerous errors included the total lack of application of writing mechanics, such as inconsistent capitalization/punctuation, misspelling, incomplete phrases/sentences and missing words/endings (P-27 pp.18-19).
65. To assess the Student's behavioral/emotional and adaptive functions the Parents and two teachers completed the Behavior Rating Inventory of Executive Function (BRIEF). The Student's overall index, the Global Executive Composite (GEC), was within the average range across parent and teacher forms. However, one Parent reported significant problems related to changes in routines and problem solving (P-27 p.19).
66. On the Behavior Assessment System for Children, Third Edition (BASC-3) when both Parents' scores were reviewed together, concerns in the home were noted in the areas of withdrawal, depressed mood, atypical behaviors, and reduced adaptive skills such as flexibility/adaptability, social skills, functional communication, leadership and activities of daily living. When the two teachers' BASC-2 forms were reviewed, the only endorsed concern in the "at risk" range, in the school, was withdrawal (P-27 p.19).
67. On the Social Responsiveness Scale-Second Edition (SRS-2) an assessment of interpersonal behavior, communication, and repetitive/stereotypic behavior, both Parents scored the Student in the moderately elevated level. For example, the Parents reported moderately elevated concerns in the home setting including Social Motivation, Social Communication, and Social Awareness, along with Restricted Interests and Repetitive Behaviors (P-27 p.19).
68. To assess adaptive skills, the Parents were asked to complete the informant report forms of the Adaptive Behavior Assessment System - III (ABAS-III). The ABAS-III is a comprehensive and norm-referenced

evaluation of independence in terms of everyday functional life. The results indicate specific concerns regarding conceptual, social, leisure, communication and home living skills (Parent 1 GAC 86 vs. Parent 2 GAC of 90) (P-27 p.19).

69. On the Beck Youth Combination Booklet-II, the Student denied any personal struggles (P-27 p.19).
70. The private evaluator concluded that the Student met the criteria for IDEA eligibility as a Student with a Specific Learning Disability, with needs in spelling, written language, reading and executive functioning. The evaluator also concluded that the Student's language, auditory processing and learning based needs required specially-designed intervention as do the Student's pragmatic language skills. The evaluator further opined that due to deficits in using communication for social purposes, lack of initiation and lack of reciprocal interactions the Student met the criteria for an Unspecified Communication Disorder and a Developmental Coordination Disorder. The evaluator then made 27 recommendations for various specially-designed instructions, accommodations, supports, and programming that the Student needed to make progress in school (P-27 pp.21-26).

### **The District's Reevaluation Following the IEE**

71. After receiving and reviewing the IEE, the District issued another PTE and with Parent approval the District reevaluated the Student (P-28).
72. The November 30, 2016, RR included a review of the Student's assessment history since enrolling in the District, a twenty minute observation of the Student by the District psychologist, a narrative report by the occupational therapist without testing, along with teacher observations (P-29 pp.7-8).
73. Based upon the Student's performance in reading during 5<sup>th</sup> grade, the Student had been placed into a Response to Intervention and Instruction Tier 2 (RtII) reading intervention, call Read Naturally, 5 out of 6 days for 30 minutes. At first, the Student's progress was monitored on a biweekly basis, using the 4<sup>th</sup>-grade level probes. Initially, the Student read 123 words correct per minute (wcpm), with 98% accuracy, then 113 wcpm with 95% accuracy and then 127 wcpm with 96% accuracy. The

- Student's wcpm data exceeded the 4<sup>th</sup>-grade benchmark of 118 wcpm. Therefore, the RtII progress monitoring was increased to 5<sup>th</sup>-grade level. At the 5<sup>th</sup> grade level the Student's reading 115 wcpm at 97%, slightly exceeded the expected fall benchmark wcpm score of 111 (P-29 p.12).
74. The RR reported responses on the Student's writing prompt scores on the District-wide assessment of all students. On the First and Second quarter writing prompt assessments, a score of 3 is considered meeting benchmark; the Student's scores across the six areas range from a low of 1.0 to a high of 3.0. Out of a total of 12 possible scores, the Student earned 6 scores at 2.0 level, 1 score at the 2.5 level, 4 scores at the 3.0 level and 1 score at the 1.0 level (P-29 p.12).
75. As part of the November 30, 2016 evaluation, the District psychologist administered the TOWL- 4 subtests of Written Language. To determine which TOWL- 4 format the private evaluator had used so as not to be duplicative the psychologist called the private evaluator; when the call was not returned the District psychologist asked the Student which prompt was used, and relying on the Student's response, the District psychologist administered the Form A story prompt and the Form B Writing Subtests (P-29 p.13).
76. On the TOWL- 4 subtests of Written Language, the Student earned a below average SS of 7 at the 16<sup>th</sup> percentile in Vocabulary, a below average SS of 7 at the 16<sup>th</sup> percentile in Spelling, a poor SS of 5 in Punctuation at the 5<sup>th</sup> percentile, an average SS of 8 at the 25<sup>th</sup> percentile in Logical Sentences, an average SS of 9 at the 37<sup>th</sup> percentile in sentence Combining, a below average SS of 84 at the 14<sup>th</sup> percentile in Contrived Writing, an average SS of 11 at the 63<sup>rd</sup> percentile in Contextual Conventions, a below average SS of 7 at the 16<sup>th</sup> percentile in Story Composition, and a Spontaneous Composite Average SS of 96 at the 39<sup>th</sup> percentile (P-29 p.13).
77. After reviewing the RR data, the IEE, the March 2016 WIAT-III results, the Student's below benchmark DIBELS fall 2016 reading data and the 5<sup>th</sup> grade RtII progress monitoring, the District members of the evaluation team rejected the IEE evaluator's findings that the Student's disability was dyslexia (P-29).



78. The District members of the evaluation team also concluded that the Student did not meet the IDEA eligibility criteria for an educationally based SLD in reading, since the Student's performance was not significantly below grade level expectations (P-29 p.14).
79. The District and the Parent agreed after reviewing the RR and the IEE that the Student did meet IDEA criteria, as Student with a SLD, in written expression (P-29 p.14).
80. The Parties agreed the Student does not meet IDEA criteria, as a Student with a SLD, in Math (P-29 p.15).
81. After reviewing the existing data, the District members of the team concluded that the Student did not qualify as a Student with a speech and language disability (P-29 p.15).
82. The District then issued another RR on November 30, 2016. The District concluded that the Student was eligible for special education as a child with an SLD, but only as related to written expression (P-29).

### **December 2016 IEP**

83. In December 2016 the District offered the Student an IEP containing one written expression goal and 19 SDIs (P-30 and P-32).
84. The SDIs in the December 2016 IEP included all of the APD accommodations included in the Student's Section 504 Agreement, with the addition of modified spelling lists and consultative OT services (Compare P-25 pp.3-4 vs. P-30 pp. 22-23; N.T., p.254).
85. The special education teacher involved in the development of the December 2016 IEP testified that several of the Section 504 accommodations were actually IEP-like specially-designed instruction (N.T., at 292).
86. After comparing the IEE recommendations with the December 2016 IEP, the Parents rejected the December IEP and NOREP and placed the Student at the private school in January 2017 (P-31, P-32).

87. In February 2017 the IEP team met to review and respond to the Parents' rejection of the December IEP and NOREP (P-32 p.13-15).
88. After reviewing the IEE evaluator's recommendations, the District revised the SDIs to include supplemental instruction in reading 2 days per cycle and written expression 3 days per cycle in the RtII classroom, totaling 5 times per 6-day cycle for 30 minutes (P-29 p.38).
89. The February 2017 IEP proposed that the Student receive supplemental instruction three times per cycle. The IEP included the related service of consultative OT therapy to address any needed modifications, along with OT strategies as an accommodation. All of the APD accommodations provided in the Section 504 Agreement were incorporated into the February 2017 IEP as SDIs (P-32 pp.29-29, S-33 pp.21-22).
90. To address the Parents' concerns about the Student's social skills, the District agreed to provide the Student with a social skills group with the guidance counselor (S-33 p.22).
91. The February 2017 IEP called for the Student to be educated, with peers, 100% of the time in the regular education curriculum (S-33 p.24).
92. On February 23, 2017, the Parents returned the NOREP and rejected the District's proposed action (S-34 p.2).

### **Review of Reading Performance and Interventions**

93. The Student entered third grade demonstrating average reading skills in fluency, comprehension, and decoding. The Student's overall Total Reading composite score was a standard score of 93, in the average range (S-10 pp.3-4).
94. In third grade, initial Dynamic Indicators of Basic Early Literacy Skills (DIBELS) benchmark testing showed the Student was above benchmark in both reading fluency and comprehension. The academic performance in third-grade reading either met or exceeded expectations (S-10 p.2, S-14 p.2).

95. Based upon Student's accuracy scores on the DIBELS benchmark testing, the Student was provided with Tier 2 RTII instruction supervised by the reading specialist for five days per week for thirty minutes using the Sonday program (S-16 p.1; N.T. 549).
96. The Student's benchmark testing and bi-weekly progress monitoring shows that the Student made substantial progress over the third grade year in all reading categories. The Student finished the third grade school year well above the cut-off point for risk (S-36 pp.1-4).
97. The Student scored Proficient on the third-grade PSSAs for English Language Arts (S-13).
98. At the start of 4<sup>th</sup> grade, the Student's benchmark scores for reading were well above the cut-off point for risk, nearing the 50<sup>th</sup> percentile in both Retell Comprehension and Oral Reading Fluency. At the start of 4<sup>th</sup> grade, the Student was not flagged for RTII intervention because the benchmark scores were at or above benchmark in all categories. Mid-year benchmark testing in January showed solidly average fluency near the 50<sup>th</sup> percentile but showed a substantial drop in the DAZE comprehension assessment (S-36 p.2-3).
99. Based upon this mid-year benchmark testing, the Student was given RTII tier 2 intervention/instruction targeting reading comprehension, for the second half of 4<sup>th</sup> grade using both Soar to Success and My Sidewalks, both of which are research-based reading instructional programs (S-26 p.2; N.T. 572, 575).
100. By the end of the year, the Student's DAZE comprehension benchmark had recovered substantially to a score of 23, just one point below the benchmark of 24 (S-36 pp. 2, 11).
101. End of the year 4<sup>th</sup> grade benchmark scores for Oral Reading Fluency and Retell Comprehension remained above the cut-off point for further interventions (S-36 p.2).
102. Across the year, bi-weekly progress monitoring and benchmark scores showed that the Student was making progress in reading (S-32 p.2).

103. The Student's 4<sup>th</sup>-grade report card grades are consistent with the DIBELS benchmark testing; the Student earned average scores for English Language Arts. The ELA teacher also noted improvement across the school year (S-26 p.1).
104. The Student's fifth grade Fall benchmarks exhibited a change in the Student's skill set – while the DAZE comprehension score was now above the cut-off point for risk, the DIBELS Oral Reading Fluency Reading Fluency (DORF) benchmark scores dropped below the District cut-off score (S-36 p.2).
105. The Tier 2 RTII interventions were again delivered – this time using the research-based Read Naturally curriculum, which targets fluency. The Read Naturally intervention yielded growth in reading fluency, with the Student's scores increasing from 82 to 112 by the mid-year benchmark (S-36 p.2, N.T. 264-265, 584).
106. At the 5<sup>th</sup> grade mid-year point, the Student's fluency scores recovered above the cut-off point for risk. The Student's success prompted the intervention team to switch to a different research-based intervention targeting comprehension, as the Student's DAZE score had again fallen below the cut-off point for risk. However, that change was never implemented, as the Student withdrew from the District shortly after the proposal was suggested (N.T. 584-586).
107. Throughout the 5<sup>th</sup> grade school year, the Student's academic performance remained average in the ELA classroom, with the Student earning a 77% for the first marking period and 79% for the second marking period (S-31).
108. The December 2016 and February 2017 IEP teams discussed the Student's reading needs, and each time concluded that the Student was benefiting from and making progress in RtII tier 2 interventions and the general education curriculum (N.T. 591-592).

## **General Legal Principles**

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize 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, rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.<sup>7</sup> Hearing officers, as 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 to be generally credible with respect to the factual matters important to deciding the issues, testifying to the best of his or her recollection; discrepancies may be attributable to a lack of precise memory and differing perspectives. It should also be noted that the Parents are clearly loving and devoted advocates for Student who know Student and Student’s challenges very well and have taken a very active role in Student’s educational programming throughout Student’s lifetime. Additionally, all of the District personnel presented as knowledgeable and experienced professionals dedicated to their fields. In reviewing the record, the testimony of every witness, and the content of each exhibit were carefully considered in issuing this decision, as were the parties’ extremely thorough Closing Arguments that judiciously struck a balance between advocacy and fairness.

## **IDEA PRINCIPLES**

The IDEA and state and federal regulations obligate local education agencies (LEAs) to provide a “free appropriate public education” (FAPE) to

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<sup>7</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

children who are eligible for special education. 20 U.S.C. §1412. 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” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing 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. \* \* \* As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits

obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” *Andrew F.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09) (other citations omitted).

The *Andrew* Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* 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.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Andrew*, *Rowley*, and the IDEA make clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012); *Andrew*, *supra*. Critically, “the measure and adequacy of an IEP can only be determined 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).

The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play “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).

Parents who believe that a public school is not providing or offering FAPE to their child may unilaterally place him or her in a private school and after that seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement is an available remedy for parents to receive the costs associated with their child’s placement in a private school where it is

determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice); *Carter*, *supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Id.*

### **Tuition Reimbursement**

To determine whether parents are entitled to tuition reimbursement, a three-part test is applied. That test is based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test. The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

### **Implementing an Out of State Transfer Student’s IEP**

The IDEA regulations identify how schools can provide FAPE to Students who transfer from one school to another during the school year. Under these regulations, the new school must provide a FAPE, that includes “comparable services” to those described in the student's prior IEP, until the district conducts an evaluation pursuant to 34 C.F.R. §§300.304-300.306 and then develops, adopts, and/or implements a new IEP if appropriate 34 C.F.R. §300.323.; 20 USC 1414(d)(2)(C)(i)(2). The Office of Special Education and Rehabilitative Services, U.S. Department of Education (“OSERS”) interprets the word “comparable” to have the “plain meaning of the word, which is “similar,” or “equivalent.” Therefore, when used with respect to a child who transfers to a new local education agency from a previous local education agency, in the same state “comparable” services means services that are “similar” or “equivalent” to those that were



described in the child’s IEP from the previous public agency, as determined by the child’s newly-designated IEP Team in the new public agency.” Fed. Reg. Vol. 71, No. 156 at 46681 (Aug. 14, 2006). The Office of Special Education Programs (“OSEP”) has also opined that the requirement to provide “comparable services” includes a duty to provide “temporary goals aligned with the annual goals in the student’s prior IEP.” *Letter to Finch*, 56 IDELR 174 (OSEP Aug. 5, 2010).

When the new public agency proposes to conduct an evaluation, it “would be to determine if the child is a child with a disability and to determine the educational needs of the child. Therefore, the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency, which would require parental consent.” Fed. Reg. Vol. 71, No. 156 at 46682 (Aug. 14, 2006).

The status of a transfer student’s out of state IEP was addressed by the Third Circuit in *Michael C. v. Radnor Twp. School District*, 202 F.3d 642 (3rd Cir. 2002). In the *Radnor Twp.* decision, the court held that in the case of an interstate transfer student, the new school district is not required to consider the out of state IEP as continuing in effect in the new state. *Radnor* 202 F.3d at 651. In reaching that decision, the court approved the reliance on administrative decisions and the current Office of Special Education Programs (OSEP) Memorandums. *Id.* 202 F.3d at 649, 650. Therefore, a school district may choose to provide comparable special education services while it pursues an initial evaluation.”<sup>8</sup> *Id*

The OSEP policy memorandums note that after enrolling a student with an IEP from another state, the transferee school district’s first step is to determine whether it will adopt the out of state evaluation and eligibility determination or conduct its own evaluation. After the evaluation, the district and the Parents must meet to develop an IEP. Once the IEP is developed, the district must provide the parents Prior Written Notice *Id.* These principles apply equally when the student moves from one local education agency (LEA) to another in the same state.

## **General Section 504 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

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<sup>8</sup> See also, *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 47 IDELR 166 (OSERS 2007), *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 54 IDELR 297 (OSERS 2010), Memorandum 96-5, 24 IDELR 320 (OSEP 1995), *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

## **Discussion and Analysis of Parents’ Denial of FAPE Claims**

### **The Third Grade 2014-2015 School Year and the Fourth Grade 2015-2016 Claims**

The first issue is whether the District’s 3<sup>rd</sup>-grade educational program for Student was appropriate. The evidence on this issue relates to the entire 2014-2015 school year and the first marking period for the 2015-16 school year. The Parents challenge the programming as it related to the provision of speech and language services and also inferentially claim the District failed to identify an alleged specific learning disability. I disagree with the Parents on both claims.

Prior to enrolling in the District the Student was evaluated and found eligible as a Student with a disability. Upon enrolling in the District, the District, consistent with the applicable regulations, implemented the out of state IEP and agreed to provide the level of speech services, occupational therapy and specially designed instruction identified in the out of state IEP. Shortly after that, after providing proper notice, the District evaluated the Student to determine IDEA eligibility. From 2014 to 2016 the Student was either assessed or evaluated on multiple occasions; therefore, the data is abundant about how the Student reacted to the SDIs and the RtII 2 interventions and the degree, or lack of, progress. The Parties do not dispute the fact that the assessments/evaluations were administered consistent with the test makers’ instructions. That said, the Parties do, however, dispute the interpretation of the reevaluation data and RtII tier 2 interventions.

Shortly after Student’s enrollment, the District conducted its own evaluation. The District’s evaluators used a variety of assessment tools to determine the Student’s unique needs. The initial evaluation included an assessment of the Student’s cognitive ability, academic achievement, speech and language skills, auditory processing and motor skills. Like the out of state assessment reports, the District’s

evaluation did not find any cognitive, academic or achievement weaknesses. After completing the evaluation protocols, the District collected input from the teachers, the therapists and the Parents. The evaluation report also included a review of the Parents' existing third-party private evaluations. Thereafter, the District prepared and forwarded a timely evaluation report to the Parents for further review/input.

Within the applicable timelines, the District prepared and offered an IEP, which at the time it was offered, was a legally sufficient appropriate offer of a FAPE. The IEP included accurate present levels, measurable ambitious goals, related services and specially-designed instruction. The specially-designed instruction was customized to address and remediate the Student's weaknesses. The specially-designed instruction provided the Student with an equally effective opportunity to access the regular education curriculum, in the least restrictive setting. After the IEP was prepared the District provided timely procedural due process notice of its intent to implement the IEP. The Parents agreed to the implementation, which then led to a series of progress reports and report cards, all of which updated the Parents on a regular basis about the Student's level of success and progress. Therefore, I find the initial evaluation was a comprehensive assessment of the Student's IDEA and Section 504 eligibility. I also find the 3<sup>rd</sup> grade IEP was appropriate. For the majority of the school day, the Student was educated in the regular education classroom with age-appropriate peers. To the extent the Student was removed from the regular education classroom, I find the removal was justified in light of the Student's unique circumstance. The third-grade IEP, as offered and delivered, was reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. The Student's progress reports and subsequent standardized testing indicate the services were provided, and that the specially-designed instruction in 3<sup>rd</sup> grade through December of 4<sup>th</sup> grade provided meaningful benefit in advancing the Student's speech and language present levels and skills (Compare P-21, P-24, P-27, P-32, P-33, S-15). Accordingly, I find the 3<sup>rd</sup> grade IEP was appropriate when developed, offered and implemented.

#### **The Fourth Grade school year, relevant assessments and reevaluations**

I disagree with the manner in which the speech therapist, absent actual notice to the Parents of the November PTE and an executed permission to evaluate, reviewed the existing data and prepared the December 2015 reevaluation report. However,

under these facts, I find the error does not rise to the level of an actionable substantive or procedural violation. Accordingly, under these facts, I find the notice error was harmless. The District's rapid correction of the flawed reevaluation process evaded a procedural/substantive violation. Once the Parents disagreed with the December reevaluation results, the District quickly provided the Parents with another legally sufficient PTE. The revised PTE called for a second review of the existing data and new testing/assessments. The January 2016 PTE led to the development of the March 2016 comprehensive reevaluation report.

The March 2016 reevaluation report included a careful review of the existing achievement assessment data, ability measures, speech assessments, reading assessments, OT/PT assessments, past vision assessments, past auditory processing assessments and included a review of the Student's participation in the District-wide and statewide assessments.

The speech therapist, this time, administered three comprehensive norm-referenced assessments of the Student's speech and language unique circumstance/needs. The new testing data indicated that the Student's SS, on the CASL, a recognized speech assessment, was in the "Average" range. Likewise the Test of Narrative Language, also a recognized speech assessment, scores placed the Student at the 92<sup>nd</sup> percentile. The Student's CELF-4 scores at the 75<sup>th</sup> percentile, were consistent with the other assessment results. The review of the speech progress monitoring reports, the teacher input and the two therapist's direct observations corroborated the norm-referenced test data.

The reevaluation included an assessment of the Student's cognitive ability that placed the Student in the Average range. Likewise, the Student's achievement testing scores were in the solidly Average range with three scores in the Above Average Range. The Student's WIAT-III reading scores were within the Average range.

The Student's DIBELS reading benchmark data indicated 4<sup>th</sup>-grade level oral fluency. The reading testing also noted that while the Student's reading comprehension scores dropped, the Student was making gains/progress in the District RtII tier 2 reading interventions. Likewise, the Student's WIAT math test results indicated the Student was performing in the "Advanced" range while the

District's Written Expression benchmark testing on three out of four areas indicated progress.

The OT administered five (5) different measures, which revealed that while the Student does need verbal and visual cues to be attentive, the Student was able to follow classroom routines. Overall the OT data indicates the Student demonstrated above age equivalent perceptual motor functioning.

When the Parents executed the PTE, they noted social/emotional/social concerns. The reevaluation report included two different assessments of the Student's behavior. While the emotional assessment summaries/data noted a difference of opinion between the teachers and the Parents about the Student's social skills, overall the data represents a valid and reliable assessment of the Student's social skills. The evaluator noted, on the BASC-2 assessment, the differences may have been elevated due to the raters overusing "sometimes" for most behavior rankings. As for the SSIS assessment, while the teachers' ratings fell in the "Average range" and the Parents' rankings fell within the "Below Average" range, the differences were reconciled with the notation that the variances were based on "performance deficits" as opposed to "skill deficit." Therefore, consistent with the applicable regulations the District used a variety of assessments.

After carefully reviewing the reevaluation report, I find the March 2016 reevaluation resulted in a comprehensive assessment of the Student's then known unique circumstances, present levels, strengths and weakness. Next, I find the action to exit the Student from IDEA specially-designed instruction was procedural and substantively consistent with the then existing, data, test scores, and Parent/teacher input/rankings. The March 2016 reevaluation included a thorough review of the then existing data. Because I find that the evaluation data supports the District's decision to exit the Student from IDEA services, it is axiomatic that I also find the implemented specially-designed instruction provided the Student with FAPE. In short, the 4th-grade IEP was reasonably calculated to enable the Student to achieve passing marks and advance from grade to grade. For the time the Student was not in the regular education classroom, in a self-contained speech setting, the IEP included appropriately ambitious goals and SDIs, to enable the Student to participate and advance through the general education curriculum.

## **The Fifth Grade 2016-2017 Section 504 Service Plan**

At the same time, the District proposed the action to exit the Student from IDEA specially-designed instruction, the District agreed with the Parents that the Student's APD was a disability within the meaning of Section 504. To provide the Student with FAPE within the meaning of Section 504, the District offered to provide the Student with a Section 504 Service Agreement. The proposed Section 504 Service Agreement included 21 proposed adaptations, modifications/ services, including the related service of OT, for 15 minutes a month, on a consultative basis. The District used the SDIs, in the then current IEP, as the basis for proposing the category/grouping of adaptations, modifications and related services as the starting point for the Section 504 Service Agreement. The Parents approved the implementation of the Service Agreement and at the same time, disagreed with the proposed action of exiting the Student from IDEA specially-designed instruction. When the Parents returned the NOREP, they requested a publically funded IEE, which request they later withdrew when they decided to obtain a privately funded IEE. After carefully reviewing the Service Agreement and the attendant facts, I find the Section 504 Service Agreement provided the Student with an equally effective opportunity to access the regular education curriculum. Therefore, the Service Agreement, when offered, provided the Student with a FAPE, within the meaning of Section 504.

## **The 2016-2017 and the 2017-2018 IDEA and Section 504 FAPE dispute**

### **The July 2016 IEE, the District's reevaluation and the December 2016 and February 2017 IEPs**

When the Parents presented the District with the results of the IEE that conflicted with the District's March 2016 reevaluation, the District quickly met with the Parents to review the IEE data. After reviewing the IEE, the District issued a timely PTE. The November 2016, reevaluation updated the Student's then existing present levels. The updated reevaluation test data partially agreed with and partially disagreed with the IEE evaluator's recommendations about the Student's IDEA eligibility as a Student with a SLD and a speech impairment.

### **The IDEA Written Expression SLD dispute**

To resolve the disagreement about the Student's written expression needs, the District psychologist, after contacting the private evaluator and not receiving a response, administered the TOWL-4 Form A story prompt and the TOWL-4 Form B Contrived Writing subtests. On the TOWL-4 the Student earned "Below Average" scores in Vocabulary, Spelling, Contrived Writing and Story Composition and a "Poor" rating on the Punctuation subtest. When the psychologist compared the TOWL-4 test results with the March 2016 WIAT-III test results the evaluator noted while the Student's WIAT-III writing scores were in the "Average" range the Student now misspelled words and omitted words, which in turn, created awkward sentences. When the team met, the Student's former teacher noted that this error pattern was consistent with the Student's classroom performance. As a result of the team's discussion about the Student's writing skills, the District agreed with the IEE evaluator's conclusion that the Student was IDEA-eligible for specially-designed instruction, as a person with a SLD in written expression.

### **The IDEA SLD Reading dispute**

Rather than administer additional reading assessments, the District psychologist compared and contrasted the Student's March 2016 WIAT-III reading test data and the Student's performance on the IEE. The District psychologist also compared the Student's 4<sup>th</sup> Grade and 5<sup>th</sup> Grade DIBELS, Oral Reading Fluency, Accuracy, Retell and DAZE data to the Student's IEE data where the Student scored in the "Low Average" range in Word Reading, Sentence Reading and Decoding data. The psychologist also compared the Student's "Average" range Reading Comprehension data and the Student's low CTOPP-2 Phonological Awareness SS of 67 at the 1<sup>st</sup> percentile to the Student's WIAT-III, DIBELS data and the RtII tier 2 data. The District psychologist cogently explained while the Fall 5<sup>th</sup> grade DIBELS assessment data fell below the expected benchmarks, the Student's second marking period RtII tier 2 progress monitoring data points, prior to the Student enrolling in the private school, indicated the Student was making "strong" progress in the RtII tier 2 reading interventions (P-29 p.14).

The District argues that “... so long as students are making progress through RTII interventions, it is reasonable for a District *not* to pursue special education for the student.” *Daniel P. v. Downingtown Area Sch. Dist.*, 2011 WL 4572024, at \*5 (E.D. Pa. Oct. 3, 2011)(emphasis in original). The District asserts that “A district's successful use of RTII will sometimes reveal that the student does not need specially designed instruction at all.” *Joshua Indep. Sch. Dist.*, 56 IDELR 88 (SEA TX 2010). Relying on the premise in *Daniel P. v. Downingtown Area Sch. Dist.*, at \*4 (E.D. Pa. Oct. 3, 2011) that so long as “... the student’s progress is closely monitored and then reassessed if and when it is clear the student is not making progress with RTII” the District argues that this hearing officer should defer to the District’s regular education RtII tier 2 data and interventions. The Parent, on the other hand, argues that when the Student’s norm-referenced standardized testing, DIBELS data and the RtII tier 2 data is critically reviewed the data suggests that the Student requires specially-designed instruction.

When the evidence is viewed as a whole, I find that the evidence is in “equipoise.” Therefore, I now conclude that the Parents have not met their burden of proof. In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) the Court held that in circumstances, like this, the burden of persuasion provides the rule for decision making. The Parents’ expert’s testimony and her report do not provide this hearing officer with the quantum, quantity or weighty evidence that is greater than the quantity or weight of evidence produced by the District. While I acknowledge the Student’s private 4<sup>th</sup> grade reading testing is low, the District’s WIAT-III testing suggests the opposite. The Parents’ IEE evaluator, although aware of the District’s WIAT-III “Average” test data, failed to compare, contrast or reconcile the WIAT-III data with the IEE findings. Instead, the IEE evaluator noted that the somewhat outdated October 2015 WJ-III Reading Mastery testing supported the IEE findings. Although the private evaluator reviewed the Student’s records, the evaluator did not discuss or reconcile the DIBELS data or the RtII tier 2 instruction and intervention data. When pressed on cross-examination, the IEE evaluator did not state the proposed IEP or the SDIs were inappropriate, inadequate or insufficient. Absent a clear reconciliation of the discrepant data, opinions and conclusions in the multiple reevaluation reports, this hearing officer cannot make a clear factual preponderant finding contrary to the District’s conclusion about the Student’s IDEA eligibility or the appropriateness of the IEPs.



As it stands now, the District staff provided a cogent and responsive explanation that shows that, in light of the Student's unique circumstances, the IEPs as offered are reasonably calculated to enable the Student to make appropriate progress. *Endrew* at Id. at 1002. The District staff forcefully explained how the IEPs and the RtII tier 2 interventions, in combination, met the *Endrew* and *Rowley*, ambitious individualized substantive and procedural FAPE standard. *Endrew* at 1002.

Accordingly, this hearing officer now finds that the December 2016 and the February 2017 IEPs were reasonably calculated to enable the Student to achieve passing marks and advance from grade to grade. For the time the Student was not scheduled to be in the regular education classroom, but in another setting receiving direct instruction and SDIs in written expression or in RtII tier 2 interventions, I find the IEPs included appropriately ambitious goals and SDIs that would enable the Student to participate and advance through the general education curriculum. I likewise find that the 504 accommodations the District provided to the Student were appropriate.

In sum, this hearing officer is compelled to conclude that the Parents failed to produce a preponderance of the evidence that the District failed to meet the IDEA and/or the Section 504 FAPE standards for this Student under both statutes. As such, there is no need to discuss whether the private school is appropriate or any equitable considerations.

### **Conclusion**

For the reasons set forth above, I find that the Parents did not meet their burden of proof. Therefore, the Parent's IDEA and Section 504 claims are denied.

## **ORDER**

And now this 26<sup>th</sup> day, of January 2018, by entering this final Order, and after a careful review of the exhibits, the testimony and rereading the transcript, the Parent's IDEA and Section 504 claims are denied. The Notice of Appeal rights is attached to the email delivering this decision.

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Date: January 26, 2018

Charles W. Jelley, Esq.  
Hearing Officer  
ODR FILE #19641-1617 KE

### **Notice of Appeal**

The Notice of Appeal of this Decision and Final Order was provided to the Parties as an attachment to the email forwarding the Decision to the Parties.