

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

ODR No. 26125-21-22

CLOSED HEARING

Child's Name:

M.I.

Date of Birth:

[redacted]

Parent(s)/Guardians:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

02/24/2023

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 compensatory education and prospective tuition reimbursement. The District seeks a declaratory ruling that it procedurally and substantively complied with each Act during each school year.

The District filed a Motion contending that claims occurring before February 2020 are time-barred. After hearing testimony from various witnesses, I concluded that Parents either knew or should have known that before February 2020, they could have filed and then failed to file a timely due process complaint. Failing to do so, the Parents' claims here begin in February 2020.

After reviewing the record, including the extrinsic evidence and applying the preponderance of evidence standard, I now find the Parents have failed to meet their burden of proof that the District failed to provide the Student with a free appropriate public education (FAPE). Next, I find that the District offered the Student an appropriate program for the 2021-2022 school year; therefore, the claim for tuition reimbursement is denied. Accordingly, I now find in favor of the District and against the Parents on all claims under either statute.

STATEMENT OF THE ISSUES

At the outset of the hearing, the Parent identified the following issues:

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).

Did the District fail to provide the Student with an appropriate education from the February 2020 school year until the end of [redacted] grade? If the answer is yes, is compensatory education appropriate relief?

Whether the District fail to provide the Student with an appropriate education during the 2020-2021 – [redacted] grade school year? If the answer is yes, is compensatory education appropriate relief?

Did the District's June 2021 individual education program (IEP) offer the Student an appropriate education? If the answer is no, are the Parents entitled to tuition reimbursement for out-of-pocket and related costs of the Student's enrollment in the private school for the 2021-2022 school year?

The record includes more than 1100 pages of testimony and 89 exhibits. At the close of the hearing, the Hearing Officer directed the submission of written closing arguments, and the Parties motioned to extend the decision due date. The motion to extend the decision due date was granted.

FINDINGS OF FACT

EARLY EDUCATIONAL EXPERIENCES IN THE DISTRICT

1. A review of educational records indicates that the District first evaluated the Student during the 2016-2017 academic term. The initial evaluation included the Kaufman Test of Early Academic and Language Skills (K-SEALS) and the Beery Developmental Test of Visual Motor Integration, Sixth Edition (Beery V.M.I.) were administered. Results of the K-SEALS indicated average to well above average scores across all areas assessed. Results of the Beery also indicated a score falling within the average range. Although scores and measures utilized were not noted in the review of records, it was indicated that the Student was proficient in attention capacity and executive functioning skills. At that time, it was determined that the Student did not meet the criteria for a disability category that was within the scope of the

psychoeducational evaluation conducted. The Student did qualify for speech and language support services. (P-14, 15).

2. Records next indicate that the Student was referred again for a reevaluation during the 2017-2018 school year. The team reviewed and considered recommendations from an outside psychoeducational evaluation provided by Student's parents. (P-14, 15).
3. Records indicate that an independent psychoeducational evaluation was conducted on July 24, 2017. The examiner used the Differential Ability Scales, Second Edition (DAS-II) to assess Student's cognitive abilities. Results indicated average standard scores (SS) across all areas assessed Verbal Ability SS 97, Nonverbal Reasoning Ability SS 93, Spatial SS 107, Special Nonverbal Composite SS 101, General Conceptual Ability SS 99, Working Memory SS 100, School Readiness SS 94). In addition to the DAS-II, the Wechsler Individual Achievement Test, Third Edition (WIAT-III) was also administered to assess Student's reading, writing, and mathematics skills. Results indicated that all scores fell within the average range. The Feifer Assessment of Reading (FAR) was also administered and yielded scores falling within the average range. At that time, the Student was determined to continue to qualify for speech and language support services; however, the Student was not determined eligible for additional disabilities. (P-1).
4. Records further indicate that the Student was referred to Main Line Audiology Consultants, PC, in October 2018. Results indicated normal peripheral hearing sensitivity; at that time, an auditory processing disorder could not be ruled out due to severe performance noted on the Staggered Spondaic Word (SSW.) Test reevaluation of this test was recommended within one month. It was also noted that poor performance on this test could be related to attention or may reflect an actual auditory processing disorder.

5. The Student was seen again at Main Line Audiology Consultants, P.C., in December 2018 for reevaluation of the Staggered Spondaic Word (SSW) test. Results indicated mild performance issues on the Staggered Spondaic Word Test. The results also indicated a notable improvement from the previous testing in October 2018. Student performance indicated mild difficulties with Organization and Decoding. Finally, it was noted that there were no indications of auditory processing disorder at that time. (P-4).
6. In January 2021, the Student was seen again for an Auditory Processing Evaluation that indicated normal hearing sensitivity and normal auditory processing abilities in auditory closure and figure-ground, binaural separation, and temporal processing. The SSW test showed a deficit in decoding and organization of roughly one and a half years behind compared to normative age data. Current results showed an overall improvement in auditory maturation compared to previous results. (P-4).

EDUCATIONAL PROFILE FROM [redacted] TO [redacted] GRADE

7. Upon the Student's enrollment [in early elementary], the District completed a reevaluation report and determined that the Student remained eligible for special education with a speech and language impairment. (S-4).
8. Beginning in [early elementary], the Student received itinerant speech and language support, focusing on articulation. (S-4). Parents first sought the advocate's assistance in the middle of the Student's [redacted] year. (NT 142, 145). At the end of the Student's [redacted] year, Parents demanded that the District fund an Independent Speech and Language Evaluation and an Independent Psychoeducational Evaluation. (S-11, P-1). The Student continued with itinerant speech and language support in [the following] grade. At the end of [redacted] grade, the District issued a permission to reevaluate (PTRE) to complete an Orton-Gillingham (OG) checklist to address Parents' ongoing concerns regarding Student's reading skills (NT p.31, p.32), (S-14).

9. In the fall of 2018, the District issued a PTRE for a Central Auditory Processing evaluation, which did not indicate an auditory processing disorder. (P-4, P-5).
10. At the beginning of the Student's [redacted]-grade year, Parents approved a Notice of Recommended Assignment (NOREP), adding Orton Gillingham instructional sessions and other reading interventions to the Student's educational program (IEP). (S-16, NT p.32, p.33).
11. Student remained in itinerant speech and language support during [redacted] grade.
12. The Student's speech and language teacher and case manager were the same during [redacted] grade. (NT p.408, p.409).
13. The [redacted]-grade reading teacher was trained and certified to teach Orton Gillingham reading instruction. (NT p.193).
14. Classroom testing indicates the Student was two Developmental Reading Assessment (DRA) levels behind grade level at the end of [redacted] grade. (NT 196).

[redacted] GRADE

15. The same teacher served as the Student's speech and language teacher and case manager for [redacted] grade. (NT 408, 409).
16. On December 10, 2019, in Student's [redacted]-grade year, Parents approved a NOREP to continue itinerant speech and language support with specially designed instruction to address Student's reading and writing needs. (S-20 pp.35-36).
17. The December 10, 2019 IEP remained in effect through the end of the [redacted]-grade year. (S-20).
18. The December 2019 IEP included present levels of achievement based on the Student's ongoing progress monitoring data during speech sessions, along with recent standardized evaluation data and teacher input. (S-20, NT p.416).

19. The December IEP also included specially designed instruction to address executive functioning needs like using verbal cues, comprehension checks, making sure the Student knew how to initiate the activity, modeling how to set up problems, frequent check-ins, a chunking technique to minimize fatigue, and guided practice strategies and pre-teaching technique. (S-20, NT pp.933-934). Recommendations from the auditory processing evaluation from October 2018, including comprehension checks and the use of an FM system, were included in Student's IEP as specially-designed instruction. (P-7, S-20). The records note the Student did not require modifications to assignments or tests. (NT p.563, p.638, p.904).
20. The overall [redacted]-grade program continued the program Student received in [the previous] grade. (NT p.464). Student's Orton Gillingham reading instruction addressed reading fluency at the phonemic level and reading deficits. (NT p.477, p.485). Reading skills like instruction on phonemes was provided. (NT p.485).
21. Student reading instruction in regular education included small-group reading interventions. (NT p.884).
22. The Student's [redacted]-grade teacher used the "ReadyGen" program to target reading fluency. (NT p.884). The Student received small-group instruction and reteaching when necessary for particular skills. (NT p.886, 9p.12, pp.926-927).
23. When the school closed in March 2020, regular education English language arts classes continued via Google Classroom or Zoom. (NT p.902).
24. During the school closure, online speech sessions occurred twice weekly for 45 minutes each with a 1:2 teacher-student ratio. (NT p.418).
25. Weekly cold probes were used to assess progress at the phrase and sentence level. The cold probe words included novel words. (NT p.422). The Student was rated by an unfamiliar listener using a rubric for conversational

intelligibility every two months. (NT pp.425-426). The raters were "taught" how to use the rubric. (NT p.426).

26. Neither the teachers nor the raters expressed concerns about the Student's receptive, expressive, or pragmatic speech skills. (NT p.419).

THE MARCH 2020 SCHOOL SHUTDOWN AND ADDITIONAL RESOURCES

27. During the school shutdown, the speech therapist provided the family with videos regarding cuing strategies and target words to practice the /r/ sound. (NT p.430).
28. The District offered virtual programming, which included small-group virtual instruction for 45 minutes each week to continue targeting articulation needs. (NT p.431, p.432).
29. The [redacted]-grade progress monitoring data indicates an upward change from 40% to 60% of Vowel + /r/ sound production at the sentence level. The data on the Student production of the /r/ sound in the initial and medial positions at the sentence level dipped slightly from 60% to 55%. *Id.* Because the Student's progress was not always a "straight shot" upwards, the therapist was not overly concerned about the initial and medial position scores dip. (S-33 NT p.435).
30. In [redacted] grade, the therapist tracked progress in reading through a Progress Checklist. (S-34, NT p.491).
31. According to the phoneme Progress Checklist, the Student was on an instructional [redacted]-grade reading level by the end of [redacted] grade. (NT p.493).
32. From the start of [redacted] grade through the end of [redacted] grade, the Student made two years of progress in reading. (S-34, NT p.494).
33. By the third marking period, the Student's DRA level increased from a Level K to a Level M, evidencing progress in reading skills. (S-27 p.17. NT p.905).
34. The Student earned A's and B's on the regular education report card. (S-27 p.27, p.28). During the summer of 2020, the Student received Orton

Gillingham reading and speech instruction during the extended school year (ESY) services between [redacted] and [redacted] grade. (NT pp.316-317, S-32, NT p.356).

THE [redacted] GRADE SCHOOL YEAR

35. Due to the pandemic, the District continued to provide virtual instruction during [redacted] grade. At this time, a different instructor became the case manager and speech and language therapist. NT p.1020).
36. At the beginning of [redacted] grade District issued a PTRE, and the Parents refused to consent to the regularly scheduled three-year reevaluation. The Parents demanded, and the District agreed to fund multiple independent evaluations, including a Central Auditory Processing evaluation (S-39), an occupational therapy (OT) evaluation (S-51), a psychoeducational evaluation (P-2), and a speech evaluation (S-40).
37. During [redacted] grade, the Student received daily Wilson reading instruction in the regular education classroom. Wilson and Orton Gillingham reading are multisensory programs focusing on decoding, encoding, reading, and spelling skills. (NT p.520, p.532). Wilson reading was provided four times per week for thirty minutes. (NT p.522). The Wilson reading class included a teacher and four students. (NT p.530). The Wilson instruction also collaborated with the regular education English language arts instructor. (NT p.519).
38. In the regular education classroom, the Student also received Reading A to Z, a computer program that targeted reading comprehension. The Student did not use the program to reinforce the skills as frequently as recommended. (NT p.534). The Student also received accommodations like extra time, and staff read tests and assignments. (NT p.563, p.638). The Wilson instructor also provided written expression instruction targeting editing and increasing details. (NT p.555).

39. In December 2020, the District issued multiple invitations for an annual IEP meeting. (S-44, S-45). Parents did not agree to several dates until a meeting was held on December 10, 2020, the day after the IEP revision dates. (S-46, NT p.1039, p.1040).
40. As a result of the ongoing dispute, the District held multiple meetings for the annual IEP in December 2020, January 2021, April 2021, May 2021, and June 2021. (S-48, S-50, S-56, S-59, S-63, NT pp.1041-1043).

THE INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION AND THE NEW IDEA ELIGIBILITY CONDITIONS

41. Records indicate that the Student was seen for a Neuropsychological Evaluation in January 2021. (P-2). The Student earned a SS of 86 on the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). Assessment results revealed that the Student's cognitive abilities fall within the low average range, as demonstrated by his Full Scale IQ. Student's verbal reasoning abilities were determined to fall within the average range, as demonstrated on the Verbal Comprehension Index (VCI) SS of 103. Student's nonverbal reasoning abilities were determined to fall within the low average range, as demonstrated by a Visual Spatial Index (VSI) score of 86 and Fluid Reasoning Index (FRI) SS of 88. The Student also earned a Working Memory Index (WMI) SS of 76 and a Processing Speed Index (PSI) SS of 77, with both scores falling within the borderline range. (P-2).
42. The Beery Buktenica Test of Visual Motor Integration (Beery VMI) was also administered, indicating a score falling within the average range. The Children's Memory Scale (CMS) was also administered and indicated average to superior scores across all areas assessed. The California Verbal Learning Test, Children's Version (CVLT-C) was also administered and indicated average to high average scores. (P-2).
43. The Test of Variables of Attention (TOVA) results indicated a variable and slow response rate during the first half of the test under conditions of low

stimulation. (P-2). The Purdue Pegboard was also administered and indicated extremely low to borderline scores. *Id.*

44. The Wechsler Individual Achievement Test, Third Edition (WIAT-III) was also administered to assess Student's reading, writing, mathematics, and oral language skills. Results indicated average scores in reading comprehension, math problem solving, sentence composition, sentence building, sentence combining, word reading, essay composition, numerical operations, oral discourse comprehension, sentence repetition, written expression, and the mathematics composite. Below-average scores were noted in pseudoword decoding and basic reading composite score. It should be noted that the score in word reading fell within the low average range. (P-2).
45. Select subtests of the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV) were also administered, indicating average scores in writing samples and sentence reading fluency. A low average score was noted in math facts fluency.
46. The Gray Oral Reading Test, Fifth Edition (GORT-5) (Form B) was also administered and indicated low average scores across all areas assessed. The Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2) was also administered. Results indicated low average composite scores in Phonological Awareness and Rapid Symbolic Naming. A borderline score was earned in Phonological Memory. Select subtests of the NEPSY-II were also administered and indicated average scores in Comprehension of Instructions, Word Generation - Initial Letter, and Arrows. A high average score was noted in Word Generation - Semantic. The Auditory Attention and Response Set subtests were also administered. Results in auditory attention indicated extremely low to borderline scores. Response Set scores ranged from Low Average to Average. (P-2).
47. The Student's Mother, father, and one teacher completed the Behavior Assessment System for Children, Third Edition (BASC-3). Parent ratings

indicated typical levels of functioning across all areas assessed. Educator ratings indicated At-Risk scores were noted in learning problems, leadership, social skills, and adaptive skills. The Student's parents and one educator also completed the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2). The Student's Mother indicated a mild elevation in planning/organizing. Clinical elevation was noted in Working Memory and Task Monitoring. The Student's father indicated a mild elevation in Task Monitoring. Educator ratings indicated a mild elevation in the Emotional Regulation Index, Working Memory, and the General Executive Composite. Potentially clinical elevation was noted on the Cognitive Regulation Index and plan/organize. A clinically significant score was noted in task monitoring. (P-2).

48. From a diagnostic perspective, the Student's neuropsychological profile was consistent with multiple diagnostic categories. Specifically, phonetic decoding, word reading, and reading fluency emerged as areas of academic weakness. The Student also displayed inconsistencies on tests of phonemic awareness and phonological Memory. The Student's overall profile is consistent with a diagnosis of Dyslexia (i.e., Learning Disorder with Impairment in Reading). Dyslexia is a reading disorder that impacts a student's word reading, decoding, and encoding. (P-2).

THE INDEPENDENT OCCUPATIONAL THERAPY EVALUATION AND THE DISTRICT'S RESPONSE

49. On or about April 16, 2021, an Independent Occupation Therapist (OT) completed various assessments. Based on the records reviewed, Parents expressed concerns regarding the Student's fine and gross motor skills, including strength and coordination of hands, legs, and hips; visual motor skills, handwriting, executive functioning; and ability to write for prolonged periods. She also expressed concerns about the Student's ability to understand directions, organize schoolwork, and navigate schoolwork on

Google classroom. "[Redacted' Mother] reports Student complains of pain and cramping of [redacted's] hand when writing." (P-15, P-16).

50. The Goal-Oriented Assessment of Life Skills (GOAL) evaluates fundamental motor abilities needed for daily living. The GOAL activities provide a standardized, psychometrically precise measure of a child's strengths and challenges. It provides a set of scores that emphasize the motor components of a child's participation in home, school, and community settings. The GOAL is individually administered, and children perform seven activities representing a range of functional tasks. Results: Student received a SS of 71 in the fine motor domain, at the 3rd percentile compared to same-age peers. The Student received a SS of 87 in the gross motor domain, corresponding to a percentile rank of 19. The Student's gross motor skills fall within the average range compared to same-age peers. The Student is demonstrating mild and moderate challenges in fine motor skills. (P-15, P-16).
51. The GOAL is individually administered, and children perform seven activities representing a range of functional tasks. Results: Student received a SS of 71 in the fine motor domain, placing the Student in the 3rd percentile compared to others. The Student received a SS of 87 in the gross motor domain, corresponding to a percentile rank of 19. The Student's gross motor skills fall within the average range compared to others. Overall the Student is demonstrating mild to moderate challenges in fine motor skills. (P-1 P-5, P-16).
52. The examiner then administered the Test of Handwriting Skills Revised (THS-R), a standardized assessment to evaluate neurosensory integration issues in students' handwriting. The THS-R is composed of the following ten subtests: Writing from Memory (uppercase), writing from Memory (lowercase), writing from dictation (uppercase), writing from dictation (lowercase), writing from dictation (numbers), copying uppercase letters,

copying lowercase letters, copying words, copying sentences, and writing words from dictation. Student's Scaled Scores resulted in a SS of 85 at the 16% Percentile Ranking; Subtest 1: Writing Upper-Case Letters of the Alphabet in Order 25% Subtest 2: Writing Lowercase Letters of the Alphabet in Order 25%; Subtest 3: Upper-Case Letters of the Alphabet from Dictation 9%; Subtest 4: Lowercase Letters of the Alphabet from Dictation 25%; Subtest 5: Writing Numbers from Dictation 1%; Subtest 6: Copying Capital Letters 25%; Subtest 7: Copying Lowercase Letters 5% Subtest 8: Copying Words 37%; Subtest 9: Copying Sentences 16%; Subtest 10: Writing Words from Dictation 25%; Writing Speed Between 50th and 16th percentile. The examiner notes the Student utilized a tripod right-hand grasp using the left hand to stabilize the paper. (P-15, P-16).

53. The examiner next administered the Beery Test of Visual-Motor Integration (VMI) (6th edition) as well as the supplemental visual perception and motor coordination tests were administered. These are all norm-referenced tests that assist therapists in identifying potential visual perceptual and/or visual motor deficits. Scores are translated from raw scores, based on the number of correct items, to a standard score to identify a client's percentile rank compared to their peers of similar age. A standard score of 100 would place the Student in the 50th percentile and be considered an "average" or "mean" score on this test. The Student earned a Visual Motor Integration SS of 97 at the 42nd percentile, a Visual Perception SS of 98 at the 45th percentile, and a Motor Coordination SS of 93 at the 32nd percentile. Overall the Student scored within the average range across all three subtests and did not require remediation in visual motor, visual perception, or motor coordination skills. (P-15, P-16).
54. The BRIEF-2 is a questionnaire completed by parents and teachers of school-aged children to rate executive functions. T scores are used to interpret the level of executive functioning as reported by parents and teachers on the

BRIEF 2 rating forms. T scores from 60 to 64 are considered mildly elevated, and T scores from 65 to 69 are considered potentially clinically elevated. T scores at or above 70 are considered clinically elevated. Percentiles represent the percentage of children in the standardization sample with scores at or below the same value.

55. The Student's father completed the parent rating form of the BRIEF-2 on March 24, 2021. The Student earned the following BRIEF -2 scores, Domain T - Score Percentile Inhibit 43 (average) 35%, Self-monitor 49 (average) 60%, Shift 49 (average) 62%, Emotional Control 43 (average) 38%, Initiate 59 (average) 87%, Working Memory 55 (average) 74%, Plan and Organize 55 (average) 73%, Task-Monitor 62 (mildly elevated) 91%, Organization of Materials 54 (average) 74%, and, a Global Executive Composite 53 (average) 63%. In a one-minute typing test, the Student typed ten words per minute (wpm) with 92% accuracy. (P-15, P-16).
56. The Student completed a self-portrait wearing a mask. The Student drew a recognizable face consisting of a head, eyes, nose, mouth, teeth, ears, hair, and a mask on the face. Lastly, the Student was asked to write about a topic of choice. The Student chose to write about soccer. The Student completed writing four sentences with letter formation patterns ranging from 1 to 3 on the Test of Handwriting Skills – Revised rubric. The Student's letter placement and letter size on college-ruled paper varied from letter to letter. (P-15, P-16).
57. The private OT evaluation report included the GOAL Assessment. The Student scored Average for the gross motor domain and mild to moderate challenge in the fine motor domain. The Student had difficulty opening a combination lock and taping a box together. "Overall, Student completed the tasks slowly, suggesting deficits in motor accuracy and speed, planning, and sequencing." (P-15).

58. The examiner concluded that the Student's motor accuracy, speed deficits, planning, and sequencing required specially designed instructions (SDIs) to allow additional time to complete classroom tasks and access teacher notes in designated areas. (P-15).
59. A review of summary indexes, scores of the Behavior Regulation Index (BRI), Emotion Regulation Index (ERI), and Cognitive Regulation Index (CRI) all fall within the average range based on the father's report. The Student's T score of 53 and percentile rank of 63 on the Global Executive Composite (GEC) is also within the average range compared with the scores of his peers. This score suggests that the Student exhibits self-regulatory abilities and cognitive executive functions within expectations relative to peers. (P-15).
60. After reviewing the independent OT report, the District's OT concluded that she did not support the need for school-based OT services based on her formal and informal testing review. (P-15).
61. The District OT next concluded that the test results indicated that the Student performs comparably to same-age peers and does not demonstrate a significant educational need for specially designed instructions. The District OT finally concluded that the teacher should provide editing strategies, including scaffolding and organization techniques. (P-15).
62. The OT recommended the following strategies: preferential seating, extended time to complete assignments, access to teacher notes in a designated area, allowing the Student to type assignments as needed, and providing a color-coded visual schedule with zoom links to support navigating digital learning and to manage classwork better. (P-15).
63. The Student's oral language abilities are within normal limits compared to same-age peers. Student scores suggest that oral receptive and expressive language, or how the Student understands and uses language, are equally strong. The Student's narrative assessment showed some language

difficulties that were not apparent on the Clinical Evaluation of Language Fundamentals Fifth Edition (CELF-5). Student exhibited relative strengths in the area of syntax. The Student exhibited a relative weakness in the area of vocabulary. The Student's narrative statement included many key story details but used vague language to describe details. The Student's functional language was obtained during the conversation. The report notes that the Student used many compound and complex sentences in spontaneous speech. Some grammatical errors were noted in the conversation but not many. In conversation, it was noted that Student's speech exhibits distortion of /r/. Despite these sound differences, the Student was mainly deemed intelligible, especially in face-to-face conversation. (P-15).

64. Despite a parental report of stuttering, the Student exhibited neither overt stuttering behaviors nor hesitations, filler words, or secondary behaviors, like heavy blinking or tapping, that might have been used to hide stuttering moments. The Student further appeared to speak spontaneously. (P-15).
65. On the Social Language Development Test – Elementary (SLDT-E), a test of language pragmatics, the Student earned a Total Test of 106 in the average or above average range on all subtests and tasks. The Student's total test score is 106, comfortably within the average range. (P-15).
66. The Student scored above Average on the Supporting Peers subtest, suggesting the ability to provide supportive responses to friends may be above Average compared to same-age peers. Because the Student scored in the average range on this assessment, it can be inferred that social language abilities are on par with typically developing peers. (P-15).
67. The District psychologist administered the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2). The CTOPP measures Informal Phonological Awareness and Reading Foundations. The records in test scores from the Test of Written Language - Fourth Edition (TOWL-4), a

Supplemental Writing Samples, and Words Their Way Inventories (Primary and Elementary). (P-15).

68. The Student's narrative assessment showed some language difficulties that were not apparent on the CELF-5. Student exhibited relative strengths in the area of syntax. The Student exhibited a relative weakness in the area of vocabulary. The Student's narrative included many key story details but used vague language. The Functional Language Assessment Information indicates that the Student uses many compound and complex sentences in spontaneous speech. Some grammatical errors were noted in the conversation but not many. In conversation, it was noted that Student's speech still exhibits distortion of /r/. (P-15).
69. Based on a review of the speech-language evaluation, the school-based speech therapist recommended that the Student continue to receive speech-language support to address articulation. The therapist recommended that the Student receive language therapy targeting vocabulary, syntax, story grammar, phonological awareness, reading fluency, writing, and spelling. The Student does not evidence a language disorder.
70. The Student performed within the Average to high Average range for both receptive and expressive language. The Student's 2021 speech scores are consistent with previous speech-language assessments administered in November 2016 and June 2017. The speech therapist concluded that the speech areas listed above could be supported through consultation with the Student's learning support services within the current Wilson Reading Program and through the general education curriculum. (P-1 5).

THE PRIVATE SEPTEMBER 2021 NEUROPSYCHOLOGICAL EVALUATION UPDATE

71. In September 2022, the private neuropsychologist updated the earlier IEE data set as the hearing proceeded. The examiner administered selected Wechsler Individual Achievement Test-Fourth Edition (WIAT-4), Gray Oral

Reading Test-Fifth Edition (GORT-5) Written Expression subtest, Woodcock-Johnson Tests of Academic Achievement-Fourth Edition (WJIV) subtest were administered. (P-20).

72. The Student earned the following WIAT-4 (Age-Based Norms) SS scores:
- a. Reading Comprehension was 97, at the 42 percentile, Average range.
 - b. Math Problem-Solving SS of 101 falls at the 53rd percentile Average range.
 - c. Sentence Composition SS of 80 fell at the 9th percentile Low Average range.
 - d. Word Reading SS of 90 falls at the 25th percentile, Average range.
 - e. Pseudoword Decoding score of 92 falls at the 30th percentile, Average range.
 - f. Essay Composition SS of 84 falls at the 14th percentile, Low Average range.
 - g. Numerical Operations SS of 94 falls at the 34th percentile, Average range.
 - h. Spelling SS of 89 falls at the 23rd percentile, Low Average range.
 - i. Reading SS of 91 falls at the 27th percentile, in the Average range.
 - j. Written Expression SS of 80 falls at the 9th percentile in the Low Average range, and
 - k. Mathematics SS of 97 falls at the 42nd percentile, in the Low Average range. (P-20).
73. The examiner also administered the Woodcock-Johnson Tests of Achievement-Fourth Edition (WJ-IV). The Student earned a Writing Samples SS of 92 in the Average range. A Sentence Reading Fluency SS of 88 in the Low Average range and a Math Facts Fluency SS of 77 in the Borderline range. (P-20).

74. On the GORT-5 (Form A), the Student earned a Rate SS of 8 at the 25th percentile in the Average range, an Accuracy SS of 8 at the 25th percentile in the Average range, a Fluency SS of 8 at the 25th percentile, in the Average range, a Comprehension SS of 10 at the 50th percentile, in the Average range, and an Oral Reading Index SS of 94 at the 34th percentile also in the Average range. (P-20).
75. The private examiner interviewed the current Wilson Reading teacher from [redacted] grade. From January-June 2022, the teacher worked with the Student daily in a group of three students. The teacher reported that Student did very well and made steady progress over the time they worked together. The teacher further noted the Student participated in class, attended well, and it was obvious to her that the Student's confidence grew as the year progressed. She noted that the Student struggled to apply spelling rules during independent writing. (P-20).
76. The independent examiner observed the Student in class at the private school. The examiner noted the Student was engaged in class and the context of this smaller classroom setting, stayed on task, and completed the work. The examiner opined that given the history of learning challenges, especially in Reading and Written Language, as well as the history of attention and executive functioning concerns, a school setting such as a private school could be an appropriate placement for the Student.
77. The educational program at the private school provides Student with a full-time special education setting where a multisensory instructional approach, access to assistive technology, and small group instruction is provided throughout the day. (P-20).
78. The Student received daily, research-based, multisensory Wilson reading instruction from a qualified special education teacher certified in its use. Written language is an area of continued weakness for the Student, and the program at the private school allows for daily writing instruction within a

small, special-education setting. The Student receives occupational therapy to address fine motor and executive functioning weaknesses. Emotionally, the Student feels very comfortable at AIM Academy. The examiner opined that the Student sees others with similar learning needs and feels comfortable asking for assistance from teachers. Finally, the examiner noted that the Student's self-esteem improved, and the Student seemed to be more independent and confident. (P-20).

THE FEBRUARY 2021 IEP

79. When the IEP team could not reach an agreement in February 2021, the District's Director of Special Education became involved. (NT p.1106). When the IEP team could not reach a consensus team meeting, she emailed both the Parents and their advocate proposing to meet and review the source of the disagreement and facilitate a resolution. (S-60, NT p.1107, p.1108). However, neither the Parents nor their advocate responded. (S-60. NT p.1107, p.1108).
80. Although mathematics was a relative strength, the Student exhibited deficits in word problems and other language-loaded math concepts. (NT 656). The February IEP included a goal for math support in solving word problems and short-term objectives. (S-69 p.47). The math goal would have been implemented via small group instruction by a certified special education teacher. (NT p.578).
81. The IEP included two speech goals: one for the initial and blended /r/ sound and another for producing the /r/ sound at the sentence level. (S-69 p.49, p.51). The speech therapist proposed shorter, more frequent individual sessions to facilitate drill practice. (NT p.1050, p.1086).
82. Speech sessions were to occur 120 minutes per month. (S-69 p.55). The speech therapy goals included explicit instruction on how to tell a story, targeting sequence words, pre-teaching vocabulary from a text, classroom spelling of words, semantics, sentence structure, conjunctions, isolating

complex sentences, and explicit teaching of how to structure a paragraph. (NT p.236, p.237, p.243, p.244, p.254, p.255).

83. The speech therapist opined that the phonological skills, vocabulary, spelling, decoding, reading fluency, and reading comprehension could be addressed outside of the regular education curriculum in a small group learning support setting from a special education teacher. (S-69, NT p.24, pp.28-29, p.33, p.37, p.41, p.45, pp.52-54, pp.573-578, p.1056).
84. The learning support teacher provided the literacy instruction, and the speech teacher addressed issues related to expressive or receptive language or articulation. (NT p.445, p.1054, p.1070).
85. The IEP included two reading fluency goals, a reading comprehension goal, a written expression goal, a spelling goal, and a vocabulary goal, each with its short-term objectives. (S-69 p.24, p.28, p.33, p.37, p.41, p.45).
86. The IEP included Wilson instruction reading fluency and phonological weakness instruction. (NT p.573). The reading fluency, reading comprehension, spelling, and vocabulary goals would have been implemented during the Wilson instruction. (NT p.573, p.575, p.577).
87. Wilson reading was scheduled for forty-five minutes daily for five days each week. (NT p.574). The Student would have continued to receive literacy instruction via the general education classroom. (NT p.575). The District OT opined that direct OT services were a necessary related service. (S-61, pp.16-17).
88. The IEP included accommodations like slowing down writing speed, speaking into a recorder, and extending the time to complete classroom assignments. (S-69, NT p.848). The IEP included specially-designed instruction to address the Student's elevated score on the "Task Monitoring" subtest of the BRIEF. (NT p.722, p.723, pp.978-982).
89. Additional forms of specially-designed instruction targeted executive functioning deficits, included 1:1 consultation with the teacher for organizing

and proofreading writing pieces, providing a model of a paragraph containing necessary components, *i.e.*, introduction, transition words, highlighting keywords and key concepts, writing or dictating original sentences, a reminder to use appropriate punctuation and capitalization, visual, written, picture prompts and cues, use of four squares organizational method of solving word problems, placement, visual and/or verbal cues fading to independence, use of graphic organizers, checklists when appropriate; instruction on how to use organizational aides such as calendars, lists, "check-off" charts, chunking, note-taking strategies, verbal reminders to slow down, and frequent breaks to improve legibility, and quality of work. (S-69 pp.28-55).

THE DISTRICT REVISED THE IEP AFTER REVIEWING THE IEE RESULTS

90. Upon completion of the Student's IEEs, the District sought parental consent to complete a reevaluation. (S-53). Since the Parents refused to allow the District to reevaluate the Student, the reevaluation allowed the District to complete observations of the Student to analyze the Student's fine motor needs and consider additional IDEA eligibility categories other the speech and language. (NT p.709).
91. Initially, the Parents refused consent and demanded mediation. (S-53). Parents eventually emailed the District's school psychologist, consented to a team review of the IEE data sets, and permitted an observation. (NT p.685, p.709). Parents still refused to complete the Parent Input form as part of this reevaluation process. (NT 694), (S-55), (S-61).
92. As a component of this review of records, this school psychologist also attempted to observe the Student in the virtual classroom environment. Parents rejected the proposed Permission to Reevaluate, dated March 17, 2021. The reevaluation report adopted and summarized the results of each IEE report. (P-14).

93. The reevaluation included the results of recent Aimsweb Testing. The Student' scores were as follows:
- a. Reading Composite - Fall 12(Below Average) winter 36(High Average);
 - b. Vocabulary - Fall 19 (Below Average) Winter74 (Average.);
 - c. Silent Reading Fluency - Fall 19 (Below Avg.) Winter 4 (Well Below Average);
 - d. Reading Comprehension - Fall 23 (Below Avg.), Winter 44 (Average);
 - e. Oral Reading Fluency -Fall 12 (Below Average), Winter 17 (Below Average) slight improvement over Fall score.
 - f. Aimsweb Math Composite - Fall 46(Average), Winter 12 (Below Average);
 - g. Number Sense Fluency - Fall 64 (Average), Winter 40 (Average);
 - h. Number Comparison Fluency - Fall 58 (Average), Winter 57 (Average),
 - i. Mental Computations and Fluency - Fall 76 (Above Average), Winter 17 (Below Average), and,
 - j. Concepts and Applications - Fall 20 (Above Average) Winter 8 (Below Average). (P-14).

THE JUNE 2021 IEP AND OFFER OF A FAPE

92. The proposed June 9, 2021, IEP was developed based on information in the comprehensive May 12, 2021, Reevaluation Report ("RR"). (S-61). The IEP included Parent and teacher input, a review of records, a classroom observation, and curriculum-based assessments; the RR included a review of the independent neuropsychological evaluation, the independent speech and language evaluation, and the independent occupational therapy evaluation, the Audiological Evaluation from January 2021. (S-61).
93. The evaluation team recommended that the Student's eligibility categories now include a Specific Learning Disability in reading, the disability of an Other Health Impairment due to ADHD, and continued eligibility with a disability category of Speech or Language Impairment. (S-61 at 12).

94. Although mathematics calculations are a relative strength, the Student exhibited deficits in word problems and other language-loaded math concepts. (NT p.656). The IEP included a goal for math word problems and short-term objectives to address these deficits. (S-69 p.47). This math goal would have been implemented via small group instruction by a certified special education teacher. (NT p.578). The math goals would target applying computation skills in a multi-step or choosing the correct operation in word problems. (NT p.656).
95. The Parents' expert agreed that the proposed math goal was appropriate for the Student (NT p.845. p.657, p.658).
96. The Speech IEE and present levels data indicated that the Student continued to exhibit articulation errors with the initial /r/ sound and /r/ blends. To meet the Student's speech and language needs, the IEP included two speech goals: one for the initial and blended /r/ sound and another for producing the vocalic /r/ sound at the sentence level. (S-69 p.49, p.51). The therapist proposed shorter and more frequent individual sessions to facilitate drill practice. (NT p.1050, p.1086). The speech sessions were to occur 120 minutes per month. (S-69).
97. The present levels note the Student now had the requisite tools to articulate the /r/ sound, and the therapist believed that drill and practice would be beneficial to increase Student's accuracy. (NT p.1050, p.1086).
98. The June IEP targeted Student's reading needs through goals and specially designed instruction. To address Student's literacy needs, the Proposed IEP included two reading fluency goals, a reading comprehension goal, a written expression goal, a spelling goal, and a vocabulary goal, each with short-term objectives. (S-69 p.24, p.28, p.33, p.37, p.41, p.45).
99. The Parents' expert also stated that the literacy goals were appropriate. (NT pp.844-845). The Student would have continued to receive individualized Wilson instruction to address reading fluency and phonological weaknesses.

(NT p.573). The reading fluency, reading comprehension, spelling, and vocabulary goals would have been implemented during the Wilson instruction. (NT p.573, p. 575, p.577).

100. Wilson instruction was scheduled for forty-five minutes daily for five days each week. (NT p.574). The Parents' expert testified that the Wilson Program was appropriate for the Student and recommended that the Student continue receiving Wilson instruction. (NT p.842).
101. The written expression goal would have been implemented via two thirty-minute periods in a small group in the learning support room (NT p.573).
102. In addition, the Student would have continued to receive literacy instruction in the general education classroom. (NT p.575).
103. Speech therapy would include explicit instruction on how to tell a story, targeting sequence words, pre-teaching vocabulary from a text, teaching spelling of words that are being targeted in the classroom, targeting semantics, looking at sentence structure, coordinating conjunctions and isolating complex sentences, explicit teaching of how to structure a paragraph. (NT p.236, p.237, p.243, p.244, p.254, p.255). Rather than providing direct speech therapy, the IEP called for instruction in the regular education curriculum and small group instruction in the learning support class. (S-69 NT p.24, p.28, p.29, p.33, p.37, p.41, p.45, pp.52-54, pp.573-578, p.1056).
104. The Parents' expert stated that the updated September 2022 recommendations targeting phonological skills, vocabulary, spelling, decoding, reading fluency, and reading comprehension could be addressed outside of speech sessions. (NT p.297).
105. The District's therapist testified that literacy skills are typically taught by teachers and not a therapist in the District. (NT p.445, NT p.1054, p.1070). The speech therapist, when necessary, could collaborate with Student's

teachers to discuss literacy instruction in the regular classroom. (NT p.1055).

106. The Parent's private neuropsychologist opined that the specially-designed instruction in the IEP addressed the Student's executive functioning weaknesses and motor sequencing concerns. (NT p.846-848).
107. The private OT testing revealed some mild weaknesses. Overall, Student's scores on the Summary of the Test of Handwriting Skills Revised range (NT p.966, p.990), the Beery-VMI (S-57), and the informal typing test were in the average range. (NT p.965). The record does not support a need for direct OT services.
108. The Student did "very well" on the informal self-portrait test. (NT 965, 966). Except for the Task Monitor subtest, the Student received all average scores on the BRIEF. (S-57, NT p.962).
109. The District's OT reviewed Student's education records and OT IEE. (NT p.948). She also communicated with the teacher and observed the Student while participating in Wilson instruction. (NT p.948). The Student wrote on a dry-erase board and standard lined paper during the observation. (NT p.950). The District OT stated that the Student's handwriting was legible. (NT p.950). Parents' OT examiners also stated that the Student's handwriting was legible during assessments. (NT p.837). The District OT opined that Student did not require direct OT services to address handwriting, handwriting speed, or typing. (NT pp.966-968, p.983).
110. Direct OT services are not required to address Student's executive functioning needs. These services are provided directly by certified regular and special education teachers. (NT p.969).
111. The District's June 2021 includes several accommodations for the Student's slow writing speed, including speaking into a recorder so that the Student can slow down, permission to type drafts, and extended time for classroom assignments. (S-69, NT p.848).

112. The June IEP included several forms of specially-designed instruction to address the Student's slightly elevated score on the Task Monitor subtest of the BRIEF. (NT p.722, p.723, pp.978-982).
113. The specially-designed instruction included 1:1 consultation with the teacher for organizing and proofreading writing pieces, providing a model of a paragraph containing necessary components *i.e.*, introduction, transition words, examples when appropriate and conclusion, letting the Student highlight keywords and key concepts; when writing dictated or original sentences, Student will be encouraged to use appropriate punctuation and capitalization; visual, written, picture prompts and cues; use of four squares organizational method of solving word problems; placement, visual and/or verbal cues fading to independence; use of graphic organizers; provide checklists when appropriate; teach the Student how to use organizational aides such as calendars, lists, "check-off" charts and color-coded folders, chunking assignments, assisted note-taking strategies, verbal reminders for Student to slow down and not rush through writing tasks, and frequent breaks to improve legibility and to avoid fatigue. (S-69 pp.28-55).

THE STUDENT'S PRIVATE PLACEMENT

114. The District mailed the IEP to Parents via email on or about July 27, 2021, approximately one month before the 2021-2022 school year, before the Student began classes in August. (S-68).
115. On August 24, 2021, Parents rejected the June IEP and notified the District of their intent to enroll the Student at a private school for the 2021-2022 school year. The message also requested reimbursement for tuition and all associated costs, including transportation. (S-69, NT p.334).
116. The special education director emailed the Proposed IEP and NOREP to Parents after being notified of Parents' request for the referral. (S-68, NT pp.1109-1111).

117. The private school only serves disabled students. (P-20 pp.1-2). Many of the Student's teachers are not certified in special education. (NT pp.1118-1119). The Student does not receive speech services at the private school. (NT p.294). The Student continues to attend the private school and should now be eligible for speech services. (P-20).
118. When the Student left the District, the Student worked on Substep 7.1 in the Wilson Program. (S-66), (NT 554). The Student began instruction on Level 3.1 of the Wilson program at the private school. (P-18 p.18).
119. At the private school, the Student missed Wilson instruction for at least sixty school days. (P-18). Wilson reading at the private school did not begin until the second Trimester. *Id.*
120. The private school does not provide audiological services. (S-52). A review of the Student's Trimester skills report indicates that the Student maintained similar scores across all three trimesters in twenty-seven objectives, which went down in three objectives while improving across the remaining twenty. (P-18).

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.²

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the

² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

witnesses."³ 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.⁴ I now find the testimony of several District and Parent witnesses, while cogent, was not otherwise persuasive.

On the Parents' side, while the Student's independent evaluators offered clear testimony about their conclusions, they were not persuasive at other times. For example, although the neuropsychologist identified new disabilities in 2021, the testimony did not relate those findings to events during [redacted] grade. Absent such an explanation, the testimony was not helpful regarding when the disability was observable. Stated another way, the private psychologist did not state that the previous evaluators erred; therefore, a good bit of the Parents' case was undercut by this testimony.

As for the dueling Occupational Therapist testimony, each offered vastly different explanations regarding the Student's need for related services. Although the private examiner administered various assessments and used those assessments to reach a reasoned conclusion, the conclusion did not establish an actionable violation. The District's OT considered the results, worked with the Student in the classroom, and reached a different conclusion. The District OT found that the low scores did not rise to the level to require OT as a related service. The District's OT's direct observations and work with the Student in real-time caused me to give her testimony greater weight even though she did not complete any formal assessments.

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁴ The 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 affected my 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 whether the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

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.⁵ A 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. The 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.'"⁶ 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 'the optimal level of services,' or incorporate every program requested by the child's parents."⁷ 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 *Andrew* standard is based on information "as of the time it was made;" this commonsense rule is commonly known as the "snapshot rule."⁸ While an IEP must aim for progress, progress is not measured by what may be ideal. *Id.*

IDEA EVALUATION STANDARDS AND 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

⁵ 20 U.S.C. § 1412 *et seq.*

⁶ *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

⁷ *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

⁸ *Fuhrman v. East Hanover Bd. of Educ.* 993 F.2d 1031, 1041 (1993).

of such child."⁹ 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."¹⁰ 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."¹¹

In Pennsylvania, districts must provide a reevaluation report to the parents describing the results within sixty (60) calendar days of receipt of the Parent's consent, excluding summers.¹⁹ Once the report is completed, "[a] group of qualified professionals and the child's parent determines whether the child is a child with a disability ... and the child's educational needs." Although the evaluation team should strive to reach a consensus, under 34 C.F.R. §300.306, the public agency is responsible for determining whether the child has a disability.

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

⁹ 20 U.S.C. §1414(a)(1)(C)(i).

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

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

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.¹² The term "consider" is not defined in either state or federal law. Once the review is completed, the district should develop an IEP and issue prior written notice of what "action" the District will or will not take.¹³

FORMS OF APPROPRIATE RELIEF

In this instance, both Parties seek appropriate relief within the meaning of the IDEA.¹⁴ The Parent seeks compensatory education until a revised appropriate IEP is offered and any other relief appropriate. At the same time, the District desires a declaratory finding that its program and placement offered a FAPE.¹⁵

TUITION REIMBURSEMENT

A three-part test determines whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test. The steps are typically taken in sequence, and the analysis ends if any step is not satisfied. The first step is to determine whether the program and placement offered by

¹² 34 C.F.R. § 300.502(c); *L.T. v. Mansfield Twp. Sch. Dist.*, Civil Action No. 04-1381(NLH), 2009 U.S. Dist. LEXIS 21737 fn.6 (D.N.J. Mar. 17, 2009) (district should a meeting to consider the new information, as parent input, to determine if a revision to the IEP in needed).

¹³ 34 C.F.R. § 300.503.

¹⁴ *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)).

¹⁵ *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)

the district is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

**DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW
THE SECOND HALF OF [redacted] GRADE**

I have reviewed the Parties' competing analysis, the exhibits, the testimony, and briefs in reaching the following Conclusions of Law. Actionable child find violations occur when parents prove that the staff failed to recognize the telltale signs of a suspected disability and then delayed evaluating the Student. That did not occur here. Before and after the shutdown, the regular education staff continuously tracked the regular education interventions and reported the results to the Parents. Nothing in the data set or the record leads me to believe that from February 2020 through the end of the year, the Student's overall performance was so discrepant as to require an IDEA evaluation. Soon after the shutdown, the District began online reading, math, and writing instruction. The record is clear that from mid-March 2020 through June 2020, the District continued to provide the regular education Orton Gillham reading instruction while at the same time, the speech therapist continued to provide and collect progress monitoring data. This early portion of the record now leads me to conclude the Student's progress in the regular education reading intervention was adequate, while progress in speech was trending upward.

The record does not support the Parents' reliance on events outside the statute of limitations had a negative carryover effect during the [redacted]-grade experience. The speech IEP included measurable goals, a detailed progress monitoring plan, and sufficient instructional time to advance toward meeting the goal statements. A review of the progress monitoring data leads

me to conclude that the Student made steady progress in speech. The March to May 2020 [redacted]-grade progress monitoring data indicates a slow upward trend in speech. Therefore, I now find the IEP speech goals when offered provided a FAPE.

THE [redacted] GRADE SCHOOL YEAR

At the beginning of [redacted] Grade, the District developed a Special Education Digital/Hybrid Learning Plan. The plan offered in-person or virtual instruction; the Parents opted for virtual learning. The plan included two speech goals and multiple forms of specially-designed instruction. The plan also included baseline data describing the Student's change from Orton Gillingham to Wilson reading instruction. As of September 14, 2020, the Student was working on two-syllable words and vowel-consonant "e" syllable skills in Substep 5.2.

The hybrid plan called for the Student to receive reading interventions four (4) times a week. During Wilson instruction, the Student received explicit instruction in decoding, encoding, and written expression. The Wilson Assessment of Decoding and Encoding (WADE) data indicates the Student earned a 66% correct score reading 79 out of 129 real words correctly. The Student also read 22 out of 60 nonsense words correctly. On November 12, 2020, the Student reached Substep 5.3; on January 7, 2021, the Student reached Substep 5.4; on April 8, 2021, the Student reached Substep 6.3; and in May 2021, the Student reached Substep 7.1. This forward movement from Substep 5.2 to 7.1 leads me to conclude the Student was learning.

In March- April 2021, the Student earned the following WADE scores: the Student read 104 real words out of 120, at 87% correct. The Student read 38 Nonsense Words out of 60, earning a score of 63%. On the WADE sounds portion, the Student earned the following scores: Consonant Sounds 24/24 at 100%, Digraphs/Trigraphs 9/9 at 100%, Vowel Sounds at 82%, Additional Sounds 9/15 at 60%, and Welded Sounds 16/16 at 100%. On

the Spelling portion of the WADE, when asked to spell words up to Step 6.1, the Student spelled 35 words correctly out of 45 words (78%). The Student had no more than one error per sentence for 7 out of 11 (74%) at level Step 6.1. On April 30, 2021, using the PSSA 3-5 Informative/Explanatory Rubric Total, the Student earned 11 out of 32 points. These data further support a finding that the Student was learning.

The [redacted]-grade speech data also reflected steady upward progress. The Parents' independent speech evaluator did not offer preponderant testimony that the Student failed to make meaningful progress in [redacted] or [redacted] grade. When viewed as a whole, the Student's scoring patterns undercut the Parents' claim that the Student was not making any progress and instead indicate that although the Student was struggling, the Student was learning, progressing, and moving forward. Therefore, I now find that the Parents failed to establish a procedural or substantive child find or FAPE violation during the [redacted] grade school year.

THE REVIEW OF THE IEES

After reviewing the results of the private evaluators' conclusions, the District asked, and the Parents agreed to an IDEA reevaluation. After considering the IEE data, the District reevaluation team concluded that the Student's ADHD impairment met the criteria for an IDEA disability as an "Other Health Impairment." At the same time, the team reviewed and agreed with the independent examiner that the Student now qualified as a person with a "Specific Learning Disability" in reading who required specially-designed instruction. The record is preponderant that the preparation of the reevaluation report included a review of the data by a team of knowledgeable people, including the Parents. I now find the review of the IEE data and the development of the reevaluation report were procedurally and substantively correct.

THE JUNE 2021 IEP ADDRESSED THE STUDENT'S NEEDS AND CIRCUMSTANCES

The June 9, 2021, IEP was developed on information in the IEEs and the comprehensive May 12, 2021, reevaluation report. The June 2021 IEP included a mathematics goal and short-term instructional objectives targeting word problems and related language-loaded math concept problems. The math goal would have been implemented via small-group instruction.

The IEP next included two speech goals, one for the initial and blended /r/ sound and another for producing the vocalic /r/ sound at the sentence level. (S-69 at 49, 51). The IEP offered 120 minutes per month of shorter and more frequent individual sessions.

The IEP next included two reading fluency goals, a reading comprehension goal, a written expression goal, a spelling goal, and a vocabulary goal, and each included measurable short-term objectives. The reading fluency, reading comprehension, spelling, and vocabulary goals would have been implemented during the forty-five minutes daily Wilson reading class five days a week. The learning support teacher offered to provide small group written expression for two thirty-minute periods a week. The regular education teacher would continue literacy instruction in the general education classroom. The regular education teacher also agreed to provide vocabulary, comprehension, and basic reading skills, along with a research-based intervention called "Imagine Learning."

The speech therapist recommended direct speech therapy on how to tell a story, pre-teaching vocabulary from a text, teaching spelling of word semantics, sentence structure, coordinating conjunctions, explicit teaching of how to structure a paragraph, and how to isolate complex sentences. Direct speech therapy would occur in the regular education classroom, via small group instruction, and in the learning support classroom.

The progress monitoring schedule was carefully crafted to provide real-time data on how the Student's circumstances, needs, and weaknesses are addressed. The IEP goals are measurable, the present levels are prescriptive, and the specially-designed instruction is linked to the goal statements. Therefore, I now find that the June IEP, when offered, was appropriate.

Applying *Burlington*, once I find the IEP is appropriate, I need not address the appropriateness of the private placement or the equities. At all times relevant, the District offered a FAPE; therefore, the Parents' compensatory education and tuition reimbursement claims are denied.

FINAL ORDER

AND NOW, this February 24, 2023, the District is now **ORDERED** as follows:

1. The Parent's IDEA child find claim for the 2019-2020 and 2020-2021 school year is **DENIED**.
2. The Parent's claim that the District failed to provide a free appropriate public education under Section 504 for the 2019-2020 and the 2020-2021 school year is **DENIED**.
3. The Parents' claim for compensatory education is **DENIED**.
4. The Parents' request for tuition reimbursement is **DENIED**.

All other claims or affirmative defenses not discussed are now dismissed.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
ODR FILE #26125-21-22
February 24, 2023