

*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: 21315-18-19**

**Child's Name:** L.Y.      **Date of Birth:** [redacted]

**Parents:**  
[redacted]

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**Hearing Officer:** Linda M. Valentini, Psy.D, CHO  
Certified Hearing Official

**Date of Decision:** March 27, 2019

## Background

Student<sup>1</sup> is an elementary school aged student who resides in the District but attends a private school unilaterally chosen by the Parents. Student is currently identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14), as a child with a specific learning disability and other health impairment (ADHD). As such, Student is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

The Parents requested this hearing, alleging that the District failed to identify Student as eligible for special education in a timely manner, and are requesting reimbursement for private school tuition and private evaluations, as well as compensatory education for the time Student remained unidentified. The District maintains that its programming for Student was appropriate at all times and that the Parents are not entitled to the remedies they seek.

In reaching my decision I carefully considered the witnesses’ sworn testimony, documents admitted into the record, and the parties’ written closing arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based on the record before me I find in favor of the Parents on most but not all their issues.

## Issues<sup>2</sup>

1. Did the District fail in its Child Find responsibilities towards Student, and if so, when should the District have evaluated and possibly identified Student?
2. If the District failed in that regard, is Student entitled to compensatory education, for what period of time, and of what type and in what amount?
3. Are the Parents entitled to reimbursement for tuition to the private placement Student is now attending?

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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 identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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> The record contains evidence both for and against a possible autism spectrum classification/diagnosis. However the issues as presented in the parties’ opening statements, as well as the parties’ subsequent confirmation that I reiterated the issues correctly on the record, do not include the specific question of whether or not Student is on the autism spectrum. Therefore I decline to address that question, given that Student has other qualifying disabilities that are indisputable. The IDEA’s eligibility criteria are exactly that: they are the categories of disabilities under which children may qualify for special education. Once a child is found eligible for special education, programming must be based on the child’s unique needs and not the child’s classification.

4. Are the Parents entitled to reimbursement for the private evaluations that they obtained?

### Findings of Fact<sup>3</sup>

#### Kindergarten: 2015-2016 School Year

1. Parental input on the Kindergarten Parent Survey identified Student's strengths as physical activities, helping others, taking charge and leading a group. The Parents identified challenging behaviors as anxiety and temper. [S-4]
2. On the District's pre-kindergarten entrance assessment Student was found to be at academic risk. Accordingly Student was afforded extended day kindergarten as well as Tier 2 Multi-Tiered Systems of Support/Response to Instruction and Intervention programming (MTSS/RtII) (herein RtII)<sup>4</sup> in the form of Title I reading support with a reading specialist 30 minutes per day for four days per week. Student worked on letter identification and blending letter sounds in words. [NT 36-38, 99, 163, 381; S-3, S-19, S-56, P-2, P-16]
3. Student's DIBELS assessment scores over the kindergarten year showed progress in First Sound Fluency (27 Fall to 60 mid-year) and in Phoneme Segmentation Fluency (51 mid-year to 71 end-of-year). [S-50]
4. Although Letter Naming Fluency showed progress from Fall to mid-year, progress stalled from mid-year to end-of-year (8 Fall, 42 mid-year, 44 end-of-year). Nonsense Word Fluency-Correct Letter Sounds showed little progress (24 mid-year, 29 end-of-year) [S-50]
5. Although Student met the kindergarten reading goal of 'reading' 26 high frequency words (80% of a word list),<sup>5</sup> despite extended day kindergarten and RtII Title I reading support, Student's DIBELS benchmark assessments of *decoding* in the winter and the

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<sup>3</sup> Transcript page references to witnesses are as follows: Parent (31-159 and 581-602); District Reading Specialist 1<sup>st</sup> Grade (162-256); District Psychologist 2017 evaluation (262-318); District Psychologist 2018 evaluation (319-365); District Reading Specialist 2<sup>nd</sup> grade (356-410); 1<sup>st</sup> Grade Teacher (410-446); 2<sup>nd</sup> Grade Teacher (456-507); District Occupational Therapist (509-570); Parents' Expert (602-758); School Counselor (751-790).

<sup>4</sup> "RtII is an early intervening strategy and carries dual meaning in Pennsylvania. It is a comprehensive, multi-tiered standards aligned strategy to enable early identification and intervention for students at academic or behavioral risk. RtII may be considered as one alternative to the aptitude achievement discrepancy model for the identification of students with learning disabilities after the establishment of specific progress measures." PDE September 2009 [Exhibit A to District's Written Closing Statement]

RtII demands data-based decision making to guide school decisions on...appropriate rates of progress. RtII demands continuous Progress Monitoring of student performance...to determine intervention effectiveness. PDE distinguishes the continuous Progress Monitoring from Benchmark and Outcome Assessment which is "assessed periodically throughout the year" against grade level benchmarks and standards. [Emphasis added] *Id.*

<sup>5</sup> The high frequency words on the pre-primer list seem to be common "sight words" that need to be recognized rather than "decoded" (read). [P-13]

spring of kindergarten showed Student remained below the cut point for risk. [NT 212-213; S-31, S-50; P-29]

6. DIBELS' cut point for risk indicates a level of skill below which a student is unlikely to achieve subsequent early literacy goals without receiving additional intensive intervention. [NT 171, 642-646; P-48]
7. On the end-of-year report card, recognizing and reading common sight words was rated 2+ indicating making progress but not meeting the rating for "Basic" which is the standard required for the grade level. [S-5]
8. Although Student's DIBELS scores were going up in some areas, the rate of progress was not what was needed to keep up with peers let alone catch up with peers, and continuation of this trend would result in Student's falling further and further behind. [NT 638]
9. Although initially excited about starting kindergarten, Student began demonstrating avoidance behaviors towards reading at home, including crying for up to 30 minutes when being asked to read. Student said Student was "stupid" and behind the others in class. [NT 38, 41, 99]
10. Parents communicated with the kindergarten teacher and the reading specialist about Student's at-home reading difficulties in person at teacher conferences and/or by email throughout the kindergarten year. The Parents were told that Student was making progress and that all children read differently. Student's kindergarten teacher reported that Student enthusiastically participated in class. [NT 39-40; S-6]

#### 1<sup>st</sup> Grade: 2016-2017 School Year

11. In 1<sup>st</sup> grade Student again received RtII Tier 2 Title I reading support 30 minutes per day for four days per week in addition to 45-60 minutes of reading instruction in the 1<sup>st</sup> grade classroom. [NT 162-163, 198-201, 206-207, 233, 248, 250, 411-415]
12. The Parents continued to report to the school that Student demonstrated stress at home around reading and also around math. The 1<sup>st</sup> grade teacher did not observe stress in the classroom until about the end of the 1<sup>st</sup> grade year. [NT424, 436-439]
13. The 1<sup>st</sup> grade teacher recognized that Student was "very bright". [NT 443]
14. The 1<sup>st</sup> grade teacher did note that Student's poor decoding skills were affecting comprehension. If the teacher could read something to Student, comprehension was good. If Student had to rely on independent reading, then Student's comprehension would not be as good. The teacher's observation comports with the Parents' expert's testimony that at 12 correct words per minute, which was Student's mid-1<sup>st</sup> grade reading rate as assessed by the QRI-5, a reader is not going to be able to interpret what is read because readers only have a limited buffer to remember the actual words. [NT 414, 654]

15. By December 2016 Student's 12 words correct per minute reading rate as assessed by the QRI-5 at the pre-primer level was well below the cut point for risk on the DIBELS. The QRI-5 has Pre-Primer, Primer, First Grade, and Second Grade Passages. Through 1<sup>st</sup> grade Student remained at the pre-primer level.<sup>6</sup> [NT 180-183, 212-215, 252-254, 654; P-2]
16. All passages presented to Student on the QRI-5 were passages with pictures. Research on reading and reading disorders, notes that a strategy of guessing using pictures is a poor strategy to use when learning to read because it leads to the student guessing instead of decoding, which is not going to be productive in life and in later academics. Student has been reinforced for that kind of strategy, at this point is very adept at this, and uses picture clues as the first recourse. [NT 183, 649. 652; P-13]
17. The QRI-5's lower grade level lists contain many sight words, so the instrument is not really representative of decoding, because the pathway to recognize sight words with automaticity is quite different than the phonological pathway used when decoding, that is, actually reading words that aren't already memorized. [NT 657]
18. Student's 1<sup>st</sup> grade end-of-year DRA-2 testing results were below the cut point for risk. [S-50, P-48]
19. In the early grades the DRA-2 passages are very picture based and a bright child such as Student can use the pictures to guess the story, and, therefore, not actually read at all, and, potentially, pass the comprehension component of it. [NT 648]<sup>7</sup>
20. Student's DIBELS benchmark assessments remained below the cut point for risk throughout the 1<sup>st</sup> grade year in all areas. [NT 165-180, 413, 415-417; S-27, P-29]
21. Although Student met Student's 1<sup>st</sup> grade SMART goal for spelling,<sup>8</sup> Student's 1<sup>st</sup> grade end-of-year Project Read testing of encoding (spelling) skills resulted in Student's earning a final grade of 33% accuracy. [NT 190-197, 205, 465; S-2, S-7, S-27]
22. Project Read spelling assessments are problematic when evaluating Student because Student has very high skills in pattern recognition and can use pattern recognition rather than actually working out how to encode words, and Student's actual skills could be even lower than the accuracy score earned. Student can be successful in recognizing patterns in word categories without actually being able to spell the words from scratch. Actually giving Student spelling tests would be a real measure of Student's encoding skills. [NT 650-651; S-7, P-37]

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<sup>6</sup> <http://ptgmedia.pearsoncmg.com/images/9780137019236/downloads/9780137019236ch1.pdf> Description of the Qualitative Reading Inventory-5. Last visited on 3-22-19

<sup>7</sup> Some instruments that assess phonological processing and phonemic processing through reading actual passages are the GORT and the CTOPP. [NT 657]

<sup>8</sup> SMART goals are for children receiving reading support.

23. At the end of 1<sup>st</sup> grade, Student's report card<sup>9</sup> rated Student's Language Arts skills as Proficient in the areas of understanding the important elements of stories, verbally presenting ideas clearly and participating appropriately in conversations. [S-25]
24. At the end of 1<sup>st</sup> grade, Student's report card noted that although Student had learned at the Proficient level to apply grade level phonics and word analysis skills to decode words, ratings of success in actually acquired *decoding-specific skills* (reads grade level irregularly spelled words, reads with accuracy to support comprehension, reads with fluency to support comprehension) were not at the Proficient level, but instead were at the Basic 'demonstrating significant progress' level. [S-25]
25. Student's 1<sup>st</sup> grade teacher recognized writing was difficult and less preferred by Student and decreased the amount of writing required. Student's end-of-year 1<sup>st</sup> grade report card did not show proficiency in the specific areas of writing, but instead recorded Student as 'making progress' toward these skill levels. [NT 423; S-25]
26. At the end of 1<sup>st</sup> grade, in addition to very poor spelling, Student's grasp of writing conventions was poor, showing lack of proper spacing between words, and random capitalization of letters. Student's formation of letters was also poor. [NT 421-422, 662; S-2, P-20, P-34]
27. Although a District psychologist opined that Student's writing skills were developmentally appropriate, they were not, given Student's enriched home learning environment, high cognitive level, and close to two years of RtII Title I instruction at the time of the District psychologist's evaluation. [NT 663-664]

#### 1<sup>st</sup> Grade Request for and Issuance of Initial Evaluation: 2016-2017 School Year

28. On October 21, 2016 the Parents submitted a handwritten letter to the school principal, signed by both, stating, "[Father] and I are requesting a (sic) IEP evaluation for [Student]." On November 4, 2018 the District issued a Permission to Evaluate-Evaluation Request Form (PTE) which the Parents signed on November 17, 2016. The District received the signed PTE form on November 21, 2016. [NT 301-302; S-8, S-9]
29. Almost three weeks later, on December 9, 2016, the District issued a Prior Written Notice for Initial Evaluation and Request for Consent Form (PWN); the District reissued this form on February 3, 2017 because it had not been returned. The Parents signed the form on February 7, 2017. The District received the PWN form on March 10, 2017. [NT 303, 311-312; S-12, S-14]

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<sup>9</sup> The report card ratings are not based on objective measurable data aligned with common core standards for the grade. The 1<sup>st</sup> grade teacher testified that in coming up with the report card ratings, while she looked at the DIBELS and used the core standards, "In 1<sup>st</sup> grade we're basically seeing how they're doing with the work that we're working on. Like, [Student] was not working on the final E, or some of these words, because [Student] was working on a lower level." [NT 420]

30. Given that the District received the signed Permission to Evaluate-Reevaluation form from the Parents on November 21, 2016, Day 1 of the statutory 60-day evaluation period was November 22, 2016 and the period ended on January 20, 2017.<sup>10</sup> [S-9]
31. The District did not issue its evaluation report until May 5, 2017, a delay of approximately 105 days from the day it received the signed PTE form giving Parents' consent to evaluate Student. [P-2]

### 1<sup>st</sup> Grade Initial Evaluation

32. Along with the signed PTE of November 21, 2016 the Parents sent a letter stating three concerns and a comment/request. The concerns were the Color Chart on which Student was sometimes penalized for talking out of turn and fidgeting; frequent trips to the bathroom; and reading/dyslexia including disclosure of a strong familial history of diagnosed dyslexia. The comment/request reinforced the teacher's comment that Student "can do the work when I specifically instruct [Student]" and included the request for a "Personal Care Assistant who is also a certified teacher." [NT 50, 269; S-9]
33. Parental written evaluation input in April 2017 again included disclosing a strong positive family history of dyslexia, reporting increasing anxiety about school stressors and difficulties in social communication with peers, and expressing continuing concerns about Student's rate of reading progress. The Parents' input also included a request to assess Student's auditory processing abilities. [NT 51-54, 78; P-2]
34. Written input from Student's therapist (who is also a school psychologist) in May of 1<sup>st</sup> grade reiterated many of the same concerns about academic struggles, corresponding escalating anxiety, weaknesses in social communication, and the need for sensory accommodations. [S-17]
35. On cognitive testing with the WISC-V Student earned a Verbal Comprehension Index of 127 – 96<sup>th</sup> percentile, a Visual Spatial Index of 114 – 82<sup>nd</sup> percentile, a Fluid Reasoning Index of 121- 92<sup>nd</sup> percentile, a Working Memory Index of 100 – 50<sup>th</sup> percentile, and a Processing Speed Index of 111 – 77<sup>th</sup> percentile. Student's Full Scale IQ was 123 at the 94<sup>th</sup> percentile, in the Very High (formerly named the "Superior") range. [NT 264-265; P-2]

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<sup>10</sup> Nothing in the IDEA or the PA Code requires specific "forms" to be used to obtain parental consent for an evaluation. The regulations say the timeline starts with consent. The substance triggers the LEA's obligations. Substantively the Parents gave their handwritten request/consent on October 21<sup>st</sup> and again on November 21<sup>st</sup>; arguably, the Parents' October 21<sup>st</sup> written request itself could have triggered Day 1. I find that in accord with the signed PTE consent form, November 22 is Day 1 of 60. The District committed a procedural error by counting the 60-day period from receipt of the PWN rather than the receipt of the PTE. Because the evaluation that was finally issued was inappropriate, there was also a substantive denial of FAPE. The remedy for the substantive denial subsumes any remedy for the procedural error.

36. Academic achievement was assessed with the WIAT-III<sup>11</sup>. The majority of Student's scores fell in the Average range: Total Reading, Reading Comprehension, Word Reading, Pseudoword Decoding, Oral Reading Fluency, Oral Reading Accuracy, Oral Reading Rate, Basic Reading; Sentence Composition, Sentence Building; Math Problem Solving, Math Fluency, Addition. Five scores, Early Reading Skills, Alphabet Writing Fluency, Sentence Combining, Mathematics, and Numerical Operations were in the Above Average range. [P-2]
37. On the CASL, Student's Spoken Language standard scores ranged from 116 to 136 and percentile ranks ranged from the 86<sup>th</sup> to the 99<sup>th</sup> percentile. [P-2]
38. In contrast to Student's WISC-V Full Scale IQ of 123 at the 94<sup>th</sup> percentile, and Student's CASL Core Composite score of 132 at the 98<sup>th</sup> percentile, on the WIAT III, the one<sup>12</sup> test of academic achievement in reading administered (no percentile ranks reported), Student's Word Reading was 98, Oral Reading Fluency was 95, Oral Reading Accuracy was 99, and Oral Reading Rate was 98. [P-2]
39. The spelling subtest, which the authors of the WIAT-III include as part of a "Dyslexia Index" to assist in identifying risk for dyslexia, was not administered, therefore a Written Expression Composite was not able to be calculated. No other assessments that could address possible dyslexia were administered, nor were other spelling (encoding) assessments administered.<sup>13</sup> [NT 270-271, 668; P-30]
40. Difficulty with spelling is a phonemic disorder, a part of a reading disorder. Reading (decoding) and spelling (encoding) are part of the same language-based deficit. Had the District psychologist administered a spelling test, it would with near certainty be discovered, based on Student's performance in decoding, that Student is incapable of spelling at a grade level expectation, let alone the expected level for a very bright child. [NT 669-670]
41. In spite of a strong family history of dyslexia - one of the strongest findings in the dyslexia research for predicting who is going to have dyslexia - as well as Student's slow progress in the RtII program within the circumstance of very high cognitive ability, very poor phonemic awareness, very poor writing skills, emotional regulation issues around literacy, behavior in class when given written materials, unwillingness to engage with literacy activities, and stress and anxiety about school, the District psychologist

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<sup>11</sup> The Parents' expert testified credibly that the WIAT-III tends to artificially inflate the scores of bright students at the lower age range of the instrument. Student was more than three months short of Student's 7<sup>th</sup> birthday when evaluated. In addition, although Student's WIAT-III scores on reading and writing were largely in the 'average' range, the WIAT-III was not sufficiently comprehensive to identify Student's needs. The WIAT is a problematic test to give to identify learning disabilities in the early grades even for children who are not as bright as Student is, because of 'floor effects', meaning that at the early grades a student has to demonstrate minimal skills to earn a score in the average range. For example on the Sentence Combining subtest, a theoretical raw score of zero (no answers correct) at Student's age would yield a scaled score of 85, in the broad average range. [NT 658-661]

<sup>12</sup> The QRI-5 is not an appropriate progress monitoring tool for reasons stated earlier. [NT 657]

<sup>13</sup> Some instruments that assess phonological processing and phonemic processing through reading actual passages are the GORT and the CTOPP. [NT 657]



conducted a surprisingly superficial evaluation. The District psychologist failed to appropriately assess Student in reading, which should have been the clearly primary area of suspected disability. [NT 667-668, 673-674; P-2]

42. The District evaluator concluded, “Given [Student’s] Very High FSIQ, some of [Student’s] WIAT-III scores are below what would be expected. However, [Student] performed well within age and grade level expectations and therefore a diagnosis of Specific Learning Disability cannot be made at this time, as [Student] does not meet criteria for a Specific Learning Disability...Student is achieving adequately for [Student’s] age in the areas of reading, writing and math.” [P-2]
43. Although the District psychologist seems to have used an ability versus achievement discrepancy model for deciding that Student does not qualify for the classification of specific learning disability, the evaluation report does not contain either a table of Intra-Achievement Variations or a table of Ability-Achievement Discrepancy Analysis leading to the question of whether the evaluator was substituting her own “eyeballing” of the scores rather than running the data through normed analysis.<sup>14</sup> [P-2]
44. On the ASEBA Child Behavior Checklist, Parents’ ratings resulted in a Total Problems score in the Clinical range and Student’s teacher’s ratings resulted in a score in the Borderline Clinical range. Parents generally rated Student as demonstrating a greater degree of emotional and behavioral dysregulation than did Student’s teacher. [P-2]
45. Although the Parents specifically requested testing of Student’s auditory (phonological) processing, and the 1<sup>st</sup> grade reading specialist identified deficits in Student’s decoding, fluency and spelling, and the fact that poor phonological processing skills are often found in students who struggle with decoding, fluency, and spelling, the District did not assess Student in the area of auditory (phonological) processing. [NT 165, 271-273]
46. Although the Parents and Student’s therapist expressed concerns about Student’s sensory needs and the need to evaluate these, the District did not assess Student in the area of occupational therapy. [NT 78-79; P-2, P-22]
47. On May 5, 2017 the District’s evaluation report was issued. Student was not found to be eligible for special education, but was found eligible for a Section 504 service plan pursuant to Attention Deficit Hyperactivity Disorder (ADHD). [NT 55; S-18, P-2]

#### Section 504 Service Agreement

48. The District sent a Section 504 Prior Written Notice form to Parents on June 9, 2017 seeking Parents’ permission for the provision of a 504 Service Agreement for Student.

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<sup>14</sup> These two analyses are generated by computerized comparison of scores. Using actual scores, both generate a predicted achievement score based on ability, the numerical difference between ability and the achievement scores, and the significance of the difference at + or – 1 standard deviation.  
<http://images.pearsonclinical.com/images/Assets/trainingcampus/AAD-Analysis-by-Gloria-Maccow.pdf>. Last visited on March 26, 2019.

The Parents had not responded as of August 28, 2017. [NT 772-773; S-20, S-21, S-29, S-32]

49. On August 30, 2017 the District sent the Parents a Section 504 Invitation to Participate in a meeting to discuss Student's eligibility for a 504 Service Agreement. The meeting convened on September 15, 2017. [NT 773-775; S-22, S-33, S-36]
50. On October 31, 2017 the Parents were invited to another Section 504 team meeting set for November 10, 2017 to discuss Parents' "thoughts, concerns and suggestions for [Student's] proposed 504 Service Agreement." Although the Parents did not show up for that meeting, on November 9, 2017 the Parents approved the 504 Service Agreement except for two accommodations: use of a timer to encourage Student's work completion and turning Student's desk away from distracting materials. On the proposed Service Agreement the Parents wrote they did not believe the plan was sufficient and that they believed the Student required "an IEP and a classification as a child with autism." Parents also wrote that they believed Student needed additional accommodations and specially designed instruction including a sensory chair, access to sensory breaks and a sensory room, a medically prescribed water bottle, social skills instruction, methods for addressing anxiety and obsessive compulsive behaviors, and a personal care assistant. [NT 774-777; S-23, S-38, S-39, S-40]
51. The 2<sup>nd</sup> grade teacher implemented all the accommodations in the Section 504 Agreement, except for the two with which the Parents disagreed. [NT 467-471; S-23, S-40]

2<sup>nd</sup> Grade: 2017-2018 School Year and Subsequent Testing in Fall 2018

52. Through mid-January of 2<sup>nd</sup> grade Student continued in the RtII Title I reading support that had been provided throughout kindergarten and 1<sup>st</sup> grade, four days per week for thirty minutes per day, and also received reading instruction in the 2<sup>nd</sup> grade classroom. [NT 367-370, 383, 402, 411-415]
53. Based on benchmark and progress data in mid-January of 2<sup>nd</sup> grade Student's Title I instruction increased to five days per week. [NT 46, 55, 370-373, 395-396; S-66]
54. Fall of 2<sup>nd</sup> grade DRA testing placed Student below the cut point for risk, and Spring of 2<sup>nd</sup> grade DRA again showed Student to be below the cut point for risk, both data sets indicating a need for more intensive services. [NT 645-647; P-36, P-48]
55. Throughout 2<sup>nd</sup> grade Student's DIBELS benchmark scores were below the cut point for risk in all areas. [S-50, P-29]
56. The Parents continued to work with Student at home on reading and spelling. Student would have "meltdowns" of 20 minutes to 4 hours that consisted of punching and pinching self, and saying Student hated the work. [NT 44-46]

57. Student's reading struggle affected other areas of school work, for example, having to read a math test and not being able to finish the test at the same time as peers occasioned a "meltdown". [NT 44-45]
58. Student was beginning to demonstrate school refusal in 2<sup>nd</sup> grade, begging every morning to stay home from school, crying and complaining of stomach aches, and repeating that Student didn't want to read. Student shared thoughts of suicide with the therapist. [NT 67, 99-100, 103; S-56]
59. Student came home from school one day with bruises on Student's arm from having bitten through a sweater in frustration over reading. [NT 45, 148]
60. The Parents communicated with the school about Student's struggles and anxiety around reading; school personnel weren't seeing this anxiety in the classroom and told the Parents that Student was progressing. [NT 46, 57]
61. Student's 2<sup>nd</sup> grade end-of-year report card, similarly to the 1<sup>st</sup> grade end-of-year report card, rated Student's Language Arts skills as proficient in the areas of understanding the important elements of stories, verbally presenting ideas clearly and participating appropriately in conversations.<sup>15</sup> [S-49]
62. Student's 2<sup>nd</sup> grade end-of-year report card, unlike the proficient rating on the 1<sup>st</sup> grade end-of-year report card, rated Student's Language Arts skill in applying grade level phonics and word analysis skills only as demonstrating significant progress toward meeting the Basic standard as required for the grade level. [S-49]
63. The 2<sup>nd</sup> grade end-of-year report card rated Student as demonstrating significant progress toward meeting the requirements for using context to monitor reading, and writing opinion and narrative pieces. [S-49]
64. The 2<sup>nd</sup> grade end-of-year report card showed ratings of demonstrating progress toward meeting the standard for reading grade-level irregularly spelled words, reading accurately and fluently to support comprehension, using revision techniques to improve writing, and applying grade level grammar and language expectations to edit writing. [S-49]
65. In contrast to the report card ratings, on a Woodcock Reading Mastery Test-III, administered on September 17, 2018 at the beginning of 3<sup>rd</sup> grade, Student scored below average in multiple areas of reading and was functioning in reading at approximately a mid-first grade level. [NT 654-655; P-12]
66. On an iReady reading assessment also administered on September 17, 2018 Student's overall reading was at the first grade level. [P-11]

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<sup>15</sup> Some skills rated on report cards as having been mastered did not necessarily line up with mastery according to the Common Core Standards. [S-25, P-42]

67. Curriculum based assessments administered by the Parents' expert in Fall 2018 found that Student had significant deficits in spelling, writing conventions, and writing coherence and had difficulty accessing text-based material. [NT 624-630; P-3]
68. Testing conducted in Fall 2018 revealed that on the Oral and Written Language Scales, an instrument that allows direct mapping comparison between verbal testing and written testing with the same exact type of measure, Student's level of discrepancy between listening comprehension versus written expression was very high, at less than that of 5% of the norm sample. Standard scores on the OWLS were as follows: Listening Comprehension 116 at the 86<sup>th</sup> percentile, Oral Expression 110 at the 75<sup>th</sup> percentile versus Reading Comprehension 89 at the 23<sup>rd</sup> percentile, Written Expression 81 at the 10<sup>th</sup> percentile. [NT 625-626; P-3]
69. During the OWLS on the written and reading tests, Student engaged in a good amount of complaining, asking how much longer it would be, saying "I hate this... do we have to go on... you told me it would be over" along with a lot of fidgeting behavior, kicking things under the seat, dropping the pencil multiple times and then having to pick it up, and moving around a lot to do that. However, when it came to the listening and oral expression portion of the test Student "didn't seem to mind that at all. [Student] was having a little bit of fun, especially in the expressive language part, [Student] really enjoyed talking." [NT 628]
70. In Fall 2018 Student's spelling was found by the Parents' expert as being very poor, several grade levels behind, with Student only knowing basic one syllable, short vowel words to spell, and even those were not perfect. Assessment by a District special education teacher within the same time frame showed results consistent with these findings. [NT 630, 632-633]

## 2<sup>nd</sup> Grade Occupational Therapy Evaluation

71. The District's May 5, 2017 evaluation had not included an OT evaluation despite concerns about sensory issues expressed by the Parents, and Student's poor handwriting and poor use of writing conventions as noted by the 1<sup>st</sup> grade teacher. However, in January of 2<sup>nd</sup> grade the District issued an OT Referral Form to Parents to gain their consent for administration of an OT screener, in order to determine the need for a full OT evaluation. [P-23]
72. Student's 2<sup>nd</sup> grade teacher completed the OT Referral Form, listing various needs of Student including deficits in sensory processing. [NT 511; P-23]
73. The Parents informed the District that they had already arranged for an OT evaluation with a private agency because the District had not done an OT evaluation as part of Student's initial evaluation. The District wanted to do its own screening, reportedly

maintaining that it would not be able to use information from the private evaluation.<sup>16</sup> The Parents canceled the private OT appointment and signed the OT Referral Form. [NT 82-84; P-23, P-32]

74. The District conducted a functional Occupational Therapy screening assessment and provided it to the Parents on March 22, 2018. [NT 482, 511-512, 779-780; S-45, S-46, P-23]
75. The OT screening assessed fine motor and handwriting skills, activities of daily living skills and collected data on classroom interventions' effectiveness. The District did not utilize standardized instruments to assess sensory processing. [NT, NT 529-530, 515-516, 563; S-45, S-46]
76. Pursuant to the District's OT screening, OT services were recommended for one thirty-minute session weekly for eight to twelve weeks to target visual motor and written communication skills, after which a full OT evaluation would be conducted if needed. The Parents rescheduled the private OT evaluation. [NT 89-90, 527-528; S-45, S-46]
77. The two OT RtII goals for the eight to twelve weeks addressed spacing of handwritten words and tying shoelaces on a shoe-tying board. [S-45, S-46, S-57]
78. Although Student made progress on these two goals Student did not master the goals, so the occupational therapist recommended a full OT evaluation<sup>17</sup>. [NT 516]
79. The private OT evaluation was completed on April 4, 2018. [S-47]
80. The private OT evaluator assessed Student's sensory processing using a variety of standardized formal and informal instruments and observation as follows: Sensory Profile 2 Caregiver Questionnaire, School Companion Sensory Profile 2 Questionnaire, Sensorimotor History Questionnaire, Bruininks-Oseretsky Test of Motor Proficiency – 2<sup>nd</sup> Edition, SCAN-3 for Children: Tests for Auditory Processing Disorders, Test of Visual Perceptual Skills-3<sup>rd</sup> Edition, Ocular Motor Skills, Developmental Eye Movement Test, Observation of Praxis, The Listening Inventory, Interactive Metronome, Jordan Left-Right Reversal Test-3<sup>rd</sup> Edition, Full Range Test of Visual Motor Integration, WOLD Sentence Copying Test, BRIEF-2, Integrated Visual and Auditory Continuous Performance Test, and the Pediatric Symptom Checklist. [S-47]
81. The private OT evaluator found that Student had needs in all areas assessed, and that difficulties in several developmental areas caused significant strain on Student's energy levels, endurance, ease of success in daily activities, meeting performance demands, and efficiency in learning skills. [S-47]

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<sup>16</sup> If this is an accurate representation of what the District told the Parents it is incorrect. Districts are required to consider private evaluations submitted by parents, although they are not bound to accept the findings or adopt the recommendations.

<sup>17</sup> By the time the 8 to 12 week OT RtII had ended, the school year was drawing to a close as well. The full OT evaluation the District ultimately performed was incorporated into the District's 2018 multidisciplinary evaluation issued in October 2018.

82. The private OT evaluator recommended strategies for classroom and home, that Student receive school-based OT one time per week for sixty minutes, and that OT consultation for school and home be provided. [S-47]
83. In June 2018 the Parents gave the private April 4, 2018 OT evaluation to the District. The District requested a Section 504 meeting to review the report and incorporate suggestions from the evaluation. [NT 89-90; S-47, S-54, P-46]

### 3<sup>rd</sup> Grade: 2018-2019 School Year Evaluation

84. The Section 504 meeting was convened in July before the start of Student's 3<sup>rd</sup> grade year. In considering the results of the private OT evaluation the District decided to conduct a complete multi-disciplinary reevaluation in the Fall after the new school year had begun. On August 28, 2018, Parents signed the Permission to Evaluate form. [NT 582; S-47, S-51, S-54]
85. Meanwhile, on August 14, 2018, the Parents had sent the District notice of their intent to enroll Student in the private school at public expense. On September 1, 2018, the Parents signed an enrollment contract to place Student at the private school for the 2018-2019 school year [NT 91; P-6, P-9]
86. On September 1, 2018, the District responded to the Parents' private placement notice, stating that the District believed the Section 504 plan addressed all Student's needs and was calculated to afford Student meaningful educational progress. The District's response did not mention its previously proposed evaluation, and the District gave no indication that the District believed the evaluation was necessary in order to provide FAPE to Student. [NT 93; P-7]
87. On September 6, 2018 the Parents informed the District that they did not believe the District's proposed evaluation was necessary now that Student was enrolled in the private school, but that they would cooperate if the District wanted to move forward with the evaluation. [P-8]
88. The District conducted a multidisciplinary evaluation and assessed cognitive functioning (Kaufman Assessment Battery for Children – 3<sup>rd</sup> Edition; Index percentile ranks ranged from the 27<sup>th</sup> percentile to the 92<sup>nd</sup> percentile) and academic achievement (Kaufman Test of Educational Achievement – 3<sup>rd</sup> Edition; subtests ranged from the 10<sup>th</sup> to the 50<sup>th</sup> percentile). [S-54]
89. Given Student's struggles with reading over three years, and given Title I reading support in the RtII program over those three years, on the Kaufman Test of Educational Achievement Student's decoding skills were only at the 10<sup>th</sup> percentile on Letter and Word Recognition and at the 18<sup>th</sup> percentile on Nonsense Word Decoding. Student's encoding (spelling) skills were only at the 10<sup>th</sup> percentile. In contrast Student's

expressive vocabulary as assessed by the Expressive Vocabulary Test – 2<sup>nd</sup> Edition was at the 70<sup>th</sup> percentile. [S-54]

90. Student's language development as assessed by the Test of Language Development – Primary 4<sup>th</sup> Edition ranged from the 58<sup>th</sup> to the 93<sup>rd</sup> percentile. [S-54]
91. Student evidenced difficulties in fine motor control on the Bruininks-Oseretsky Test of Motor Proficiency – 2<sup>nd</sup> Edition, scoring 30 in Fine Motor Control where the mean score is 50. [S-54]
92. Assessed through the School Companion Sensory Profile – 2<sup>nd</sup> Edition, Student evidenced some sensory processing differences that were affecting Student's ability to access the academic program. [S-54]
93. Assessed through Parents' and teachers' (2<sup>nd</sup> and 3<sup>rd</sup> grade) ratings on the Achenbach Child Behavior Checklist, areas of concern in the Clinical Range in both home and school settings were Externalizing Problems and ADHD. The Parents observed more problems in the home than did teachers in the District and at the private school. [S-54]
94. Assessed through the 2<sup>nd</sup> grade and the 3<sup>rd</sup> grade teachers' ratings on the Conners Rating Scale, Student demonstrated difficulties in the Very Elevated range in both the District and the private school on Hyperactivity/Impulsivity and ADHD predominantly Hyperactive-Impulsive Presentation. Additionally Student's Inattention was rated as Very Elevated by the 2<sup>nd</sup> grade teacher, while Defiance Aggression, Peer Relations, and Oppositional Defiant Disorder very rated as Very Elevated by the 3<sup>rd</sup> grade teacher. [S-54]
95. Executive Functioning as assessed by the 2<sup>nd</sup> and 3<sup>rd</sup> grade teachers' ratings on the BRIEF- 2<sup>nd</sup> Edition showed Clinically Elevated scores on the Inhibit and Behavior Regulation Index in both settings. The 2<sup>nd</sup> grade teacher additionally rated Working Memory in the Clinically Elevated range, and the 3<sup>rd</sup> grade teacher additionally rated Self-Monitor, Shift, Emotional Control, Emotional Regulation Index and Global Executive Composite in the Clinically Elevated range. [S-54]
96. The District issued its reevaluation report on October 26, 2018 and concluded that Student had needs in the areas of improved decoding and encoding skills, improved reading fluency, improved focus and attention to teacher instruction/directions, improved ability to complete work independently, improved ability to cope with frustration and other negative emotions, improved fine motor and visual motor skills, and improved sensory processing and self-regulation skills. [S-54]
97. In contrast to its May 5, 2017 evaluation completed about 18 months previously, on which Student was not found to be eligible for special education but was found eligible for a Section 504 service plan pursuant to ADHD, the District's October 26, 2018 reevaluation found that Student had a Specific Learning Disability in encoding, decoding and reading fluency with processing deficits in auditory processing and long-term

retrieval in addition to Other Health Impairment due to ADHD Predominantly Hyperactive-Impulsive Presentation, and by virtue thereof was entitled to specially designed instruction. [S-54, P-2]

98. Learning disabilities such as Student exhibits would not spontaneously appear somewhere between end of first grade and beginning of third grade. They are considered by the field of developmental psychology to be neurologically based and developmental, so they do not come and go. [NT 634]
99. On November 20, 2018 the District issued an IEP. The Parents neither approved nor disapproved of the IEP.<sup>18</sup> [S-58, S-60]

#### Additional Information of Note

100. The Parents' expert, a researcher and professor in cognitive psychology (how children think and learn and how that process changes as they age) with a concentration in psycholinguistics (the study of language processing, language acquisition, how individuals use, learn, and have deficits in language) observes that Student is inquisitive and insightful and comes across as being gifted. [NT 604-605, 619]
101. Bearing out the Parents' expert's observational data, Student earned a Full Scale IQ of 126 (96<sup>th</sup> percentile) on cognitive testing conducted in October 2018 by a private school psychologist. Student's verbal ability was at the 96<sup>th</sup> percentile (126) while fluid reasoning was at the 99<sup>th</sup> percentile (138). Tested by a District psychologist within the same approximate time period, Student's Full Scale IQ was 123 at the 94<sup>th</sup> percentile, in the Very High (formerly named the "Superior") range. Statistically the two Full Scale IQs obtained by two different examiners using two different instruments are comparable. [S-54, S-56]
102. Children with high IQ levels are expected to acquire reading quickly at a high rate of progress, and often they acquire reading seemingly on their own with almost no instruction. [NT 619-620]
103. Often students who find the process of reading and writing aversive cannot access content areas such as science and social studies, and do not engage in leisure reading. The very bright students in particular tend to become disengaged in school, engage in school refusal, and begin to exhibit problem behaviors. [NT 631-632]

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<sup>18</sup> The Parents' expert pointed out various ways in which the November 2018 IEP is not appropriate. [NT 682-687; S-58] Although I admitted the IEP over the Parents' objections, and it is part of the record, after carefully reviewing all the evidence in this case I now conclude that my ruling was incorrect and I decline to reach the question of whether this IEP was appropriate. Based on what the Parents knew at the time, they enrolled Student in private school. Their decision was appropriate, as Student was not receiving FAPE in the District, and in fact Student had yet to be identified as eligible for special education. Should the parties disagree as to whether Student should remain in the private school for the next school year, a new IEP would have to be created and assessed for its appropriateness at that time.



104. Student's specific learning disability in reading relates to phonological processing. This disability also affects elements of writing, particularly with both the formation of letters and with encoding (spelling). [NT 617-618]
105. In order to make progress in reading and in writing Student needs a systematic multisensory linguistically informed program, a program taught by individuals who really understand the process of how phonemes are represented cognitively and how they need to be represented in the process of encoding and decoding. [NT 630]
106. Ordinary strategies for teaching reading have been attempted with Student for three years and have been largely unsuccessful, particularly given Student's very high intelligence. Student requires an Orton-Gillingham<sup>19</sup> approach to reading instruction. Orton-Gillingham versus typical reading instruction such as that which Student received in RtII goes well beyond a difference in methodology. The difference between Orton-Gillingham and the usual way of remediating reading deficits is the high level of specialized training required of instructors in linguistics and how language works and how reading works neurologically and how people break down phonemes from fully connected words and put together those phonemes; that knowledge is required in order to address a core reading disorder such as Student demonstrates. [NT 681-682]
107. Student needs Orton-Gillingham informed teachers for any content type of instruction. For example, even if Student is learning social studies Student still has to be able to access the written material and still needs someone who is able to help Student really understand and not simply gloss over when Student is challenged in reading and writing. [NT 682-683]

3<sup>rd</sup> Grade School Year: 2018-2019 The Private School

108. Student entered 3<sup>rd</sup> grade in the private school in Fall 2018. [NT 36]
109. The private school addresses the needs of Students with learning differences. Orton-Gillingham is the central principle of the private school and the private school also teaches certification in Orton-Gillingham. [NT 702]
110. At the private school Student's identified needs are being addressed with the following: Orton-Gillingham instruction in reading in a multisensory sequential curriculum for literacy; Orton-Gillingham supported instruction for all content classes;

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<sup>19</sup> This hearing officer, a licensed clinical psychologist and school-certified psychologist, takes notice of the fact that neurologist Dr. Samuel T. Orton (who died in 1948) and psychologist/educator Anna Gillingham (who died in 1963) first articulated a multisensory approach that has been adapted and refined in various incarnations. Anna Gillingham with the help of Bessie Stillman first published *Remedial Training for Children with Specific Disability in Reading, Spelling and Penmanship* in 1935. The Orton-Gillingham methodology uses phonetics and emphasizes visual, auditory and kinesthetic learning styles. The approach provides students with immediate feedback and a predictable sequence that integrates reading, writing, and spelling.

sensory accommodations; assistive technology; small class instruction; fast paced, high engagement, multisensory environment; weekly occupational therapy; weekly social-emotional curriculum. [NT 97-98, 681-683, 692, 695, 701-702; S-56, P-3]

111. As of December 2018 the Parents were beginning to see improvement in attitude towards school and willingness to engage in academic tasks. [P-3]

#### Expert Reports<sup>20</sup>

112. Although the Parents as well as Student's therapist expressed concerns about Student's sensory needs the District's May 5, 2017 evaluation did not include an OT evaluation. [NT 78-79; P-2, P-22]
113. In March 2018 the District conducted an OT screening assessment and subsequently provided OT services in the RtII model for 8 to 12 weeks after which a full OT evaluation would be performed if deemed necessary. [S-45, S-46]
114. After the District conducted its OT screening evaluation and began RtII OT services, the Parents commissioned a private OT evaluation that was completed on April 4, 2018. The Parents did not share that private OT evaluation with the District until June 2018 after which the District requested a Section 504 meeting to review the report and incorporate suggestions from the evaluation. However, Student left the District before the beginning of the 2018-2019 school year. [S-47]
115. On October 5, 2018 Student received an OT evaluation from the District. Some of the tests overlapped with those administered for the private OT evaluation. The District's OT evaluation report was incorporated into the District's October 26<sup>th</sup> multidisciplinary reevaluation. The OT evaluator recommended that Student receive OT services in school to assist in accessing the educational environment. [S-54]
116. The District produced its reevaluation finding Student eligible for special education on October 26, 2018. [S-54]
117. A private school psychologist submitted an evaluation report on October 22, 2018 four days before the District issued its October 26, 2018 evaluation report. [S-5]
118. The Parents' expert's report was submitted on December 3, 2018. These reports were prepared at least in part for purposes of litigation and were not provided until after the Parents filed their due process complaint. [P-3]

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<sup>20</sup> Parents' closing brief references Exhibit P-43 (invoices). Exhibit P-43 was not included in my exhibit binder. This is irrelevant however since reimbursement for the private evaluations is being denied.

## Legal Basis

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). All witnesses appeared to be testifying truthfully to the best of their recollections, although I did not give equal weight to each witness. I did give considerable weight to the opinions of the Parents' expert witness who is well-qualified by education and experience to render opinions pertinent to the case, and is exceptionally well-versed in the research around cognition, learning, and dyslexia. She was able to provide detailed, technical, information in clear language that placed specifics about Student into the larger context of the body of current knowledge about learning disabilities, their diagnosis and their remediation.

**Child Find:** Students with disabilities are entitled to a free, appropriate, public education (FAPE). The IDEA and its implementing state and federal regulations obligate school districts 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. This obligation is commonly referred to as "child find." Under the IDEA's "child find" requirement, a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Perrin v. Warrior Run Sch. Dist.*, 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Section 504 imposes a similar obligation. *See P.P. v. West Chester Area School District*). Districts are required to fulfill the child find obligation within a reasonable time after notice of behavior that suggests a disability. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). School districts are not, however, required

to identify a disability “at the earliest possible moment.” *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012); The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. *Ridley*.

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).

The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student's “intellectual potential.” *Shore Reg'l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). In *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court considered a lower court’s 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.” The Court 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.” (Emphasis added)

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Student is entitled to compensatory education, and giving the District all of kindergarten and over half of 1<sup>st</sup> grade to find Student eligible for special education is more than reasonable.

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method (“hour for hour”), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method (“same position”), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

The compensatory education hours awarded to Student are to be used exclusively for educational, developmental and therapeutic services, products or devices that address Student’s identified needs. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student’s 21<sup>st</sup> birthday. The services are meant to supplement, and not be used in place of, services that may be in Student’s future IEPs. The Parents will choose how to use the compensatory education hours.

Tuition Reimbursement: Parents who believe that a district’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement, but they place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parents’ selected placement is inappropriate.

The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement. This three-part test is referenced as the “Burlington-Carter” test for tuition reimbursement claims under the IDEA. The second and third tests need be determined only if the first is resolved against the school district.

A unilateral private placement is only appropriate if it provides “education instruction specifically designed to meet the unique needs of a handicapped child.” *Frank G.*, 459 F.3d at 365 (quoting *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034). A parent’s decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, i.e., it provides significant learning and confers meaningful benefit....” *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007). The “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). See also *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d.

## Discussion

The Parents' position, as articulated in the first sentence of their opening statement, perfectly captures the essence of this case: Too little and too late.

This matter centers on the length of time it took the District to determine that Student has a qualifying disability under the IDEA and to offer FAPE. Using RtII as an initial intervention with Student was not inappropriate; to be perfectly clear, I am not concluding that the District denied Student FAPE by trying RtII as an initial intervention. In its closing brief, the District urges me to find in its favor because an adverse decision will "have a chilling effect on [the District's] MTSS/RtII intervention initiatives." Nothing herein precludes the use of MTSS/RtII as a regular education intervention, and the District's argument is specious. Arguments akin to 'we just need more time for regular education to work' have been rejected consistently for over 30 years. Regular education models, no matter how well-intended, cannot be used to delay the special education process when IDEA mandates are triggered. MTSS and RtII are no different than any other regular education effort in this sense. If, like any other form of regular education, the District's adoption of MTSS/RtII has resulted in a Child Find violation, the misuse of these otherwise promising systems ought to be chilled.

As noted by the Parents' expert, originally RtII was envisioned as a schoolwide system of offering students extra help to see whether intervention lasting 10 to 12 weeks, at most a semester, would be successful in getting the student on track to be at grade level, in lieu of moving right into the evaluation for special education process.<sup>21</sup> When RtII was first proposed in the literature there was concern among researchers about how it might delay identification for children who needed IEPs, but there was "sort of an assurance from the original authors of RtII that it would only help those students who didn't need an IEP, but it wouldn't hurt the ones who did because, of course, they would be evaluated in a timely manner." [NT 635-638]

In Student's case RtII was used for three years and exactly what the original researchers opposed to RtII had feared occurred. Although the record is silent about any stance PDE may have regarding an acceptable length of time a child should participate in RtII without significant progress before an evaluation is conducted, I conclude that the District kept Student in the RtII process too long.

Additionally, when the Parents requested that their child be evaluated, the District committed a procedural error, improperly delaying the start of the timeline for completion of the evaluation by over one hundred days. The procedural error was followed by a substantive error when the District conducted an inappropriate evaluation and found Student to be ineligible for special education but in need of a Section 504 plan. Only after the Parents had placed Student in a private school that addresses Student's specific learning disabilities in reading and writing did the District reevaluate Student and find Student eligible for special education. As noted earlier, neurologically-based learning disabilities such as Student exhibits would not spontaneously appear somewhere between end of first grade and beginning of third grade.

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<sup>21</sup> The Parents' expert had contact with some of the professionals doing the seminal research on RtII, and at times worked as a collaborative group in grants that delved into this research.

The Supreme Court of the United States has ruled that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” In this matter, the child’s circumstances are of great importance.

The first circumstance, known to the District at least as early as November 21, 2016, is that Student has a strong family history of dyslexia. Certainly the District’s Title I reading specialists and the District’s psychologists had to have been exposed to the research that has found family history to be a robust factor in dyslexia.

The second circumstance, testified to by the 1<sup>st</sup> grade teacher, but surely known to the kindergarten teacher and the kindergarten and 1<sup>st</sup> grade Title 1 reading specialists, is that Student is exceptionally bright. Even without the IQ numbers to prove it, Student’s high intelligence as exhibited in asking questions, class participation, and leadership qualities could not have been left undiscovered by school personnel in day to day contact with Student.

The third circumstance, which the mother shared with teachers and reading specialists and credibly explained in her testimony, is that Student required a great deal of help with homework, particularly when it involved reading, and that Student was having meltdowns when required to read. Although Student apparently did not experience the same degree of distress in school, this is not unusual; children are often able to ‘hold it together’ at school and then let out their frustrations in the comfortable and private home setting. Teachers and other school personnel telling a parent who reports schoolwork-related emotional dysregulation in the home that “we don’t see it at school” without initiating exploration into learning issues does a disservice to the child and ultimately as in this case, to a school district.

The fourth circumstance, which showed up in progress monitoring data at the end of kindergarten and the end of 1<sup>st</sup> grade is that in spite of being very bright, and in spite of receiving a great deal of support with schoolwork in the home, and in spite of receiving Title I reading support, and in spite of receiving literacy instruction in the general education classrooms, Student remained below the cut point for risk on most measures of acquisition of decoding and encoding skills.

Given these significant circumstances, the District’s initial evaluation was inappropriate both procedurally in terms of mandated timelines for completing an evaluation after obtaining parental consent and substantively in terms of an inadequate exploration of Student’s reading ability/disability, which the District should have strongly suspected by the time it did conduct its evaluation. The substantive error led to the incorrect conclusion that Student was not eligible for special education under the IDEA.

Although it is unknown when the District would have itself initiated a request to evaluate Student, fortunately when the Parents made their formal written request the District agreed. I find that, however, the District impermissibly delayed the evaluation for over 100 days by requiring a second signed consent form from the Parents after receiving both the Parents’ written evaluation request in October and their signed consent in November. Had the initial evaluation found Student to be eligible under the IDEA I would have contemplated awarding Student compensatory education for the 100 plus day delay, a procedural denial of FAPE<sup>22</sup>. However, in spite of the circumstances

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<sup>22</sup> "The remedy of compensatory education is available only where a student's substantive rights are affected by a school district's non-compliance with the IDEA." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). "Accordingly, '[a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.'" *Ridley*.

known to the District, the District conducted an inappropriate evaluation and found the child ineligible for special education, thus adding a substantive denial of FAPE to the procedural denial of FAPE.

Student is entitled to compensatory education on the basis of a denial of FAPE in the area of literacy from February 20, 2017, a date I identify as being when an appropriate evaluation on or before January 20, 2017 identifying the child as eligible for special education would have been followed by the initiation of specially designed instruction, through the last day Student was present in the District in the 2017-2018 school year.

Although the Parents had expressed written concerns about Student's sensory processing issues, and the 1<sup>st</sup> grade teacher noted issues with Student's writing (printing) the District did not include an occupational therapy assessment as part of its belated multidisciplinary evaluation of May 2017. The District did partially correct this error, conducting an OT screening which it provided to the Parents on March 22, 2018. Pursuant to the recommendations in the screening report, the District began to provide 30 minutes weekly of OT services to Student for an 8 to 10 week period. Although a subsequent private OT evaluator recommended 60 minutes a week of OT, there was not enough evidence for me to identify an appropriate number of minutes one way or another. Therefore the District is credited for providing 30 minutes of OT per week commencing on or before March 23, 2018. Student is then entitled to 30 minutes per week of OT services for every week school was in session from February 20, 2017 through March 22, 2018.

These were patient parents. Rather than remove Student from the District when they received the evaluation report finding their child ineligible for special education, they allowed the District another year to attempt to appropriately educate their child. Finally they decided to place Student in the private school. This unilateral placement was appropriate. The District had failed to identify Student as eligible for special education and the private school is uniquely designed for children with Student's needs. There are no equitable considerations that would reduce or remove the District's responsibility to reimburse the Parents for tuition to the private school.

The funds the Parents spent on private evaluations will not be reimbursed. Although the District did not conduct an OT assessment as part of the initial evaluation, the Parents did not share the private OT evaluation they obtained in early April 2018 with the District until June 2018. The evaluations conducted by the private school psychologist and the Parents' expert were not completed until Student entered the private school and were prepared for purposes of supporting the Parents' position in litigation that had already commenced through filing the request for due process.

#### Section 504/Chapter 15 – Denial of FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here— the District denied the student



FAPE under the provisions of Section 504/Chapter 15 as well as under the IDEA. The remedy provided suffices for denials of FAPE under both IDEA and Section 504.

### **Order**

It is hereby ordered that:

1. The District failed in its Child Find responsibilities towards Student, committing procedural and substantive errors. The District should have completed its evaluation of Student by January 20, 2017 and found Student eligible for special education.
2. Based on a denial of FAPE in the area of literacy skills, Student is entitled to ninety (90) minutes of compensatory education per day for every day Student was present in school from February 20, 2017 through the last day of the 2017-2018 school year. Based on a denial of FAPE in the area of occupational therapy, Student is entitled to 30 minutes per week of compensatory education for every week school was in session from February 20, 2017 through March 23, 2018. Compensatory education is to be used in the manner described above. Student is not entitled to compensatory education for lack of extended school year (ESY) or social skills training.
3. The Parents are entitled to reimbursement for tuition paid to the private school for the 2018-2019 school year.
4. The Parents are not entitled to reimbursement for the private evaluations that they obtained.

Any claims not specifically addressed by this decision and order are denied and dismissed.

*Linda M. Valentini, Psy.D., CHO*

March 27, 2019

Linda M. Valentini, Psy.D. CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official