

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 Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 26290-21-22

Child's Name:

R.W.

Date of Birth:

[redacted]

Parent:

[redacted]

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Date of Decision:

3/10/2023

Hearing Officer:

Charles W. Jelley Esq.

STATEMENT OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The Parents contend that under either Act, the District failed to locate, identify, evaluate, and educate the Student in a timely fashion. Parents seek multiple forms of relief, including an award of retrospective and prospective hour-for-hour compensatory education until the District offers a free appropriate public education (FAPE). The District seeks a declaratory ruling that it procedurally and substantively complied with each Act during each school year. Applying the preponderance of evidence standard and the snapshot rule, I now find the Parents have established, and the administrative record supports a Decision in their favor in part and against the District.

STATEMENT OF THE ISSUES

Did the District promptly and appropriately identify the Student's need for special education support and services? If no, what relief is appropriate?

Did the District provide the Student with a Free, Appropriate Public Education under Section 504 and the IDEA during the 2020-2021, 2021-2022, and the 2022-2023 school years? If no, what relief, if any, is appropriate?

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parent also makes denial of education claims under Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P- p.) followed by the exhibit number. Finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

Is an Order for an appropriate educational program moving forward otherwise appropriate? If yes, what relief, if any, is appropriate? (NT pp.18-19).

At the close of the hearing, the Hearing Officer directed the submission of written closing arguments; at the parties' request, I extended the decision due date.² Before the submission of closing statements, the Parties asked, and I agreed to extend the time to file briefs; I also granted another request to extend the Decision Due Date.

FINDINGS OF FACT

THE 2019-2020 [redacted] GRADE SCHOOL YEAR

1. Before the state-mandated COVID-19 school closure in March 2020, during the 2019-2020 school year, the District received a request for homebound instruction due to medical issues. (N.T. pp. 378- 379). During the mandated school closure, the District issued a continuity of education plan which offered online enrichment materials and did not include new instruction. (N.T. p.343).
2. Before the shutdown, the Student scored Basic for marking periods two and three. (P-4, P-13, N.T. pp.253-254. There were no grades or scores for marking period four due to the COVID mandatory shutdown. (N.T. 254).

THE 2020-2021 [redacted] GRADE SCHOOL YEAR

3. When school resumed for the 2020-2021, [redacted] grade school year, the District told the Parents that they could select the type of classroom and the location of the classroom. The choices included in-person instruction, virtual instruction via Google Live, and asynchronous online instruction via the Virtual Learning Academy ("VLA"). (N.T. p.319, N.T. p. 367, p.368, p. 596. p. 599 ln. 17.

² N.T. p. 674-675.

4. In response to the spread of the COVID virus and the local response to the pandemic, the Parent chose to have the Student attend school online instruction through the VLA. (N.T. pp.367-368, N.T. p. 368, N.T. p. 367, pp. 340 -341).
5. VLA students signed on in the morning, all assignments were online, time engaged in instruction was tracked, and attendance was monitored in the VLA program. (N.T. p. 602-603).
6. The Parent contacted the District in October 2020 with concerns about the Student's ability to access the online education platform. (N.T. pp.341-342).
7. Like [redacted] grade, the Student struggled in [redacted] Grade, 2020-2021, in the English/Language Arts class. The Student performed in the Basic range for the first two marking periods. (P-4 N.T. p.255). Science and Social Studies continued to be areas of significant concern. (P-4, N.T. pp.255-256).
8. The Mother told the District staff that the District's VLA program was challenging. (N.T. p.537). The VLA platform did not offer direct instruction; therefore, the Student and family were expected to complete the assigned work without support. At some point, the Mother expressed concern that the work was above the Student's head. (N.T. p.538). The Mother also explained that the VLA program was the only option due to the numerous doctor's appointments during the [redacted] grade. (N.T. p.538). The Mother emailed the District about the Student's struggles with the online VLA program and medical condition. (N.T. p.538).
9. The person responsible for monitoring the VLA platform stated that "it would be difficult...for Child Find to take place" in the online environment. (N.T. p.604). The VLA program was not offered to Kindergarten and First-grade students after the 2020-2021 school year. (N.T. 595-596).
10. The Parent contacted the District in October 2020 with concerns about the Student's ability to access and learn on the VLA platform. (N.T. pp. 341-342)

11. In response to Parent's request, the District initiated an evaluation to determine whether the Student was eligible for special education. The District issued a Prior Written Notice issued on October 26, 2020. (S-1, N.T. p. 412).
12. The District received Parent's consent to complete the evaluation on or after November 9, 2020. (S-1, N.T. p.413).

THE DISTRICT'S 2020-2021 EVALUATION REPORT

13. On January 14, 2021, the District completed an initial evaluation report. (P-15, N.T. p. 246). This report included reviewing report cards, attendance records, progress in response to Title 1 interventions, and previous speech and language evaluation results. (N.T. p. 249-257, p. 296)
14. The assessments were conducted under standardized conditions except for COVID protocols that did not affect the validity of the results. (N.T. p.298). The evaluation included a single intelligence test, the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and the Wechsler Individual Achievement Test – Third Edition (WIAT-III). The WISC is an individually administered, comprehensive instrument for assessing the intelligence of school-age children. The WISC-V provides primary index scores that represent intellectual functioning in specified cognitive areas. The WIAT-III is a comprehensive, individually administered test for assessing achievement. The WIAT-III comprises multiple subtests to evaluate listening, speaking, reading, writing, and mathematics skills. The WIAT-III can comprehensively assess a broad range of academic skills or test only in the area of need. Standard scores were computed based on age-level norms. (P-14).
15. The WISC-V Score Summary provides the following:

	Standard Score	Percentile Rank	Qualitative Description
Verbal Comprehension	92	30	Average
Visual-Spatial	102	55	Average

Fluid Reasoning	76	5	Very Low
Working Memory	100	50	Average
Processing Speed	108	70	Average
Full Scale	88	21	Low Average

(P-14)

16. On the WIAT-III, the Student earned the following scores:

Subtest	Standard Score	Percentile Rank
Reading Comprehension	93	32
Math Problem Solving	83	13
Sentence Composition	89	23
Word Reading	88	21
Pseudoword Decoding	88	21
Numerical Operations	84	14
Oral Reading Fluency	91	27
Spelling	87	19
Math Fluency-Addition	98	45
Math Fluency-Subtraction	93	32
Math Fluency-Multiplication	83	13

Composite Standard Score Summary

	SS	Percentile Rank	Qualitative Description
Reading	86	18	Average
Basic Reading	88	21	Average
Reading Comp. and Fluency	89	23	Average
Mathematics	82	12	Below Average
Math Fluency	91	27	Average (P-14 pp.4-5)

17. COVID-19 safety procedures did not interfere with standardized test administration; all results are believed to be reliable and valid. Neither the psychologist nor the teacher completed a classroom observation. (P-14).
18. Despite standards-aligned instruction, the evaluation team concluded that the Student did not meet state-approved grade-level standards in oral reading fluency, math calculation, or math problem-solving. (P-14).
19. Without benefit from an assessment and teacher observations, the evaluation team concluded that the Student had a Specific Learning Disability evidenced by delayed oral reading fluency, math calculation, and math problem-solving skills relative to age, grade level standards, and intellectual development. The evaluation team recommended participation in learning support programming. At this time, the evaluation team found that the Student needed to improve reading and math skills. (P-14, N.T. pp.300-301, p.318)
20. Although no assessments, rating scales, or screenings were completed, the psychologist's review of the records did not note any social, emotional, or behavioral needs. (N.T. p.27, p.300, p.314, N.T. p.352).

THE FEBRUARY 2021 IEP

21. The February 2021 IEP included the following disclaimer; "The proposed initial IEP reflects the parents' choice of the Google Live learning pathway instead of attending brick and mortar school for in-person instruction. While the parents have chosen not to access the in-person instruction offered by the WWSD and instead requested remote learning, the recommendation of the WWSD and the educators of the IEP is that in-person instruction for the 2020-2021 school would best meet the Student's educational needs. Providing in-person instruction would benefit Student's progress, and all sections of the IEP could be implemented." The District agreed to support the Parents' choice for remote learning due to the COVID-19 pandemic and their concern for their child's health and safety. (P-20 p.2).

22. The psychologist discussed the evaluation results with the Parent and the full IEP Team. (N.T. p.302-304). After administering the Aimsweb oral reading fluency, math calculations, number sense fluency, and writing probes, the psychologist, not the teacher, drafted the initial IEP present levels and goal statements. (N.T. p.276, pp.306-308).
23. The present levels included the WIAT and WICS-V standard scores from the evaluation report. The present levels also included Aimsweb data. The Aimsweb data notes that when presented with 4th-grade level oral reading fluency passages, the Student read 78 words correct per minute (8th percentile). The Student's performance was in the below-average range. When presented with 4th-grade level math concepts and application assessment, the Student earned a raw score of 8 at the 8th percentile. The Student's math concepts score is in the "Below Average" range. When presented with a story starter, one (1) minute to plan, and three (3) minutes to write, the Student-generated 16 total words at the 4th percentile, 15 words spelled correctly at the 8th percentile, and 16 correct writing sequences at the 12th percentile. The Student's performance fell in the "Below Average" range. (P-8 pp.7-11). The present levels next state, "Student needs to improve [redacted] reading fluency, math problem solving, and writing fluency skills in order to experience success with grade level curriculum expectations." (P-8 p.11). Although the psychologist administered the WIAT-III, she omitted all written expression-related subtests. (P-14).
24. The present levels note the Parents expressed additional concerns regarding the Student's mental health needs. The team discussed including social work services in the future. The team determined if social work services were provided, the present levels, goals, and Student's IEP team would revise the related services section of the IEP. (P-8 p.10). The initial February 2021 IEP did not include social worker services as a related service. (P-8).

25. The IEP included an Oral Reading Fluency Goal, Math Concepts and Applications Goal, and a Writing Fluency Goal. The IEP included two (2) forms of specially-designed instruction. The first offered specially-designed instruction for all assessments in the regular education setting to be completed in a small group setting. The same specially-designed instruction stated that all questions and directions should be read aloud as permitted by the assessment, and the Student would receive additional time (not to exceed 50% of original time). The second form of specially-designed instruction included support for math calculation problems. The Student was to receive a multiplication chart graphic organizer to support long calculations and access to manipulatives. (P-8 p.22).
26. The team decided not to offer extended school services. Rather than work through the five standards questions about what forms of supplementary aids and services were considered or rejected to allow for participation in regular education, the IEP states as follows "The IEP team has discussed and addressed the above questions. . . . The need for supplemental instruction in English Language Arts and Math strongly outweighs the benefit that Student would derive from participation in regular classroom instruction, even with substantial modification of the general curriculum and with adapted instruction, instructional grouping, texts, materials, equipment, and assessments. Therefore, the needed supplemental instruction will occur in the special education classroom for 30 minutes daily. The Student will participate in co-teach English Language Arts and Math instruction in a regular education setting." (P-20 p.25).
27. The team then decided to provide Itinerant Services for 30 minutes a day. (P-20 pp.25-26).
28. The District sent the Parents a Notice of Recommended Educational Placement (NOREP), and after a series of miscommunications, the Parents returned the NOREP with a side note that they accepted the placement and

program pending the results of the pending independent evaluations. (P-21 p.4). The NOREP offered Itinerant Learning Support through Google Live, reflecting discussions with Parents and honoring Parent's preferences due to the COVID pandemic. (P-21 p. N.T. p.3, pp.415-417). The Parent signed the NOREP on February 19, 2021, and returned it via email on February 25, 2021. (S-5, N.T. p.416).

29. On February 25, 2021, the Parents requested small group social work services to develop or enhance coping or problem-solving strategies due to anxiety. (P-22). While the record is somewhat unclear when the social worker began to work with the Student, the record is clear that by April 2021, the Student was meeting with the social worker once (1) a week for 30 minutes. (P-31 p.34).
30. On April 12, 2021, the team revised the Math goal. The revised goal statement included twice monthly assessments on the [redacted] grade Number Sense Fluency probe. The Student was expected to progress from a score of 19 to 25 as measured on three consecutive probes. (P-31 p.3).
31. On June 10, 2021, the IEP team revised the Math Goal again. A new baseline score was to be determined upon returning to school for [redacted] Grade in August 2021. (P-31 p.3. p.35).

THE [redacted] GRADE 2021-2022 SCHOOL YEAR AND IEP

32. For the 2021-2022 school year, the District's Health and Safety Plan no longer provided families with the educational pathway of Google Live instruction. This 2021-2022 IEP was revised to reflect a return to in-person learning. Students were expected to receive in-person instruction within the brick-and-mortar setting with appropriate precautions in place. (P-31).
33. On September 22, 2021, the IEP team reconvened and made the following IEP revisions: (1) During co-taught small group intervention, the Student would be provided with pre-teaching and front-loading activities to support skill acquisition in the general education curriculum. (2) To reduce anxiety,

the social worker would provide the "Coping Cat" intervention once a week for 30 minutes. (3) Read Naturally intervention would be provided to improve the Student's oral reading fluency skills. (4) Data, including time of day, would be collected to determine the frequency of the Student's attempts to leave the classroom, *i.e.*, go to the restroom. (P-31 p.3). No data was collected during the co-taught instruction. No records were provided about when or how the teachers provided specially-designed instruction. (NT *passim*).

34. The IEP included an Oral Reading Fluency goal, a Math Concepts and Applications goal, a Writing Fluency goal, and a Math Number Sense Fluency Goal. (P-31 pp.21-34). The Student continued to receive 30 minutes of daily pull-out instruction by the special education teacher and 30 minutes of weekly social worker services. (P-31).
35. In [redacted] grade, the Student had eleven (11) absences and one (1) unauthorized absence. (P-30).

THE INDEPENDENT EVALUATIONS ARE COMPLETED

36. The Parents asked, and the District agreed to pay for an independent neuropsychological and a speech and language evaluations. (P-26, P-27).
37. The record is somewhat unclear, but it appears that Parent provided some health information to the District and different health records to the independent evaluations. (P-27, N.T. pp.264-267).
38. The independent neuropsychological assessment included a Parent intake, a teacher interview, a virtual classroom observation, and two scheduled testing sessions. (P-27).
39. The neuropsychological evaluation included the following tests: the Differential Abilities Scales-Second Edition (DAS-II), a comprehensive and flexible instrument that assesses conceptual and reasoning abilities across a broad range of ages and developmental levels, and the Woodcock-Johnson Tests of Achievement-IV (WJ-IV), Gray Oral Reading Tests-5 (GORT-5), Test

of Word Reading Efficiency–2 (TOWRE-2), Comprehensive Test of Phonological Processing – 2 (CTOPP-2), Beck Youth Inventor, Behavioral Assessment System for Children-III (BASC-3), the Brown Executive Functioning assessment, the Delis-Kaplan Executive Function System (D-KEFS), and the Test of Written Language-4 (TOWL-4). (P-27).

40. On the Differential Ability Scales-II, the General Conceptual Ability Score (GCA) reflects a general ability to perform mental processing involving conceptualizing and transforming information. On the DAS-II, the Student's overall level of intellectual functioning fell in the average range with a GCA of 105 when compared to same-aged peers. On the DAS II, Digits Forward, the Student scored in the "Below" average to borderline range. The Student showed difficulties when asked to use working memory and divided attention during complex, timed activities like skip counting, reciting the months of the year in reverse order, and dividing attention between 2 rote sequences. The Student was overwhelmed and made multiple set errors. The Student scored in the "Low" average to borderline range when required to use higher-level executive skills on a verbal fluency task that required shifting mental set between two semantic categories (D-KEFS Verbal Fluency Category Switching 9). The Student has semantic skills but struggled with set-shifting, divided attention, and cognitive flexibility in verbal activities. The DAS –II scores were as follows:

	T-score/ SS	Percentile Rant
Recall of Designs	51	54
Word Definitions	58	79
Pattern Construction	54	66
Matrices	51	54
Verbal Similarities	54	66
Sequential &		
Quantitative Reasoning	50	50
Recall of Digits Forward	51	54

Recall of Sequential Order	30	2
Speed of Information Processing	62	88
Recall of Digits Backward	33	4
Rapid Naming	51	54
Verbal	109	73
Nonverbal Reasoning	100	50
Spatial	104	61
GCA	105	63
Working Memory	71	3
Processing Speed	112	79 (P-27).

41. The examiner described the Student's graphomotor functions as a concern. The Student used a modified right-hand quad grip when writing and drawing and consistently used the left hand to secure the paper. Sentence/paragraph writing was slow and inefficient, and sometimes the Student shifted or changed pencil grip. On a test of Design Copying, the Student earned an average score. The examiner noted that the Student worked very slowly and tended to over-focus on details instead of taking the time or engaging in planning to identify the central organizing aspects of the designs; mild difficulties with reduced planning and problem-solving were noted. (P-27 p.9).
42. The Student's overall reading skills were at the "low" end of the "Average" range on the WJ-IV (Broad Reading). However, the Student's single-word reading skills were in the age/grade-appropriate range on the WJ-IV (Letter Word Identification). The Student showed retrieval of high-frequency words and was able to use basic decoding to attempt less frequent, multisyllabic words. Sometimes the Student omitted or added morphology and phonemes. The Student's phonological awareness and processing skills were at the low end of the "Average" range. The Student's reading comprehension skills were at the low end of the "Average" range on the WJ-IV and mildly

below age and grade expectations on the Passage Comprehension subtest. The Student had some word identification skills but sometimes struggled to remember the text and derive overall meaning from what was read. The Student reported confusion and needed some encouragement. The Student's overall comprehension and efficiency of reading very simple sentences that were read silently was at the low end of the "Average" range (Sentence Reading Fluency). The Student received a borderline score on an Oral Reading measure. The Student made visual orthographic/retrieval errors, including omitting and adding words and replacing target words with visually similar words like "they" for "there," "lot" for "lots," "gather" for "gathering," and "contains" for "centuries." (P-27 pp.9).

43. On the GORT, the Student's overall Oral Reading Index was within the borderline range compared to same-aged peers. (P-27 p.9)
44. The CTOPP-2 was administered to assess Student's phonological processing and naming speed skills. The Student showed solid skills regarding sound-symbol correspondence and isolating specific sounds/phonemes within presented words (Phoneme Isolation), but weaknesses were noted in working memory, which impeded the ability to delete specific phonemes within the middle of words and articulate new words. The Student earned an average to high average score when asked to blend orally presented sounds into words and then scored in the "Average" range when required to repeat presented nonwords (Nonword Repetition) on the CTOPP-2. Average skills were noted on a task of rote sustained attention (Memory for Digits) and showed rote repetition skills. (P-27 p.9).
45. Concerning single-word reading efficiency, the Student scored in the "Low" average range on the TOWRE-2. The Student identified high-frequency sight words at a mildly reduced pace and made a few retrieval/accuracy errors, like "raves" for waves," and "child" for children. The Student's phonemic decoding efficiency was also within the low average range on the TOWRE-2

and mildly below age and grade expectations. The Student's pace was below expectations when asked to read nonwords under time pressure. The errors reflected orthographic visual retrieval weaknesses, including letter reversals, as opposed to primary difficulties with sound-symbol relationships. Such weaknesses were also noted on written language assessments and reading fluency/accuracy. The Student's overall basic math skills were in the average range on the WJ-IV but somewhat variable across measures in Broad Math. (P-27 p.10)

46. The Student scored within the "low" average range on a test of math calculation skills (WJ-IV Calculation). The Student scored within the average range on a math reasoning task involving visual stimulus pictures and verbally mediated responses (WJ-IV Applied Problems). The Student exhibited number sense but inconsistently completed more complex computations requiring regrouping. The Student also made sequencing, organization, and planning/executive function errors on multipart subtraction and multiplication items. The Student could not complete items requiring long division or computation with decimals and order of operations. The Student benefited from the use of multisensory strategies. (P-27).
47. The Student demonstrated conceptual knowledge and quantitative reasoning. The Student's math fact fluency was in the average range. On a formal/structured WJ-IV Spelling assessment, the Student exhibited weaknesses. The Student's performance reflected phonics skills but inconsistent retrieval of some irregular and less frequent spellings (*i.e.*, "come" for "comb" "impotent" for "important," and "vecashion" (sic) for "vacation"). The Student received low scores when asked to formulate grammatically appropriate sentences on a structured writing task (WJ-IV Writing Samples). The Student made formulation grammar/ tense errors and struggled with spelling/orthographic retrieval. The Student also made multiple punctuation and capitalization errors. The Student scored within the

average range on a simple sentence writing task that assessed output speed (Sentence Writing Fluency). The Student benefited from the visual modeling, visual and verbal prompts, and structured/ simple nature of the rote activity. The Student struggled with organization, grammar, and mechanics. The student-produced a paragraph when asked to write a story to accompany a complex picture. The Student followed the task instructions and produced a story sequence related to a presented stimulus picture. The Student's writing included emotional expressions, a description of the objects and activity in the picture, and some action sequences. The Student did not exhibit theme or character development, and the narrative lacked a clear beginning and conclusion. (P-27).

48. The Student displayed weaknesses regarding writing mechanics in the context of an essay, including spelling errors, omitted punctuation/capitalization, run-on, and partial sentences, made grammar errors, and omitted transitions and keywords. The TOWL-4 Contextual Conventions and Story Construction writing skills are below age and grade expectations. (P-27 pp.10.11).
49. Two teacher Brown Executive Function and Attention Scales forms were unremarkable across the Total Composite and all sub-scores. On the Brown Executive Function and Attention Scales, the Student's Total Composite was not elevated, while on Student's Parents' forms, one Parent-reported concern regarding utilizing working memory and activating recall. (P-27 pp.11-12).
50. On the BASC-3, Student's Mother reported "at risk" anxiety levels and physical symptoms/somatization. The Father reported "at risk" levels of somatic complaints/symptoms. Both teacher forms reflected concerns regarding adaptive/coping skills (i.e., leadership, study skills, adaptability/flexibility, and social skills). On the Beck Youth Combination Booklet-2, Student self-reported elevated concerns and problems regarding

anxiety and somatization (e.g., "I think about scary things, I worry people might tease me.", "My hands shake, I am afraid that I might get sick," "I get shaky," "I am afraid something bad might happen to me," "I worry," "I have problem sleeping," "I worry I might get bad grades," "I worry when I am at school," and "I get nervous"). The Student did not self-endorse any significant difficulties with anger, depressed mood, behavior, and/or self-confidence. During a clinical interview, the Student talked about illness and "does not feel good." The Student stated that when participating at school, the symptoms are worsened, feels stomach upset/pain and has quickly/intense thoughts/ideas, and that other students laugh when the Student reads. On the CSRPI, Student endorsed areas of personal strength in terms of being healthy, finishing homework, sports, doing things, sharing, making friends, being responsible, and reported areas of weaknesses in keeping the room clean, doing chores at home, completing math, reading, and spelling homework. The Student endorsed the following critical items: "I have a hard time paying attention in class," "I often don't feel well in school," "I am not as smart as most kids in my class," "I have a lot of bad dreams," and "I worry a lot and I hate school." (P-27 pp.12).

51. On the NEPSY-II SS Percentile Comprehension of Instruction, the Student's scores ranged from the 9th to the 50th percentile. (P-27 p.19).

52. On the Woodcock-Johnson Tests of Achievement-IV (WJ-IV), the Student earned the following scores:

	SS	Percentile	Grade Equiv.
Letter Word Identification	93	32	3.3
Sentence Reading Fluency	90	25	3.0
Calculation	88	21	3.1
Math Facts Fluency	97	43	4.0
Spelling	96	41	3.9
Oral Reading	76	6	1.5

Sentence Writing Fluency	99	47	4.1
Passage Comprehension	90	26	2.8
Applied Problems	103	57	4.7
Writing Samples	88	22	2.3
Word Attack	91	27	2.8
Broad Reading	91	27	3.1
Broad Math	95	38	3.8
Broad Written Language	93	32	3.4
Academic Skills	92	29	3.4
Academic Fluency	94	33	3.6
Academic Applications	92	29	3.3. (P-27 p.21).

53. On the Test of Written Language – 4 (TOWL-4) SS Percentile Contextual Conventions 6. (P-27 p.21).

THE INDEPENDENT SPEECH REPORT

54. The independent speech therapist administered the following tests: TAPS-4, A Language Processing Skills Assessment Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), Reading Comprehension and the Structured Writing Supplemental tests, Observational Rating Scale Comprehensive Assessment of Spoken Language-Second Edition (CASL-II), Receptive Language Subtest Language Processing Test-Third Edition (LPT-3), and the Oral Passage Understanding Scale (OPUS) Language Sample. (P-27).

55. On the TAPS-4, a Language Processing Skills Assessment, the Student scores ranged from the "Well Below Average" to "Average range. The Overall index scores fell in the Average range. On CELF-5, the Student earned nine (9) scores in the "Average" Range and one "Below Average" score. The five (5) Core Language Skills all fell in the "Average" range. (P-27).

56. On CASL-2, the Student scored in the "Average" range. On LPT-3, the Student had five (5) scores in the "Average" range and two in the "Below

Average" range. The Student's s Total Test Standard Score of 70 falls within the Below Average range. (P-27).

57. The OPUS is a measure of auditory comprehension that evaluates a person's ability to listen to passages read aloud and recall information. The Student scored in the "Average" range. (P-27).
58. Student's Mother completed the CELF-5 Observational Rating Scale. This scale is designed to identify verbal and nonverbal pragmatic deficits that may negatively influence social and academic communication. The Mother expressed concerns such as difficulty expressing themselves, and reading and writing challenges were areas of weakness. (P-27).
59. The examiner suggested multiple goal statements and made several recommendations, including School-based individual Speech and Language Therapy once a week for 30 minutes each session and once a week for 30 minutes of push-in within the classroom. The independent speech therapist suggested the following (1) Strengthening all aspects of his memory process: encoding, storage, retrieval, and reporting, (2) Teach strategies to improve recall (*i.e.*, repetition, chunking information/summarizing occasionally, encourage Student to restate directions, using visual imagery and association to support auditory input), and (3) Activities addressing semantics and syntax in oral and written narratives. (P-27).
60. When the independent evaluations arrived, the District's school psychologist reviewed the neuropsychological evaluation and met with the private evaluator to review the data set. (N.T. p.314, P-31, N.T. pp.405-406).
61. The overall determination of educational needs and the explanation of how the Student's disabilities affected participation in the regular education setting by the independent examiner was vastly different from the District's evaluation. (P-15 vs. P-18, vs. P-20, vs. P-31).
62. Although the Student received social worker services, the District did not have objective data about the Student's anxiety until it received the IEE.

(N.T. p.315, P-15, vs. P-18, P-20, and P-31). The Student's emotional needs were conveyed by the Student's self-report and with the adults responding to the rating scales and other assessment questions. (P-27).

63. The District received the Parent's approval for the social worker services on March 22, 2021. (S-13, NT p.424).

THE FEBRUARY 2022 [redacted] GRADE TO [redacted] GRADE IEP

64. On February 9, 2022, midway through [redacted] grade, the IEP team met to develop the [redacted] to [redacted] grade IEP. (P-34).

65. The present levels included reading, math, and writing data. Using the 5th-grade Aimsweb Plus oral reading fluency probe, the Student could read 115 words per minute at the 20th percentile using the Winter normative data. (P-34 p.7). Using the 5th-grade Aimsweb Plus Number Sense Fluency probe, the Student earned a score of 30 at the 60th percentile, using [redacted] grade Winter normative data. Writing Progress Monitoring data indicates that when given a story with 1 minute to plan and three minutes to write, the Student wrote 49 total words written (TWW) and had 48 correct word sequences (CWS). Using Winter normative data for [redacted] grade, the Student's TWW score was between the 52nd and 54th percentile, and CWS was between the 68th and 69th percentile. (P-34 p.8).

66. As of January 19, 2022, roughly 90 days into the school year, the Student had one (1) unknown absence, 15 excused absences, 14 unexcused absences, and two (2) half-day unexcused absences. (P-34 p.9).

67. Ongoing progress monitoring data and standardized assessment results indicate that Student does not meet state-approved grade-level standards in oral reading fluency despite standards-aligned instruction. The Student's delayed reading skills interfere with success and independence in the general education curriculum. (P-34 p.10).

68. The IEP included an Oral Reading Fluency Goal and a Social Worker goal. The social work goal called for the Student to use the "Coping Cat" intervention targeting anxiety. (P-34 pp.19-21).
69. The February 2022 IEP dropped the writing fluency goal statement. (P-34).
70. The 2022 IEP added pre-teaching and front-loading activities to support skill acquisition in the general education curriculum. Read Naturally intervention was added to improve the Student's oral reading fluency skills, and the social worker continued to use "Coping Cat" one (1) time a week for 30 minutes/session. The IEP team also decided to maintain the existing support. (P-34 p. 22).
71. The IEP team, after reviewing the data, concluded that Student was now a person with a primary disability category of Specific Learning Disability. The IEP team did not consider whether the Student was eligible under other IDEA disability categories. Due to the lack of evidenced difficulties with regression and recoupment, extended school-year services were not recommended. (P-34 p.24).
72. The team concluded the Student needed supplemental instruction outside the regular class for 30 minutes a day. (P-34).

GENERAL LEGAL PRINIPLES

BURDEN OF PROOF AND WITNESS CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case,

the Parents are the party seeking relief and must bear the burden of persuasion.³

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."⁴ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on particular testimony.⁵

Although the teachers worked with the Student, I am convinced their lack of practical day-to-day familiarity with the IDEA and Section 504 standards contributed to incomplete responses to routine questions. Finally, after reading the record, I found some of the testimony unresponsive to the call of the question. For example, the psychologist could not explain why she omitted the written expression testing. The psychologist and the special education director waffled on how the District identifies students with a specific learning disabilities. Similarly, the social worker could not explain why she did not follow up on the DESSA rating scales with the teachers and the Parent.

On the Parent's side, the Student's independent speech evaluator's testimony about her conclusions was somewhat less than cogent and bordered on partisan. Her testimony that the language instruction must be delivered by the therapist was somewhat overreaching. Rather than explain

³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁴ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁵ A fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affect the credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. When the testimony is delivered in a persuasive fashion factors like body language, eye contact, and when the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

the data based on the test maker's instruction, she filtered her opinions through third-party researchers. Therefore, I will give this portion of her testimony little to no weight.

Finally, I found the Mother's testimony choppy and disjointed. It seemed like in this case, like in the companion case; for some unknown reason, the Mother was reluctant to speak out. Sometimes she could not relate or recall basic foundational facts about this Student. After reviewing the testimony and my notes, I am left with a feeling that, at times, she was guarded in her candor and demeanor.⁶

IDEA FAPE PRINCIPLES AND PARENT PARTICIPATION

The IDEA requires each state to provide eligible children with a "free appropriate public education" (FAPE) for special education services.⁷ FAPE consists of both special education and related services. In *Board of Education v. Rowley*, 458 US 176 (1982), the Supreme Court held that the FAPE mandates are met when IEP services provide personalized instruction and comply with the Act's procedural obligations. A district meets its FAPE obligation by providing an IEP which is "'reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential.'"⁸ IEPs are "... constructed only after careful consideration of the child's present levels of achievement, disability, and growth potential." *Id.* Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, a district is not obligated to "provide

⁶ Parent's testimony regarding the information provided to the District and communication with the District about their concerns was at times vague when describing day-to-day events and timelines. (N.T. p. 535 (doesn't remember who she told about student's anxiety, referencing first and second grade when asked for a timeframe); pp. 536-537, (stating there is no diagnosis and referencing multiple years for the same event), pp.546-547, (provided specific records to IEE evaluator but cannot recall whether, what or when she provided records medical records to the District).

⁷ 20 U.S.C. § 1412.

⁸ *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

'the optimal level of services,' or incorporate every program requested by the child's parents."⁹ All the law expects is appropriate services in light of a child's unique circumstances, not those necessarily sought after by "loving parents." *Id.* The assessment of whether a proposed IEP meets the *Rowley* and *Endrew* standard is based on information "as of the time it was made;" this commonsense rule is commonly known as the "snapshot rule."¹⁰ While an IEP must aim for progress, progress is not measured by what may be ideal. *Id.*

IDEA EVALUATION REQUIREMENTS

The IDEA evaluations or reevaluations have twin purposes. First, the evaluation should determine whether or not a child is a child with a disability, and second, the evaluation must "determine the educational needs of such child."¹¹ The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of several specific disability classifications and, "by reason thereof, needs special education and related services."¹² An appropriate evaluation or a reevaluation includes a "[r]eview of existing evaluation data." *Id.* The review of the existing data must include all existing "evaluations and information provided by the parents," "current classroom-based, local, or State assessments, and classroom-based observations," and "observations by teachers and related services providers." *Id.* "Upon completion of the administration of assessments and other evaluation measures[,], the determination of whether the child is a child with a disability . . . and a team shall make the educational needs of the child of qualified professionals and the parent of the child."¹³

⁹ *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

¹⁰ *Fuhrman v. East Hanover Bd. of Educ.* 993 F.2d 1031, 1041 (1993).

¹¹ 20 U.S.C. §1414(a)(1)(C)(i).

¹² 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).

¹³ A full IDEA evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general

Districts must (1) use a variety of assessment tools and strategies; and (2) the assessment tools should assist the team in developing the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.¹⁴ The evaluation team should not use any single measure or assessment tool as the sole criterion for determining whether a child is a child with a disability. *Id.*

Parental disagreement with the conclusions of a district evaluation does not, in and of itself, establish that the District's evaluation is inappropriate. The usual remedy when an evaluation does not meet the requisite criteria is either a reevaluation or an IEE request. When an evaluation is conducted per 34 C.F.R. §300.304 through 34 C.F.R. §300.311, and the child was not assessed in a particular area, the Parent has the right to request an IEE.

When parents present an IEE, the District must consider the report. The IEP team must consider the evaluation results if it meets agency criteria. *Id.* The term "consider" does not mandate the local agency accept the recommendations in the independent report; however, the team must "consider" the existing data.¹⁵ The term "consider" is not defined in either state or federal law. The final decision after the review should be shared when the district issues prior written notice of what "actions" the District will or will not take.¹⁶

RELATED SERVICES

Related services are designed to enable a student to benefit from special education services and supplementary aids and services. Related services

intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c) (4), 20 U.S.C. § 1414(b)(3)(B).

¹⁴ 34 C.F.R. § 300.8.

¹⁵ 34 C.F.R. § 300.502(c), *L.T. v. Mansfield Twp. Sch. Dist.*, Civil Action No. 04-1381, 2009 U.S. Dist. LEXIS 21737 fn.6 (D.N.J. Mar. 17, 2009) (the district should hold a meeting to consider the new information, ask for parent input, and make revisions to the IEP if needed).

¹⁶ 34 C.F.R. § 300.503.

allow students "(i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children. . . ."

IDEA school-based social work services include "preparing a social or developmental history of a student with a disability, group and individual counseling with the student and family, working in partnership with parents, and assisting in developing positive behavioral intervention strategies." 34 C.F.R. §300.34(4) and (20).

IDEA speech-language pathology services include "identification of students with speech or language impairments, diagnosis of specific speech or language impairments, referral for medical or other professional attention necessary for the habilitation of speech or language impairments, the provision of speech and language services, and the counseling and guidance of parents, students, and teachers regarding speech and language impairments.

APPROPRIATE RELIEF

In this instance, both Parties seek appropriate relief within the meaning of the IDEA.¹⁷ The Parent seeks retrospective relief for past violations and prospective compensatory education until a revised appropriate IEP is offered. At the same time, the District desires a declaratory finding that its program and placement offered a FAPE. Finally, they seek any other relief necessary to remedy all violations.¹⁸

¹⁷ *Sch. Dist. of Phila. V. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)).

¹⁸ *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (comparing the make-whole versus the hour-for-hour approach)

DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW

THE IDEA CHILD FIND CLAIM

I have reviewed the Parties' competing analysis, the exhibits, the testimony, and briefs in reaching the following Conclusions of Law. The record does not support the Parents' reliance on events two years before filing the action. The applicable screening regulations at 22 Pa Code 14.122 suggest that districts have a reasonable time to engage in early intervening services. The COVID-19 shutdown and reopen cycle was an intervening factor that interfered with and otherwise extended the "reasonable time" in [redacted] grade necessary to identify and evaluate the Student. Stated another way, even if the Student was in school, not all struggling children require an immediate assessment. When the Parent asked, the District promptly evaluated the Student. Therefore, the Parents' child find claim is denied.

THE LACK OF ACHIEVEMENT DATA INTERFERED WITH A COMPREHENSIVE ASSESSMENT IN ALL AREAS OF SUSPECTED LEARNING DISABILITY

22 Pa Code §14.125 of the Pennsylvania Special Education Regulations, in conjunction with IDEA regulations at 34 C.F.R. §300.309, identify four factors teams must consider when identifying a student as eligible for special education under this specific learning disability category. A comprehensive specific learning disability evaluation includes an assessment of (1) oral expression, (2) listening comprehension, (3) written expression, (4) basic reading skills, (5) reading fluency skills, (6) reading comprehension, (7) mathematics calculation, or (8) mathematics problem solving §14.125(a)(1). An evaluation team must consider several exclusionary factors, like a lack of instruction. Simply put, an eligible student must meet each assessment area for each definition factor to qualify as a student with a specific learning disability. IDEA and state regulations require that District

use a variety of assessment tools when completing comprehensive evaluations. The IDEA also requires that no single measure is used to determine the Student's eligibility. These fundamental rules were not applied in this instance.

THE PSYCHOLOGIST DID NOT ASSESS WRITTEN EXPRESSION

The WIAT includes a variety of subtests to measure the eight (8) areas of achievement specified by IDEA regulations required to identify and classify learning disabilities.¹⁹ The WIAT-III allows testers to calculate seven different composite scores, including Oral Language Total Reading, Basic Reading, Reading Comprehension and Fluency, Written Expression, Mathematics, Math Fluency, and Total Achievement. The District psychologist failed to administer the Alphabet Writing Fluency, Early Reading Fluency, Early Reading Skills, and Essay Composition subtests.

I now find the initial evaluation was fatally flawed. The psychologist here failed to administer and of the measures of written expression which in turn understated the extent of the Student's disability. The omission of the Written Expression subtest and the failure to calculate the written Expression Composite score prevented the accurate calculation of the difference between the Student's ability and achievement. Therefore, absent the written expression measurements, the Student was not assessed in all areas of suspected disability.

THE DISTRICT'S EVALUATION REPORT DID NOT INCLUDE A VARIETY OF ASSESSMENTS

In this instance, contrary to the variety of assessment rule, the psychologist used one measure to assess intelligence and one to assess achievement to

¹⁹ The WIAT subtests assess Oral Expression, Early Reading Skills, Word Reading, Pseudo Word Decoding, Reading Comprehension, Oral Reading Fluency, Alphabet Writing Fluency, Spelling, Sentence Composition, Essay Composition, Math Problem Solving, Numerical Operations, Math Fluency – Addition, Math Fluency – Subtraction, and, Math Fluency – Multiplication. (P-5, P-18).

determine the learning disability; nothing more was done, and nothing more was considered. The lack of other measures assessing organizational, executive functioning, or measures of alertness in light of the Student's known medical troubles is a second fatal flaw. Given the suspected organizational, alertness, and executive functioning deficits, the District failed to complete a comprehensive assessment, and relying on one achievement, and one ability assessment is a fundamental flaw. The failure to complete social, behavioral, or executive functioning assessments contributed to an insufficient understanding of the Student's needs and circumstances. This threshold procedural violation created a series of procedural and substantive violations. Given the District's focus on the number of missed school days and the Student's history of medical excuses, the District had a duty to complete additional assessments. The procedural error here caused substantive violations.

THE STUDENT WAS NEVER OBSERVED IN THE CLASSROOM

Contrary to the assessment regulations, the initial evaluation failed to include a teacher and an assessment observation by another knowledgeable professional of the child's learning environment/setting.²⁰ This standalone omission caused a failure to document the child's academic performance and behavior relating to the suspected learning disability.²¹ It is black letter law that a child must be observed in the classroom setting to document their academic performance in the areas of difficulty; that did not occur.²² I now

²⁰ See, *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 73 (1st Cir. 2016), *Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 U.S. Dist. LEXIS 13560, 2020 WL 435385, at *28 (N.D. Ohio Jan. 28, 2020).

²¹ 34 C.F.R. § 300.310(a); see also § 300.305(a)(1)(ii) (requiring an IEP Team to review classroom-based observations for purposes of an initial evaluation).

²² *Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 WL 435385 (N.D. Ohio Jan. 28, 2020).

find that failing to complete the observation is a standalone, procedural, and substantive violation.²³

The lack of assessment data and the failure to observe the Student caused the team to underestimate the frequency and duration of needed forms of specially-designed instruction. I now find these violations interfered with the Parents' participation rights and denied the Student a FAPE.

THE FEBRUARY 2021, APRIL 2021, NOVEMBER 2021, AND SEPTEMBER 2021 IEPS WERE FUNDAMENTALLY FLAWED

The IDEA mandates that a student's IEP "set out measurable annual goals, including academic and functional goals, along with a 'description of how the child's progress toward meeting' those goals will be gauged" in all areas of unique need. *Id.* Typically a district's failure to establish measurable annual goals and present levels of educational performance constitutes a procedural violation of the IDEA. Students can recover for such violations only if the omissions "impede[] the child's right to a free appropriate public education."²⁴ The District errors and omissions contributed to underestimating the frequency, intensity, and duration of otherwise needed personalized specially-designed instruction. These errors also contributed to improper goal statements and related services. I now conclude that the lack of a full comprehensive individual assessment in written expression, along with the failure to complete an observation and the failure to use a variety of assessments, denied the Student a FAPE.

²³ An observation of the Student's academic performance is mandatory element of a comprehensive evaluation. In *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 78 (1st Cir. 2016) the court held that "[A]n SLD determination must take into account 'information from an observation in routine classroom instruction and monitoring of the child's performance.'" *Id.* (quoting § 300.310(b)).

²⁴ *Rodrigues v. Fort Lee Bd. of Educ.*, 458 F. App'x 124, 127 (3d Cir. 2011); see also *G.N. v. Bd. of Educ. of Twp. Of Livingston*, Civil Action No. 05-3325 (JAG), 2007 U.S. Dist. LEXIS 57081, 2007 WL 2265035, at *7-8 (D.N.J. Aug. 6, 2007) ("The failure to include goals and objectives violates IDEA").

THE EVALUATION REPORT, THE DATA SET, AND THE GOALS STATEMENTS ARE NOT ALIGNED

The evaluation report and the IEPs are out of sync. The IEP includes three goal statements, the first talks about Oral Reading Fluency, the second references Math Concepts and Applications, and the third targets Writing Fluency. As stated above, I found the initial evaluation inappropriate because it lacked a measure of written expression. Yet somehow, writing was included as a goal statement. It seems like the examiner tried to cure that lead to the writing goal. The Aimsweb testing did not cure the fatal initial assessment flaws. It is axiomatic without a comprehensive initial assessment; the IEP design was inappropriate. The single Aimsweb probe violates the single measure and variety of assessment problems described in the analysis of the evaluation report. Even assuming *arguendo* the Aimsweb testing cured the violation, the IEP, as written, does not include any strategies, interventions, or specially-designed instruction to teach the writing goal. Therefore, when drafted, the writing goal was inappropriate and lacked specially-designed instruction.

While English and Language Arts were co-taught, the IEP did not inform the teacher or the Parents what specially-designed reading instruction or supports would be provided in regular English, Science, or Social Studies classes. While the IEP listed Read Naturally as a form of specially-designed instruction, the record does not include any data Read Naturally data. This failure denied the Student a FAPE.

As for the Nonsense Math Fluency goal, a multiplication chart, a graphic organizer to support long calculations, and manipulatives are accommodations, not specially-designed instruction. Specially designed instruction means adapting, as appropriate, the content, methodology, or delivery of instruction to address the student's unique needs resulting from the student's disability. Specially-designed instruction ensures access to the

general education curriculum so that the Student can meet the state educational standards. 34 C.F.R. §300.39(a)(1). Stated another way, specially-designed instruction is what the student receives, while accommodations are supports students use in performing the instructional task. The failure to include specially-designed instruction in math is another fundamental flaw.

THE DURATION AND INTENSITY OF SUPPORTS AND SERVICES ARE INSUFFICIENT

In one place, the IEP states that the Student needs supplemental instruction in the special education classroom for 30 minutes daily. Assuming the 30 minutes of instructional time was divided equally across the three-goal statements, each school day, the Student would receive 10 minutes a day of instruction or 50 minutes a week of math, 50 minutes of reading, and 50 minutes of writing support. The commitment of 50-minutes of resources, when contrasted against the Student's testing profile of 4th percentile in sentencing writing, 8th percentile in spelling, 12th percentile in completing sentences, 8th percentile in oral fluency, and 8th percentile in math on its face, is an insufficient commitment of resources to make meaningful progress on the annual goal. Furthermore, after carefully reviewing the testimony and the exhibits, the record is preponderant; the staff did not cogently explain how 30 minutes a day was appropriate. Accordingly, I now find the initial IEP, when offered, was inappropriate.

THE START OF IN-SCHOOL SOCIAL WORKER SERVICES

The IEP team must determine and specify, in the IEP, the types of related services, if any, a student will receive. 34 C.F.R. §300.320 (a)(4). An IEP must then include a statement of the anticipated frequency, location, and duration of related services provided to the child. 34 C.F.R. §300.320 (a)(7). Stated another way, no single staff member may unilaterally decide a student's needs, frequency, location, or duration of the

related services. All IEP decisions are individualized and linked to the student's unique needs and surrounding circumstances. 34 C.F.R. §300.320 (a)(4), 34 C.F.R. §300.320 (a)(7). The District did not follow the black letter law.

As early as February 25, 2021, the Mother completed a request, and the District agreed to provide in-school social work services. (P-22). On April 21, 2021, outside of the IEP and evaluations process, a social worker began to work with the Student (N.T. pp.192-193, p.196). The social worker stated that when she began services, she was told that the Mother agreed to start services to address coping strategies surrounding feelings of "anxiety." (N.T. pp.192-193). The social worker did not receive the February 2021 evaluation or the February 2021 IEP. (N.T. 193). The social worker did not gather information from the Mother about the source of the suspected anxiety. (N.T. pp.193-195). Finally, the social worker did not administer or share informal screenings or assessment results.²⁵

While social worker services started as a regular education intervention, the provision of regular education social work services did not last long. The social work unilaterally determined all services' duration, frequency, and intensity. (N.T. pp.198-199). The IEP states that when social work services were offered in the future, the IEP team would revise the present levels, goals, and related services portions of the IEP. That did not happen. Instead, the social worker continued to unilaterally make all the decisions about the frequency, duration, and intensity of services.

²⁵ Screening is a process for evaluating the possible presence of a particular problem. The outcome is normally a simple yes or no. Assessment is a process for defining the nature of that problem, determining a diagnosis, and developing specific treatment recommendations for addressing the problem or diagnosis. <https://www.socialworker.com/feature-articles/practice/what-every-social-worker-needs-to-know-about-sbirt/#:~:text=It's%20important%20to%20note%20that,that%20may%20take%20several%20sessions.>

The effects of the Student's anxiety went unnoticed in the classroom. For example, on or about April 2021, close in time to the start of the social worker services, the regular education teacher reported that by the third marking period, of [redacted] grade the Student's baseline of 78 correct words per minute at the [redacted] grade level dropped to 63 correct words per minute at the [redacted] grade level. (P-31, N.T. p.153). The [redacted] grade report card also indicates scattered success. (P-4). The record is preponderant that the Student struggled in Science and Social Studies, scoring in the "Basic" range in Science and "Below Basic" range in Social Studies. (P-4, N.T. 256).

Then in September 2021, the [redacted] Grade IEP team, without baseline data, added social worker services as a related service. The IEP did not include a goal or a statement why the social work services were otherwise necessary. The IEP team cannot reasonably calculate or determine the appropriate frequency, intensity, location, or duration of services without a comprehensive evaluation or objective present levels. The IEP team cannot accurately measure progress without a present level and measurable goals. Finally, without a comprehensive evaluation and ongoing progress data, the IEP team cannot determine the support the teachers need to implement social worker services. Absent assessment data, the September IEP failed procedurally and substantively to offer the Student a FAPE.

THE INDEPENDENT EVALUATIONS INCLUDED A VARIETY OF ASSESSMENTS THAT ADDED INSIGHT INTO THE STUDENT'S NEEDS

The Parent requested the independent evaluations before the District offered the February 2021 IEP (P-18). Although the District believed its evaluation report was appropriate, it granted Parent's request for independent evaluations. (S-4; N.T. pp.425-426). The District received the Neuropsychological Evaluation over the summer before the 2021-22 school year started. (P-27). A meeting to discuss the report was held on September

14, 2021. (P-31). The District received the independent Speech evaluation on October 30, 2021. (S-20; N.T. pp.429-430). By February 2022, the District had completed its internal review and offered a revised IEP. The record does not include an updated reevaluation report discussing the results of the independent evaluations. Neither the IEP team nor the Parents knew what test results, findings, or recommendations were accepted or rejected by the District staff who completed the review. Absent such a writing, the testimony about the IEP discussions remains uncorroborated. Therefore, testimony about any data review at the IEP meeting is given less persuasive weight. Assuming *arguendo*, the IEP team reviewed the data without a prior written notice describing what "actions" the District would or would not take is unknown. The failure to provide prior written notice interfered with the Parents' meaningful participation.

The independent evaluations provided an in-depth understanding of how the Student's disability limited participation in the regular education curriculum. Much of the data found in the independent reports were omitted from or missing from the revised 2022 IEP. These omissions or errors caused a denial of a FAPE.

The Speech examiner concluded that Student had a language disorder. (N.T. p. 518). The speech examiner distinguished the Student's language disability from a speech disorder; she then made multiple language-based recommendations. To her credit, she noted that the District seemed to have met the Student's speech articulation needs. Curiously, while the District did not disagree with the speech testing data or the findings that the Student needed language support, the District did not make any changes.

While I agree with the District that the decision who teaches what to the Student is left to the IEP team; the District's failure to explain why the Student did not need a language goal is a different matter. The District failed to explain how it decided not to provide language support. Accordingly, while

I will give the independent evaluator's teacher-specific recommendations little weight, I will give her report and testimony full weight about the Student's language needs.

The neuropsychologist assessment described a different child. Contrary to the District's assessments, the neuropsychological disclosed additional reading rate and accuracy weaknesses. The examiner noted the Student struggled significantly when asked to read paragraphs aloud. The examiner next noted the Student's impairments impeded general free retrieval and comprehension of written text. The independent evaluator next described how the Student's working memory and executive function-sequencing weaknesses impacted the Student's ability to approach and complete multipart math calculations.

The evaluation also revealed a deficit in writing mechanics associated with idea, theme development, and organization. Furthermore, written language emerged as a significant weakness in spelling when writing sentences, organizing paragraphs, proper use of grammar, delays in writing mechanics, and the use of words. The record also supports a finding that the Student meets the criteria for Specific Learning Disability in reading, writing, math calculation, math problem solving, math fluency/multiplication, spelling, word reading, word reading, and sentence composition. Simply put, the independent evaluator's report tied down needs the severity of which was either unnoticed or misunderstood.

Unlike the District psychologist, the examiner administered various teacher, Parent, and Student social and emotional rating scales. The teacher's ratings were unremarkable, except for concerns regarding adaptive-coping skills. The final profile supported the Parents' ongoing concerns about anxiety and somatization. Unlike the District's assessment, which did not assess emotional needs, the independent examiner opined that the number of

missed school days and lack of constant exposure to the curriculum contributed to anxiety and somatic symptoms.

The Student self-endorsed high levels of anxiety/distress, including fear of getting bad grades, dislike of school, feeling ill at school, trouble focusing in class, feeling shaky/uneasy, stomach upset, and other physical symptoms and fear of the worst happening interfered with learning, yet the District did not respond. While the Student exhibited occasional periods of inattentiveness, the inattentiveness did not reach the level of an attention disorder.

While a Generalized Anxiety Disorder is not identified as a specific IDEA disability, under these circumstances, it can be identified as either an Other Health Impairment or a standalone Section 504 disability. Under either statute, the record is preponderant that the anxiety caused ongoing specific fears of school, failure, and being teased that impeded the Student's performance. The Generalized Anxiety impairment also adversely affected the Student's education.

Like the academic findings, the neuropsychologist's results provided context and cleared up the lack of data about the Student's needs. For the first time, the independent evaluator recommended that the teaching staff receive training and supports to implement cognitively based-behavioral strategies. Cognitive strategies will help the Student reframe negative thoughts in the school setting. The examiner next recommended that the staff have support from someone with experience working through school anxiety/phobia impairments. In closing, the examiner recommended a comprehensive school-wide plan be developed to manage the ongoing anxiety. To ensure consistency across all settings, the examiner recommended close communication and consistent goal monitoring across home-school and school-based-private therapists as needed. The IEP team should review these recommendations.

The record supports a finding that the Student meets the IDEA criteria as a person with an Other Health Impairment. Therefore, I now find that the anxiety impairment either substantially limited the Student's major life function of learning or, in the alternative, adversely affected the Student's educational performance.

To address the academic and social needs, the examiner made specific recommendations for specially designed instruction in reading, written expression, and math in structured, supported settings. The report next noted that instruction in other academic areas, such as science and social studies, will also require specially designed instruction reading, with supplemental aids and accommodations targeting anxiety, learning differences, working memory, organizational and executive weaknesses. The District previously identified none of these particularized unique needs or suggested forms of specially-designed instruction. The IEP must consider these recommendations. For all of the above reasons, I now find the District's 2021 failure to evaluate the Student in all areas of suspected disabilities caused a denial of a FAPE.

THE FEBRUARY 2022 IEP WAS INADEQUATE WHEN OFFERED

The District's February 9, 2022, IEP eliminated the Math Concepts and Applications and the Writing Fluency goals. (P-34). These decisions are at odds with the unopposed findings in the independent neuropsychological testing. The independent evaluator found that the Student's Broad Math skills were at the 38th percentile, Math Fact Fluency Skills fell at the 43rd percentile, Math Calculation was at the 21st percentile, and Applied Problems were at the 57th percentile. All of the scores are below age and grade level expectations. Accordingly, I now find that eliminating the Math goal was a substantive flaw.

The Student's Spelling skills are at the 6th percentile, while Broad Written Language skills fall at the 32nd percentile. Practically speaking, the Student's performance reflects inconsistent phonics skills and word retrieval skills. When asked to formulate grammatically appropriate sentences, the Student made grammar, tense, and morphology errors. Overall the Student struggled with organization, grammar, and mechanics and performed. The elimination of the Writing goal is a substantive flaw.

The Oral Reading Fluency goal was monitored on a [redacted] grade level, even though the Student appears to be performing below grade level by all accounts. (P-34, P-27 p.21). The Student Sight Word Reading Efficiency and Phonemic Decoding Efficiency are at the 21st percentile, Sentence Reading Fluency is at the 25th percentile, Oral Reading is at the 6th percentile, Passage Comprehension is at the 26th percentile, and Broad Reading is at the 27th percentile. This data set does not represent grade-level work. Accordingly, the offered Oral Reading Fluency goal is neither ambitious nor challenging. (P-34, P-27 p.21).

The duration, frequency, and intensity of social work services and goals remained the same despite the Student's anxiety causing stomach aches and overall feelings of dread. (P-34, N.T. pp.221-221). Even though the Student spends 90 percent of the time in the regular class, the social work specially designed instruction does not include support for the classroom teachers or the Student. (P-34, N.T. p.222). Although the social worker testified that the Student completed the "Coping Cat" program, no other form of specially-designed instruction was offered. While the social worker asked the staff to complete the Devereux Students Strength Assessment (DESSA), the data was never shared with the staff or the Parents or placed in the IEP or the reevaluation. (NT pp.217-223).

Specially-designed instruction is lacking, and each-related service's frequency, intensity, and duration are not based on current circumstances and known data sets. The IEP must reconsider how to provide social worker and language support. Accordingly, I now find the 2022 IEP, when offered, was inappropriate.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.

Applying *GL* and *MC*, once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE.

After reviewing the record, the testimony, and the exhibits, against the loss of a FAPE, I now find that the District either knew or should have known that the FAPE denial began in February 2021 when they completed the initial evaluation. After reviewing the independent evaluations, I also find that the District knew or should have known again in February 2022 that the Student was denied a FAPE. The errors in completing the initial evaluation and each IEP placed the District on notice of the follow-along denial of FAPE violations.

The updated testing, and the emergence of the Generalized Anxiety impairment, now require me to award a modified equitable quantitative hourly relief. I now find that based on the overall circumstances, including the scope and the magnitude of the loss of a chance to make meaningful academic, social, and behavioral progress, the Student is awarded four (5) hours a day for each day of school beginning on February 10, 2021, through the present. I reach this conclusion by noting that the math, reading, and writing instruction are regularly scheduled for one hour each day. The remaining two hours will address the follow-along related service needs. The record, however, does not include sufficient testimony to support an award of compensatory education for the alleged failure to

provide ESY services. The compensatory education award continues until such time as the District offers a revised IEP and NOREP consistent with the following **ORDER**.

The Parties are now directed to collaborate in calculating the total award of compensatory education for each year. Using the school calendar for each year, the Parties should multiply the number of days the District was in session by five hours. Typically the award is equitably reduced by the number of days the Student was absent; in this instance, since the Student's health issues impeded attendance in school, the Parties should include those school days in the final compensatory education calculation. Days missed for a family vacation, holidays, and snow days should be excluded.

The District did not offer any testimony on the reasonable rectification period; therefore, following the language in the NOREP, I now find that ten (10) days was a reasonable time to learn of and correct the February 2021 and February 2022 denial of a FAPE. Accordingly, the Parties should reduce the calculation by 20 days.

SELECTION AND PAYMENT FOR COMPENSATORY SERVICES

The Student may use the compensatory education bank of time for any developmental, corrective, remedial, or specially-designed instruction, including related services, transition services, and supplemental or auxiliary aids, as defined in the IDEA or Section 504.

The Parent can select the compensatory education service provider at their sole discretion. The District should reimburse the Parent selected compensatory education provider at the rate regularly charged for each service by each provider. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the

District's rate for travel reimbursement. In January of each year, the District should report unused compensatory education hours to the Student and the Parent. Any unused compensatory hours remaining after age 23 will revert to the District and are otherwise forfeited.

FINAL ORDER

AND NOW, this March 10, 2023, the District is now **ORDERED** as follows:

1. The Parent's IDEA child finds a claim for the 2019-2020 school year is **DENIED**.
2. The Parent's claim that the District failed to provide either IDEA or Section 504 free appropriate public education for the 2019-2020 school year is **DENIED**.
3. The Parent's claim the District failed to provide a free appropriate public education from February 2021, through June 2021, and entire 2021-2022, and the entire 2022-2023 school years is **GRANTED**. The appropriate relief for these violations is described above and is now **ORDERED**.
4. The IDEA equitable relief **ORDERED** above makes the Student whole for any Section 504 FAPE violations.
5. The Parents' claim for extended school year relief is **DENIED**. No other ESY relief is **ORDERED**.
6. To remedy the FAPE violation, the District is now **ORDERED** to fund a bank of compensatory education as described above. The Parties are directed to calculate the amount of compensatory education as directed above.
7. The District is **ORDERED** to pay the total costs for all billed compensatory education services at the rate charged by the service provider selected by

the Parent, at the rate charged for each service(s). All compensatory education services or travel invoices should be paid within 45 days of receipt.

8. The Parent can select the individual(s) or the provider for all make-whole compensatory education services.
9. The District is directed to schedule an IEP meeting with Parents to reconsider the IEE evaluations within ten (10) days of this **ORDER**. The IEP team is directed to consider and decide how to revise the IEP consistent with the Findings and Conclusions stated in this Decision. The IEP team must consider all any and types of specially-designed instruction and related services needed to implement each goal statement. Suppose the IEP team determines the District cannot implement the Decision in the District. In that case, the District should ask the Department of Education for technical assistance on how to implement the Decision or, in the alternative, find an appropriate program.
10. All other claims for appropriate relief, causes of action, or affirmative defenses not argued for in the Parents' or the District's closing statements are now dismissed with prejudice.

March 10, 2023

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
ODR FILE #26290-21-22