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

ODR No. 29474-23-24

OPEN HEARING

Child's Name:

H.G.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

08/21/2024

INTRODUCTION AND PROCEDURAL HISTORY

The student, H.G. (Student),¹ is a middle-school aged student residing within the boundaries of the Colonial School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on Specific Learning Disability and a Speech/Language Impairment, and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

In the spring of the 2023-24 school year, the Parents filed a Due Process Complaint under the IDEA and Section 504, contending that the District did not implement appropriate programs for Student from the spring of 2022-23 through the end of the 2023-24 school year; as a remedy, they sought an Independent Educational Evaluation at public expense; a directive to convene a meeting of Student's Individualized Education program, (IEP) team; compensatory education; and reimbursement for certain expenses. The District denied the Parents' contentions and all relief demanded, maintain that its most recent evaluation and programming during the time period in question were appropriate. The matter proceeded to an efficient due process hearing.⁴

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibit (HO-) 1; Citation to duplicative exhibits are not necessarily provided. The term Parents will be used in the plural where it

Following review of the record and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

ISSUES

1. Whether the District's special education programs for the last quarter of the 2021-22 school year, the 2022-23 school year, and/or the 2023-24 school year were appropriate for Student;
2. If the District's programming for Student was not appropriate for any portion of the relevant time period, should Student be awarded compensatory education;
3. If the District's program for Student was not appropriate for any portion of the relevant time period, should the Parents be reimbursed for private services they obtained for Student; and
4. If the District's fall 2023 reevaluation of Student was not appropriate under the applicable legal criteria, should the District be ordered to provide an Independent Educational Evaluation of Student at public expense?

FINDINGS OF FACT

1. Student is middle-school aged and resides in the District. Student is eligible for special education pursuant to the IDEA with the protections

appears that one was acting on behalf of both. HO-1 was a series of stipulations prepared by counsel for both parties, which commendably served to further the efficiency of the hearing.

afforded under Section 504 based on Specific Learning Disability (basic reading, reading fluency, and written expression) and Speech/Language Impairment. (HO-1 at 1, ¶¶ 1-2, 4, 8, 10.)

2. Student is bright and is a diligent worker even when struggling with schoolwork. Student's difficulties with homework became evident during the first year in the District and continued through the time of the due process hearing. (N.T. 30-31, 50, 1044-45, 1190.)
3. The Parents believe that Student's speech intelligibility has worsened over time. (N.T. 1044-46.)
4. The Parents reported a few instances of peer conflict and schoolwork challenges for Student to the District over the relevant time period. (P-61.)
5. The District has the obligation to provide Student FAPE and is a recipient of federal funds. (HO-1 at 1, ¶¶ 3, 5.)
6. The science of reading is an extensive body of research conducted over several decades of time that has identified five components of literacy: phonemic awareness, phonics, fluency, vocabulary, and comprehension. (N.T. 1215; P-70.)
7. The Pennsylvania Department of Education (PDE) requires all local education agencies to be certified using the science of reading by 2024. The District has developed process to transition from a balanced literacy approach to a structured literacy approach to teaching reading through a process begun in late 2022 with professional development for its staff for implementation beginning in the fall of 2024. (N.T. 1237-43, 1258; P-70.)

Early Educational History

8. Student was identified by the District as eligible for special education and related services as a student with speech/language impairment (articulation) during the 2017-18 school year, Student's first for school-aged programming. Student has always attended District schools. (N.T. 32; HO-1 at 1, ¶ 6; P-4; S-1 at 2.)
9. Student was diagnosed with a serious medical condition in approximately 2020 and underwent a surgical procedure. (N.T. 30.)
10. The District reevaluated Student in the fall of 2020 when Student was a mid-elementary school-aged student. (HO-1 at 1, ¶ 7.)
11. The October 2020 Reevaluation Report (RR) summarized information from a previous April 2020 RR that did not include any assessments because of the COVID-19 pandemic closures and restrictions. At that time, Student had exhibited reading needs particularly with decoding, encoding, letter-sound relationships, and inferential reasoning. Mathematics was reportedly a strength. (P-18; S-1 at 1-3.)
12. Social/emotional skills were evaluated in April 2020 through the Behavior Assessment System for Children-Third Edition (BASC-3) rating scales. The teacher's and Parents' ratings reflected at-risk concern only with somatization. (S-1 at 5-7.)
13. In the fall of 2020, Student earned average to high average scores on all Composites of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) with a Full Scale IQ of 106 (average range) and a General Ability Index score of 113 (high average range). Student's higher-order cognitive abilities were relative strengths compared to those related to cognitive efficiency such as Processing Speed. (S-1 at 7-9.)

14. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the October 2020 RR yielded scores on nearly all subtests on the Reading portion in the below average range, with a low range score with Pseudoword Decoding (1st percentile) and an average range score with Reading Comprehension (25th percentile). Both the Basic Reading and Total Reading Composite scores were in the below average range (2nd and 5th percentiles, respectively). Student’s scores on the Writing portion were in the average range (Alphabet Writing Fluency and Sentence Combining) to below average range (Spelling, Sentence Composition, and Sentence Building, all below the 10th percentile). Student’s scores on the Mathematics and Oral Language subtests and Composites were all in the average to above-average range. (S-1 at 7-11.)
15. In occupational therapy assessment for the October 2020 RR, Student demonstrated weaknesses with hand manipulation, endurance with handwriting, bilateral gross motor coordination, and tracking objects. The therapist recommended a continuation of hand strengthening activities, use of visual supports to isolate work, tools to identify lines of text, a near seat position for copying from a board, movement breaks, and possible assistive technology. Consultative occupational therapy was suggested. (S-1 at 11-13.)
16. The October 2020 RR determined that Student was eligible for special education based on Specific Learning Disability (Basic Reading, Reading Fluency, and Written Expression) and Speech/Language Impairment. Recommendations to the IEP team were: supports for the regular education curriculum in for reading and spelling; multimodal presentation; priming and review; checks for understanding of new materials and skills; daily reading with an adult on topics of interest; practice with word and spelling games; general

repetition and practice; graphic organizers, editing checklists, and a personal spelling dictionary; and the recommendations of the occupational therapist. (S-1 at 15-16.)

17. An IEP was developed for Student following the October 2020 RR for learning support in the areas of reading at an itinerant level as well as speech/language therapy.⁵ (S-3 at 8.)

2021-22 School Year

18. An IEP was developed in October 2021 with a meeting attended by the Parents. (N.T. 34-35, 211; P-24; S-3.)
19. The October 2021 IEP noted that, at the start of the 2021-22 school year, Student was reportedly on grade level for instructional reading, but had difficulty with decoding that impacted fluency; Student also had miscues, but reading comprehension was strong. In the area of writing, Student exhibited difficulty with story sequencing, providing details, and spelling; prompts, cues and sentence starters were helpful. (S-3 at 8-9.)
20. The October 21, 2021 IEP identified needs in reading fluency; decoding; encoding; writing production; articulation of certain speech sounds; visual tracking; and self-regulation. Annual goals addressed reading decoding (word lists with specific syllable patterns); reading fluency and accuracy (at Student's instructional level); written expression (punctuation and self-editing for spelling errors); encoding (lists of decodable words with specific syllable patterns); and speech/language (articulation with intelligibility of the speech sound weaknesses). All of the goals had baselines with the exception of self-

⁵ This IEP was not introduced into evidence.

editing, which would be determined when an appropriate writing unit began. (S-3 at 17-23.)

21. Program modifications and items of specially designed instruction were: tools to isolate lines of text; a weekly direct, systematic, multisensory spelling program focused on spelling, decoding, phonics, writing, and conventions; check-ins during reading groups; individual teacher conferences during editing of writing tasks along with check-ins during planning and drafting; tools for checking spelling; reminders of speech strategies with prompts, modeling, and self-monitoring; graphic organizers and editing checklists for writing assignments; assistive technology and a scribe for dictation; practice with keyboarding; teacher check-ins during independent work; test accommodations; seating position when copying; movement breaks; and hand-strengthening exercises. (S-3 at 24-25.)
22. The October 2021 IEP proposed a program of learning support at an itinerant level with speech/language therapy and occupational therapy consultation. Student would participate in regular education except during speech/language sessions and occupational therapy consultation. Student was not eligible for Extended School Year (ESY) services. The Parents signed the accompanying Notice of Recommended Educational Placement (NOREP). (P-25; S-3 at 25-27.)
23. In January 2022, the Parents asked a District school psychologist about the possibility of a specific private school for Student. The school psychologist responded with the suggestion that increased support be provided at school in the District. (P-61 at 1-5.)
24. Student's IEP was revised in March 2022 after Student mastered the punctuation goal, and the criteria for success increased. The District also proposed ESY services, but the Parents declined because of

another commitment (private tutoring). (N.T. 35-36; P-26; S-3 at 30-31; S-5.)

25. On an end-of-year English/Language Arts assessment, Student was in the basic range with a score of 40%. Student attained a basic score in English/Language Arts, a proficient score in Mathematics, and an advanced score in Science on the spring 2022 Pennsylvania System of School Assessment (PSSA). (S-7 and 8.)
26. By the end of the 2021-22 school year, Student exhibited growth but some inconsistency on the goal for decoding lists of decodable words; growth with some inconsistency on the reading fluency goal; minimal and inconsistent growth with teacher and technology support on the written expression goal for punctuation; mastery of the self-editing for spelling; some growth but inconsistency on the goal for encoding words; and some growth with inconsistency on the speech/language goals. (P-28; S-17.)
27. Student's grades at the end of the 2022-23 school year reflected that Student was progressing toward or meeting all expectations. (P-34.)
28. A private school instructional specialist who is also a certified reading specialist administered the Wilson Word Identification and Spelling Test (WIST) in May 2022. Student scored in the below average to very poor range across all norm-referenced components, but the evaluator reported an erroneous birthdate for Student, so the scores were for a child one year older than Student at the time. (N.T. 805-06; P-37 at 7-9.)
29. Another assessment by the private school instructional specialist reflected well below benchmark scores in reading. That assessment calculated the benchmark as a target goal for "the odds of becoming a good reader." On an assessment of phonological processing, Student's

scores were variable, with one area below average (rapid symbolic naming). (N.T. 817-20; P-55.)

30. Student did not attend the District's ESY program in 2022. (N.T. 35-36.)

2022-23 School Year

31. A new IEP was developed in October 2022 with a meeting attended by the Parents and an advocate, a different instructional specialist. The team discussed additional decoding support and written expression needs. (N.T. 36-37, 227, 354-55, 409.)
32. The October 2022 IEP provided information on Student's beginning of the year assessments. Student was reportedly at an end of the previous year grade level for instructional reading, but difficulty with decoding still impacted fluency and Student continued to have miscues. Reading comprehension was not a concern. In the area of writing, Student continued to exhibit difficulty with punctuation and spelling but prompting was still helpful. (P-30; S-7 at 7-8.)
33. Progress monitoring of the October 2021 IEP goals as reported in October 2022 reflected inconsistent progress without mastery of the decoding goal; mastery of the fluency goal (from 68 words per minute at 98% accuracy to 75 words per minute at 96% accuracy); mastery of the editing (punctuation) goal with prompting; near mastery of the self-editing misspelled words goal; some inconsistency but progress on the encoding goal; and inconsistency with the speech/language goals for two of the speech sounds. (S-7 at 10-16.)
34. The October 2022 IEP identified the same needs as in the prior IEP. The annual goals were also similar or identical: the same for decoding of the same patterns but at a higher accuracy; the same for reading fluency and accuracy; the same for written expression but one (self-

editing) with greater accuracy; the same for encoding; and the same for speech/language but for fewer speech sounds. All of the goals had baselines consistent with the most recent progress monitoring. (S-7 at 21-27.)

35. Program modifications and items of specially designed instruction in the October 2022 IEP remained the same, except that generalization tasks for the newly mastered speech sounds was added. This IEP proposed maintaining the program of learning support at an itinerant level with speech/language therapy and occupational therapy consultation, and Student would participate in regular education except during speech/language sessions and occupational therapy consultation. Student was eligible for ESY. (S-7 at 28-30.)
36. Beginning in October 2022, after the IEP team meeting, a District reading specialist provided systematic decoding instruction to Student during a daily thirty-minute extra period when students were able to access enrichment and intervention activities based on their needs. This instruction began in a small group but quickly changed to individual to better address Student's needs. The instruction included phonology, sound-symbol association, syllables, morphology, syntax, and semantics. Student also was provided approximately four weeks of a structured literacy intervention that is systematic, explicit, and multisensory. (N.T. 405-06, 409-10, 416, 426-28, 441-44.)
37. Student's decoding skills with the reading specialist were monitored using a tool requested by the Parents for reading accuracy and fluency; however, the instrument stopped at a grade level that was two below Student's that school year, which the team discussed at the October 2022 meeting. Student's comprehension skills were also monitored. Student did not achieve any of the benchmarks on the below grade-level progress monitoring tool by the end of the school

year, remaining well below expectations with Word Reading Fluency. (N.T. 409-11, 445-50, 452-53, 465-66; S-19.)

38. Student was provided a balanced (leveled) literacy reading program over the 2022-23 school year in a small group daily with a special education teacher. The program addressed reading fluency, decoding, and comprehension. (N.T. 301-02, 357-59, 381.)
39. Student used a research-based online learning program at Student's instructional level for reading homework during the 2022-23 school year that assessed both reading fluency and comprehension. (N.T. 343-45.)
40. Student was able to access grade-level regular education content materials over the 2022-23 school year assisted by guided notes and adult support as well as the provisions in the IEP. Tests were not modified for Student, and in the District's view, Student was successful overall in regular education classes. (N.T. 323-26, 352-54, 428-29.)
41. Sometime during the winter months of the 2022-23 school year, the Parents advised the District that they were moving out of the District. The move was to be temporary because the family had lost their housing, and lasted several months.⁶ (N.T. 1047-48.)
42. Progress reporting on goals at the end of the 2022-23 school year reflected inconsistent progress without mastery of the decoding goal; essentially stagnation on the fluency goal; inconsistency but overall growth on the editing (punctuation) goal with prompting; growth without technology on the self-editing misspelled words goal; possible but unclear progress on the decoding goal; and progress on the

⁶ It is not clear from the record evidence that the District was notified of its temporary nature.

speech/language goals for one of the speech sounds. (S-11 at 5-6, 8; S-18.)

43. On the spring 2023 administration of the PSSA, Student scored in the Basic range in English/Language Arts and in the Proficient range in Mathematics. (P-35.)
44. During the 2022-23 school year, Student was provided with some interventions that are based on the science of reading. (N.T. 1235-36, 1294.)
45. The District did not provide ESY services for Student in 2023, informing the Parents that Student no longer qualified due to residency. (N.T. 1043.)

2023-24 School Year

46. The Parents requested a new evaluation by the District in the fall of 2023 because they were concerned with Student's grade level and lack of progress. With their signed consent for reevaluation in early October, they provided results of the May 2022 and September 2023 WIST reports and a summary of undated Woodcock-Johnson Fourth Edition achievement test results that had an inaccurate date of birth for Student. (N.T. 37-38, 45-46, 1146; P-37; S-10; S-38 at 10-11.)
47. The same private school instructional specialist who administered the first WIST administered another in September 2023, this time reporting the correct birthdate. Student scored below the tenth percentile on all areas that instrument assessed. (P-37 at 8.)
48. During the first several months of 2023-24 school year, Student had small group reading instruction every other day for a block period of approximately eighty minutes with a special education reading specialist. Student was provided this intervention to address decoding (but not encoding), fluency, morphological processing, semantics, and

some comprehension. Syntax was not part of that instruction. This teacher used a research-based program based on the science of learning and structured literacy, and an additional program addressing reading decoding, fluency, and accuracy, in addition to vocabulary and some spelling. The research-based program ended after a December 2023 IEP meeting. (N.T. 481-83, 486-89, 503, 525-27.)

49. A new RR was created in October 2023 limited to a review of records that was begun before the Parents' request for a full evaluation. (S-11; P-40; S-38 at 10.)
50. The October 2023 RR included input from the Parents including the private testing results provided, and incorporated results of the October 2020 RR. The Parents' concerns then were lack of Student's significant progress, a desire for performing closer to grade level, and their belief that a new placement was necessary. Teacher input, recent grades, and benchmark assessments as well as IEP goal progress were also provided; Student was then in an intervention reading class. A recent Scholastic Reading Inventory identified Student's reading comprehension level with a score of 795, below the recommended proficient range for that grade level was 925-2070. On a different measure, Student attained an instructional reading level score approximately one half year below grade expectations; and in the area of phonics, Student scored poorly at a beginning level, showing difficulty with sight word accuracy and nonsense word accuracy as well as fluency. Student remained eligible for special education based on Specific Learning Disability and Speech/Language Impairment. (P-45; S-11.)
51. A new IEP was developed in October 2023 with a meeting attended by the Parents and their instructional specialist advocate. (N.T. 43, 752-53, 1269-70; P-41; S-12.)

52. Student's needs identified in the October 2023 IEP were for written fluency and production, use of punctuation, reading decoding, articulation of one specific speech sound, visual tracking and scanning, self-regulation, and technology tools. (S-12 at 12-13.)
53. Annual goals in the October 2023 IEP addressed decoding text at Student's instructional reading level; independent paragraph production based on the state rubric domains (focus, content, organization, style, and conventions); encoding words from a list of decodable words with different patterns than previously; use of speech intelligibility strategies for words and phrases; and use of strategies for the one remaining speech sound. All of the goals contained baselines. (S-12 at 17-21.)
54. The program modifications/items of specially designed instruction essentially remained the same, with the addition of speech-to-text for writing assignments; fluency instruction; explicit phonics instruction in decoding and encoding; and monthly counseling. (S-12 at 22-23.)
55. The October 2023 IEP proposed a program of learning support Student at a supplemental level, with Student participating in regular education except during English/Language Arts, reading, speech/language therapy, and occupational therapy consultation. The Parents approved the accompanying NOREP. (P-42; S-12 at 25-26; S-13.)

November 2023 Reevaluation

56. Another RR issued in late November 2023. In addition to incorporation of the information from the October 2023 RR, additional assessments for occupational therapy were obtained. Student exhibited only continued needs for hand strength and a monitoring of typing skills and other technology access in that area. (P-47; P-48; S-14 at 8-9.)

57. A District school psychologist observed Student in an English/Language Arts learning support class for the November 2023 RR. Student was on-task for 95% of the observation compared to 90% for three random peers. (S-14 at 11.)
58. The District school psychologist administered the WISC-V for the November 2023 RR. Student's scores were in the low average (Processing Speed) to high average range on all Composites; the Full Scale IQ was average range with a General Ability Index in the high average range. On the Fourth Edition of the WIAT (WIAT-4), Student earned scores in the high average range on the Oral Language Composite; in the average range on the Mathematics Composite; in the very low range on the Reading Fluency, Basic Reading, Orthographic Processing and Phonological Processing Composites; and in the extremely low range on the Written Expression Composite. A separate assessment of written language revealed overall poor scores. (S-14 at 13-15.)
59. Speech/language evaluation for the November 2023 RR yielded a recommendation for continuation of pull-out speech/language therapy for articulation deficits. Student's performance on an articulation instrument revealed a well below average score on speech-intelligibility compared to same-age peers. No other speech/language needs were identified. (S-14 at 19-21.)
60. Rating scales from the BASC-3 were also obtained for the November 2023 RR from the Parents, two teachers, and Student. At least one teacher identified at-risk concerns with withdrawal, leadership, functional communication, and study skills; by contrast, the Parents endorsed clinically significant concerns with somatization and atypicality, as well as at-risk concerns with anxiety, depression, withdrawal, and functional communication. Student's scales reflected

only attitude to school and self-reliance as at risk concerns but anxiety at a clinically significant level. (S-14 at 15-17.)

61. Needs identified by the November 2023 RR were for basic reading skills, reading fluency, spelling, written expression, speech intelligibility for two specific speech sounds; supports for auditory memory, processing speed, and anxiety at school were also noted. (S-14 at 21.)
62. Recommendations to the IEP team in the November 2023 RR addressed: direct instruction for phonological awareness, decoding, and sight word recognition; reading fluency strategies; reinforcement for written expression elements; supports for assistive technology and writing tasks including graphic organizers; multi-modal presentation of material and directions; checks for understanding of directions with periodic check-ins; leadership opportunities and positive reinforcement; occupational therapy strategies for writing tasks, hand strengthening exercises, typing practice, and access to technology for writing assignments; access to counseling; and test and assignment accommodations especially for reading. (S-14 at 10, 23-24.)
63. A meeting convened to review the November 2023 RR. (N.T. 1215.)

December 2023 IEP

64. In mid-December 2023, the Parents reported to the District that Student had expressed emotional responses to school experiences, and asked for mental health support for Student's anxiety over and reluctance to attend school. (P-61 at 48.)
65. A new IEP was developed in December 2023 after the November RR, in a meeting attended by the Parents. (N.T. 47, 149, 151, 1269-70, 1275; P-49; S-15)

66. The needs identified in the December 2023 IEP were written expression (fluency and encoding), reading decoding skills, articulation of two specific speech sounds, hand strengthening, and monitoring of technology. (S-15 at 21.)
67. Annual goals in the December 2023 IEP maintained the goal for decoding text at Student's instructional reading level; maintained the independent paragraph production goal using the state rubric domains (focus, content, organization, style, and conventions); maintained the goals for use of speech intelligibility strategies for words and phrases; and added a second sound for the use of strategies for a total of two sounds. All of the goals contained baselines. (S-15 at 22-25.)
68. The program modifications and items of specially designed instruction in the December 2023 IEP were revised significantly from the October 2023 document: direct instruction in phonological awareness and decoding; improvement with automaticity of sight words; strategies for reading fluency; support for spelling including assistive technology; written expression support including graphic organizers, sentence starters, examples; reinforcement of grammar rules; concise directions with checks for understanding; accommodations for reading tasks in all classes; speech/language direct instruction, modeling, and practice with identification of Student's most common speech substitutions; positive reinforcement and leadership opportunities; tools for writing tasks, practice with typing, speech-to-text access, and hand strengthening activities; prompts and cues; test and assignment accommodations; and counseling twice each month in addition to a mental health referral. (S-15 at 26-28.)
69. The program proposed by the December 2023 IEP was learning support and speech/language support at a supplemental level. Student would participate in regular education during all classes with

the exceptions of English/Language Arts, reading, and group speech therapy sessions. (S-15 at 30-31.)

70. Student was provided with additional support from a reading specialist during homeroom three times each week beginning in January 2024 with a program based on the science of reading. (N.T. 90-91, 178, 1278-80.)
71. In the spring of 2024, the Parents began having private speech therapy services provided to Student. The private speech/language pathologist convened all of those sessions remotely by videoconference. (N.T. 53-54, 599-600, 617.)
72. The private speech/language pathologist also conducted a Language and Literacy Assessment in May 2024 with a report summarizing her findings. This assessment included oral, pragmatic, and written language; articulation; reading; spelling; executive functioning; and rapid naming. These assessments of Student were administered remotely by videoconference. In addition to known reading and writing needs, the conclusions identified additional areas of deficit including reading comprehension, oral expression, and pragmatic language. She recommended an out of District placement that suggested a private school environment. (N.T. 576, 618; P-66.)
73. Student's English/language arts class during the 2023-24 school year was learning support in a small group of approximately eight students, a teacher, and a paraprofessional. The class met daily for a block (approximately 80 minute) period. The students use grade-level materials but move at a slightly slower pace than in regular education. (N.T. 135-38.)
74. By the end of the 2023-24 school year, progress reporting on the December 2023 IEP goals reflected the following: Student mastered

the goal for reading text at the instructional reading level which was then the same as the actual grade level; maintained skills on the written expression goals with inconsistent performance; and made progress on the goals for the two speech sounds. (S-20.)

75. During the 2023-24 school year, Student was provided with some interventions that are based on the science of reading. (N.T. 1235-36, 1294.)
76. Student was able to access grade-level regular education content materials over the 2023-24 school year. (N.T. 1295.)
77. In May 2024, the Parents' instructional specialist/advocate wrote a review of the District's IEPs for Student, and criticized its program as not appropriate for Student.⁷ She prepared a sample plan for compensatory education that appears to recommend a private school placement. (P-62; P-63.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally considered to comprise two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint that resulted in the administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

⁷ Part of her criticism was the typical programming for undergraduate and graduate level post-secondary education programs in general.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts; any contradictions among witnesses are attributed to lapse in memory or recall, or to differing perspectives, rather than on any intention to mislead, including the vastly different accounts of the Parents' instructional specialist/advocate and the District Supervisor of Special Education who was involved about discussions at the IEP meetings both attended. For purposes of this decision, however, the weight accorded the evidence was not equally placed.

Both Parents provided testimony that was not only credible, convincing, and exemplary, particularly as to Student's needs and presentation at home, but also in its deference to and positive description of District professionals with whom they had experience. The District witnesses were all well qualified and clearly devoted professionals who testified genuinely and persuasively; and that of the school psychologist who conducted the November 2023 reevaluation and the District Director of Curriculum and Instruction was particularly knowledgeable and insightful as to Student's functioning as it related to the District's ability to be appropriately responsive to Student's needs.

The Parents' instructional specialist/advocate provided impassioned and confident testimony that along with her report were not convincingly probative in most respects, for a number of reasons. Most notably, she had a tendency to deviate significantly away from responding to the questions presented by providing overly lengthy answers throughout her testimony.

Additionally, she professed that children do not learn literacy skills differently than do other children (N.T. 1027-29), despite the IDEA’s premise of individualized programming, which is surprising in light of her special education experience; and, she exhibited some misunderstanding of the purpose of the PSSA (N.T. 995-96).⁸ One aspect of her testimony was nonetheless persuasive as well as amply supported by other evidence of record, as discussed more fully below, namely that Student requires individualized instruction in foundational reading, writing, and related language skills (N.T. 978-79) with frequent progress monitoring (N.T. 1000-01).

The testimony and reports of the private school instructional specialist diminished any persuasive value of her testimony and assessment through her reporting of an inaccurate date of birth for Student (P-56) along with other typographical errors (N.T. 834-35); her focus on grade equivalency scores (N.T. 813; P-53); her use of an out-of-date version of an instrument (N.T. 846-47; P-55) and another that calculated the “odds” of Student becoming a “good reader” (P-53); and her concession that she did not author the reports provided and was not certain who did or even recall if she may have prepared one of them (N.T. 836-40); but she had a specific recollection that the birthdate she used in scoring was not inaccurate (N.T. 806-07); and, most importantly, she testified to the appropriateness of Student’s program without an understanding of what was provided by the District but, rather, relied on an absence of endorsement by a particular literacy organization (N.T. 854-58).

⁸ “Individual student [PSSA] scores [] can be used to assist teachers in identifying students who may be in need of additional educational opportunities, and school scores provide information to schools and districts for curriculum and instruction improvement discussions and planning.” See <https://www.education.pa.gov/K-12/Assessment%20and%20Accountability/PSSA/Pages/default.aspx> (last visited August 19, 2024).

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA mandates that states provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. "Special education" consists of specially designed instruction. 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a). "Specially designed instruction" is adapting the content, methodology, or delivery of instruction as appropriate to a child with a disability to meet educational needs and to provide for access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

More than thirty years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed the IDEA's statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act. Through local educational agencies (LEAs), states meet this obligation of providing FAPE to an eligible student through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). An IEP "is constructed only after careful consideration of the child's present

levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017).

An LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Indeed, “the IDEA cannot and does not promise ‘any particular [educational] outcome.’” *Endrew F., supra*, 580 U.S. at 398 (quoting *Rowley, supra*, 458 U.S. at 192).

A proper assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). Nevertheless, evidence subsequent to the development of the IEP may be considered, but “only in assessing the reasonableness of the district's initial decisions regarding a particular IEP or the provision of special education services at all” rather than to engage in “Monday Morning Quarterbacking.” *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3d Cir. 1995) (citing *Fuhrmann*, 993 F.2d at 1040).

Evaluation Requirements

The IDEA explicitly provides for two purposes of any special education evaluation: “to determine whether a child is a child with a disability” and “to determine the educational needs of such child.” 20 U.S.C. §1414(a)(1)(C)(i). Certain procedural requirements are also set forth in the statute and its implementing regulations designed to ensure that all of the child’s individual needs are appropriately examined. 20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s

special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Parents are entitled to an IEE funded by the LEA if its evaluation does not meet IDEA criteria.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S., supra*, 602 F.3d at 565.

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE has been considered to be substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of*

Education, 172 F.3d 238, 253 (3d Cir. 1995). The two statutes do intersect, but as the Third Circuit recently observed, they are not the same. *LePape v. Lower Merion School District*, 103 F.4th 966, 978 (3d Cir. 2024). The IDEA itself notes that claims under Section 504 are not limited by the IDEA. 20 U.S.C. § 1415(l). Where a party raising claims under both statutes based on the same facts does not assert any legal distinction between them as applied to the case, the differences do not need to be separately addressed. *B.S.M. v. Upper Darby School District*, 103 F.4th 956, 965 (3d Cir. 2024). Thus, to the extent applicable, the IDEA and Section 504 claims based on the same set of facts may be addressed together.

The Parents' Claims

The Parents' first claim is whether the District denied Student FAPE between April 2022 and the present. This analysis requires separate consideration of Student's needs throughout that time period along with the District's responses. It is nonetheless important to first observe that, contrary to the Parents' apparent position, special education can take countless forms and be provided in a variety of settings, including push-in support, and such services often cannot be captured by the PennData page of the IEP. As PDE has explained, "Educational Environment reporting is not an indication of the amount of special education service that a student with a disability receives; it indicates where the student receives services.⁹ Thus, the calculations on the PennData page of Student's IEPs is not controlling nor reflective of all special education services proposed and implemented. Still, Student's actual program was not always accurately represented in the body of those IEPs.

⁹ PaTTAN - Guidelines for Calculating Educational Environment for Federal Special Education Reporting, available at <https://www.pattan.net/Publications/Guidelines-for-Calculating-Educational-Environment> (last visited August 19, 2024).

At the start of the 2021-22 school year when the October 2021 IEP was developed, Student had needs in the areas of reading fluency, decoding, encoding, written expression, articulation, visual tracking, and self-regulation. The IEP addressed each of these needs with annual goals that were measurable, logically connected to Student's academic levels, and reasonably ambitious in light of Student's unique circumstances. Program modifications and specially designed instruction provided support for Student's specific needs and were consistent with the most recent RR recommendations. A revision in March 2022 was responsive to Student's mastery of a goal, and, although ESY services were recommended, the Parents did not elect to have Student receive those services. It is unfortunate that Student did not exhibit steady progress on all of the IEP goals by the end of the 2021-22 school year, but the term of the annual IEP was not yet complete. The record as a whole does not preponderantly support a finding that the District denied Student FAPE for the relevant time period during the 2021-22 school year. The privately obtained testing in the spring of 2022, based on an apparent inaccurate age and estimating chances of becoming a reader, simply fail to establish that Student's needs were unmet by the District at that time.

The October 2022 IEP identified the same needs as in the prior year. Although it is not surprising that the annual goals would remain similar, what is perplexing is that they targeted the same pattern of words in decoding and the same fluency goal at the same level that had been mastered. Student's decoding and fluency were still significant needs, and these goals strongly suggested that Student was not making meaningful educational progress with those deficits. Even with the addition of the daily reading decoding instruction with structured literacy components that were not expressly set forth in that IEP, Student's progress on the Parents' requested progress monitoring tool reflected little growth in basic reading

accuracy and even less in reading fluency; standard progress monitoring reports mirrored those results. The District certainly had adequate opportunity to respond to the lack of progress on these two key areas of foundational reading skills, and did not. As a result, Student was denied FAPE over the 2022-23 school year.

The same result must be reached for the 2023-24 school year. As of October 2023, Student's reading comprehension was no longer a strength; Student's instructional reading level was still below grade level and, critically, reading accuracy and fluency were still areas of significant deficit. Rather than respond with different programming, however, the District essentially maintained several similar annual goals but removed the fluency and accuracy goals to the following section of the IEP, with only fluency instruction in addition to phonics instruction for decoding and encoding. The supplement of learning support for English/Language Arts was certainly a positive and reasonable step forward, particularly with structured literacy elements, along with continued dedicated reading specialist support; however, without annual goals in fluency and accuracy, any progress or lack of progress would not be routinely monitored, gauged, and reported. Here, although it was determined that Student's decoding skill deficits impacted fluency, one cannot assume that improvement in the former would necessarily lead to growth in the latter. Student so obviously had major needs for these foundational reading skills that were merely made part of Student's regularly provided instruction. This hearing officer concludes that Student was thereby denied FAPE.

The November 2023 RR confirmed Student's continued deficits in reading, written expression, and articulation; yet, the December 2023 IEP did not return to goals for reading fluency and accuracy. Direct instruction in phonological awareness and decoding along with strategies for reading fluency along with more learning support for reading instruction were also

wholly appropriate but, again, without corresponding goals in those areas of significant deficit, Student's growth was not monitored closely and regularly. Student undoubtedly was challenged all content-classes to some degree without acquiring those basic early reading skills, even with the many supports to access those materials. The denial of FAPE continued throughout the 2023-24 school year. Student is thus entitled to a remedy for the entire period of the deprivation.¹⁰

The second issue is whether the District's November 2023 RR was appropriate. This evaluation included the newest input of the Parents and teachers, as well as an observation of a classroom where Student exhibited the greatest needs, with on-task data compared to peers. The November 2023 RR did not rely on a single assessment or measure of functioning but included tests of cognitive and achievement functioning; assessment of occupational and speech/language therapy needs; and behavior rating scales indicating some areas of concern. This RR identified a number of areas of weakness and deficit, determined Student's eligibility for special education and needs for specially designed instruction, and yielded many recommendations for the IEP team across domains. The RR was also reviewed by the team at a meeting. In sum, all of these elements met the criteria for an appropriate IDEA evaluation.

The Parents point to the District's decision to conduct a record review in the fall of 2023 before the Parents asked for a full evaluation. However, other than emphasizing the requirement that all areas of suspected disability be assessed, they rely on the results of the private speech/language therapist's testing that this hearing officer does not find compelling on this

¹⁰ To the extent the Parents contend that the denial of FAPE extends to the speech/language therapy provided by the District, they have not preponderantly established that its programming as implemented was inappropriate.

claim. The Parents have not met their burden of establishing that they are entitled to an IEE at public expense.

Finally, having determined that the Parents have not set forth or established any separate Section 504 claims that have not been fully addressed, that statute need not be discussed further.

Remedies

Having found a denial of FAPE, it is appropriate to turn to available remedies. The Parents seek both compensatory education and reimbursement for privately obtained services.

Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the period of time reasonably necessary for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Reimbursement

Reimbursement for private school tuition may be an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter*, *supra*. Other costs incurred by parents such as privately obtained services may be considered through the same analysis.

Relief

Student is clearly entitled to compensatory education, so the question turns to what that award should comprise. The Parents did present evidence from which a make whole remedy may be derived but, as noted above, that report was not persuasive in the context of this case, and the relief portion strongly suggests that Student requires an ideal program contrary to the IDEA's focus on appropriateness. Moreover, the District is prepared to provided structured literacy programming beginning with the 2024-25 school year, and there is no reason to assume that it will fail to implement many of the recommendations that she and the other private instructional specialist, as well as PDE, have made. Accordingly, an hour-for-hour approach must be the basis, as challenging as quantifying the FAPE denial may be.

Student's fundamental reading deficits clearly impacted Student throughout the school day. Nevertheless, Student was provided supports to successfully access the regular education content and curriculum over the 2022-23 and 2023-24 school years. Students at Student's age should be

confidently reading to learn rather than learning to read, and the deprivation here in the failure to program adequately for Student to teach those foundational reading skills is what requires a remedy. This hearing officer concludes that it is equitable to award one hour per day of compensatory education for each day that school was in session over the entirety of the 2022-23 and 2023-24 school years, an estimate of the amount of time that Student's specific early reading skills were not a focus of instruction and practice based on the eighty-minute blocks that generally encompassed more than one subject area. The District shall be provided with a thirty calendar day period of reasonable rectification at the start of the 2022-23 school year following the Parents' choice not to have Student participate in ESY in 2022.

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

providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

With respect to reimbursement for services privately obtained,¹¹ the Parents have failed to establish that they should recoup the cost of remotely-provided speech/language services provided by a professional who has never met Student in person yet has identified Student as having a host of needs not previously suspected, and reached those conclusions through administration of assessments that generally exceed the scope of expertise of speech/language pathologists. This claim must therefore be denied.

CONCLUSIONS OF LAW

1. The District did not deny FAPE to Student during the relevant portion of the 2021-22 school year.
2. The District did deny FAPE to Student in certain respects during the 2022-23 and 2023-24 school years.
3. Student is entitled to compensatory education.

¹¹ The District contends that the Parents' Complaint fails to seek this remedy; however, due process complaints require proposed relief only to the extent known at the time. 34 C.F.R. § 300.508(b).

4. The District's November 2023 evaluation was appropriate under the applicable law and the Parents are not entitled to an IEE at public expense.

ORDER

AND NOW, this 21st day of August, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was not denied FAPE during the relevant part of the 2021-22 school year.
2. Student was deprived of FAPE during the 2022-23 and 2023-24 school years.
3. Student is awarded one (1) hour of compensatory education for each day that school was in session over the 2022-23 and 2023-24 school years, less a thirty calendar day period of reasonable rectification based on its approved calendar for the start of the 2022-23 school year. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
4. Within ten calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to revise the IEP consistent with this decision and order through the end of the current IEP term. That revision shall, at a minimum, add one or more measurable goals for reading fluency and accuracy and specify all time that Student will be out of the regular education

environment for the duration of that IEP. The District shall also thereafter convene a meeting to develop a timely new IEP when due in the fall of 2024.

5. The District's evaluation of Student in November 2023 met all IDEA criteria.
6. The District is not ordered to take any other action.
7. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is RELINQUISHED.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 29474-23-24