

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

█ a Student, by and through Parents
and █,

No. 14C-DP-004-ADE

Petitioners,

vs.

Kyrene Elementary School District,

ADMINISTRATIVE
LAW JUDGE DECISION

Respondent.

HEARING: December 9-13 and 17, 2013

APPEARANCES: Attorney Richard J. Murphy, Esq., LAW OFFICE OF RICHARD J. MURPHY, PLC, appeared on behalf of Petitioners, accompanied by Parents; attorneys Erin Walz, Esq. and Heather Pierson, Esq., UDALL SHUMWAY PLC, appeared on behalf of Respondent Kyrene Elementary School District ("KESD"), accompanied by designated representative Shari Dukes, Ph.D., Director of Exceptional Student Services, KESD.

HEARING RECORD: Certified Court Reporters Leisel Baker, RPR, and Karine Moore-Davis, RPR, of WHITE & ASSOCIATES were present and recorded the proceedings as the official record of the hearing.¹

WITNESSES:²

Joint Witnesses: Kelsey Barker, Special Education Teacher, Aprende Middle School ("AMS"), KESD ("**Middle School Language Arts Resource Teacher**"); **Paula McCall**, Ph.D., School Psychologist, KESD; Aimee Lindeman, Special Education Teacher, Waggoner Elementary School, KESD ("**Elementary School Resource Teacher**"); **Adama Sallu**, Ed.D., Sixth Grade Administrator, AMS, KESD; David Landis, Special Education Teacher, AMS, KESD ("**Middle School Math Resource Teacher**"); and **Kristine Gregory**, M.S., CCC-SLP, Speech Pathologist, KESD.

Petitioners' Witnesses: █ ("**Mother**"); █ ("**Student**"); **Laura Busby**, Private Tutor; **Tamara Ballou**, Special Education Advocate; **Sharon**

¹ The parties stipulated that the court reporter record is the official record of the proceedings. An audio recording was also made by the Arizona Office of Administrative Hearings.

² Throughout the body of this Decision, proper names of Student, Parents, and Student's teachers are not used in order to protect the confidentiality of Student and to promote ease of redaction. Where necessary, pseudonyms (noted above in bold type) will be used instead. Pseudonyms are not used for administrators, service providers, evaluators, and other professionals.

1 **Rendelman**, Director, Lindamood Bell Learning Center, Scottsdale, Arizona; **Paul**
2 **Beljan**, Psy.D., Independent Pediatric Neuropsychological Evaluator; **Dana Herzberg**,
3 Head of School, On-Track Academy; **Lynn Carahaly**, MA, CCC-SLP, Director of
4 Foundations Developmental House, LLC, Independent Speech-Language Evaluator;
5 **Nancy Mather**, Ph.D., Professor of Special Education, University of Arizona; Jo
6 Shurman, Special Education Teacher, Special Assignment, KESD ("**Special**
7 **Assignment Teacher**"); Debbie Gundry, **Science Teacher**, AMS, KESD; Pamela
8 Kuznia, **Social Studies Teacher**, AMS, KESD; **Haley Lanier**, SLP-a, Speech
9 Pathology Assistant, AMS, KESD; **Deborah Kristofferson**, MS, CCC-SLP, Speech
10 Pathologist, KESD; and **Susan Swanson**, Assistive Technology Specialist, KESD.

11 **Respondent's Witnesses:** **Lisa Gibson**, Principal, C.I. Waggoner Elementary
12 School, KESD.

13 **ADMINISTRATIVE LAW JUDGE:** Eric A. Bryant

14 Petitioners bring this due process action on behalf of Student, claiming that
15 Respondent School District did not provide Student a free appropriate public education
16 ("FAPE") from August 2011 through April 2013. Parents seek reimbursement for the
17 costs of supplemental education they obtained privately as well as for a unilateral
18 parental placement that began April 2013. Parents also request reimbursement for an
19 independent evaluation and compensatory education for alleged missed instruction.
20 The law governing these proceedings is the Individuals with Disabilities Education Act
21 ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and
22 amended in 2004),³ and its implementing regulations, 34 Code of Federal Regulations
23 ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, Arizona Revised
24 Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona
25 Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

26 Procedural History

27 Petitioners filed their due process complaint on July 3, 2013, and filed an
28 amended complaint on September 27, 2013. The complaint, as amended, claims that
29 Student was not provided a FAPE for his fifth grade and sixth grade years. Petitioners
30 claim both substantive and procedural violations. Primarily, they assert that

Respondent School District did not adequately address Student's severe dyslexia. Respondent School District denies all claims. Respondent School District asserts that the Individualized Education Programs ("IEPs") at issue offered Student a FAPE that included meaningful educational benefit and that Student is not entitled to any relief.

Statute of Limitations

The IDEA provides that a due process complaint must "set[] forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. . . ."⁴ This provides a two-year period within which to claim a violation of the IDEA.

On July 11, 2013, Respondent School District filed a Motion to Dismiss Complaint Allegations Outside the Statute of Limitations ("Motion to Dismiss"). Respondent School District argued that Petitioners' due process complaint filed on July 3, 2013, contained "repeated references to alleged acts or omissions of the District that occurred prior to the two-year window relevant to this Complaint."⁵ Respondent School District did not provide a list of claims it believed were barred, but listed examples of the references in the due process complaint to which it objected, some of which seemed to indicate alleged violations that took place more than two years prior to the filing of the due process complaint (which would be barred) and others which merely alleged facts that occurred prior to the two-year period.⁶ Respondent School District requested that the Administrative Law Judge issue a ruling stating that (1) the two-year limitation period in the IDEA applies to Petitioners' complaint; (2) any allegation outside the two-year period be stricken; and (3) that Petitioners "adhere to the two-year statute of limitations in their presentation of allegations, evidence and testimony at hearing."⁷

³ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004," IDEA 2004 became effective on July 1, 2005.

⁴ 20 U.S.C. § 1415(b)(6)(B). See also 34 C.F.R. § 300.507(a)(2) ("The due process complaint must allege a violation that occurred not more than two years before. . . .")

⁵ Motion to Dismiss at 1.

⁶ *Id.* at 1-2.

⁷ *Id.* at 3.

1 Petitioners responded, stating that they were claiming no violations prior to July
2 3, 2011 (the start of the two-year period), and asserting that they were allowed to offer
3 evidence of facts that took place outside the period because those facts are relevant to
4 the issues in the complaint.⁸ Respondent School District filed a reply⁹ and the
5 Administrative Law Judge set a telephonic prehearing conference to discuss the
6 violations alleged in the complaint in light of the Motion to Dismiss.¹⁰

7 A telephonic prehearing conference was held on August 9, 2013, for two hours.
8 Petitioners were called upon to clarify the numerous alleged violations in the due
9 process complaint. Much of the time was spent discussing the application of the two-
10 year limitation period to the case. During that conference, the Administrative Law
11 Judge ruled that only alleged violations that occurred after July 3, 2011, would be
12 allowed to go to hearing and that any evidence that was relevant to the issues at
13 hearing would be allowed into the record, regardless of date. In other words, the
14 Administrative Law Judge ruled that the two-year limitation period governs alleged
15 violations, but allowance of evidence at hearing is governed by relevancy. In
16 particular, the Administrative Law Judge ruled that Student's February 2011 IEP, under
17 which Student was being educated after July 3, 2011, would be accepted as the
18 operative IEP for the period from July 2011 to February 2012, when a new IEP was
19 formulated. Questions about whether Student received a FAPE after July 3, 2011,
20 such as those alleged by Petitioners, necessarily involve the February 2011 IEP. At
21 the end of the pre-hearing conference, counsel for both parties did not indicate any
22 confusion about the ruling.

23 No written ruling was issued. Petitioners amended their complaint on September
24 27, 2013. Respondent School District did not file another motion to dismiss any portion
25 of the amended complaint based on the two-year statutory limitation period.

28 ⁸ Petitioners' Response to Respondent's Motion to Dismiss Complaint Allegations Outside of Statute of
29 Limitations, filed July 15, 2013, at 1-2.

30 ⁹ Reply in Support of Motion to Dismiss Complaint Allegations Outside Statute of Limitations, filed July
22, 2013.

¹⁰ Order Setting Prehearing Conference, issued August 5, 2013.

1 During the hearing, Respondent School District made evidentiary objections to
2 exhibits or testimony that counsel stated were "outside the statute of limitations."¹¹ The
3 Administrative Law Judge reiterated the earlier ruling that evidence was governed by
4 relevancy considerations, not date.¹² Respondent School District did not move, during
5 the hearing, to preclude or dismiss any specific claim for being outside the two-year
6 period.

7 In its written closing argument, Respondent School District has raised the issue
8 again, claiming that the Administrative Law Judge's ruling was erroneous.¹³
9 Respondent School District "reiterates its position that the 2011 IEP, and any other
10 evidence dated prior to July 3, 2011, may not be challenged, and the only permissible
11 use of such evidence (and events) should be limited to background purposes."¹⁴ Again,
12 Respondent School District does not state specific claims in Petitioners' amended due
13 process complaint that are outside the limitations period.¹⁵

14 Respondent School District's argument is not clear, as it appears to confuse
15 factual allegations with alleged violations of law. As support for its argument,
16 Respondent School District cites a single case, *J.W. v. Fresno Unified Sch. Dist.*, 570
17 F. Supp. 2d 1212 (E.D. Cal. 2008). For the reasons stated below, the Administrative
18 Law Judge does not find the *J.W.* decision to be clear or persuasive on this issue or to
19 support Respondent School District's argument.

20 In the *J.W.* case, the court evaluated an argument that the IDEA limitations
21 statute barred "*allegations* prior to September 1, 2003."¹⁶ The court ruled that "the
22 statute of limitations bars all *issues* arising before September 1, 2003."¹⁷ These
23 statements are consistent with the statute. The court then stated the following:

24 Plaintiff concedes that he *alleges facts* that fall outside the IDEA's statute
25 of limitations. Plaintiff points out that although the *facts alleged* to occur
prior to September 1, 2003 are time-barred, the ALJ allowed Plaintiff "to

26 ¹¹ For example, see Reporter's Transcript of Proceedings ("RTP") Vol. IV at 1152 and 1162 (Dec. 12,
27 2013).

28 ¹² *Id.* at 1162-63.

29 ¹³ Respondent's Response Memorandum at 3.

30 ¹⁴ *Id.*

¹⁵ Petitioners did not address the argument in their Reply Memorandum.

¹⁶ 570 F. Supp. 2d at 1221 (emphasis added). The applicable limitations period in *J.W.* was three years.

¹⁷ 570 F. Supp. 2d at 1222 (emphasis added).

1 challenge the services the District provided within the three-year statute
2 of limitations based on" an event occurring prior to September 1, 2003;
3 namely, the May 20, 2003 [individualized educational program ("IEP")]."
4 Thus, "[w]hile the Complaint contains *information* regarding [Plaintiff] and
5 the District that occurred before September 1, 2003, this *information* is for
background purposes regarding the District's knowledge of [Plaintiff's]
hearing and language impairments."

6 This Court agrees that *facts alleged* prior to September 1, 2003 are
7 barred by the IDEA's statute of limitations. Plaintiff may not challenge
8 *conduct* that occurred prior to that date, but may rely on *allegations of*
events prior to September 1, 2003 for background purposes.¹⁸

9 These statements are difficult to understand, but appear to show the court applying the
10 limitations statute to factual allegations rather than claimed violations, which is clearly
11 inconsistent with the statute; it is also inconsistent with the earlier statements of the
12 court. Because the *J.W.* court's ruling is vague and confusing, it does not support
13 Respondent School District's position.

14 It must be emphasized that the IDEA limitations statute bars "alleged violations"
15 that are outside the limitations period;¹⁹ it does not bar alleged facts. Initially, the *J.W.*
16 court's statements are consistent with the statute when the court says that "issues"
17 arising before September 1, 2003, are barred. But then the court states several times
18 (sometimes quoting a party) that "alleged facts" are barred by the statute. However,
19 the statute does not bar the alleging of facts. The court's ruling "that facts alleged prior
20 to September 1, 2003 are barred by the IDEA's statute of limitations" is not supported
21 by the clear language of the statute, which bars alleged violations and not alleged facts
22 that occurred prior to the period. This inconsistency is confusing and clouds the ruling
23 of the court, which appears to be that events that occur prior to the limitations period
24 can be alleged for background purposes only. However, it also appears that the *J.W.*
25 court, like Respondent School District, confuses factual allegations with alleged
26 violations of law, at least in part of its decision. Because the *J.W.* court's analysis is
27 confusing, the Administrative Law Judge can discern no clear ruling on the issue by the
28

29
30 ¹⁸ *Id.* (brackets in original; emphasis added).

¹⁹ 20 U.S.C. § 1415(b)(6)(B).

1 J.W. court. Therefore, that case does not support Respondent School District's
2 argument.

3 The Administrative Law Judge ruled on August 9, 2013, that any alleged
4 violations that occurred outside the limitations period for this case are barred by the
5 statute. In addition, any evidence (regarding information, facts, or events) that is
6 legally relevant to the alleged violations claimed by Petitioners has been admitted into
7 evidence, regardless of its date.²⁰ Respondent School District's argument in it's closing
8 memorandum, to the extent that it is a re-urging of its pre-hearing Motion to Dismiss, is
9 not persuasive and is not supported by the legal authority cited. Therefore, it is denied.

10 *Claims Raised for First Time in Petitioners' Opening Memorandum*

11 Respondent School District notes that Petitioners have raised three claims in
12 their Opening Memorandum that were not stated in the September 27, 2013, amended
13 due process complaint: (a) Modification of curricula that was not authorized by an IEP;
14 (b) Respondent School District did not follow its own policies for bullying incidents; and
15 (c) reimbursement request for an independent evaluation by Dr. Paul Beljan, Psy.D.²¹
16 Respondent School District impliedly moves for dismissal of these claims.²² After
17 reviewing the amended complaint, the Administrative Law Judge makes the following
18 rulings.

19 Claim (a) above was not included in the amended complaint. Petitioners' Reply
20 Memorandum does not address Respondent School District's allegation that the claim
21 was not set forth in the amended complaint. This silence by Petitioners implies that
22 Petitioners do not object to the motion to dismiss Claim (a) above. Thus, Claim (a)
23 above, unauthorized modification of curricula, will not be addressed, as it was not
24 properly and timely raised in the amended complaint.

25
26 ²⁰ See *Kevin T. v. Elmhurst Community Sch. Dist. No. 205*, 2002 U.S. Dist. LEXIS 4645 at *5, n. 5 (N.D.
27 Ill. March 19, 2002) ("The District contends that all events prior to 1998 are irrelevant because they fall
28 outside the IDEA's two year statute of limitations. While the Court acknowledges that the District cannot
29 be held accountable for action before 1999, as discussed above, Kevin's IQ and academic test scores
30 and his IEPs before 1998 are relevant to the Court's determination of whether Kevin's IEPs were
'reasonably calculated to enable [Kevin] to receive educational benefits.' Therefore, the Court will
examine evidence from before 1998.").

²¹ Respondent's Response Memorandum at 4.

²² *Id.*

1 Petitioners object to Respondent School District's assertion that Claim (b) above,
2 failure to follow policy for bullying, was not set forth in the amended complaint.²³

3 However, even if it were in the amended complaint, whether or not Respondent School
4 District followed its own bullying policy is not a claim within the scope of the IDEA; it
5 does not allege a complaint with respect to any matter relating to the identification,
6 evaluation, placement, or provision of a free appropriate public education to Student.²⁴
7 Therefore, it too will not be addressed herein.

8 Claim (c), a request for reimbursement for the cost of the independent evaluation
9 obtained by Parents from Dr. Beljan, was raised in the amended complaint²⁵ and will be
10 addressed herein.

11 *Evidence and Issues at Hearing*

12 The parties presented testimony and exhibits at a formal evidentiary hearing
13 held over six days in December 2013. The parties presented testimony from the
14 witnesses listed above and provided pre-marked Exhibits as Joint Exhibits 1 through
15 23,²⁶ Petitioners' Exhibits 24 through 143,²⁷ and Respondent School District's Exhibits
16 A through WW.²⁸ The Joint Exhibits were admitted by stipulation. Petitioners' Exhibits
17 were admitted as follows: P24, P27, P29, P32 through P123, P126 through P130, P132
18 through P137, and P143.²⁹ Respondent School District Exhibits were admitted as
19 follows: A through OO, RR, and TT through WW.³⁰

20 After the Exhibits and testimony were admitted,³¹ the parties submitted written
21 arguments to the tribunal. The final memorandum was filed on April 15, 2014.

22 Petitioners make the following claims:³²

23
24 ²³ Petitioners' Reply Memorandum at 16.

25 ²⁴ See 20 U.S.C. § 1415(b)(6)(A).

26 ²⁵ First Amended Request for Due Process Hearing, filed Sept. 27, 2013, at 28.

27 ²⁶ Identified herein as J1 through J23.

28 ²⁷ Identified herein as P24 through P143.

29 ²⁸ The Exhibits of record consist of thousands of pages of documentation, some of which are duplicative.
30 The record contains exhibit lists from both parties for specific identification.

31 ²⁹ In order to make the record as clear as possible, it is hereby noted that the Administrative Law Judge
DID NOT admit Petitioners' Exhibit P30 for the reason stated on the record. Exhibits P25, P26, P28,
P31, P93, P102, P113, P131 and P138 through P142 were not offered.

32 ³⁰ Exhibits PP, QQ, and SS were not offered.

³¹ Exhibits were moved into evidence during a post-hearing telephonic conference held on January 10,
2014. The docket contains a recording of that conference.

- 1) Respondent School District failed to provide Student a FAPE beginning August 2011 through April 2013 by failing to evaluate Student in all areas of disability—specifically, dyslexia.
- 2) Respondent School District failed to provide Student a FAPE because Student's 2011 IEP (as implemented beginning August 2011),³³ 2012 IEP, and 2013 IEP, did not adequately address Student's needs in reading, writing, and math. Therefore, those IEPs were not reasonably calculated to provide meaningful educational benefit.
- 3) Respondent School District failed to provide Student a FAPE because Student's 2011 IEP (as implemented beginning August 2011), 2012 IEP, and 2013 IEP, did not adequately address Student's needs in speech and language. Therefore, the speech goals in those IEPs were inadequate and insufficient.
- 4) Respondent School District failed to provide Student a FAPE by failing to provide Student with Extended School Year ("ESY") services in Summer 2012.
- 5) Respondent School District failed to provide Student a FAPE by not meeting Student's emotional needs in 2012-2013.
- 6) Respondent School District failed to provide Student a FAPE by failing to timely assess Student for assistive technology.³⁴
- 7) Respondent School District failed to provide Student a FAPE by failing to fully implement Student's 2011 IEP (as implemented beginning August 2011), 2012 IEP, and 2013 IEP because (a) Student was not provided the amount of speech services, language arts instruction, and writing instruction that the IEPs provided; and (b) Student was also not provided all the accommodations in the IEPs.

³² Petitioners' claims in the closing memoranda are not organized or presented in the same way they are in the amended complaint, making it difficult to discern the claims that Petitioners are asserting. For clarity, the Administrative Law Judge has rewritten Petitioners' claims by combining the issues stated in the amended complaint and the issues argued in Petitioners' post-hearing memoranda. See, *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1090 (9th Cir., 2002) (hearing officer may reorganize and restate issues in her own words as long as she addresses the merits of all issues).

³³ As noted above, the earliest date available for Petitioners to claim that a violation of the IDEA occurred is July 3, 2011. School did not begin that year until August 2011. Therefore, Student's 2011 IEP was not implemented, within the available period, until August 2011. Thus, August 2011 is the start date for Petitioners' claims.

³⁴ In their Opening Memorandum at page 2, Petitioners' expressly dropped their claim regarding occupational therapy.

- 1 8) Respondent School District should reimburse expenses incurred by
2 Parents for private tutoring Student received while attending
3 Respondent School District and expenses incurred by parental
4 placement in a private school, On-Track Academy, beginning April
5 2013 due to the failure of Respondent School District to provide a
6 FAPE.
- 7 9) Respondent School District should reimburse Parents for the private,
8 independent evaluation they obtained from Paul Beljan, Ph.D.
- 9 10) Respondent School District should provide Student compensatory
10 education and services in the amount of 48 hours for missed
11 speech services. Also, as compensation for missed instruction,
12 Respondent School District should pay tuition and transportation
13 expenses for Student to attend On-Track Academy through May
14 2016.

15 The Administrative Law Judge has considered the entire record, including the
16 testimony and Exhibits,³⁵ and now makes the following Findings of Fact, Conclusions of
17 Law, and Decision finding that Student was provided a FAPE and that Parents are
18 entitled to reimbursement only for the independent evaluation of Dr. Beljan.

19 **FINDINGS OF FACT**

20 The claims made by Petitioners are based on actions that occurred from August
21 2011 through April 2013. Therefore, the following factual findings are focused on that
22 period.

23 1. Student began school in the Respondent School District when he was in
24 kindergarten in 2005.³⁶ He was determined eligible for special education as a child
25 with Preschool Moderate Delay.³⁷ For a brief period, he attended a private preschool,
26 but returned to Respondent School District for first grade and was found to be a child
27 eligible for special education due to Speech Language Impairment ("SLI").³⁸ In 2007,

28 ³⁵ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned
29 in this Decision. The Administrative Law Judge has also considered the testimony of every witness,
30 even if the witness is not specifically mentioned in this Decision.

³⁶ Exhibit J1 at 99 (hereinafter, page numbers of Exhibits will be the Bates-stamped numbers without the
preliminary letters/numbers).

³⁷ *Id.*

³⁸ *Id.* at 100.

1 he was re-evaluated and found to meet IDEA eligibility criteria for Other Health
2 Impairment ("OHI") as well as SLI.³⁹

3 2. Student received his next three-year re-evaluation in February 2010. The
4 Multidisciplinary Evaluation Team ("MET") Report at that time found that Student
5 continued to be IDEA-eligible in the category of SLI.⁴⁰ The MET also found significant
6 deficits for Student in reading, writing, and math achievements. The Report noted that
7 Student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), but
8 concluded that Student's problems were better described under the category of Specific
9 Learning Disabilities ("SLD").⁴¹ For that reason, the MET found Student eligible under
10 SLD – in the areas of basic reading, written expression, reading comprehension,
11 reading fluency, and math calculation – but discontinued eligibility under OHI.⁴²

12 Student's 2011 IEP

13 3. In August 2011, Student began fifth grade at the same elementary school he
14 had been attending for prior grades in Respondent School District. He was being
15 educated under an IEP that was created in February 2011. The IEP contains several
16 pages that provide information about how Student was performing at the time. He was
17 making progress in language arts, but the progress was slow due to his disabilities.⁴³
18 He was reading at the pre-primer and primer levels with varying degrees of accuracy
19 above 50 percent.⁴⁴ His daily reading fluency was inconsistent and he had significant
20 struggles with decoding.⁴⁵ His teacher noted that he needed "repeated lessons,
21 practice and overall repetition with his reading in order to continue his progress."⁴⁶ For
22 math, his noted weakness was story problems, stemming from his reading difficulties.⁴⁷
23 His speech provider noted that Student worked very hard and was making "great
24

25 ³⁹ *Id.* There is also a notation that Student has been diagnosed with "Fetal Alcohol Effects due to birth
26 mother," which is not Mother; Student is adopted. *Id.* at 101

27 ⁴⁰ *Id.* at 112-13.

28 ⁴¹ *Id.* at 108-09.

29 ⁴² *Id.* at 110-11; 114.

30 ⁴³ Exhibit J2 at 269.

⁴⁴ *Id.* at 269-70.

⁴⁵ *Id.* at 270.

⁴⁶ *Id.*

⁴⁷ *Id.*

progress."⁴⁸ However, he continued to struggle with syntactical structures and overall expressive language. He had difficulty with "regular, irregular past tense, noun-verb agreement, third person and possessives."⁴⁹ He had good sentence length, but his spontaneous utterances often contained deleted syllables, deleted words, and incorrect word order. He was noted to have a good attitude.⁵⁰ Student had no notable behavior problems.

4. The "Parent Input" section of the IEP states that Parents "noticed a marked improvement in his reading abilities" and that Student had made "huge strides."⁵¹

5. Also noted in the "present levels" portion of the 2011 IEP was that Student was doing very well in general education classes, which he attended for roughly 60 percent of his school day.⁵² The IEP stated that Student was making progress on his reading goals, but noted that the progress was slow and inconsistent.⁵³ He was making "a lot of progress" in math.⁵⁴ And he had made "great progress" in speech.⁵⁵ Overall, the IEP concluded that Student was making appropriate progress on his IEP goals.⁵⁶

However:

At times, [Student]'s retention and distractibility hinder his academic progress. Often times, additional time is spent on the same skills in order to show progress and achieve mastery. His speech/language deficits also impact his overall academic skills.⁵⁷

6. Student's 2011 IEP contained thirteen goals: three in reading (phonemic awareness, fluency, and decoding), two in writing (sentence structure and formatting, and using a writing rubric at kindergarten level), four in speech (articulation, integrated language, traditional language, and oral expression), and four in math (one-step story

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 271 and 275.

⁵³ *Id.* at 271.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

1 problems, division facts, multiplication facts, and counting money).⁵⁸ He was taught at
2 his ability level rather than at grade level, and he was pulled out of general education
3 for instruction in language arts and math, and for speech services.⁵⁹

4 7. Student's 2011 IEP provided a long list of accommodations for Student,
5 including extra time, use of visual aids and models, verbalizing information and having
6 texts read aloud to him, and use of small group/individual instruction.⁶⁰

7 8. Finally, Student's 2011 IEP noted that Student had received ESY services for
8 the prior three years in reading, writing, and math.⁶¹ The IEP team found that he was
9 eligible for ESY in Summer 2011 as well.⁶²

10 9. Parents decided not to send Student to ESY in Summer 2011. Instead, they
11 hired a private tutor to work with him in reading.⁶³

12 10. Student's progress reports show that he made progress on the 2011 IEP
13 goals between August 2011 and February 2012.⁶⁴ He made progress and met his
14 goals in phonemic awareness, decoding, the writing rubric at kindergarten level,
15 articulation, traditional language, and all four of his math goals.⁶⁵ In reading fluency he
16 was making slow progress.⁶⁶ In sentence structure and formatting, he was doing well
17 with capitalization and punctuation, but continued to struggle with spelling.⁶⁷ For
18 integrated language, his goal was 80 percent accuracy and he achieved 70 percent
19 accuracy with the comment that he was beginning to use many grammar structures in
20 his spontaneous speech.⁶⁸ In his oral expression, Student achieved 70 percent
21 accuracy toward his goal of 85 percent accuracy and he was beginning to use more
22 conjunctions in spontaneous conversations.⁶⁹

23 Student's 2012 IEP

24 ⁵⁸ *Id.* at 273-74.

25 ⁵⁹ *Id.* at 275-76.

26 ⁶⁰ *Id.* at 274-75.

26 ⁶¹ *Id.* at 275.

26 ⁶² *Id.*

27 ⁶³ RTP Vol. V at 1602 (Dec. 13, 2013).

28 ⁶⁴ Exhibit J4.

28 ⁶⁵ *Id.* at 216, 218, 220, 221, 223, and 225-26.

29 ⁶⁶ *Id.* at 217.

29 ⁶⁷ *Id.* at 219.

30 ⁶⁸ *Id.* at 222.

1 11. In February 2012, Student's IEP team met and created a new IEP for him.
2 Based on district assessment scores, he remained significantly below his grade level
3 peers in math, reading, and writing.⁷⁰ However, progress was also noted. His speech
4 provider noted that he had made great progress and was a hard worker, but struggled
5 with language memory and production of multisyllabic words during structured and
6 spontaneous speech.⁷¹ Student was working on organizing grammatical structures into
7 his structured and spontaneous speech.⁷² In reading, he was still at the "frustration
8 level" for decoding at the pre-primer and primer level.⁷³ However, an assessment at the
9 end of January 2012 showed significant progress with decoding.⁷⁴ Again, he had
10 shown slow progress. He had improved with consonant blends and consonant
11 digraphs, and was beginning to work on fluency with long vowels and vowel digraphs.⁷⁵
12 His accuracy had "greatly improved," as had his "sight word fluency," but he struggled
13 with reading fluency.⁷⁶ There were no concerns with comprehension. Importantly, he
14 had become more comfortable reading in front of his peers in the resource room.⁷⁷

15 The team noted this statement by Student's speech provider:

16 Anything that involves reading above [Student]'s current reading level is
17 difficult for [Student]. He has difficulty reading anything above a first
18 grade reading level, [including] word problems in math. Writing complete
19 sentences with correct word order and spelling continue to be a struggle
20 for [Student]. His writing is difficult to read, and often times he needs to
21 read his writing aloud to me so that I understand what he has written.⁷⁸

22 Anytime reading and writing were involved in an assignment, it became difficult for
23 Student, even though he tried hard.⁷⁹

24 ⁶⁹ *Id.* at 224.

25 ⁷⁰ Exhibit J5 at 204.

26 ⁷¹ *Id.* at 204, 205.

27 ⁷² *Id.* at 205.

28 ⁷³ *Id.*

29 ⁷⁴ *Id.*

30 ⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 206.

⁷⁹ *Id.*

1 12. In writing, Student showed improvement, but continued to struggle with
2 spelling, although he had shown some improvement with spelling.⁸⁰ In math, which was
3 still described as one of Student's strengths, he had made significant gains having met
4 all his goals, but he still struggled with word problems due to his reading deficits.⁸¹

5 13. Parental input to the 2012 IEP showed that, at that time, Student was being
6 privately tutored for an hour two times a week in reading and had been recently
7 diagnosed with dyslexia.⁸² He also had been getting private speech services for
8 several years. Parents stated that they had seen significant improvements in reading
9 and that his testing did not always reveal his progress: "Though his various testing
10 scores do not necessarily reflect this improvement, both [sic] his teachers, family and
11 even [Student] himself, have seen and recognized the improvements."⁸³

12 14. The 2012 IEP team reviewed Student's progress on his IEP goals and found
13 that he had met all of his math goals and had shown progress with his reading and
14 writing goals.⁸⁴ For reading, again the team noted that progress was slow.⁸⁵ For
15 writing, the team noted that Student's writing was still significantly below grade level
16 and that he would continue to be graded for writing using "the K-2 rubric for beginning
17 writers."⁸⁶

18 15. The 2012 IEP team determined that Student needed assistive technology in
19 the form of computer programs that read text aloud to him and helped him with reading
20 and writing.⁸⁷

21 16. Nine goals were created for Student: two in reading (fluency and decoding,
22 both at the first grade level), two in writing (complete sentences and the writing rubric
23 for grades 1-2), three for speech (grammar and sentence structure, oral expression –
24 conjunctions and transition words, and oral expression – labeling parts of language),
25

26 ⁸⁰ *Id.* at 205-06.

27 ⁸¹ *Id.* at 205.

28 ⁸² *Id.*

29 ⁸³ *Id.*

30 ⁸⁴ *Id.* at 206-07.

⁸⁵ *Id.* at 207.

⁸⁶ *Id.*

⁸⁷ *Id.*

1 and two for math (two-step story problems and multiply/divide).⁸⁸ Student remained in
2 the same placement: general education with resource room for special education
3 instruction and speech.⁸⁹ He also kept the same accommodations.⁹⁰ The 2012 IEP
4 provided Student five hours per week of specialized reading instruction, two hours per
5 week of specialized writing instruction, four hours per week of specialized math
6 instruction, and one hour per week of speech therapy (four hours per month).⁹¹

7 17. In the 2012 IEP, Student was determined to be ineligible for ESY services
8 for Summer 2012.⁹² While the IEP acknowledges that Student had received these
9 services in the past, it states that the team had considered ESY, but that the data did
10 not show a need for it.⁹³ No specific data is identified.

11 18. Student's 2012 IEP began implementation in February 2012. For the rest of
12 that school year (Student's fifth grade year), he made slow progress on his goals.⁹⁴ At
13 the end of that year, he was set to transfer from elementary school to middle school for
14 sixth grade within Respondent School District.

15 19. During Summer 2012, Student remained in private tutoring for reading.⁹⁵

16 20. Student began middle school in August 2012. His progress reports show
17 that he made progress on his goals.⁹⁶ By February 2013, he had completed the goals
18 for reading fluency, decoding, the writing rubric, two-step story problems in math, and
19 multiplication/division.⁹⁷ These were five of his nine goals. He was close to meeting,
20 but did not achieve, his goals in the other four areas.

21 21. Student's Middle School Language Arts Resource Teacher testified at
22 hearing that in October 2012 she was concerned about Student's reading progress.⁹⁸
23 She noticed regression after the summer and that he was not recouping the skills that

24
25 ⁸⁸ *Id.* at 207-09.

26 ⁸⁹ *Id.* at 211.

27 ⁹⁰ *Id.* at 209-10.

28 ⁹¹ *Id.* at 209.

29 ⁹² *Id.* at 210.

30 ⁹³ *Id.*

⁹⁴ Exhibit J7.

⁹⁵ Exhibit P133.

⁹⁶ Exhibit J7.

⁹⁷ *Id.* at 666, 667, 670, 674, and 675.

⁹⁸ RTP Vol. II at 399-400 (Dec. 10, 2013).

1 he had ended the prior school year with.⁹⁹ After consulting with Special Assignment
2 Teacher, she began using a new reading program, the Wilson Reading Program ("the
3 Wilson program").¹⁰⁰ The Wilson program is a multisensory reading program that the
4 parties agree was a good program for Student. The evidence shows that Middle
5 School Language Arts Resource Teacher received in-district, informal training for how
6 to administer the Wilson program from Special Assignment Teacher and others.¹⁰¹ She
7 also studied Wilson program training materials¹⁰² and was monitored by Special
8 Assignment Teacher.¹⁰³ The evidence shows that she trained adequately to enable her
9 to administer the Wilson program,¹⁰⁴ and she credibly testified that she administered it
10 to Student within her classroom with fidelity.¹⁰⁵

11 Student's 2013 MET Report

12 22. In February 2013, Student was due for his three-year re-evaluation and a
13 new IEP. In January 2013, Student's MET reviewed the existing information and
14 determined that his three-year re-evaluation should include a psycho-educational
15 evaluation that included a behavioral/emotional component, a speech/language
16 evaluation, and an occupational therapy evaluation of Student's fine motor skills.¹⁰⁶
17 Parents informed the MET that they had obtained a private speech evaluation in
18 December 2012, but they refused to disclose the report of that evaluation to the MET
19 until after Respondent School District had performed its speech evaluation. They told
20 the District's speech evaluator what tests and assessments Student had been given by
21 the private speech evaluator so that she would not administer those tests again, but
22 they would not disclose any other information about the private evaluation. The record
23
24

25 ⁹⁹ *Id.* at 398.

26 ¹⁰⁰ *Id.* at 400.

27 ¹⁰¹ *Id.* at 400-02.

28 ¹⁰² *Id.*

29 ¹⁰³ *Id.* at 401.

30 ¹⁰⁴ Petitioners' witness testimony to the contrary is not persuasive. None of those witnesses represented the publishers of Wilson. Petitioners presented no evidence from Wilson materials showing what the standards for teaching the program were and the requirements needed to meet those standards.

¹⁰⁵ *Id.* at 402-07.

¹⁰⁶ Exhibit P51.

1 shows that the MET received the private speech evaluation on February 5, 2013, one
2 day before the team met to review all of the information and make its determination.¹⁰⁷

3 23. School Psychologist Paula McCall, Ph.D. performed a thorough and
4 extensive evaluation of Student. She put together a 34-page MET report¹⁰⁸ that
5 includes all the information that was available at the time, and the team met on
6 February 6, 2013, to determine Student's continuing eligibility and to create a new
7 IEP.¹⁰⁹ The MET report starts with a lengthy section that reviews the existing data.
8 This includes Student's 2012 IEP and the progress he had made on the goals therein,
9 a summary of prior evaluations, background information, and the results of state and
10 district standards testing. Notable statements within the data review section include
11 that Student's teachers were contacted in August 2012 to inquire if Student needed
12 counseling services and the teachers reported that they were not seeing any concerns
13 that would warrant counseling services.¹¹⁰ Student's teachers reported on the MET
14 report that Student was trying very hard, still had difficulties in the same areas, but had
15 made some progress in reading due to the implementation of the Wilson program and
16 some progress on his 2012 speech goals.¹¹¹

17 24. The 2013 re-evaluation included classroom observations by Dr. McCall
18 along with extensive psycho-educational testing, and testing in speech and fine motor
19 skills. Dr. McCall made detailed notes on her observations of Student in two different
20 settings: a general education classroom, and the resource room in which Student
21 receives special education.¹¹² Significantly, she observed Student using assistive
22 technology (a laptop with Respondent School District's reading and writing assistance
23 software) as he was working on a writing assignment in language arts.¹¹³ Student's
24
25
26

27 ¹⁰⁷ Exhibit J13 at 72.

28 ¹⁰⁸ Exhibit J13.

29 ¹⁰⁹ Exhibit P55.

30 ¹¹⁰ Exhibit J13 at 46.

¹¹¹ *Id.* at 50-51.

¹¹² *Id.* at 52-53.

¹¹³ *Id.* at 53.

1 testing results are set forth in great detail.¹¹⁴ Notable within that section are the
2 following:

3 a. Student's verbal reasoning abilities indicated delays in expressing
4 knowledge of vocabulary and in verbally stating similarities between given
5 items.¹¹⁵

6 b. Student's nonverbal reasoning abilities were consistently in the
7 borderline range.¹¹⁶

8 c. Student's overall working memory abilities were in the low average
9 range.¹¹⁷

10 d. Student's overall processing speed was found to be in the average
11 range.¹¹⁸

12 e. Dr. McCall administered the Leiter-Revised Intelligence Test as a
13 second measure of Student's cognitive abilities because that test removes
14 any reliance on verbal processing of information, thus factoring out his
15 challenges with verbal reasoning.¹¹⁹ Student's overall cognitive abilities
16 were found to be, according to Leiter-Revised scores, average to below
17 average. Dr. McCall stated in her report: "When eliminating the need for
18 verbal language and comprehension, [Student] performed at a higher
19 level on this cognitive assessment, and this result is believed to be the
20 most appropriate estimation of actual cognitive abilities due to identified
21 language impairments."¹²⁰

22 f. Student's visual-spatial skills were in the average range.¹²¹

23 g. Student's fluid reasoning abilities were in the low range.¹²²

25
26 ¹¹⁴ *Id.* 54-73.

¹¹⁵ *Id.* at 55.

27 ¹¹⁶ *Id.*

¹¹⁷ *Id.* at 55-56.

28 ¹¹⁸ *Id.* at 56.

¹¹⁹ *Id.*

29 ¹²⁰ *Id.*

¹²¹ *Id.*

30 ¹²² *Id.*

- 1 h. Student was able to attend to tasks and divide attention between two
2 alternating tasks.¹²³
- 3 i. Student's memory abilities were average to slightly below average.¹²⁴
- 4 j. Student's achievement testing results showed mostly "below average,"
5 "low average," and "low" ranges, with a few "averages" in the areas
6 tested, which included oral language skills, reading skills, writing skills,
7 and math skills.¹²⁵
- 8 k. Results from language testing showed deficits in receptive and
9 expressive language similar to those Student has always had.¹²⁶ It was
10 noted that he no longer had speech impairment in articulation and did not
11 demonstrate significant sound errors.¹²⁷
- 12 l. Student showed elevated levels of concern regarding executive
13 functioning and inattention.¹²⁸ A diagnosis of Attention Deficit
14 Hyperactivity Disorder, Inattentive Type ("ADHD") was medically verified
15 on February 5, 2013.¹²⁹
- 16 m. Behavioral assessments given to Parents showed that Student
17 exhibited significant levels of anxiety, but these same assessments given
18 to teachers did not show significant levels of anxiety. Student self-
19 reported a negative attitude toward school, but not toward teachers. He
20 self-reported elevated, but not clinically significant, levels of anxiety and
21 depression.¹³⁰
- 22 n. During an interview by Dr. McCall, Student stated that school was "the
23 worst place to be." When asked why, he stated that he did not like to get
24 up early in the morning and did not like homework.¹³¹

25
26 ¹²³ *Id.* at 57.

27 ¹²⁴ *Id.*

28 ¹²⁵ *Id.* at 57-59.

29 ¹²⁶ *Id.* at 65-67.

30 ¹²⁷ *Id.* at 67.

¹²⁸ *Id.* 63-64.

¹²⁹ *Id.* at 72.

¹³⁰ *Id.* at 59-62.

¹³¹ *Id.* at 69.

1 o. Student's Science Teacher reported that a recent science test was
2 read aloud to him and he missed only two items on it. He gets along well
3 with other students, according to his teachers, and is given preferential
4 seating in the general education classroom.¹³²

5 p. Student's Middle School Language Arts Resource Teacher reported
6 that Student was below grade level but "tries very hard" to complete his
7 work. He works well with peers and prefers to work in a group. He was
8 encouraged to use the available assistive technology when writing, but he
9 often did not want to because he believed he was "bad at typing."¹³³

10 25. The team carefully and thoroughly summarized the findings from the re-
11 evaluation. The 2013 MET report noted that Student's cognitive abilities were in the
12 below average range.¹³⁴ Also,

13 Cognitive results offer some guidance in understanding [Student]'s
14 learning challenges. [Student] demonstrates a significant cognitive deficit
15 in relation to verbal reasoning, and this deficit impacts his performance
16 even on "nonverbal" tasks that require an underlying component of verbal
17 explanation, clarification, or processing. [Student]'s relative strength in
18 math, including his own recognition of this as an area of strength, is likely
19 due to cognitive processing that favors visualization of objects and recall
20 of numbers and visuals. [Student] processes information in a very
21 visually-based manner, and he is likely to be more successful with tasks
22 that focus on manipulation of objects. He can struggle with repetitious
23 patterns or identification of items out of sequence, but sequential
24 processing is intact, which directly translates to the learning of steps in
25 mathematical problem solving and calculation.

26 Specific areas of deficit in cognitive processing can directly translate into
27 [Student]'s challenges with reading and writing. [Student]'s limitation in
28 verbal reasoning has a clear and direct link to understanding of language,
29 comprehension of written material, and ability to organize writing. . . .¹³⁵

30 26. Dr. McCall noted that "[Student] reads slowly, having to sound out most
words and with errors that do not indicate recognition of many common sight words."¹³⁶

132 *Id.*

133 *Id.* at 71.

134 *Id.* at 74.

135 *Id.*

136 *Id.*

1 Thus, "[i]t is likely that [Student] forgets parts of what he has sounded out because of
2 the length, which was noted in academic achievement results to occur in words with
3 more than three sounds."¹³⁷ Additionally, "[Student]'s writing is negatively impacted by
4 errors in spelling, punctuation, and word spacing."¹³⁸

5 27. Dr. McCall further noted that "[Student]'s overall cognitive abilities are
6 believed to be best reflected by the Leiter-R [score that showed an average to below
7 average level]."¹³⁹ She concluded that Student "demonstrates a significant discrepancy
8 between ability and achievement in the areas of Basic Reading, Reading
9 Comprehension, Reading Fluency, and Written Expression. With confidence intervals,
10 he also demonstrates a significant discrepancy in Math Reasoning."¹⁴⁰

11 28. After discussing Student's ADHD diagnosis, Dr. McCall stated:

12 [Student] demonstrates cognitive processing deficits and very low
13 academic achievement that is believed to characterize a Specific
14 Learning Disability that would likely be present even without the presence
15 of symptoms of inattention. Thus, should the MET consider eligibility
16 under the category of Other Health Impairment, it is encouraged to
17 consider it as secondary to the category of Specific Learning Disability,
18 which is believed to most comprehensively reflect [Student]'s disability
19 and needs.¹⁴¹

20 With regard to Student's emotional/behavioral assessment results, Dr. McCall noted

21 the presence of symptoms related to anxiety by both [Student] and his
22 parents, although these were not noted by his teachers. It is possible that
23 [Student] is experiencing feelings of anxiety that may be related to his
24 challenges in school, and he may cover these feelings at school with
25 distracted behaviors, conversations with peers, and comments about not
26 liking school while showing the symptoms more at home. [Student] also
27 reported a reduced sense of self-reliance, which can be attributed to his
28 need for support at school in order to be successful. His self-esteem,
29 however, was adequate.¹⁴²

30 ¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 75.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

1 At the February 6, 2013 MET meeting, Mother confirmed that Student's difficulty at
2 school was the source of his anxiety.¹⁴³

3 29. The MET report summarized the speech/language evaluation results by
4 noting that Student's vocabulary skills "are at or near the average range for a child his
5 age" and that his use of language is inconsistent, with "noticeable errors of form,
6 content and use" that were "readily apparent."¹⁴⁴

7 30. Student's occupational therapy evaluation did not find evidence that
8 anything in this area was affecting his ability to benefit from special education.¹⁴⁵
9 However, recommendations for accommodations such as use of adapted paper for
10 assistance with spacing and use of the computer were noted.¹⁴⁶

11 31. The 2013 MET report ends with a long list of accommodations that would
12 benefit Student, such as: visually-based instruction, "visual notes" when possible,
13 assistance with sequencing tasks, oral administration of tests, use of visual checklist
14 when editing or writing, use of color coding for organization, encouraging conversations
15 with adults at school (such as a one-on-one lunch with a teacher once per week), and
16 show Student his progress by using a visual system.¹⁴⁷

17 32. Student's 2013 MET found him eligible as a student with Specific Learning
18 Disabilities in the areas of Basic Reading, Written Expression, Reading
19 Comprehension, Oral Expression, Mathematics Reasoning, and Reading Fluency.¹⁴⁸
20 The MET also found that Student was Other Health Impaired¹⁴⁹ and had a
21 Speech/Language Impairment.¹⁵⁰ Because the disabilities in these three categories
22 impaired Student such that he needed specialized instruction and related services, he
23 remained qualified for special education and a new IEP was created.¹⁵¹

24 Student's 2013 IEP

25
26 ¹⁴³ Exhibit P56 at 119.

27 ¹⁴⁴ Exhibit J13 at 75-76.

28 ¹⁴⁵ *Id.* at 76.

29 ¹⁴⁶ *Id.*

30 ¹⁴⁷ *Id.* at 77.

¹⁴⁸ *Id.* at 79-80.

¹⁴⁹ *Id.* at 81-82.

¹⁵⁰ *Id.* at 83-84.

¹⁵¹ Exhibit J14.

1 33. On February 6, 2013, the same day as the MET, Student's IEP team drafted
2 his annual IEP for the period of February 2013 through February 2014.¹⁵² At hearing
3 on this matter, Dr. McCall, who ran the February 2013 IEP team meeting, testified that
4 she would describe Student as a slow learner: "He's going to learn very slowly. It's
5 going to be harder for him to learn and to maintain information. And he's going to have
6 a lot of inconsistencies in his learning and his ability to apply information."¹⁵³ This is
7 reflected in Student's 2013 IEP in the section regarding Student's present levels of
8 academic achievement and performance.¹⁵⁴ Also reflected is the progress Student
9 made on his goals in the 2012 IEP, which showed that he had completed goals in
10 reading fluency, reading accuracy, use of the writing rubric (with assistive technology),
11 and both of his math goals.¹⁵⁵ He came close, but did not meet, his goals in the other
12 areas (writing complete sentences with correct capitalization, punctuation, word order
13 and spelling with 85% accuracy; language goal regarding use of appropriate grammar
14 and sentence structure in conversation; language goal in oral expression –
15 conjunctions and transition words, and language goals in oral expression – labeling
16 parts of language).¹⁵⁶

17 34. Student's 2013 IEP contained four language goals, two math goals, three
18 reading goals, and two writing goals. The language goals were aimed at: (1) improving
19 grammar and sentence structure in conversation with focus on proper use of past
20 tense, noun/verb agreement, third person, and possessives; (2) improving oral and
21 written expression by formulating ideas for a narrative or summary in a sequential
22 order; (3) identifying and applying strategies to reduce word-finding difficulties; and (4)
23 demonstrating knowledge of grade level vocabulary/concepts by applying
24 acquisition/retention strategies.¹⁵⁷ The math goals address fraction and decimal
25 conversions and addition/subtraction of fractions.¹⁵⁸ The reading goals address

27 ¹⁵² Exhibit J15.

28 ¹⁵³ RTP Vol. III at 944 (Dec. 11, 2013).

29 ¹⁵⁴ Exhibit J15 at 168-80.

30 ¹⁵⁵ *Id.* at 178-80.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 181.

¹⁵⁸ *Id.* at 181-82.

1 decoding, reading fluency at the second grade level, and reading comprehension at
2 second grade level.¹⁵⁹ The writing goals are aimed at using assistive technology to
3 improve writing on self-selected topics, and spacing between words on handwritten
4 work both with and without adaptive paper.¹⁶⁰ The goals were measurable and
5 progress was to be reported quarterly.¹⁶¹

6 35. The 2013 IEP maintained the same placement that Student had in the prior
7 year's IEP by continuing to have Student use the resource room for special education
8 in language arts and math, for a total of almost 13.5 hours per week.¹⁶² His speech
9 services were set for four hours per month (one hour per week).¹⁶³ Student's services
10 also included consultation with the classroom teachers by the occupational therapist
11 and the speech/language service provider.¹⁶⁴ And, the IEP provided for staff training in
12 writing software with word prediction and text-to-speech features, and in the multi-
13 sensory reading program that Student was using,¹⁶⁵ which at that time was Wilson.

14 36. The 2013 IEP contained a very long list of accommodations that included all
15 of those in the 2013 MET report as well as others.¹⁶⁶

16 37. ESY for Summer 2013 was not provided in the IEP.¹⁶⁷ However, the Prior
17 Written Notice ("PWN") that issued after the IEP meeting noted that, based on parental
18 request, the IEP team would reconvene to address ESY.¹⁶⁸

19 38. Student's March 2013 progress report showed that Student was already
20 making some progress on some of his goals, even though he had only been working on
21 them for one month.¹⁶⁹

22 39. On April 4, 2013, the IEP team met again and addressed ESY for Student in
23 2013.¹⁷⁰ The team also addressed, at parent request, changing Student's placement to

24
25 ¹⁵⁹ *Id.* at 182.

¹⁶⁰ *Id.*

26 ¹⁶¹ *Id.* at 181.

¹⁶² *Id.* at 182-83.

27 ¹⁶³ *Id.* at 183.

¹⁶⁴ *Id.*

28 ¹⁶⁵ *Id.* at 184.

¹⁶⁶ *Id.* at 184-85.

29 ¹⁶⁷ *Id.* at 185.

¹⁶⁸ Exhibit J16 at 189.

30 ¹⁶⁹ Exhibit J23.

1 a private placement at the Lindamood Bell Center.¹⁷¹ The IEP team found Student
2 eligible for ESY, but rejected private placement because Student's current placement
3 was a less restrictive placement and Student was making progress in that placement.¹⁷²
4 An IEP amendment was issued adding ESY to the IEP.¹⁷³

5 40. The next day, April 5, 2013, Parents sent Respondent School District a
6 letter that they stated "will serve as our 10-day notice of intent to seek public
7 reimbursement for private placement. . . ."¹⁷⁴ Student did not return to class in
8 Respondent School District after April 12, 2013.¹⁷⁵ Parents continued Student's private
9 tutoring in reading through April and May 2013¹⁷⁶ and also had Student attend the
10 Lindamood Bell Center in May and June 2013.¹⁷⁷ For the 2013-2014 school year, they
11 placed him in On-Track Academy, a private school.¹⁷⁸ He did not attend ESY 2013 at
12 Respondent School District.

13 41. Parents gave proper notice that they were removing Student from
14 Respondent School District and placing him in private instruction.

15 42. Just before he stopped attending school, but after the IEP meetings,
16 Student was evaluated by Respondent School District to see what assistive technology
17 could help him. A report was issued on April 8, 2013.¹⁷⁹ Because he did not return to
18 school, the report was never considered by Student's IEP team.

19 Harassment of Student by other Students

20 43. Petitioners provided evidence of several instances in which Student was
21 harassed, both verbally and physically, while in sixth grade at middle school.¹⁸⁰ The
22 first involved a fellow female student in special education who was making cruel
23

24 ¹⁷⁰ Exhibit J18.

25 ¹⁷¹ *Id.*

26 ¹⁷² *Id.*

27 ¹⁷³ Exhibit J17.

28 ¹⁷⁴ Exhibit P65.

29 ¹⁷⁵ Exhibit J23 at 161, 162. Student returned briefly the week of April 19, 2013, to participate in AIMS
30 statewide testing. Testimony of Adama Sallu, RTP Vol. IV at 1360-61 (Dec. 12, 2013).

¹⁷⁶ Testimony of Laura Busby, RTP Vol. VI at 2153-54 (Dec. 17, 2013).

¹⁷⁷ Exhibit P96.

¹⁷⁸ Exhibit P107.

¹⁷⁹ Exhibit J19.

¹⁸⁰ Student denied any significant harassment while in fifth grade. Testimony of Student, RTP Vol. I at
300 (Dec. 9, 2013).

1 comments to Student about his disabilities and occurred in early February 2013.¹⁸¹

2 Respondent School District took immediate action and changed class schedules to
3 minimize contact between Student and the female student.¹⁸² Mother indicated at
4 hearing that she was satisfied with Respondent School District's response.¹⁸³

5 44. The second instance was more serious, and Respondent School District
6 took swift and serious action. The incident began on April 3, 2013 when, due to some
7 sort of interaction during lunch, another male student pulled Student's pants down in
8 front of other students, exposing Student.¹⁸⁴ The other male student was given an
9 immediate two-day suspension.¹⁸⁵ Upon returning to school after the suspension, the
10 other male student physically threatened Student for "telling on him."¹⁸⁶ The school
11 imposed an immediate five-day in-school suspension on the other male student.¹⁸⁷
12 This occurred shortly before Parents decided to remove Student from Respondent
13 School District.

14 45. At the end of the IEP team meeting on April 4, 2013, Mother informed the
15 team that she had recently learned that one of her older sons had found Student at
16 home with a knife to his neck.¹⁸⁸ She attributed his action to his hatred of school. She
17 stated that he begs not to go to school and that "he doesn't want to go to lunch outside"
18 but wants to be with a teacher in a classroom because he "gets teased."¹⁸⁹ The rest of
19 the IEP team was shocked by the news about Student's action at home. His Middle
20 School Language Arts Resource Teacher expressed that she did not have any idea
21 that he was feeling that way.¹⁹⁰ The district representative who was running the
22 meeting mentioned school resources to help Student, and Mother indicated that she
23 had already been in contact with the proper people.¹⁹¹ Because the time for the
24

25 ¹⁸¹ Exhibit O.

26 ¹⁸² Exhibit S.

27 ¹⁸³ RTP Vol. V at 1880 (Dec. 13, 2013).

28 ¹⁸⁴ Testimony of Adama Sallu, RTP Vol. V at 1353 (Dec. 12, 2013).

29 ¹⁸⁵ *Id.* at 1355.

30 ¹⁸⁶ *Id.* at 1359.

¹⁸⁷ *Id.*

¹⁸⁸ Exhibit P64 at 162.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 167.

¹⁹¹ *Id.*

meeting was ending and members had to get back to other responsibilities, the meeting soon closed with no further talk about Student's emotional needs.

46. In the days following the April 4, 2013 IEP amendment meeting, Respondent School District took several actions to ensure Student's well-being and safety. These included instituting a "buddy system" for Student at lunch time¹⁹² and offering him personal counseling.¹⁹³ In addition, Respondent School District was willing to meet with Parents in person to discuss further ideas.¹⁹⁴

CONCLUSIONS OF LAW

APPLICABLE LAW

FAPE

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a FAPE (free appropriate public education) that meets their individual needs.¹⁹⁵ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.¹⁹⁶ To provide a FAPE, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment, and placement of students who need special education, and seeks to ensure that they receive a FAPE. A FAPE consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."¹⁹⁷ The IDEA mandates that school districts provide a "basic floor of opportunity," nothing more.¹⁹⁸ The IDEA does not require that each child's potential be maximized.¹⁹⁹ A child receives a FAPE if a program of instruction "(1) addresses his unique needs, (2) provides adequate support services so he can take advantage of the

¹⁹² Exhibit W.

¹⁹³ Exhibit X.

¹⁹⁴ Exhibits AA and BB.

¹⁹⁵ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

¹⁹⁶ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

¹⁹⁷ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

¹⁹⁸ *Id.*, 458 U.S. at 200.

¹⁹⁹ *Id.* at 198.

educational opportunities and (3) is in accord with an individualized educational program.²⁰⁰

The IEP

2. Once a student is determined eligible for special education services, a team composed of the student's parents, teachers, and others familiar with the student formulate an IEP (Individualized Education Program) that generally sets forth the student's current levels of educational and functional performance and sets annual goals that the IEP team believes will enable the student to make progress in the general education curriculum.²⁰¹ The IEP tells how the student will be educated, especially with regard to the student's needs that result from the student's disability, and what services will be provided to aid the student. The student's parents have a right to participate in the formulation of an IEP.²⁰² The IEP team must consider the strengths of the student, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the student.²⁰³ To foster full parent participation, in addition to being a required member of the team making educational decisions about the student, school districts are required to give parents written notice when proposing any changes to the IEP,²⁰⁴ and are required to give parents, at least once a year, a copy of the parents' "procedural safeguards," informing them of their rights as parents of a student with a disability.²⁰⁵

ESY

3. Disabled students are eligible for Extended School Year services if those services are necessary so that (1) the student will not severely or substantially regress in skills during recesses or the summer break, and (2) if the benefits gained by the student during the regular school year would be significantly jeopardized during school

²⁰⁰ *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (citing *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995)).

²⁰¹ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

²⁰² 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

²⁰³ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

²⁰⁴ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

²⁰⁵ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

20 U.S.C. § 1415(d)(B).

breaks without extended services.²⁰⁶ ESY is not appropriate to provide daycare or respite services to caregivers, for summer recreation, or to maximize academic potential.²⁰⁷ ESY is to be determined by the IEP team using retrospective data unless it is not available, in which case predictive data can be used.²⁰⁸

Reimbursement for Parental Private School Placement

4. Parents who dispute whether an IEP provides a FAPE to a student, and who as a result enroll that student in a private program, may receive reimbursement for the costs of that private enrollment under certain circumstances.²⁰⁹ The program offered by the school district must fail to provide a FAPE to the student and the private school must be an "appropriate" placement.²¹⁰ A private school placement may be appropriate even if it does not operate under public school standards.²¹¹ Under these circumstances, parents may "enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the [school district]. . ." and seek reimbursement from the school district for the expense of that enrollment from a court or hearing officer.²¹² Indeed, parents have "an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education]."²¹³ Furthermore, the placement does not have to meet IDEA requirements.²¹⁴

5. However, an award for reimbursement can be reduced or denied in various circumstances.²¹⁵ An award may be reduced or denied if the parents have not given adequate notice as set forth in the IDEA.²¹⁶

Compensatory Education

²⁰⁶ A.R.S. § 15-881(A).

²⁰⁷ A.R.S. § 15-881(D).

²⁰⁸ A.R.S. § 15-881(B).

²⁰⁹ 34 C.F.R. § 300.148.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² 34 C.F.R. § 300.148(b) and (c).

²¹³ *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992)).

²¹⁴ *Florence County. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

²¹⁵ 34 C.F.R. § 300.148(d).

²¹⁶ 34 C.F.R. § 300.148(d)(1). *Anchorage School District v. M.P.*, 689 F.3d 1047, 1059 (9th Cir. 2012) lists other equitable factors that might reduce reimbursement, none of which have been raised here.

1 6. Compensatory education is an equitable remedy that may be awarded in
2 appropriate cases wherein students have not been provided a FAPE.²¹⁷ Although the
3 goal is to compensate a student for missed education or services, there is no obligation
4 to provide day-for-day compensation for time missed.²¹⁸ Appropriate relief is that which
5 is designed to ensure that the student is appropriately educated within the meaning of
6 the IDEA.²¹⁹ Case-specific factors should be taken into account to craft an appropriate
7 remedy.²²⁰

8 **DECISION**

9 **Burden of Proof and Basis of Decision**

10 7. A parent who requests a due process hearing alleging non-compliance with
11 the IDEA must bear the burden of proving that claim.²²¹ The standard of proof is
12 "preponderance of the evidence," meaning evidence showing that a particular fact is
13 "more probable than not."²²² Therefore, in this case Petitioners bear the burden of
14 proving by a preponderance of evidence that Respondent School District failed to
15 provide Student a FAPE through Student's 2011 IEP (as implemented beginning
16 August 2011), 2012 IEP, and 2013 IEP. If a denial of a FAPE is shown, Petitioners
17 must then show that they are entitled to the compensatory education they are
18 requesting. To be reimbursed for a private parental placement, they must also show
19 that the parental placement at On-Track Academy was appropriate.

20 8. This tribunal's determination of whether or not Student received a FAPE must
21 be based on substantive grounds.²²³ For substantive analysis of an IEP, this tribunal's
22 review of the IEP is limited to the contents of the document.²²⁴ Therefore, the question
23

24 ²¹⁷ *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994).

25 ²¹⁸ *Id.*

26 ²¹⁹ *Id.*

27 ²²⁰ *Id.*

28 ²²¹ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ²²² *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*
No. J-84984, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

²²³ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

²²⁴ *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) ("only those services identified or
described in the . . . IEP should have been considered in evaluating the appropriateness of the program

1 of whether an IEP is reasonably calculated to provide educational benefit to Student
2 must be decided on the basis of the content of the IEP itself.

3 9. Procedural violations in and of themselves do not necessarily deny a student
4 a FAPE. If a procedural violation is alleged and found, it must be determined whether
5 the procedural violation either (1) impeded the student's right to a FAPE; (2)
6 significantly impeded the parents' opportunity to participate in the decision-making
7 process; or (3) caused a deprivation of educational benefit.²²⁵ If one of those three
8 impediments has occurred, the student has been denied a FAPE due to the procedural
9 violation.

10 Petitioners' Claims

11 10. Petitioners' primary claim is that Respondent School District did not offer a
12 FAPE to Student because the services and instruction provided were not adequate or
13 intensive enough to allow him to make sufficient progress in reading, writing, and math,
14 and to either "close the gap" between Student and his non-disabled peers or at least
15 "maintain" the gap. Parents' main concern was that Student was falling further and
16 further behind his peers each year. Petitioners recognize, however, that the legal
17 standard for determining whether or not a FAPE has been offered is whether an IEP is
18 reasonably calculated to enable a child to obtain educational benefit. That standard
19 was expressed in the *Rowley* opinion by the United States Supreme Court. Because of
20 Petitioners' primary argument, a closer look at that decision is warranted.

21 Rowley: The Meaning of a FAPE

22 11. In *Rowley*, the Court was called upon to determine the meaning of "free
23 appropriate public education" in the face of a statutory definition in the IDEA²²⁶ that the
24 Court said "tends toward the cryptic rather than the comprehensive."²²⁷ The Court then
25 stated:

26
27
28 offered) (relying on *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (IDEA requirement of a
formal, written offer should be enforced rigorously)).

29 ²²⁵ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

30 ²²⁶ At the time that *Rowley* was decided, the statute was called the "Education of the Handicapped Act."
458 at 179. It was later renamed.

²²⁷ 458 U.S. at 188.

1 According to the definitions contained in the Act, a "free appropriate
2 public education" consists of educational instruction specially designed to
3 meet the unique needs of the handicapped child, supported by such
4 services as are necessary to permit the child "to benefit" from the
5 instruction. Almost as a checklist for adequacy under the Act, the
6 definition also requires that such instruction and services be provided at
7 public expense and under public supervision, meet the State's
8 educational standards, approximate the grade levels used in the State's
9 regular education, and comport with the child's IEP. Thus, if personalized
instruction is being provided with sufficient supportive services *to permit
the child to benefit from the instruction*, and the other items on the
definitional checklist are satisfied, the child is receiving a "free
appropriate public education" as defined by the Act.²²⁸

10 The Court discerned a congressional intent to allow access to the public school system
11 for disabled children, who had previously been excluded (prior to the 1975 enactment
12 of the law that was later named the IDEA) from public school.²²⁹ Moreover, the Court
13 noted the lack of a mandated level of education to be provided these children:

14 Noticeably absent from the language of the statute is any substantive
15 standard prescribing the level of education to be accorded handicapped
16 children.²³⁰

17 The lack of a prescribed substantive standard for the education to be provided these
18 children, the Court concluded, was intentional:

19 . . . Congress sought primarily to make public education available to
20 handicapped children. But in seeking to provide such access to public
21 education, Congress did not impose upon the States any greater
22 substantive educational standard *than would be necessary to make such
access meaningful*. Indeed, Congress expressly "[recognized] that in
23 many instances the process of providing special education and related
24 services to handicapped children is *not guaranteed to produce any
particular outcome*." S. Rep., at 11. Thus, the intent of the Act was more
25 to open the door of public education to handicapped children on
26 appropriate terms than to guarantee any particular level of education
once inside.²³¹

27 And, again, the Court said:

28 ²²⁸ *Id.* at 188-89 (emphasis added).

29 ²²⁹ *Id.* at 189.

30 ²³⁰ *Id.*

²³¹ *Id.* at 192 (emphasis added).

1 . . . the Senate and House Reports unmistakably disclose Congress'
2 perception of the type of education required by the Act: an "appropriate
3 education" is provided when personalized educational services are
4 provided.²³²

5 These conclusions led the Court to decide:

6 We think . . . that the requirement that a State provide specialized
7 educational services to handicapped children generates no additional
8 requirement that the services so provided be sufficient to maximize each
9 child's potential "commensurate with the opportunity provided other
10 children."²³³

11 12. The *Rowley* Court further stated that Congress' intent could not be read "as
12 imposing any particular substantive educational standard upon the States."²³⁴ Instead,
13 said the Court, Congress sought primarily to identify and evaluate disabled children,
14 and provide them access to free public education.²³⁵ The Court saw an implied
15 requirement that the free public education provided to disabled children confer *some*
16 benefit on them; the Court noted that requiring access to an education that provided no
17 benefit would make no sense. But this only means, according to the Court, that
18 disabled children are given a "basic floor of opportunity" that consists of specialized
19 instruction and related services that are individualized and designed to provide
20 educational benefit.²³⁶ The Court thus summarized:

21 When the language of the Act and its legislative history are considered
22 together, the requirements imposed by Congress become tolerably clear.
23 Insofar as a State is required to provide a handicapped child with a "free
24 appropriate public education," we hold that it satisfies this requirement by
25 providing *personalized instruction with sufficient support services to permit*
26 *the child to benefit educationally from that instruction*. Such instruction
27 and services must be provided at public expense, must meet the State's
28 educational standards, must approximate the grade levels used in the
29 State's regular education, and must comport with the child's IEP. In
30 addition, the IEP, and therefore the personalized instruction, should be
formulated in accordance with the requirements of the Act and, if the child
is being educated in the regular classrooms of the public education

232 *Id.* at 197 (footnote omitted).

233 *Id.* at 198.

234 *Id.* at 200.

235 *Id.*

236 *Id.* at 201.

1 system, should be reasonably calculated to enable the child to achieve
2 passing marks and advance from grade to grade.²³⁷

3 The Court's decision indicates that public schools need not guarantee that disabled
4 children make progress in the curriculum or be given every available opportunity to
5 progress.

6 Rowley Standard Re-Affirmed

7 13. Furthermore, in 2010 the Ninth Circuit Court of Appeals re-affirmed the
8 *Rowley* standard in *J.L. v. Mercer Island School District*.²³⁸ In that case, the federal
9 district court had found that the *Rowley* standard had been superseded when Congress
10 amended the IDEA in 1997. The Ninth Circuit Court reviewed the lower court's
11 reasoning and rejected it: "We hold that the district court erred in declaring *Rowley*
12 superseded. The proper standard to determine whether a disabled child has received
13 a free appropriate public education is the 'educational benefit' standard set forth by the
14 Supreme Court in *Rowley*."²³⁹ In a footnote appended to the last sentence just quoted,
15 the court stated the precise wording of the "benefit phrase" was not important:

16 Some confusion exists in this circuit regarding whether the Individuals
17 with Disabilities Education Act requires school districts to provide
18 disabled students with "educational benefit," "some educational benefit"
19 or a "meaningful" educational benefit. As we read the Supreme Court's
20 decision in *Rowley*, all three phrases refer to the same standard. School
21 districts must, to "make such access meaningful," confer at least "some
22 educational benefit" on disabled students. For ease of discussion, we
23 refer to this standard as the "educational benefit" standard.²⁴⁰

24 Thus, the *Rowley* standard, requiring school districts to confer "some educational
25 benefit" in an IEP, remains the standard by which to judge a substantive claim alleging
26 lack of a FAPE.

27 14. The United States Supreme Court has made it clear that the substantive
28 standard for the IDEA means students receiving special education are to get the same
29 opportunities to benefit from public education as non-disabled students. This is not

30 ²³⁷ *Id.* at 203-04 (emphasis added).

²³⁸ 592 F.3d 938 (9th Cir. 2010).

²³⁹ *Id.* at 951 (footnotes omitted).

²⁴⁰ *Id.* at 951, n. 10 (citations omitted).

1 necessarily the best possible education, but one that provides some benefit to the
2 student.²⁴¹

3 Claim 1: Respondent School District failed to recognize and evaluate
4 Student's dyslexia.

5 15. Petitioners initially argue that Respondent School District failed to evaluate
6 Student's dyslexia. This is not borne out by the evidence and is not a relevant
7 argument with respect to the requirements of the IDEA.

8 16. The IDEA recognizes a category of eligibility for students with learning
9 disorders, which it calls "specific learning disabilities." "Specific learning disability"
10 means "a disorder in one or more of the basic psychological processes involved in
11 understanding or in using language, spoken or written, which disorder may manifest
12 itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical
13 calculations."²⁴² Dyslexia is listed in the IDEA as an included disorder in the types of
14 disorders covered by the definition.²⁴³ However, the IDEA looks at specific areas of
15 learning disability and labels specific disabilities by the skill that is affected.²⁴⁴
16 Respondent School District was obligated to evaluate Student for specific learning
17 disabilities. In doing so, Student's dyslexia was recognized as a learning disability.

18 17. Furthermore, the IDEA does not emphasize identifying the eligibility
19 category of a disabled child as much as it does meeting the needs of a child who is
20 eligible for special education. Once a child has been found eligible for special
21 education, the legal requirement is to meet the child's needs.²⁴⁵ At that point, the
22 eligibility category is secondary. Therefore, even if Respondent School District had
23 failed to recognize Student's dyslexia, because he was found to be eligible for special
24

25
26 ²⁴¹ Parents of non-disabled children who want more than the public school offers frequently provide their
27 children with private education or supplement their children's public education with private tutoring. This
28 is no different for parents of disabled children.

29 ²⁴² 20 U.S.C. § 1401(30)(A).

30 ²⁴³ 20 U.S.C. § 1401(30)(B).

²⁴⁴ 34 C.F.R. § 300.309(a)(1).

²⁴⁵ 34 C.F.R. § 300.304(c)(6) (IDEA evaluation must be "sufficiently comprehensive to identify all of the
child's special education and related services needs, whether or not commonly linked to the disability
category in which the child has been classified.").

1 education under several categories, no harm came to him unless Respondent School
2 District failed to meet his needs.

3 18. Petitioners' first claim fails.

4 Claim 2: Student's 2011, 2012, and 2013 IEPs failed to provide Student
5 meaningful educational benefit in the areas of reading, writing, and math.

6 19. As noted, Petitioners' primary argument is that Student's IEPs did not
7 provide him with meaningful benefit. Under the *Rowley* standard, Respondent School
8 District is obligated to create IEPs that are calculated to provide some benefit to
9 Student. The evidence shows that Respondent School District has done so for each
10 year at issue.

11 20. The evidence shows that Student's IEP teams each year reviewed his
12 current levels of performance, his strengths and weaknesses, and his disabilities, and
13 then drafted IEPs that were designed to allow him to make educational progress. And
14 he did make progress. The progress was slow and inconsistent, as all his teachers
15 recognized, but nevertheless it was *some* progress that gave *some* benefit to Student.
16 As the *Rowley* decision makes plain, this is all that is required by the IDEA.

17 21. Petitioners' second claim fails.

18 Claim 3: Student's 2011, 2012, and 2013 IEPs failed to provide adequate
19 speech language services to Student.

20 22. In their third claim, Petitioners' make the same argument as above, but with
21 respect to speech language services rather than classroom instruction. Again, the
22 argument cannot withstand scrutiny because the evidence shows that Student received
23 some benefit from the speech language services provided in his IEPs.

24 23. Petitioners called an expert witness at the hearing to dispute the speech
25 language goals drafted by Student's IEP teams.²⁴⁶ However, the record shows that the
26 speech language goals were measurable and offered Student some benefit. While
27 Petitioners' expert testified that she would have written Student's goals differently, her
28 entire testimony seemed to be based on what was "best" for Student.²⁴⁷ She did not

29
30 ²⁴⁶ Respondent School District countered with its own experts.

²⁴⁷ Testimony of Lynn Carahaly, RTP Vol. I at 111-89 (Dec. 9, 2013).

1 identify any goal in Student's IEPs that would not have offered some benefit to Student.
2 And, the evidence of record, as noted in the Findings of Fact above, shows that
3 Student made some progress in his speech therapy.

4 24. Petitioners' third claim is not supported by the evidence.

5 Claim 4: Respondent School District failed to recognize that Student was
6 eligible for ESY in Summer 2012.

7 25. Petitioners claim that Student should have received ESY in Summer 2012.
8 Respondent School District disagrees. The evidence supports Petitioners' claim.

9 26. First, Student was eligible for ESY for several years prior to 2012.²⁴⁸ While
10 this does not create a presumption, it is retrospective data that does create a strong
11 inference that Student has long-term trouble maintaining skills over long breaks from
12 school. He had not attended ESY in 2011 at Parents' choice; however, the data
13 regarding his progress on goals between May 2011 and October 2011, which
14 Respondent School District relies upon to deny this claim, is a mixed bag, with both
15 some progress on some goals and lack of progress on others.²⁴⁹ And, according to the
16 testimony of Elementary School Resource Teacher, there was enough data to show
17 that Student did, indeed, qualify for ESY in 2012 in the areas of reading and writing.²⁵⁰
18 Finally, Student's need for ESY is confirmed by the testimony of Middle School
19 Language Arts Resource Teacher, who stated that after Summer 2012 she noticed
20 regression in Student and that he was not recouping skills.²⁵¹ This is the reason she
21 started the Wilson program in October 2012.

22 27. The evidence shows that Student was eligible for ESY in Summer 2012 and
23 was not found eligible by Student's team. Therefore, Student is entitled to
24 compensatory education for that lack of instruction. Compensatory education is
25 discussed below.

26
27
28 ²⁴⁸ Exhibit J2 at 275 (Student had ESY for reading, writing, and math for 3 years prior to 2011; and was
found eligible in 2011).

29 ²⁴⁹ Exhibit J4.

30 ²⁵⁰ RTP Vol. IV at 1201-02 (Dec. 12, 2013). Respondent School District's attempt to impeach that
testimony failed. *Id.* at 1208-11.

²⁵¹ RTP Vol. II at 398 (Dec. 10, 2013).

1 Claim 5: Respondent School District failed to address Student's emotional
2 needs in the 2012 and 2013 IEPs.

3 28. Next, Petitioners claim that Student had emotional needs that were unmet
4 by Respondent School District. While the 2013 MET Report did recognize significant
5 levels of anxiety for Student, as reported from Parents, school personnel unanimously
6 reported that Student was not showing this in the classroom. The evidence does not
7 show any significant emotional problems that were affecting his schoolwork.
8 Furthermore, for the two instances of harassment that occurred in February and April
9 2013, Respondent School District took timely and appropriate action to address them.
10 Nothing more was required.

11 29. Petitioners' fifth claim fails.

12 Claim 6: Respondent School District failed to provide Student with needed
13 assistive technology.

14 30. Petitioners argue that Respondent School District "waited too long" to
15 request an assistive technology evaluation of Student.²⁵² However, Petitioners do not
16 cite any legal authority showing when, or if, a school district must perform an assistive
17 technology evaluation.²⁵³ Indeed, the IDEA regulations require only that IEP teams
18 "[c]onsider whether the child needs assistive technology devices and services."²⁵⁴ The
19 record shows that Student's IEP teams did so each year, and provided for such
20 assistance in the accommodations, which helped Student make progress. Thus,
21 Respondent School District met its obligations under the IDEA with respect to assistive
22 technology.

23 31. Petitioners' sixth claim fails.

24 Claim 7: Respondent School District failed to fully implement Student's
25 2011, 2012, and 2013 IEPs.

26 32. Petitioners next argue that Student did not receive all of the special
27 education instructional time in language arts that he was entitled to by the IEPs. They
28 also argue that he did not receive all speech therapy minutes called for in the IEPs. In

29 ²⁵² Petitioners' Opening Memorandum at 36.

30 ²⁵³ In fact, Petitioners do not cite any legal authorities in support of Claim 6.

1 order to prevail on this argument, Petitioners must show that the failure to implement a
2 provision of an IEP is a material failure.²⁵⁵ A material failure occurs “when there is
3 more than a minor discrepancy between the services provided to a disabled child and
4 those required by the IEP.”²⁵⁶

5 33. The record shows that, due to holidays, school activities, and periodic
6 scheduling issues, sometimes Student missed speech services. However, his speech
7 providers credibly testified that they attempted to make up any missed time with
8 Student and felt that they were successful in doing so.²⁵⁷

9 34. With regard to instructional minutes, Middle School Language Arts
10 Resource Teacher credibly testified that she worked with Student during his language
11 arts class and during his “academic lab” time.²⁵⁸ The evidence shows that he received
12 special education instruction for the amount stated in his IEPs.

13 35. Petitioners have not shown a material failure to implement the IEPs at issue.
14 Thus, claim 7 fails.

15 Requested Remedies

16 36. Petitioners’ final three claims are claims for remedies to address the various
17 violations claimed in the first seven claims. These remedies are contingent upon the
18 finding of a violation of the IDEA.

19 Claim 8: Parents are entitled to reimbursement of expenses for private
20 tutoring and unilateral parental placement in a private school.

21 37. As noted above, parents have “an equitable right to reimbursement for the
22 cost of providing an appropriate [private] education when a school district has failed to
23 offer a child a [free appropriate public education].”²⁵⁹ Here, except for ESY for Summer
24 2012, the evidence shows that Student was offered a FAPE through the three IEPs at
25

26 ²⁵⁴ 34 C.F.R. § 300.324(a)(2)(v).

27 ²⁵⁵ *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 811 (9th Cir. 2007).

28 ²⁵⁶ *Id.*

29 ²⁵⁷ Testimony of Kristine Gregory, RTP Vol. IV at 1235-38 (Dec. 12, 2013); Testimony of Haley Lanier,
id. at 1503-06.

30 ²⁵⁸ RTP Vol. II at 396 (Dec. 10, 2013); RTP Vol. III at 808, 897-98 (Dec. 11, 2013).

²⁵⁹ *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960
F.2d 1479, 1485 (9th Cir. 1992)).

1 issue. Therefore, Parents are entitled to reimbursement only for the private tutoring
2 provided in June, July, and August 2012.

3 38. With regard to ESY for Summer 2012, the evidence shows that Student
4 received private tutoring in reading from Laura Busby during June, July, and August
5 2012, for a total of \$900.00.²⁶⁰ Parents are entitled to reimbursement of that amount.²⁶¹

6 Claim 9: Parents are entitled to reimbursement of expenses for the
7 independent evaluation of Dr. Paul Beljan.

8 39. Parents had an independent evaluation of Student performed in May 2013
9 by Paul Beljan, Psy.D., after Student had been removed from Respondent School
10 District and privately placed by Parents.²⁶² They seek reimbursement by Respondent
11 School District for that expense.

12 40. Independent Educational Evaluations ("IEEs") are referenced only briefly in
13 the IDEA.²⁶³ The United States Department of Education is given authority to make
14 specific regulations concerning them.²⁶⁴ Those regulations provide, in part, the
15 circumstances under which IEEs can be obtained at public expense and the process
16 used if the school objects:

17 (a) General.

18 (1) The parents of a child with a disability have the right under this part
19 to obtain an independent educational evaluation of the child, subject to
20 paragraphs (b) through (e) of this section.

21 (2) Each public agency must provide to parents, upon request for an
22 independent educational evaluation, information about where an
23 independent educational evaluation may be obtained, and the agency
24 criteria applicable for independent educational evaluations as set forth in
25 paragraph (e) of this section.

26 (3) For the purposes of this subpart--

27 (i) Independent educational evaluation means an evaluation
28 conducted by a qualified examiner who is not employed by the public
29 agency responsible for the education of the child in question; and

30 (ii) Public expense means that the public agency either pays for the
full cost of the evaluation or ensures that the evaluation is otherwise

²⁶⁰ Exhibit P133.

²⁶¹ Transportation expenses for tutoring during this time are denied, as the evidentiary record is not
specific. See Exhibit P134.

²⁶² Exhibit P99.

²⁶³ 20 U.S.C. § 1415(b)(1) gives parents a right to obtain an IEE.

²⁶⁴ 20 U.S.C. § 1415(d)(2)(A).

provided at no cost to the parent, consistent with § 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

A federal district court in Alabama summed up the essential requirements quite succinctly:

In other words, a parent is entitled to an independent educational evaluation at public expense if (1) a parent disagrees with an individual evaluation conducted by the public agency; and (2) the agency either (a) does not file for a due process hearing without unnecessary delay or (b) does so file, but does not demonstrate, at that hearing, either that its own evaluation was appropriate or that the independent educational evaluation did not meet agency criteria.²⁶⁵

²⁶⁵ *Ms. H. v. Montgomery County Bd. of Educ.*, No. 2:10cv247-WHA-SRW (WO), 2011 U.S. Dist. LEXIS 14594, at *57-58 (M.D. Ala. Feb. 14, 2011).

1 Subsequent sections of 34 C.F.R. § 300.502 address in what ways an IEE is to be
2 used,²⁶⁶ authorize hearing officers to order IEEs at public expense,²⁶⁷ and allow school
3 districts to set criteria for IEEs within specified parameters.²⁶⁸

4 41. There is no evidence in the record showing that Parents ever expressed
5 disagreement with Respondent School District's evaluation (the 2013 MET Report) or
6 ever asked Respondent School District for an independent evaluation. Without those
7 minimal requirements being met, Parents are not entitled to reimbursement for the
8 evaluation performed by Dr. Beljan.

9 Claim 10: Student is entitled to compensatory services for missed speech
10 services and compensatory education for lack of a FAPE from August
11 2011 to April 2013.

12 42. Because the evidence shows no material failure by Respondent School
13 District to provide the instruction and services set forth in Student's IEPs, no
14 compensatory education or services are warranted.

15 Conclusion

16 43. The Administrative Law Judge is convinced that, given the circumstances,
17 moving Student to another school was the right thing for Parents to do in April 2013.
18 However, Respondent School District was offering Student a FAPE and, therefore, is
19 not responsible to pay for the private placements that Parents chose. Respondent
20 School District provided "some benefit" to Student, as it was required to do. Parents
21 want more for Student, which is commendable. The public schools, however, are not
22 required to provide more than a basic floor of opportunity.

23 44. Petitioners have prevailed on Claim 4 of the amended due process
24 complaint, but on no other claim.

25 DECISION

26 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
27 Respondent School District reimburse Parents \$900.00 for expenses as noted above.

28
29 ²⁶⁶ 34 C.F.R. § 300.502(c).

30 ²⁶⁷ 34 C.F.R. § 300.502(d).

²⁶⁸ 34 C.F.R. § 300.502(e).

1 IT IS FURTHER ORDERED that all other claims brought by Petitioners are
2 denied.

3 Done this day, August 25, 2014.

4 /s/ Eric A. Bryant
5 Administrative Law Judge
6

7
8 **RIGHT TO SEEK JUDICIAL REVIEW**

9 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this
10 Decision and Order is the final decision at the administrative level.
11 Furthermore, any party aggrieved by the findings and decisions made
12 herein has the right to bring a civil action, with respect to the complaint
13 presented, in any State court of competent jurisdiction or in a district court
14 of the United States. Pursuant to Arizona Administrative Code § R7-2-
15 405(H)(8), any party may appeal the decision to a court of competent
16 jurisdiction within thirty-five (35) days of receipt of the decision.
17

18 Copy sent by **electronic mail** and regular mail
19 this 25 day of August 2014, to:
20

21 Richard J. Murphy
22 Law Office of Richard J. Murphy, PLC
23 1928 E. Highland Ave., Suite F104-278
24 Phoenix, AZ 85016-4636
25 **Richard@phoenixspedlaw.com**

26 Erin Walz, Esq.
27 Heather R. Pierson, Esq.
28 UDALL SHUMWAY
29 1138 N. Alma School Rd., Suite 101
30 Mesa, AZ 85201
Attorneys for Respondent
ehw@udallshumway.com
hrp@udallshumway.com

1 Transmitted electronically to:

2 Kacey Gregson, Deputy Director of Legal Services
3 Arizona Department of Education
4 **kacey.gregson@azed.gov**

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6 By: Cruz Serrano
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