

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

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

Closed Hearing

ODR File Number: 23330-1920AS

Child's Name:

N.B.

Date of Birth: [redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

October 30, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The Student¹ (hereafter Student) is [redacted] District resident, parentally placed in a private school. Student is eligible for special education under the Individuals with Disabilities Education Act (IDEA)² as a child with a specific learning disability in basic reading, reading comprehension, reading fluency, and written expression.

On January 30, 2020, the Parents (Parent) requested this hearing, alleging that during 2017-2018, 2018-2019, and 2019-2020 school years, the District denied Student a free appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973³ (Section 504) as well as the regulations implementing those statutes. The Hearing Officer granted the Parents request to amend their Complaint. Parents filed an amended Complaint on April 13, 2020. As a remedy, Parents sought compensatory education from January 5, 2017, through February 16, 2018, reimbursement for tuition and related expenses for their unilateral private school placement of Student from February 2018 through the 2019-2020 school year, costs for all and experts' professional services,⁴ and any other relief deemed appropriate.⁵

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

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 implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14).

³ 29 U.S.C. § 701 et seq., The federal regulation implementing Section 504 are set forth in 34 C.F.R. §§ 104.1-104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code § 15 et seq. (Chapter 15).

⁴ Parents raised this issue in their Amended Complaint, but it was not stated when the hearing issues were placed on the record.

⁵ Parents seek full payment of attorneys' fees and costs as permitted by 20 U.S.C. §1415(i)(3) and other applicable state and federal statutes.

The District maintains that it provided and offered FAPE and that no remedy is due. In response to the Complaint filed by the Parents, the District filed a Motion to Limit Claims.⁶ The first hearing session was devoted solely to obtaining evidence about specific misrepresentations Parents alleged to have been made by the District, thereby creating an exception to the two-year statute of limitations.⁷ After the session, the hearing officer ruled that no grounds existed to base a retrospective extension of the IDEA's two-year statute of limitations. Accordingly, the relevant period for recovery in this matter began on January 30, 2018, two years before the date the Parents filed their Complaint.

J-1 through J-37; P-1 through P-7, P-9 through P-11, P-13, P-14, P-18, P-19, P-21⁸; S-1, S-2, S-4 through S-10 are admitted into the hearing record. The following Hearing Officer exhibits are admitted into the hearing record: HO-1 through HO-16.⁹

For reasons that follow, the Parents have preponderantly established that the January 2018 IEP denied Student FAPE. The Parents have not proven by a preponderance of the evidence that the District substantively or procedurally denied Student FAPE through the May 2019 and August 2019 offers of FAPE. Parents have established that the private school placement was appropriate. Accordingly, the District must reimburse Parents for tuition and related expenses from February 16, 2018, through the last day of Student's attendance at the private school for the 2018-2019 school year. After weighing the equities in this matter, the

⁶ Numerous prehearing requests were made by both parties. The applicable pleadings and Orders are referenced and admitted into the record as Hearing Officer (HO) Exhibits.

⁷ The IDEA provides two explicit exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of: i. specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or ii. the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D); see also 34 C.F.R. § 300.511(f)

⁸ Counsel for the District objected to the introduction and admission of P-21. A ruling was deferred until the issuance of this decision. The exhibit is admitted.

⁹ References to the record throughout this decision will be to the Notes of Testimony (N.T. p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Due to multiple scheduling conflicts, the necessity to resolve prehearing issues and the volume of evidence presented, the hearing exceeded the typical seventy-five-day timeline. The Parties made multiple requests to extend the Decision Due Date, finding good cause this hearing officer granted the Parties' joint requests.

tuition reimbursement award will not be reduced or modified. Parents have failed to prove that the District discriminated against Student in violation of Section 504. Parents' request for payment or reimbursement of expert witness fees is denied.

ISSUES

- 1) Whether the District offered Student a free appropriate public education in the January 30, 2018, IEP?
- 2) Whether the District offered Student a free appropriate public education in the May and/or August 2019 IEPs?
- 3) Whether the private school is an appropriate private placement for Student; and
- 4) Whether the equities weigh in favor or against reimbursement of Parents' tuition costs at the private school?

FINDINGS OF FACT

1. The Student is a [redacted] sixth-grader enrolled by the Parents in a private school.
2. Student completed kindergarten and first grade as a regular education student in [an out-of-state] public school. (N.T. 43)

2016-2017 School Year - Second Grade

3. In July 2016, after relocating to Pennsylvania, Parents enrolled Student in the second grade into a District elementary school. (J-1; N.T. 42)
4. During registration, the Parent informed the District that Student had reading and spelling difficulties and suffered from migraine headaches. (J-1, S-1, pp. 1,3; N.T. 44-45)
5. Early in the school year, Student's second-grade teacher observed Student's struggle with basic reading skills, sight vocabulary, reading fluency, and decoding and made a referral to a District literacy specialist. (P-2; N.T. 196, 198)

6. On September 19, 2016, the District's MTSS/ CORE team, comprised of a District reading specialist and classroom teacher, met and decided to collect benchmark assessment data. (J-4, p.1)
7. On October 17, 2016, the CORE/MTSS team implemented an action plan to address Student's literacy needs, provided Parents with suggestions for the home, and initiated instruction with the reading specialist and Student four days a week. (J-4, p. 1, J-6, p .4; N.T. 53-54, 102, 202-203, 219-221, 755)
8. The District's MTSS has three tiers of support. Tier 1 is considered benchmark support offering differentiated instruction in the general education curriculum for thirty-minutes. Tier 2 is considered strategic support offering thirty minutes of support in a small group, with biweekly progress monitoring. Tier 3 offers intensive support in a small group for 30-60 minutes, with weekly progress monitoring. (P-6; N.T. 1156, 1265)
9. On October 27, 2016, the District met with Parents to discuss Student's benchmark data, classroom performance, private reading tutoring, and the need for a comprehensive evaluation. (P-2; J-4; N.T. 200)
10. On November 6, 2016, the District issued prior written notice (PWN), and the Parents consented to an evaluation of the Student to assess overall academic concerns and issues with focus, attention, and possible anxiety. (J-5, S-1, p. 5; N.T. 1089-1090)
11. On January 9, 2017, the District completed its initial evaluation report (ER) of Student. (J-6)
12. The Parent provided input for the ER noted the Student's struggle to differentiate letters, difficulty reading, writing, losing focus when frustrated, and migraine headaches. (J-6, pp. 2-3; N.T. 1093)
13. The Student's second-grade teacher's input to the ER noted struggles in language arts, math, and writing. (J-6, pp. 3-4; 1094-1095)
14. In the ER, no significant behavioral concerns were noted by the Parents, teachers, and the school psychologist who completed the Student's classroom observation. (J-6, pp.2-4; N.T. 210-211, 1096, 1097)
15. The school psychologist assessed Student's cognitive abilities with the Wechsler Intelligence Scale for Children (WISC-V), academic abilities with the Wechsler Individual Achievement Test (WIAT-III), and social-emotional needs, with the Behavior Assessment System for Children (BASC-3), Behavior Rating of Executive Functioning (BRIEF) and the ADHD-5. (J-6, p.2, 6, 9-10; N.T.1096, 1100)

16. On the Wechsler Intelligence Scale for Children (WISC-V), Student received a full-scale IQ score of 95, in the average range of overall cognitive ability. (J-6; N.T. 1100)
17. On the subtests of the WISC-V, Student's verbal reasoning ability, visual-spatial skills, and working memory skills were in the average range. Fluid reasoning was in the low average range, and processing speed was in the high average range. (J-6, p. 8; N.T. 1105)
18. On the Wechsler Individual Achievement Test (WIAT-III), the Student received a score in the 2nd percentile on the total reading composite, significantly below average, indicative of a high level of impairment, with difficulty noted in identifying sounds, decoding real and nonsense words, and reading words with single short vowels and consonants, vowel and consonant digraphs and irregular vowels and diphthongs. (J-6, p. 11, J-8, p. 7; N.T. 1111)
19. In basic reading, Student scored in the 3rd percentile, in word reading at the 3rd percentile, in pseudoword decoding in the 2nd percentile, in reading comprehension and fluency, in the 2nd percentile, and in reading fluency the 4th percentile. (J-6, J-8; N.T. 1105, 1111)
20. In written expression, Student scored in the 9th percentile, in the 2nd percentile in sentence composition, and the 10th percentile in spelling. (J-8, p.8)
21. Students' skills were in the average range for listening comprehension, processing skills, and working memory. Student's oral expression scores were slightly below average, although the overall composite was average. (J-8, p. 8; N.T. 1111)
22. The school psychologist selected the WIAT-III to assess Student because it analyzed the five areas discussed by the National Reading Panel and the International Dyslexia Association. (N.T. 1101)
23. Student's math composite and math fluency composite scores were in the average range. (J-6, p.12; N.T. 1113)
24. Administration of the BRIEF indicated no executive functioning, problem-solving, and planning concerns. (J-6, pp. 9-10; N.T. 1107)
25. On the ADHD-5, which assessed Student's inattention and hyperactivity/impulsivity, no concerns were noted. (J-6, pp. 9-10; N.T. 1107-1108)
26. On the BASC-3, no anxiety or depression concerns were noted. (N.T. 1110)
27. The school psychologist administered all assessments according to the publisher's protocols and under standard conditions. (N.T. 1101)

28. An occupational therapy evaluation determined that Student had difficulty coordinating fingertip movement and visual-motor integration issues. (J-6, p.16; S-5; N.T. 993-996, 1006-1007, 1018)
29. The ER concluded that Student qualified for special education as a child with a specific learning disability in basic reading skills, reading comprehension, oral reading fluency, and written expression. (J-6, p.16; N.T. 714-715, 1113)
30. Based on the evaluation results, the school psychologist concluded that Student's reading impairment was moderate to severe and recommended that the team consider offering Student the highest level of support through an evidence-based, multi-sensory reading and writing program providing direct, explicit instruction in the five areas of reading. (J-6, p. 19; N.T. 1147-1148, 1154, 1163)
31. The OT evaluation determined that Student needed occupational therapy support based on below-average visual-motor integration, average visual perception, below fine motor precision, and average fine motor scores. The evaluation recommended thirty minutes of weekly, small group OT to improve fine and visual-motor skills. (J-8, p.9)
32. The ER noted no assistive technology, communication, or ESY needs. (J-8)
33. Before the IEP meeting, the school psychologist met with Parents and explained Student's evaluation results, reading deficits, educational strengths, and needed literacy supports. (N.T. 1093, 1115-1117, 1160)

FEB 2017 - IEP

34. On February 7, 2017, the IEP team met to discuss the proffered IEP. (J-7, J-8)
35. Annual goals in the February 2017 IEP addressed oral reading fluency (baseline of thirty correct words correct per minute at a second-grade level to seventy-two words correct per minute on three consecutive probes); written expression (baseline of four correct writing in a three minute period to a goal of eleven correct writing sequences); decoding (baseline to be determined in March to segmenting syllables up to five sounds to read with 90% accuracy and spell with 75% accuracy); reading comprehension (independent baseline of PrePrimer one level to grade one level); and two occupational therapy goals. (J-8)
36. Program modifications and SDI included: access to a water bottle and extra snacks to address migraine concerns; reading of tests to Student; direct instruction in the domains of writing; direct, explicit, systematic phonemic-phonetic, word analytic approach to

decoding/fluency; direct, explicit, systematic instruction in vocabulary pre-reading, reading, and post-reading comprehension strategies. (J-8, pp.22-23)

37. After the Parents signed the NOREP, Student received supplemental learning support for two hours a day and weekly group occupational therapy for 30 minutes.(J-8, pp. 23- 25, 1259; J-9, p.3; J-15, p.10)
38. To implement the decoding goal, a second-grade special education teacher provided Student with 30 minutes of daily, Level 1, Wilson Foundations instruction. (J-8, p. 19, N.T. 1198)
39. Foundations is a Wilson Language Training researched-based program providing multi-sensory and systematic phonics, spelling, and handwriting instruction for students in kindergarten through third grade. Foundations offers two tiers of programming. Tier 1 is a general education instructional program delivered daily for thirty minutes. Tier 2 is for at-risk students in the lowest 30th percentile in need of strategic and targeted intervention. Tier 2 standard implementation is daily for sixty-minutes plus double dose lessons for an additional thirty minutes when warranted. (P-18, S-8. p.25; N.T. 70, 704-705, 707-709, 1264-1265)
40. Tier 1 and Tier 2 of Foundations have four levels ranging from K to Level 3, each corresponding to a student's grade level. Within each Level of Foundations are units of instruction. (P-18, p. 9; S-8, p. 23; N.T. 1201, 1269)
41. Level 2 of Foundations has 17 units of instruction to be delivered over 31 weeks of school as a component of a general education curriculum. (P-18, p.9)
42. Tier 2 Foundations can be an appropriate program for students in the lowest 30th percentile of reading performance in need of strategic and targeted intervention. (P-18, p. 7)
43. The Student suffered from migraine headaches triggered by stress and anxiety, resulting in 19 nurse visits during the 2016-2017 school year. (J-3, p.4; J-6, pp. 1-4; N.T. 830)
44. The IEP team determined that Student did not qualify for ESY during the summer of 2017 based on data collected before and after spring break. The District advised Parents to enroll Student, at their own expense, in the District's Camp Success summer program for reading. (S-1, p.32; N.T. 69, 844-846, 945-946)

2017-2018 School Year – Third Grade

45. During the 2017-2018 school year, Student was a third-grader in a District elementary school receiving supplemental learning support services with direct instruction in decoding, reading fluency and comprehension, written expression, and occupational therapy services. (J-8)
46. During the third grade, Student suffered from nearly daily migraine headaches, and after the school day, physical symptoms persisted in the home. (J-37, p. 42; N.T. 855, 863)
47. The District categorized Student at an intensive support (Tier 3) level, requiring daily, intensive small group support for 30-60 minutes with weekly progress monitoring. (P-6; N.T. 293, 322, 835)
48. In support of the decoding/encoding IEP goal, in mid to late September, Student received thirty-minutes of group reading instruction using Level 2 of the Foundations program. (J-8, pp.19, 23; N.T. 1189-1190, 1197, 1203, 1259-1261)
49. The teacher providing Foundations instruction to Student received either a half-day or full-day training on the program and spent more than one year becoming Wilson Level 1 certified. (N.T. 1189, 1264, 1272)
50. The District uses the Word Identification and Spelling Test (WIST) to determine placement into the appropriate encoding/decoding Wilson program. The District did not administer a WIST to determine the appropriate Foundations placement for Student. (N.T. 741, 1230, 1269-1272)
51. In addition to Foundations, Student received literacy instruction through other research-based interventions. (S-8, pp.2, 18, 35; N.T. 359, 496-498, 501, 507-508, 512-513)
52. In October 2017, after Student returned from a one-week reading skills program for dyslexia, the Parents met with the District to discuss the incorporation of some of the learned strategies into Student's academic programming. (S-7, p.1; N.T. 77-78, 150-151, 283-284, 290-291, 847-848, 1263-1264)
53. On December 12, 2017, the Parent contacted Student's regular education teacher expressing concern that Student was struggling in math. (S-1, pp. 68-69; N.T. 853-854)
54. On January 8, 2018, the District met with Parents and discussed math supports and the role of dyslexia in Student's learning difficulties. The team decided to provide Student with 45 minutes of daily pull-out math review to discuss the concepts taught in regular education (S-1, p. 70; S-7, p. 2; N.T. 162-164, 184-185, 373-374, 853-854, 1211)

55. After the meeting, Parents advised Student's third-grade regular education teacher that private school placement for Student's fourth-grade year was under consideration. (N.T. 855-856)
56. Between September 2017 and December 2017, Student completed three units of Level 2 of Foundations, receiving scores of: Unit 1 -60%, Unit 2- 40%, and Unit 3-56%. Mastery of a Foundations unit is a score of at least 80%. (J-12, p. 2; P-18, pp. 8-9; N.T. 722, 1203-1206, 1266-1269)
57. According to June and December IEP progress reporting provided to the Parents, Student met reading fluency and comprehension goals and one of the occupational therapy goals. Student made progress in decoding, written expression, and the second occupational therapy goal. (J-10, J-13; N.T. 511, 541, 1025, 1203-1204, 1212)
58. From the IEP progress reports provided to the Parents, it is difficult to discern whether Student made progress in reading fluency and decoding. (J-10, J-13; N.T. 844, 1196)
59. During third grade in the District, Student made ten nurse visits, four related to headaches. (J-3, p.4)

January 2018 Offer of FAPE

60. On January 30, 2018, the annual IEP meeting occurred to discuss Student's programming and needs in decoding and encoding, reading fluency, sight word vocabulary, reading comprehension, sentence construction, and OT. (J-15, p.11)
61. The present levels reported scores related to Student's reading ability based on the AIMSweb, Fountas and Pinnell and Roe and Burns informal reading inventory. (J-15)
62. Annual academic goals proposed in the January 2018 IEP included: decoding/encoding by segmenting syllables into up to six sound, identify six syllable types and word structures to read multi-syllabic words with 90% accuracy and spell with 75% accuracy (baseline of 78% reading accuracy and spelling 74% accuracy); reading fluency at a third-grade level, 86 cwpm with 94% accuracy (baseline of 76.3 cwpm with 97.3% accuracy at second-grade level) (Aimsweb baseline, third grade 48 cwpm); reading comprehension at a third grade, first month – Lexile level 400-500 (baseline second grade, first month, Lexile 300-399); writing using all steps of the writing process to produce a one to three paragraph essay earning 75% average (baseline one paragraph with four to five sentences averaging 70% accuracy on the rubric). Two occupational therapy goals were included in the IEP. (J-15)

63. SDI proposed in the January 2018 IEP included: 60 minutes of daily, direct, explicit, systematic phonemic-phonetic approach to decoding fluency and encoding using controlled texts and passages; 30 minutes of daily direct, explicit instruction in vocabulary and reading comprehension strategies using a multi-sensory program; 30 minutes of daily explicit instruction in the writing process; 45 minutes of daily review and reinforcement of math skills; water and snacks to offset migraine headaches; technology access and homework modification. (J-15, pp.23-25, 1219)
64. In the January 2018 IEP, the District proposed an increase in Foundations instruction from thirty to sixty minutes daily, or a “double dose,” consistent with implementation at Tier 2 or intervention level of support for Student, according to Wilson protocol. (J-15, S-8, pp. 23-28; N.T. 364, 1217, 1219)
65. After the IEP meeting, the Parents signed the NOREP, agreeing to the District's program and placement. (J-18)
66. On February 2, 2018, Parents emailed Student’s special education teacher advising of their intention to enroll Student in a private school. In the email, Parents indicated that a 1:4 student to teacher ratio was a better fit for Student. That same day the private school requested records from the District regarding Student. (J-17, J-18, S-1, pp. 73-75; N.T. 180)
67. On February 13, 2018, the Parent completed the District form advising of Student’s withdrawal from the District. That same day both of Student’s special education teachers completed recommendations for enrollment in the private school. (J-17, S-1, pp. 74, 76; N.T.371, 405)
68. Student’s first day at the private school was February 16, 2018. (J-18; N.T. 1224)
69. Student attended the third grade at the private school for the remainder of the 2017-2018 school year. (S-1, p.77)

Third Grade -February 2018-June-2018 (Private School)

70. The private school is religious-affiliated, accredited by the PA Association of Independent Schools, recognized by the International Dyslexia Association, and serves students in third through twelfth grades with learning disabilities. (N.T. 379-382, 431)
71. The private school daily schedule consists of a 15-minute homeroom, 75 minutes of language arts, morning gathering, specials class, a break, 50 minutes of math, lunch, a check-in with advisors, a second specials class again, 40-minute reading class, 40 minutes

of science and social studies and a final 10-minute end of day check-in with advisors. (J-19; N.T. 383-384)

72. At the private school, student's progress is monitored daily, and trimester reports are issued to Parents with language arts broken down into fifteen separate concepts/skill areas of word identification, fluency, vocabulary, development, and comprehension. Math is divided into sixteen areas, including geometry, measurement, and problem-solving. (P-11, p.63, 65)
73. The private school provides literacy instruction using Orton-Gillingham principles, regarded as a structured, research-based, explicit, multi-sensory, diagnostic teaching approach. All teachers at the private school have Orton-Gillingham training and experience. (N.T. 380, 385, 389, 1147-1148, 1154, 1163)
74. The private school uses a multi-sensory math program and an experiential approach to science. (J-19, P-11, p. 35; N.T. 96-97, 879-880)
75. At the private school, lessons presented in text are available in an auditory format. (N.T. 395)
76. End of third-grade progress in language arts (decoding/spelling, fluency, writing) indicated Student developed a solid command of syllable types, needing more practice with vowel pairs and diphthongs, spelling, and steady progress in fluency. (J-19, p. 2)
77. Student progress at the conclusion of third grade in math indicated progress and completing or working toward objectives in base ten numbers, fractions, algebraic concepts, geometry, measurement, and problem-solving. (J-19, p. 3)
78. Student progress at the conclusion of third grade indicated growth in word identification, fluency, vocabulary development, and comprehension skills. (J-19, p.4)
79. In third-grade life sciences, Student made progress in understanding key terms, concrete projects, and applying geography skills. (J-19, p.5)
80. Student received instruction in art and physical education as a third-grader at the private school. (J-19, p.6)
81. While attending the private school, the District offered, but the Parents declined OT services for Student. (N.T. 554, 890-891)
82. The private school taught Student cursive writing to address concerns with motor skills. (N. T. 876)

2018-2019 – Fourth Grade – Private School

83. Student attended fourth grade at the private school during the 2018-2019 school year.
84. The private school provided Student with language arts instruction through explicit, structured, direct, individualized, repetitive, multi-sensory, hands-on instruction. Student worked in pairs, small and large groups, and independently engaging in interactive lessons, activities, and games. (P-11)
85. Student demonstrated improvement on all language arts assessments. In September 2018, Student received scores of 34% for graphemes and 0% for syllables on the primary grade assessment. By April 2019, Student's scores improved to 51% for graphemes and 53% for syllables. In 2019, on the (Phonological Assessment Test (PAT) Student's scores increased from 34% in September to 69% in May. (P-11, p. 80)
86. According to the private school records, in September 2018, Student could read 35/100 sight words but progressed to reading 632/700 sight words by May 2019. (P-11, p. 83; J-37, p.6)
87. In 2018, Student was unable to read at a rate accurate enough to determine words per minute but by May 2019 progressed to reading 126 words per minute with 92% accuracy on a fourth-grade passage. (P-11, p. 83; J-37, p.6)
88. According to year-end progress reporting by May 2019, Student was proficient in reading consonant, short vowels, consonant digraphs but still struggled with long vowels and final stable syllables (-Cle). (J-37, p.7)
89. By May 2019, in phonemic awareness, Student demonstrated proficiency in rhyming, isolation, deletion, substitution, and blending and a developing skill level in segmentation and decoding. (J-37, p.7)
90. According to the private school assessments, in reading fluency, Student received scores ranging from 93% to 100% and in reading comprehension scores ranging from 74% to 100%. (J-37, p. 8)
91. Math progress at the private school indicated Student obtained mastery of basic concepts but struggled with number formation and handwriting, leading to fatigue. To address writing, Student was provided with a dry erase whiteboard instead of pencil and paper. (J-37, p.8)
92. Parents reported that during the fourth grade Student, started reading more, developed confidence, and began advocating for needs. (N.T. 877)

93. Between January and April 2019, the Parents, through counsel, discussed Student's school enrollment plans. (P-1, pp. 27-33)
94. On April 29, 2019, near the end of Student's fourth-grade year at the private school, the Parents, through counsel, requested an offer of FAPE from the District for the 2019-2020 school year. (P-1, p.28, S-9, p.1)
95. After Parents provided consent, the District requested from the private school Student's report cards, progress reports, attendance records, assessments/evaluations, and reading progress from 2017 onward. (S-1, p. 88)
96. On May 20, 2019, the District received Student's attendance records and report cards. (J-19, J-20, P-1, p. 34; S-1, pp. 88, 90)
97. In order to obtain current academic information, on May 30, 2019, the District administered to Student the Word Identification and Spelling Test (WIST) and AIMSweb benchmark assessments in reading fluency, reading comprehension (MAZE), math and writing. (J-22, pp. 6-8, S-1, p. 94; N.T. 895, 1229)
98. Student's performance on the (WIST) ranged from poor (third percentile) to very poor (less than first percentile). (J-22, pp. 6-8)
99. On the District administered AIMSweb benchmark assessments, Student's performance while attending the private school (winter 2018-May 2019) indicated improvement in reading fluency and reading comprehension. (J-22, p. 7, J-26, J-36, pp.10-11; N.T. 1291, 1310)

Offer of FAPE/May 2019

100. On May 31, 2019, the IEP team met to discuss Student's fifth-grade programming for the upcoming 2019-2020 school year. (J-22, J-27; N.T. 1119, 1121)
101. Parent concerns shared with the IEP team included: Student's transition back to the elementary school; access to grade-level content; multi-sensory instruction in each subject area; monitoring of and response to Student's stress level; and breaks throughout the day. (J-22, p.18)
102. The IEP team determined Student's academic, developmental, and functional needs as word attack to improve decoding and encoding; increase reading fluency; sight word vocabulary; reading comprehension; and sentence and paragraph construction. (J-22, p. 18)

103. The present levels in the IEP included data from the District administered WIST, current and former AIMSweb assessment scores and information from the private school. (J-22)
104. Based on the AIMSweb data, Student met benchmark expectations in reading comprehension and progressed in reading fluency while attending the private school. (J-22, p.7)
105. Annual goals proposed in the May 2019 IEP included: decoding high-frequency, phonetic, and nonsense words, including six-syllable with 93% accuracy (baseline WIST of 79); encoding high frequency, phonetic and nonsense words and six-syllable with at least 80% accuracy (baseline WIST of 17); reading fluency, unrehearsed passage at fourth-grade level applying decoding and word analysis to read 95 correct words per minute with 94% accuracy on four out of five trials (baseline 79 wpm at fourth-grade level); reading comprehension, reading passage at third-grade level aloud and verbally answer literal and inferential comprehension questions with 87% accuracy or higher on three consecutive probes, (baseline MAZE 18 out of 18 correct responses, assessment will be administered at start of school year to determine needs); writing, produce a one to five paragraph essay earning 75% or more in all rubric areas (baseline 7 correct writing sequences on AIMSweb probe). (J-22, pp. 3, 26-30; N.T. 1031, 1069)
106. Based on the benchmark probe's writing sample, the District occupational therapist determined that Student had challenges with margin alignment, upper case letters, word spacing, letter alignment, and formation, and recommended thirty minutes of weekly OT. (J-22, p. 3, J-34; N.T. 1031-1034)
107. The proposed modifications and SDI included: 50 minutes of direct, multi-sensory, daily Wilson reading instruction, 45 minutes of daily, direct, explicit, vocabulary and pre-reading, reading and post-reading comprehension instruction, access to technology and word processing; 30 minutes of daily, explicit writing instruction, 30 minutes of daily reinforcement of math; a pre-assessment to determine whether additional math intervention was necessary; modified homework; a SETT process within the first 60 days of school; use of water bottle/snacks for headache; instructional adaptations to the content and core subject areas; and a transition plan for Student to return from the private school to the public school setting. (J-22, pp. 32-34)
108. The Wilson Reading System, a Wilson Language Training Program, is recommended by the National Reading Panel as an evidence-based, multi-sensory, direct, explicit, reading, and writing program, providing instruction in the five areas of reading. When provided daily for 45-60 minutes, Wilson is a Tier 3 literacy intervention. (N.T. 705, 728, 1147-1148)

109. Under the proposed transition plan proposed in the May 2018 IEP, Student would return to the school a week before classes to meet with teachers. (J-22, p.34)
110. The IEP proposed consultation time between regular education and special education staff and the Wilson teacher to support the implementation of the decoding/encoding strategies across the curriculum. (J-22, p. 35)
111. At the IEP meeting, the District discussed with Parents the proposed implementation of the IEP, including the multi-sensory instruction and the reevaluation of Student. Parents advised that Student was undergoing a private evaluation. (N.T. 1242-1245)
112. The Parents did not sign or return the NOREP dated May 31, 2019. (J-23)
113. On August 13, 2019, the Parents provided the District with a 10-day notice advising of Student's continued placement at the private school and seeking tuition reimbursement. (J-24; S-1)

Offer of FAPE/ August 2019

114. On August 20, 2019, the IEP team met with Parents and discussed the 10-day notice, concerns with the May 2019 IEP, and Student's triennial reevaluation. (J-25, J-26, J-27; N.T. 1178)
115. The Parents indicated the same concerns raised at the May meeting but added Student's stress, increased migraines related to the transition and curriculum, and the need for all-day learning support. (J-26, p. 20)
116. The proposed August IEP was the same as the May IEP, but the team amended the transition plan and added other SDI to address concerns regarding Student's stress levels, content material preview, and a method to self-initiate the need for a break. (J-26, p. 37; N.T. 1248-1249)
117. The Parents consented to the District's proposed reevaluation of Student. A handwritten note on the PWN indicated "still waiting on private neuropsychological report." (J-27; N.T. 1122)
118. The school psychologist discussed with Parent waiting for the neuropsychologist evaluation report before commencing the triennial evaluation so that the District did not duplicate testing. (N.T. 1170)

2019-2020 School Year (Private School) (Fifth-Grade)

119. Student attended fifth grade in the private school during the 2019-2020 school year. (J-29)
120. According to the Parents, since attending the private school, Student is happier, reading has improved, headaches have abated, and the teachers provide constant communication with the family. (N.T. 874)
121. On October 28, 2019, the District issued its reevaluation report of Student. (J-29; N.T. 1124, 1167, 1178)
122. Based on the evaluation results, Student continued to qualify for special education under the disability category of Specific Learning Disability with needs in basic reading skills, reading comprehension, oral reading fluency, math problem-solving, math calculation, written expression and secondary eligibility criteria as a student with a Other Health Impairment (OHI). (J-29)
123. On November 18, 2019, the team met and proposed an IEP with literacy, executive functioning, math, social skills, and OT goals.¹⁰ (J-32, pp. 27-31; N.T. 1043, 1068-1069)
124. The Parents did not sign or return the NOREP dated November 19, 2019. (J-33)
125. On April 13, 2020, the Parents filed a Complaint requesting a due process hearing.¹¹

Parent Obtained Neuropsychological Evaluation

126. From July-September 2019, a neuropsychologist, at Parents' request, evaluated Student. (J-37)
127. The neuropsychologist is a Pennsylvania certified school psychologist, licensed psychologist and is credentialed by the American Board of School Neuropsychology. (J-37)
128. For incorporation into the report, the neuropsychologist reviewed the 2018-2019 private school progress reports, conducted an observation of Student at the private school, and administered and reported results from the: Beck Youth Inventories-Second Edition (BYI-III), the BASC-3, the Differential Ability Scales-Second Edition (DAS-III), NEPSY-III, the Neuropsychological Processing Concerns Checklist for School-Aged Children and

¹⁰ The scope of this due process hearing concerns only the January 2018, May 2019 and August 2019 offers of FAPE. (HO-4; N.T. 911, 983)

¹¹ HO-3, HO-4

Youth -Third Edition (NPCC-3), the WIAT-III and the Wide Range Assessment of Memory and Learning-Second Edition (WRAML2). (J-37)

129. According to the WIAT-III, since 2017, Student's performance decreased with lower scores in reading fluency, sentence combining, spelling, and math with comparatively higher scores in word reading, pseudoword decoding, reading comprehension, and oral reading fluency. (J-6, pp.12-13, J-37, pp. 67-68)
130. The neuropsychologist determined Student to have a specific learning disability in reading, written expression, and math computation. She determined that Student exhibited functioning commensurate with a diagnosis of ADHD and a classification of other health impairment (OHI) to be appropriate. (J-37, p. 41)
131. Based on the evaluation, the neuropsychologist recommended continued attendance at the private school and that Student required: structured, explicit instruction for decoding, comprehension, writing, and math-based research-based programs; multi-sensory, interactive, experiential activities and lessons to hold interest and facilitate understanding; small group instruction with frequent 1:1 teacher support; graphic organizers; flexibility in programming; repeated exposure, extended time, frequent monitoring; assistive technology; dictation from an adult; decreased writing demands in math, and consistent OT support. (J-37, p. 42)

Parent Obtained Literacy Assessment

132. On April 15, 2020, a speech-language pathologist (SLP) conducted a literacy assessment of Student at Parents' request. (P-18; N.T. 747)
133. The Speech/Language Pathologist (SLP) has a Bachelor of Science in Education of the Deaf and Hard of Hearing and a Master of Arts in Speech-Language Pathology.
134. Certifications held by the SLP include New Jersey State Licensed Speech-Language Pathologist; New Jersey School Certified Speech-Language Specialist; New Jersey Certified Teacher of the Deaf and Hard of Hearing; ASHA Certificate of Clinical Competence (CCC-SLP); Wilson Certified Dyslexia Practitioner (Level 1); Structured Literacy/Dyslexia Interventionist, Center for Effective Instruction (SL/DI); Board Certified Specialist in Child Language (BCS-CL); specialist in child language and certified as a structured language/ dyslexia interventionist through the Center for Effective Reading Instruction. (P-18, p. 20, P-19; N.T. 687)
135. Since 2007, the SLP has co-owned a New Jersey-based private practice providing evaluation and intervention services for children and young adults with language, disability, and communication needs. (P-18, P-19; N.T. 675)

136. The SLP is dually certified as a speech-language pathologist and teacher of the deaf and hard of hearing. (N.T 684)
137. The SLP has testified as an expert witness in NJ regarding child language, language skills, development and disorders in children, literacy disorders, and programming and interventions for children with literacy disorders. (N.T. 678)
138. The SLP is level 1 Wilson certified, has completed some training in Orton-Gillingham, and has completed all of the Lindamood-Bell literacy training except for LiPS. (N.T. 686)
139. For input into the evaluation, the SLP reviewed some of the District and private school educational records and the privately obtained neuropsychological evaluation. COVID-19 restrictions prevented a school observation and face to face interview with Student. (P-18, p.1; N.T. 749, 751-752)
140. The SLP administered the Gray Oral Reading Test-5th Edition (GORT-5), the Qualitative Reading Inventory-6th Edition (QRI-6), and an Informal Writing Sample to Student. (P-18, p. 15)
141. Based on the evaluation, the SLP concluded Student required an evidence-based, intensive intervention to address literacy deficits and presentation of all academic content and experiences in a format that would enable Student to access the information and apply skills at a functional level. (P-18, p. 19)
142. The SLP determined that a structured literacy program with explicit, intensive phonics instruction and a cumulative scope and sequence, like the Wilson Reading System, was appropriate for Student. (N.T. 693-694, 732)
143. The SLP concluded that the private school was an appropriate educational placement for Student. (P-18, p.20)

APPLICABLE LEGAL PRINCIPLES

WITNESS CREDIBILITY

Hearing officers, as factfinders, are 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). All testimony was reviewed and weighed in light of the witnesses' participation in the hearing during their testimony and in light of the documentary evidence specifically reviewed by them and, where applicable, in general. Considering the testimony in light of the documentary evidence, I find that most of the witnesses, including Parent, were credible and reliable witnesses. In most cases, the witnesses' testimony was consistent with the documentary evidence and other testimony

BURDEN OF PROOF

The burden of proof, generally, 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. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents, as the party seeking relief, bear the burden of persuasion.

IDEA FAPE PRINCIPLES

Parents who believe that a local education agency (LEA) has failed to comply with its obligations under the IDEA may "present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child." 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 30.512, 300.515; 22 Pa. Code § 14.162. In this matter, the Parents filed a Complaint and challenged the District's proposed program for the latter half of 2017-2018, 2018-2019, and 2019-2020 school years. In reviewing the record, every witness's testimony and each exhibit's content was thoroughly considered in issuing this decision, as were the parties' comprehensive closing arguments.

The IDEA requires states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In 1982, our U.S. Supreme Court addressed these statutory requirements, concluding that FAPE mandates are met by providing personalized instruction and support services designed to permit the child to benefit educationally from the program and comply with the procedural obligations in the Act. *Board of Education of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)

Local education agencies (LEA), including school districts, meet the obligation of providing a FAPE to eligible students through the development and implementation of an IEP, which must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. In 2017, the U.S. Supreme Court determined that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206-09) (other citations omitted).

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). Instead, the law demands an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Andrew F.*; *see also, Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) A program’s appropriateness must be based on the evidence known to the school district at the time at which the offer was made and not in hindsight. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010). *Andrew F.*, makes clear that the “IDEA... requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances." *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000.

The IEP is the center of the statute's education delivery system for disabled children. *Andrew F.* (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE, as the IDEA defines it, includes both "special education" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities, special education, and related services "in conformity with the [child's] individualized education program" or "IEP." *Id.* § 1401(9)(D). Further, the law does not demand that an LEA provide a goal for, or particularized data on, "every single recognized need of a disabled student. "FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education." *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff'd*, 581 Fed. App'x 141 (2014).

A school district could violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 176. "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *J. W. v. Fresno Unified School District*, 626 F.3d 431 (9th Cir. 2010) (citing *Rowley*, 458 U.S. at 206-207). A procedural violation occurs when a district fails to abide by the IDEA's procedural requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, e.g., L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation

constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* 137 S.Ct. 1001.

SECTION 504 PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on 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). In Pennsylvania, Parents may request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA's identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8. The obligation to provide FAPE is substantively the same under Section 504 as under the IDEA. *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

DISCUSSION AND CONCLUSIONS OF LAW

Student completed kindergarten and first grade as a regular education student [out of state]. In July 2016, after relocating to Pennsylvania, Parents enrolled Student in the second grade into a District elementary school. During enrollment, Parents shared that Student had a history of reading difficulty as well as migraine headaches. Within the first few weeks of the 2016-2017 school year, Student's struggle with reading triggered the District's CORE/MTSS team's involvement. By September 2016, the team administered benchmark assessments and developed an action plan, sharing the results and recommendations with Parents.

In early November 2016, the District issued a PWN to evaluate Student for overall academic concerns. The evaluation, completed in January 2017, was comprehensive and thorough. It assessed Student's cognitive abilities, academic, social-emotional, and related service needs. The Parents and current teachers provided input, and the school psychologist conducted a classroom observation. The evaluation determined that Student qualified for special education under the disability category of specific learning disability with needs in all areas of literacy, including decoding, reading comprehension, reading fluency, and written expression. The OT evaluation concluded that Student had fine motor deficits necessitating services.

In February 2017, an IEP team meeting occurred with the Parents present. The February 2017 IEP provided goals in decoding, reading comprehension and fluency, writing, and OT.¹² The Parents approved the NOREP, and Student received daily, supplemental learning support for two hours along with 30 minutes of weekly OT for the remainder of the 2016-2017 school year and into the 2017-2018 school year, Student's third-grade year. The District chose to implement the reading goals using the Wilson Foundations Program in conjunction with other research-based literacy interventions.

In third grade, the Student's reading struggle continued. Parents' concerns increased, and they removed Student from school for a week-long dyslexia program. Student continued to receive 30 minutes of daily, small group decoding instruction using the Foundations program with other literacy interventions and OT in school. In mid-December, the Parent advised that Student needed more math support, and the District promptly scheduled a meeting to address this concern. Although progress monitoring reports provided to the Parents indicated progress toward most of the IEP goals, Student had great difficulty with each Foundations unit.

January 2018 Offer of FAPE

On January 30, 2018, the District held Student's annual IEP meeting. The January 2018 IEP contained the same goals as the previous year (OT, decoding/encoding, reading fluency, reading comprehension, and writing). However, this IEP updated the SDI and proposed increasing the daily Wilson Foundations instruction from 30 to 60 minutes, "double dose," and

¹²Although providing necessary background information, the February 2017 IEP is no longer the subject of this due process hearing. (HO-1 through HO-16)

added: math support, instructional adaptations, breaks, homework modifications, and testing accommodations. Total time in special education would increase from 2 to 2.75 hours daily. The Parents signed the NOREP, agreeing to the program and placement; however, weeks later, they withdrew Student from the District for enrollment in a private school.

The Parents now contend that the January 2018 IEP and the subsequent offers of FAPE through the May 2019 and August 2019 IEPs, were substantively and procedurally flawed. The purported substantive violations are numerous but center on allegations that the District denied Student a FAPE by failing to address the severity of Student's disability with an intensive literacy intervention. The purported procedural deficiencies allege that the District prevented the Parents from meaningfully participating in the IEP process.

The Parents have established by a preponderance of the evidence that the District's January 2018 IEP did not offer Student a FAPE. The January 2018 IEP was not "reasonably calculated" for this child to receive "meaningful educational benefit" in light of the student's "intellectual potential" and, therefore, was not substantively appropriate. *Andrew, supra*, 137 S. Ct. at 999, 197 L.Ed.2d at 350. The District's 2017 initial evaluation determined Student to have average cognitive ability but with significant needs in decoding, reading fluency, vocabulary, reading comprehension, and writing. During the hearing, the District's school psychologist credibly testified that Student's needs were moderate to severe. She recommended that the team consider offering Student the highest level of support through an evidence-based, multi-sensory reading, and writing program providing direct, explicit instruction in the five reading areas. Student's occupational therapy needs, although existent, were not nearly as profound as those in literacy.

In January, the District again proposed Foundations as the vehicle to address Student's severe decoding/encoding needs. Although a District need not select a specific instructional approach or methodology to educate its special education students, the selected educational programming must be individualized to the student's needs and designed to provide meaningful educational benefit. *Andrew, supra*. The January 2018 IEP proposed a "double dose" or sixty minutes, which moved Student from a Tier 1 to a Tier 2 instructional level according to the Foundations instructional protocol. However, the increase in instructional time, without a change in the strategy to teach decoding and related literacy skills, was inadequate. This Student was not

just a struggling reader. When evaluated, the District determined that Student had profound decoding/encoding needs resulting in difficulty accessing the entire academic curriculum. A review of the District evaluation report, monitoring data, and Student's laborious and questionable progress through just three of the seventeen units of Foundations, in four months, without achieving a mastery level, should have confirmed for the team that a different programmatic approach was warranted for this Student.

Through the evidence presented, I agree with the Parents' assertions that Student required an intense, individualized literacy intervention appropriate for a special education student, not a general education strategy for the struggling reader. Without a change in the instructional approach to teach decoding and related literacy skills to this child, the proposed increase of instructional time was simply not enough. In support of their contentions that Student's reading disability warranted a more intense intervention, the Parents offered the testimony of a Speech-Language Pathologist (SLP) who evaluated Student. Over the District's objection, the Parents sought qualification of the SLP as an expert witness in Literacy Disorders. I deferred a ruling until the issuance of this decision. Because of demonstrated knowledge, skill, experience, training, education, and involvement with this Student, I agree that the SLP should be qualified as an expert witness in literacy disorders for this proceeding. The SLP's testimony was credible and is admissible. The SLP's testimony and report underscored the severity of Student's reading needs, its deleterious impact, and the necessity for aggressive intervention. I agree with the SLP's conclusions that mastery of decoding and encoding skills are necessary foundations for learning and the core of education. Although Student received special education only for one year through the District, by January 2018, valuable remediation time had elapsed, and a more intense reading intervention was necessary. As the SLP testified, mid-way through the third grade is a critical time for literacy skills. In early elementary school, the intervention must be the most intense to provide a child with the ability to access their education as demands to read independently across the curriculum increase with every advancing grade. Student's frustration and anxiety about reading had already taken a physical toll, at such a young age, through the presence of migraine headaches, necessitating frequent breaks, snacks, and access to a water bottle, which the District appropriately proposed. This is not to say that all of the District's implemented and proposed interventions for this Student were improperly chosen. However,

based on the entirety of the record in this matter, including the SLP's testimony and report, the January 2018 IEP was not appropriate for this Student.

Finally, the combined decoding/encoding goal, as drafted, comingled with spelling demands is confusing. Although this goal's progress expectations were updated from the previous year's IEP, the inclusion of spelling expectations results in a lack of clarity that renders reporting of progress toward this goal challenging to assess and, based on the testimony, difficult to explain. In this case, the voluminous record is clear that Student's decoding and encoding deficits are severe, and the response needed to be intense. Because of poor goal drafting, it would be nearly impossible to determine whether Student made progress in decoding, encoding, or spelling.

The District urges that deference is to be accorded to the IEP developed by an educational professional, and Parents cannot insist upon a specific methodology or program for the education of their child. These assertions are correct and supported by case law. *A.B. ex rel. D.B. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004); *T.L. v. Lower Merion School District*, 2016 WL 34053; *Kathryn F. v. West Chester Area School District*, 2013 WL 6667773. Because the Parents seek tuition reimbursement, the first hurdle they must overcome is whether the District offered FAPE to Student. The January 2018 IEP did not offer FAPE. This conclusion should not be interpreted that a specific brand name methodology or program is necessary for FAPE to be afforded. Undoubtedly, the District has at its disposal a wide array of more appropriate literacy strategies, programs, and services than was offered to Student in January 2018. The District witnesses, including the school psychologist and special education teachers, were credible, and their dedication and commitment were evident in their testimony. However, the selected instructional approach must be compatible with the problem it intends to rectify. Accordingly, this hearing officer concludes that the January 2018 IEP was not sufficiently individualized for the student's needs. A remedy for that denial of FAPE shall therefore be awarded. Finally, Parents have failed to establish that procedural deficiencies prevented their participation in the IEP process, resulting in a denial of FAPE.

May/August 2019 Offers of FAPE

In April 2019, toward the end of Student's fourth-grade year and more than a year after enrollment in the private school, the Parents requested FAPE from the District. In response, the District requested specific information from the private school but received only attendance records and report cards. The records received did not provide sufficient data regarding Student's academic levels or needs, so the Parent agreed to produce Student for benchmark assessment testing at the District. Although a full reevaluation of Student did not occur, for reasons explained later in this decision, the District obtained assessments were sufficient to conclude that Student continued to have profound needs in most areas of reading.

Based on the benchmark assessment information, the District offered an appropriate IEP in May 2019 IEP with goals intended to address decoding, encoding, reading comprehension, reading fluency, writing, and OT. After the IEP meeting, the Parents rejected this offer and provided a ten-day notice seeking reimbursement for Student's enrollment at the private school for the 2019-2020 school year. In response to the ten-day notice, in August 2019, the District amended the IEP to address concerns raised by the Parents regarding the need for additional transition support, stress management, and more learning support. The goals remained the same. The Parents rejected this IEP and now contend that both IEPs were substantively and procedurally flawed, denying Student FAPE. I disagree.

First, Parents assert that the District failed to gather enough information to draft an appropriate IEP resulting in a denial of FAPE. Instead of relying on the May benchmark assessment data, Parents contend that the District failed to obtain necessary information through a reevaluation and did not assess Student in all areas of suspected disability. I find the opposite to be true. Student's triennial evaluation was not due until January 2020. In response to the Parents' request for FAPE, which did not occur until April 29, 2019, the commencement of a full-scale reevaluation of Student was not practical, legally deficient, and certainly did not result in a denial of FAPE.¹³ Even if the District started Student's reevaluation, the testing, including a

¹³ The LEA where the private elementary school or secondary school is located is responsible for conducting reevaluations of children with disabilities enrolled by their parents in the private elementary school. An LEA must ensure that a reevaluation of each child with a disability is conducted if (1) the LEA determines that the child's

school observation, would not have been completed before the end of the 2018-2019 school year, rendering a time-sensitive offer of FAPE nearly impossible.¹⁴ Additionally, during the May IEP meeting, the Parents advised the District that an independent evaluation of the Student was underway. Logically, the District decided to wait to obtain those results to avoid duplicating testing. The record evidence has established that the District assessment data, coupled with the obtained private school information, was sufficient to draft an IEP responsive to Student's needs.

Next, Parents contend that the May and August 2019 IEPs failed to offer Student robust and individualized reading programming; goals were not tied to needs; proffered reading instruction interfered with Student's ability to access the fifth-grade curriculum; consultative staff time was inadequate, and a fractured day between regular and special education would create difficulty for Student to integrate information. I disagree. Based on the record's totality, Parents have not preponderantly established that the May and August IEPs failed to offer Student FAPE.

Based on the information available to the District at the time, the May and August IEPs addressed all of the Student's known academic and functional needs. According to the District assessments, Student continued to have deficiencies in most areas of literacy. However, unlike its January 2018 predecessor, both the May and August offers of FAPE proposed separate decoding and encoding goals supported by 50 minutes of daily, "[d]irect, multi-sensory instruction using the Wilson Reading Program...to improve decoding and encoding." Additional literacy goals in reading comprehension, fluency, and writing were adequately supported with commensurate daily instruction. An occupational therapy goal was proposed to address fine motor concerns.

Interestingly, both Parent expert witnesses agreed with the District school psychologist's conclusion that Student required a structured, explicit, intensive multi-sensory, research-based literacy instruction. As established by the evidence, in this case, the Wilson Reading System, offered by the District in its May and August offers of FAPE, fulfills the criteria recommended

educational or related services needs, in light of the child's academic achievement and functional performance, warrant a reevaluation; or (2) the child's parent or teacher requests a reevaluation. 34 CFR §300.303

¹⁴ 22 Pa. Code §§14.123, 14.124

by the experts that testified in this hearing. The Wilson Reading System is an intensive Tier 3 literacy intervention and is part of the Wilson Language Training program. It is recommended by the National Reading Panel as an evidence-based, multi-sensory, direct, explicit, reading, and writing program, providing instruction in the five areas of reading. The District, through its offer of this intensive literacy approach, offered an appropriate program to address Student's identified literacy needs.

The evidence does not support Parents' remaining assertions regarding OT and math. Since attending the private school, no OT services were in place, so no records existed to review. However, from Student's handwriting sample, obtained during the benchmark writing probe, the therapist determined that alignment word spacing and letter formation issues still existed. As proposed, the resumption of OT services and the goal carried over from the January 2018 IEP was appropriate based on the information available. Concerning math, the Parents contend that the omission of a math goal constituted a denial of FAPE. The teacher comments from the private school nor the May 2019 AIMSweb assessments administered by the District raised significant math concerns. Although Student's math scores indicated below benchmark performance, the assessments were intended as a snapshot of present functioning. The District's recommendation of 30 minutes of daily math support and a pre-assessment before the start of school was appropriate. Similarly, although the team did not identify assistive technology as a specific need, the SDI in the proffered IEP offered Student access to technology, word processing, and the completion of a SETT process within the first sixty days of the 2019-2020 school year, should Student return to the District.

Parents have failed to present credible, convincing evidence that the proposal regarding consultative time between Student's regular and special education teacher and Student's transition between the regular and special education classrooms denied Student FAPE. The SDI proposed by the District in the May and August IEPs was responsive to Student's needs, offering transition plans sensitive to a possible return and individualized to support all proffered goals. Both IEPs were crafted to provide meaningful educational benefit in the event Student returned to the District. The District worked diligently to offer Student a program that would be beneficial

while incorporating revisions based on Parents' concerns. Parents were active, respected participants in the IEP process.

The chief difference between the May and August IEPs was the transition plan. The August offer contained a more detailed transition plan in the event Student returned to the District. The August IEP was explicitly updated in response to Parent's rejection of the May IEP, citing concerns of Student's purported anxiety associated with a possible return to the elementary school. I determine the District offered Parents FAPE through the May 2019 IEP.

Specifically, both IEPs reflect the *Andrew F.* expectation that the IEP be developed based on thorough consideration of Student's present achievement levels and growth potential. Based on the information the IEP team had available to it in May 2019, the May IEP and August IEP were reasonably calculated for this Student to make meaningful educational progress. I find that the Parents did not present preponderant evidence to establish that the May and August 2019 IEP's alleged substantive deficiencies (individually or as a whole) rendered either IEP inappropriate.¹⁵

Concerning the Parents' assertions that the District procedurally denied Student FAPE, I find that contention unsupported by the record in this matter. The Parents' participation in their child's educational programming was evident based on the multiple meetings they attended, the scores of emails they sent to which the District responded, and their specific input into at least four IEPs proposed within two years. Parents have presented no persuasive evidence that actions by the District resulted in lost educational opportunity, a deprivation of educational benefit, or their participation in the IEP process was prevented.

Tuition Reimbursement

¹⁵ After the District completed a reevaluation of Student in November 2019, it offered FAPE through an updated IEP. Intentionally, this decision will not address that offer. The Parents' amended complaint explicitly limited the scope of this due process hearing to the January 2018, May 2019 and August 2019 offers of FAPE. (HO-4; N.T. 911, 983)

The Parents seek reimbursement for tuition and related expenses from February 2018 through the 2019-2020 school year. Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). This is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412(a)(10)(C)(iii)); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010).; *Carter, supra*. A private placement need not satisfy all the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

Having concluded that the District did not offer Student an appropriate program from January 2018 until May 2019, the next question in the tuition reimbursement analysis is a consideration of the private school program. The private school is religious-affiliated, accredited by the PA Association of Independent Schools, recognized by the International Dyslexia Association, and serves students in third through twelfth grades with learning disabilities. The daily school schedule consists of homeroom, language arts, morning gathering, specials class, a break, math, lunch, a check-in with advisors, specials class again, reading, science, social studies, and a final check-in with advisors. The private school provides all literacy instruction using a structured, explicit, multi-sensory, diagnostic method consistent with an Orton-Gillingham program. All teachers have Orton-Gillingham training and experience. Math is taught using a multi-sensory approach. At the private school, lessons presented in a text format are also available in an auditory format. During the 2018-2019 school year, Student received educational programming commensurate with identified needs for the remainder of third grade. Specifically, Student received instruction in language arts (decoding/spelling, fluency, writing),

math, word identification, fluency, vocabulary development and comprehension, life sciences, art and physical education. While at the private school, Student met benchmark expectations in reading comprehension and made progress in reading fluency. Based on a review of progress reports and the testimony presented, Student experienced academic and social gains with much better control of anxiety provoked migraine headaches while attending the private school. The record contains reliable evidence of the programming, specialized instruction, and services Student received at the private school. As such, the private school meets the appropriateness prong of the *Burlington-Carter* test.

In arguing against reimbursement, the District suggests that the Parents did not provide it with the ten-day notice contemplated by the IDEA. That statute and the implementing regulations permit a reduction or denial of tuition reimbursement if adequate notice was not provided by parents. 20 U.S.C. § 1412(c); 34 C.F.R. § 300.148(d). The notice provision is permissive, rather than obligatory. On February 2, 2018, Parents advised the Student's special education teacher through an email of their intention to enroll Student in the private school, citing the student-to-teacher ratio. That same day, the private school requested records from the District regarding Student. On February 13, 2018, both of Student's special education teachers completed recommendations for enrollment in the private school, and the Parent completed the District form advising of Student's withdrawal. Student's first day of attendance at the private school was February 16, 2018. The Parents removal of the Student from the District could hardly be characterized as a surprise. The Parents advised of their intention, supplied a reason (smaller ratio), and asked for and received the cooperation of District staff in securing a recommendation in advance of the transition to the private school. Parents completed the official District form after multiple informal notifications advising of Student's withdrawal. No equitable considerations exist to justify a reduction or denial of reimbursement. Parents are awarded tuition reimbursement for Student's attendance at the private school from February 16, 2018, through the last academic day of the Student's attendance at the private school for the 2018-2019 school year.¹⁶

¹⁶ Although the District's May 2019 proffer of FAPE is appropriate, tuition reimbursement is ordered to occur through the last academic day of the 2018-2019 school year.

Last, Parents allege that the District violated Student’s rights under Section 504. The failure to provide a FAPE under the IDEA is not a per se violation of Section 504. To establish a violation of § 504 of the Rehabilitation Act, the filing party must prove:

1. A qualifying disability as defined by the Act;
2. Qualification to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. Exclusion from participation in, denied the benefits of, or subject to discrimination at the school. 34 C.F.R. § 104.3(j)(1)

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met only by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction,” is necessary to support such a claim. *Id.* at 263.

Parents have failed to present any evidence that the District deliberately excluded Student from participation in or denied access to any of the benefits available at the school or its programming. On the contrary, the District offered Student a wide array of educational supports during the years in question. Parents have not provided evidence of discrimination. Accordingly, Parents’ request under Section 504 for reimbursement of “costs of all independent evaluators’ and experts’ professional services” is denied.¹⁷

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

¹⁷ In their amended Complaint Parents requested reimbursement of independent evaluators’ and experts’ expenses under Section 504 as opposed to the IDEA. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300-02 (2006) (IDEA does not provide for payment of expert witness costs), *S.M. v. Sch. Dist. of Upper Dublin*, 59 IDELR 94 (E.D. Pa. 2012); *L.T. v. Mansfield Sch. Dist.*, 53 IDELR 7 (D.N.J. 2009) (Payment of expert witness costs after prevailing with Section 504 claim)

1. The District denied the Student a free appropriate public education based on substantive deficiencies in the District's processes and programming, from January 30, 2018, through the 2018-2019 school year.
2. The Parents are entitled to reimbursement for tuition, transportation, and related expenses for Student's attendance at the private school from February 16, 2018, through the last academic day of the 2018-2019 school year. Upon presentation to the District by the Parents of proof(s) of payment, or outstanding balance due, reimbursement shall be made to Parents within 45 calendar days the documentation is presented.
3. If the District did not provide transportation to and from the private school, the District shall reimburse Parents for transportation expenses, either by a receipt showing the Parents' out-of-pocket transportation costs and/or by using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates. The District will reimburse Parents for mileage expenses for every day the student attended the private school from February 16, 2018, through the last academic day of the 2018-2019 school year. The reimbursement for transportation shall be only for the days the student attended the private school.
4. Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree in writing.

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

Joy Waters Fleming, Esquire
Joy Waters Fleming, Esquire
Special Education Hearing Officer

October 30, 2020