

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

STUDENT¹,

Student,

Case No: 2021-DP-0008

v.

Janet K. Maxwell-Wickett,
Impartial Hearing Officer

City of Chicago SD 299,

School District.

FINAL DETERMINATION AND ORDER

JURISDICTION

The undersigned has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C §1400 *et seq.* and the Illinois School Code, 105 ILCS 5/14-8.02a *et seq.*

BACKGROUND

The Student is an 8-year-old, male who is a 3rd grade student at a private therapeutic day school. He qualifies for special education services under the disability category of specific learning disability (SLD) pursuant to an eligibility and IEP meeting held on May 11, 2020. The Student previously qualified for special education services under the disability category of developmental delay (DD) pursuant to an eligibility and IEP meeting held on May 21, 2018. His eligibility category was changed to SLD at an eligibility and IEP meeting held on June 10, 2019. He struggles with reading, specifically encoding, decoding, phonemic awareness and reading

¹ Personal identification information is provided in Appendix A.

fluency; and writing. He requires related services in the areas of speech language and occupational therapy. As a result of the eligibility and IEP meeting held on May 11, 2020, the Student's specific learning disability was found to impact his reading, writing, speech language and independent functioning skills. The IEP team recommended removal from the general education setting for 31% of the Student's day in order to receive direct English/Language Arts/Reading, Speech and Occupational Therapy services in a separate class.

Parents maintain the following: The District's June 10, 2019 and May 11, 2020 IEPs failed to provide the Student with specially designed instruction, accommodations/modifications, related services, and a placement reasonably calculated to meet the Student's needs and enable him to make educational progress thus denying him a free appropriate public education. Therefore, Parents provided notice and unilaterally placed the Student at a private therapeutic day school. Parents further maintain that said placement is appropriate. (IHO Exhibit #1.)

The Parents filed a due process hearing request on July 24, 2020. (IHO Exhibit #1.) The District timely filed its response to same on July 31, 2020. (IHO Exhibit #3.) The parties participated in mediation on August 11, 2020. However, they were unable to resolve the outstanding issues. (IHO Exhibit #5.)

The Parties jointly requested a continuance of the 45-day deadline on August 28, 2020 to continue the prehearing conference in order to accommodate the parties' schedules and agreed upon due process hearing dates and to provide ten (10) days for issuance of this IHO's Final Determination and Order. The requested continuance was granted for good cause shown pursuant to this Hearing Officer's order dated August 31, 2020. (IHO Exhibit #8.) The Prehearing Conference was completed on August 27th and the Due Process Hearing dates were

set by agreement for October 13, 15-16 and 19, 2020. The decision due date is set for November 2, 2020. (IHO Exhibit #8, 10.)

The Parents opted for a closed hearing. The Due Process Hearing was held on October 13, 15-16, 19, 2020. Ms. Micki Moran of Grund & Leavitt represented the Parents. Mr. John Anders & Ms. Hazel Kochy of the Board of Education of the City of Chicago – Law Department represented the District. The parties presented their individual witnesses and several joint witnesses.² The Parents presented the following Exhibits (PE): #1-3, 5 which were admitted into evidence. The District presented the following Exhibits (SD): #1-7 which were admitted into evidence. The Parties presented the following Joint Exhibits (JE): #1-3, 5, 11, 13, 19-20, 26, 30, 32-35 which were admitted into evidence. The Hearing Officer's Exhibits were: IHO Exhibits # 1-14. Both parties submitted oral closing statements, a written outline thereof, and provided citations to any case law relied upon.

ISSUES

The issues raised by the Parent, including the relief requested, and the response of the District, present the following issues, defenses and requested relief for determination by this Hearing Officer:

(a) Whether the District's June 10, 2019 and May 11, 2020 IEPs provided the Student with specially designed instruction, accommodations/modifications, related services, and a placement reasonably calculated to enable the Student to receive educational benefit. Specifically, as follows:

- (1) Whether the Student's IEPs at issue provided him with appropriate specialized instruction to address his learning disabilities and language impairments and deficits in the areas of phonics/decoding/word recognition, reading fluency, reading comprehension, written expression, auditory memory thus being reasonably calculated to enable the Student to receive educational benefit and providing a FAPE.

² Witnesses presented by both parties are identified in Appendix A.

- (2) Whether the Student's IEPs at issue provided him with appropriate goals in the areas of reading fluency, reading comprehension, written language, math, science, and social studies to address his reading and written language deficits and thus are reasonably calculated to enable the Student to receive educational benefit and provide a FAPE.
- (3) Whether the Student's IEPs goals, in the IEPs at issue, contain accurate present levels of performance which enable the IEP goals to be meaningful and measurable and thus are reasonably calculated to enable the Student to receive educational benefit and provide a FAPE.
- (4) Whether the Student's IEPs at issue provided him with appropriate speech language services to address his deficits in "th" sounds, using correct pronouns, noun/verb agreement, regular and irregular tenses, and formatting sentences independently thus enabling him to receive educational benefit and a FAPE.

The Parents maintain that the District failed to provide the Student with specially designed instruction, accommodations/modifications, related services, and a placement reasonably calculated to enable the Student to receive educational benefit as in paragraphs (a)(1) through (4) above thus denying him a FAPE.

The District maintains that the IEPs at issue provided the Student with specially designed instruction, accommodations/modifications, related services, and a placement reasonably calculated to enable the Student to receive educational benefit thus providing him with a FAPE.

(b) Whether Parent's unilateral placement of the Student at Hyde Park Day School (HPDS) provides educational instruction specifically designed to meet the unique needs of the Student, supported by such services as are necessary to permit the Student to benefit from the instruction.

Parents maintain that the unilateral placement provides educational instruction specifically designed to meet the unique needs of the Student, supported by such services as are necessary to permit the Student to benefit from the instruction.

The District maintains that Parents' unilateral placement is inappropriate as the Student does not require a private therapeutic day school to meet his unique educational needs. The District further maintains that the general education setting, with self-contained special education programming, services, and supports, is the appropriate setting in which this Student's unique educational needs can be met. The District further maintains that the needs of the Student can be met in either his neighborhood school or in a District school which offers research-based, specialized multisensory structured literacy curriculum, both of which were offered options.

(c) Whether the balancing of the equities favor the Parent or District considering the following factors: (1) whether Parents provided the District with timely notice of rejection of the proposed placement, including Parents' concerns and intent to enroll the Student in a private therapeutic day school at public expense; (2) whether, prior to the removal, the Parents made the Student available to the District for evaluation; (3) whether the Parents' actions were unreasonable; (4) whether the cost of the private placement is unreasonable; and (5) whether there was a lack of parental cooperation with the District.

Parents allege that the balancing of the equities favors the Parents therefore entitling Parents to the requested relief of tuition reimbursement, prospective payment of tuition at a private therapeutic day school, specifically HPDS and extended school year services for the 2020-2021 school year.

The District maintains that the balancing of the equities favors the District.

Parents request the following relief:

- a. Placement of the Student at a private therapeutic day school, specifically HPDS, with appropriate transportation for the 2020-2021 school year;
- b. Order tuition reimbursement and transportation reimbursement for the Student to attend HPDS for the 2020-2021 school year through the date of this hearing;
- c. Provide compensatory education, using the qualitative analysis, approximately 10 hours per week for 4 months in which Student was doing remote learning. Parents advise that placement at HPDS will satisfy the compensatory education request.

Parents believe that the level of intensity of services at HPDS, including what would be ESY for 2021, would provide the requested compensatory education therefore eliminating the need for additional compensatory education hours.

STIPULATIONS

During the Due Process Hearing, the District and Parents stipulated to the following fact:

1. Pursuant to Illinois Governor J.B. Pritzker's Executive Order related to COVID 19, Act of God days began on March 17, 2020 and continued through April 12, 2020. The District's remote learning days began on April 13, 2020 and continued through the last day of the 2019-2020 school year which was June 16, 2020.

FINDINGS OF FACT

This Hearing Officer did not have the benefit of a transcript with respect to the testimony heard when writing this decision. Therefore, the following is based upon this Hearing Officer's personal notes, recording of the hearing, and recollection. This Hearing Officer carefully considered the testimony of all witnesses presented and all documents introduced and admitted into evidence whether or not specifically referred to or cited when making her final determination. After considering all the evidence, as well as the arguments of both District counsel and Parents' counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is an 8-year old male who is currently a 3rd grade student at a private therapeutic day school, HPDS. He qualifies for special education services under the disability category of specific learning disability (SLD) pursuant to eligibility and IEP meetings on June 10, 2019 and May 10, 2020. (JE #3, 13, 26.) He struggles with reading, specifically encoding, decoding, phonemic awareness, reading fluency; and writing. The Student also requires related services in the areas of speech language and occupational therapy. (Testimony of Mother, Father, Dr. O³, Dr. C⁴; JE # 3, 11, 13; PE #1.)
2. The Student was enrolled in the District commencing in three year old pre-school through the end of the 2019-2020 school year. (Testimony of Mother, GE1, GE2, SPED1, SPED2.)
3. The Student is currently in 3rd grade and cannot read. He struggles with reading, encoding, decoding, phonemic awareness, reading fluency; and writing. He has average reading comprehension skills and is of at least average intellectual abilities. (Testimony of Mother, Father, Dr. O, Dr. C, SPED2⁵, GE1⁶, GE2⁷, PSY⁸; JE #3, 5, 13.)

³ Dr. O is an Illinois licensed Clinical Psychologist who evaluated the Student at Parents' request in February – March 2020. (Testimony of Dr. O; PE #3.)

⁴ Dr. C is the Executive Director of HPDS. He holds a Bachelor's Degree in Special Education, a Master's Degree in Educational Leadership, and an Ed.D. in Educational Leadership. He taught special education for 9 years. (Testimony of Dr. C; PE #5).

⁵ SPED2 was the Student's second grade diverse learner teacher. She holds a Bachelor's Degree in English, a Master's Degree in Special Education. She is licensed to teach in Illinois and Massachusetts and holds an LBS1

4. The Student has visual and fine motor deficits. While at the District elementary school, he received 30 minutes per week of pull out direct occupational therapy services. (Testimony of OT; JE #3, 13, 20.)

5. The Student has speech language impairment in articulation of the /th/ sound which impacts his intelligibility as well as his grammar and sentence structure. He also has grammar difficulties with prepositions, pronouns, verb tenses, and noun + verb agreement. (Testimony of SLP⁹; JE #19; PE#1.) While at the District elementary school, he received 30 minutes per week of pull out speech language services. (Testimony of SLP; JE#3, 13, 19.)

6. During the Student's 1st and 2nd grade school years, 2018-2019 and 2019-2020, the Student received reading instruction and evaluation using the Fountas and Pinnell guided reading program. Fountas and Pinnell levels "A" through "C" are kindergarten level foundational reading skills. (Testimony of SPED2.) The Student's instructional reading level was a Fountas & Pinnell level B at the end of his 1st grade year. (JE #13.) The Student's instructional reading level was a Fountas & Pinnell level C in the Spring of his 2nd grade year when the District closed schools, per the Illinois Governor's Executive Order, due to the COVID-19 pandemic. (Testimony of SPED2; JE #3.)

certification in Illinois. She is currently employed by the District and has been so employed since January 2019. (Testimony of SPED2.)

⁶ GE1 was one of the Student's second grade general education teachers. She holds a Bachelor's Degree in Elementary Education and is currently working toward a Master's Degree as a reading specialist. (Testimony of GE1; SD#5.)

⁷ GE2 was one of the Student's second grade general education teachers. She holds a Bachelor's Degree in Early Childhood Education with a Special Education endorsement and a Master's Degree in Educational Technology. She has been employed by the District as a pre-kindergarten through second grade teacher for 15 years. (Testimony of GE2; SD #6.)

⁸ PSY is the school psychologist. She evaluated the Student twice including during April 2019. PSY is an Illinois licensed School Psychologist. She has been employed in that capacity by the District for 20 years. (Testimony of PSY; SD #2.)

⁹ SLP is the District Speech Language Pathologist. She holds an Illinois type 73 license and an ASHA certificate of clinical competence. She has been employed by the District as a Speech Language Pathologist for seven years. (Testimony of SLP; SD#1.)

7. During the Student's 2nd grade school year, the District used Wilson Foundations to support the Student in reading. Wilson Foundations is a Response to Intervention (RTI) level 2 support. It is not a special education program and is not designed for students who need special education reading instruction. Although Wilson Foundations was being used with the Student, his progress was monitored using Text Reading Comprehension (TRC) which is part of the Fountas & Pinnell guided reading program. The Student's reading abilities were two grades below his current grade level at the end of second grade. (Testimony of SPED2, Dr. O, PRIN¹⁰; JE #13.)
8. During the 2018-2019 school year, the Student was unable to meet his phonics reading goal and was unable to meet his reading recovery goal. (Testimony of SPED1; SD#33.)
9. The Student's June 10, 2019 IEP writing goal for the 2019-2020 school year indicated that the Student would "write a 5-sentence passage telling his opinion..." However, at the time the IEP was drafted, the Student could not write more than a string of five words. The present levels of performance reflect that the Student could write his name, the first letter of four words, and he could spell two words. At the sentence level, the Student was able to write only simple three-word sentences however, this was not noted in the June 10, 2019 IEP. The Student was unable and did not meet his writing goal or benchmarks before Illinois schools were closed due to COVID 19 in March 2020. The Student was unable to meet his writing goal during remote learning between April and June 2020. (Testimony of SPED1, Dr. O; JE# 13, 34.)
10. In February and March 2020, Mother and Father engaged Dr. O to perform a comprehensive cognitive and social/emotional evaluation of the Student. Parents requested this

¹⁰ PRIN is the Principal of MES, another District elementary school which houses a multi-sensory program. PRIN holds a Bachelor's Degree in political science, a Master's Degree in Teacher and Educational Leadership. She also holds an Illinois professional educators license in Teaching and Administration in school districts. She has been employed by the District for 24 years. (Testimony of PRIN.)

evaluation due to concerns with the Student's academic achievement and self-confidence related to his difficulties with reading and writing. (Testimony of Mother, Father, Dr. O; JE #11.)

11. The Student has a Developmental Coordination Disorder. He exhibits low average fine-motor control and speed. Letter formation is awkward from the bottom up and he does not consistently cross midline on fine-motor demands. (Testimony of Dr. O, OT¹¹; JE #11.)

12. The Student has a Specific Learning Disorder with impairment in reading decoding and fluency, severe, which is characterized by impaired reading for words in isolation and text. He presents with specific cognitive weaknesses, or dyslexic characteristics, which interfere to a severe degree, with his reading and associated spelling skills. On the Word Identification and Spelling Test (WIST), the Student scored in or below the 1st percentile in the following areas: Word Identification (Regular/Irregular), Spelling (Regular/Irregular), Fundamental Literacy Ability Index, and Word Attack (Pseudo Words and Letter Sounds). The Student scored in the 6th percentile for Oral Reading Fluency. The Student has average sound/symbol memory and comprehension skills. There is a substantial discrepancy between what the Student can read and what he can comprehend. (Testimony of Dr. C, Dr. O; JE #11; PE#1.)

13. Dr. O has evaluated approximately 6,000 students over his career to date. The severity of this Student's disability is considerable. (Testimony of Dr. O; JE#11.) Parents were shocked by Dr. O's findings as the District teachers had never indicated to them the severity of the Student's inability to read. (Testimony of Mother.)

¹¹ OT is the Occupational Therapist who provided evaluation and services to the Student at the District elementary school he attended. OT holds a Bachelor of Science degree in Occupational Therapy and is currently enrolled in an Occupational Therapy Doctorate Program. She is a licensed Occupational Therapist in the State of Illinois. She has been employed by the District since 2001. (Testimony of OT; SD#3.)

14. The Student has a Specific Learning Disorder with impairment in written expression, moderate. He exhibits impaired spelling consistent with the reading concerns. He has low average written expression in his ability to complete sentences. (Testimony of Dr. O; JE #11.)
15. Based upon his identified language-based disability, the Student requires an intensive, systematic, multi-sensory approach to reading intervention such as the Wilson Reading Program, provided with fidelity. A multi-sensory approach provides and utilizes tactile modalities and simultaneously combines the development of visual and auditory systems. (Testimony of Dr. O; JE#11.)
16. Dr. O reviewed the District's May 11, 2020 IEP, his report was shared with the Student's IEP team, and a colleague from his office attended the May 11, 2020 IEP meeting. (Testimony of Dr. O.)
17. The Student requires a specific reading goal targeting decoding and fluency. The goal needs to have a clear baseline for words read in a minute with an error rate to help establish a fluency goal. The Student needs an explicit decoding goal, targeting a high level of proficiency with specific phonics patterns in single-syllable words. These skills need to be tracked with nonsense words and spelling to a high level of mastery. (Testimony of Dr. O; JE#11.)
18. The Student's decoding goal in the May 11, 2020 IEP is not appropriate as it is vague, does not provide information regarding what the Student is being assessed on and provides for the use of a guided reading program which has nothing to do with a multi-sensory, research based curriculum which is necessary for a student with severe dyslexia to develop reading skills. (Testimony of Dr. O; JE #3, 11.)
19. The Student's fluency goal in the May 11, 2020 IEP is not appropriate as it is based upon using a guided reading approach and there is no research to suggest that such an approach

provides any benefit to a student such as this Student with severe dyslexia. (Testimony of Dr. O; JE# 3, 11.)

20. Fountas & Pinnell guided reading levels do not support or benefit this Student with severe dyslexia. There exists no research to support that a student with severe dyslexia, such as this Student, would benefit from Fountas & Pinnell or any other guided reading level or reading recovery program. (Testimony of Dr. O.) This testimony of Dr. O was uncontroverted at hearing.

21. The Student's written expression goal in the May 11, 2020 IEP, which requires him to write a five-sentence passage, is not appropriate given his current level of functioning. The goal should target basic sentence structure without focus on language mechanics. Further, the written expression goal says there is a research based approach. However, the District uses and recommends the Lucy Calkins rubric which is used in the general education population, is not appropriate for this Student with a specific language disability, and which has no research base to support its use with students with SLD. (Testimony of Dr. O; JE#3, 11.)

22. The May 11, 2020 IEP reading comprehension goal is not appropriate as it does not address the Student's deficits. The Student has a relative strength in comprehension when information is read to him or text to speech software is used. Further, the goal does not use a research based measurement and does not apply a consistent metric, over time, which can be clearly measured. (Testimony of Dr. O; JE#3, 11.)

23. Dr. O reviewed the Student's May 11, 2020 and June 10, 2019 IEPs. The Student requires a higher level of support in his deficit areas than either of these IEPs provides. The change from a co-taught general education class in English and Language Arts to a self-

contained special education classroom for English and Language Arts is not a high enough level of support for this Student given his disability. (Testimony of Dr. O; JE # 3, 11, 13.)

24. The District staff fundamentally misunderstand this Student's disability. (Testimony of Dr. O, GE1, GE2, SPED1, SPED2; JE# 3, 11, 13, 33-34.)

25. Mother and Father provided notice to the District on July 24, 2020 of their intent to unilaterally place the Student at HPDS. This was uncontroverted at hearing. (IHO Exhibit #1.)

26. The Student has transitioned very well to HPDS and is again enjoying attending school. (Testimony of Mother, Dr. C, Dr O; PE #1.)

27. HPDS is a private therapeutic day school which services bright students who have language-based disabilities with expressive and receptive language, such as dyslexia. The program is designed to provide services to these students and to transition them back to public or private general education environments. The typical length of a student's stay at HPDS is two to three years. This is based upon 21 years of data collected by HPDS. (Testimony of Dr. C.)

28. HPDS is a Wilson Reading System Certified provider. It uses the Wilson Reading System which is a twelve step, multi-sensory, research based reading program that benefits significantly dyslexic students such as this Student. The Wilson program is implemented with fidelity and is implemented throughout the Student's day in other areas including writing, math, science and social studies and speech language services. Teachers and the speech language pathologist are all Wilson Certified. (Testimony of Dr. O, Dr. C; PE# 1.)

29. Wilson Reading System Certification means that providers/teachers have all attended 175 hours of training in all 60 Wilson Reading Program Lessons. The certification training last approximately one year. During the training, teachers work directly with a student under the supervision of a Wilson Certified teacher. (Testimony of Dr. C.)

30. HPDS provides the Student with academic instruction in reading, writing, and math via a multi-sensory, researched based Wilson Reading System program, delivered in a small group setting. HPDS also provides speech language, occupational therapy, social work and independent functioning services to the Student. (Testimony of Dr. C; PE#1.)
31. The HPDS Individual Learning Plan provides individualized academic instruction and goals for the Student in his areas of deficit including reading, writing, speech language, occupational therapy, social work, and independent functioning consistent with his specific learning disability. (Testimony of Dr. C, Dr. O; PE#1.)
32. Multi-sensory, researched based programs including Step Up to Writing, Handwriting without Tears, and Visualize to Verbalize are used to deliver handwriting and speech language services to the Student. The social work model implemented focuses on self-esteem issues, black and white thinking, stress and frustration due to reading deficits in order to build self-confidence, awareness of strengths and weaknesses, and to teach students to self-advocate in the classroom. (Testimony of Dr. C; PE#1.)
33. Parents paid an initial deposit to HPDS and signed a Fall 2020 Matriculation agreement on June 17, 2020. At the time of the May 11, 2020 IEP meeting, Parents had not commitment to send the Student to HPDS in the Fall of 2020. (Testimony of Mother, Father; PE#2.)
34. The cost of tuition at HPDS for the 2020-2021 school year is \$48,950.00. At the time of the Due Process Hearing, Parents had paid a total of \$9,259.15 to HPDS. (Testimony of Father; PE#2.)
35. On August 6, 2020, the District sent Mother and Father a notice offering to place the Student at a different District elementary school, MES. (Testimony of CM¹²; JE#1-2.)

¹² CM is the Case Manager at the District elementary school that the Student previously attended. He holds Type 03, 73, and 75 licenses in Illinois. He has been employed by the District for 20 years. (Testimony of CM; SD#4.)

36. The Parents do not know anything about the MES multi-sensory program as it was never discussed at the May 11, 2020 IEP meeting. Parents did not learn anything about the MES program until the due process hearing. (Testimony of Mother.)

37. MES is a general education elementary school with approximately 621 students. In addition to a general education population, MES houses a cluster program for students with very low intellectual profiles and also houses the District's multi-sensory program. The District offered, via letter dated August 6, 2020, to place the Student in the multi-sensory program commencing in Fall 2020. The multi-sensory program provides some level of Wilson Reading System instruction. It is unclear the exact number of Wilson Reading System teachers, their specific credentials, and the extent of the Wilson Reading Program training said teacher(s) have received in the MES multi-sensory program. (Testimony of SJ¹³, PRIN.)

38. Some Wilson trained teachers have participated in a three day Wilson training course whereas Wilson Reading System Certified teachers have received 175 hours over one full year of training and have participated in hands on student instruction under the supervision of a Wilson Reading System Certified teacher during the training period. (Testimony of Dr. C.)

39. From the testimony at hearing, it is unclear what level of Wilson instruction the Student would receive in the MES multi-sensory program. It is unclear what the credentials, experience, and training of the teacher, and possibly teaching assistant, delivering the Wilson instruction would be. It is also unclear the extent to which Wilson would be implemented with fidelity. (Testimony of SJ, PRIN.)

40. The District has not collected any data related to student success in the multi-sensory reading program at MES. (Testimony of SJ.)

¹³ SJ is a Special Education administrator with the District. She holds a Bachelor of Science Degree in Psychology, a Master's Degree in Special Education, an LBS1 endorsement, and a General Administrator or General Supervisor Endorsement. She has been employed by the District for 17 years. (Testimony of SJ; SD#7.)

41. The District began remote learning on April 13, 2020. The Student had difficulty with remote learning. After the first hour of each school day, there was no direct instruction in any area. All assignments were on Google Drive or Parents could go to the school and pick-up hard copy packets. The work was asynchronous. As the Student was unable to read, the work was unbearable. The Student was frustrated and embarrassed as Father and Mother had to read all of the information to him. There was no direct math instruction and there was very little support from the Student's special education team. (Testimony of Mother, SPED2.) The Student's teachers received communication from Mother that Parents wanted the Student to attend remote learning. However, when the Student did not appear via video conference for speech language or occupational therapy services, the special education team did not follow up with Parents to find out why the Student was not participating. (Testimony of OT, SLP, SPED2. GE1, GE2.)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of Parents' counsel and District counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Tuition Reimbursement for Parent's Unilateral Placement

The Parents request relief in the form of tuition reimbursement and prospective funding of Parent's unilateral placement. IDEA provides as follows:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . elementary school or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education (FAPE) available to the child in a timely manner and that the private placement is appropriate. 34 C.F.R. §300.148(c); *Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

In applying what has come to be known as the three-prong *Burlington-Carter* standard, “equitable considerations are relevant in fashioning relief and the courts enjoy ‘broad discretion’ in so doing.” *Burlington* at 374, 369. “Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” *Carter* at 16.

Free Appropriate Public Education (FAPE)

The first prong of *Burlington-Carter* requires that the hearing officer must determine whether a free and appropriate public education was made available to the child in a timely manner. 34 C.F.R. §300.148(c); *Burlington* at 359; *Carter* at 7. The Individuals with Disabilities Education Act (“IDEA”) guarantees children with disabilities the right to a free, appropriate, public education (“FAPE”). 20 U.S.C. §1412(a)(1). In order to determine whether a school district has provided a FAPE requires the determination of whether the school district complied with the procedural and substantive requirements of IDEA. *Board of Education of the Hendrick Hudson Central School District, Westchester County et. al. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034 (1982). As recently clarified by the United States Supreme Court, under the Individuals with Disabilities Education Improvement Act (“IDEA”), a school satisfies its substantive obligation to provide a free appropriate public education by offering a child “an IEP reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, No. 15-827, 137 S.Ct. 988 (U.S. Mar. 22, 2017.)

In matters alleging a procedural violation, the hearing officer may find that a student did not receive a FAPE only if the procedural inadequacy impeded the student’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decisions-making process

regarding the provision of a FAPE to the parent's child or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513(a); *Rowley* at 206-207. In the instant case, Parents do not allege any procedural violations of the IDEA.

Therefore, the inquiry turns to the District's substantive obligations. "An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. See *Andrew F.*, 137 S. Ct. 988, 999. The child's circumstances are described by such information and drive the educational planning.

The IDEA provides a specific framework for Individualized Education Programs (IEPs), composition of the IEP team, and development of the IEP among other things. See 34 C.F.R. §§300.320-300.325. Under IDEA, an IEP must include "(1) a statement of the child's present levels of academic and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum" and "(2)(i) [a] statement of measurable annual goals, including academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 34 C.F.R. 300.320(a). "[A]n IEP is reasonably calculated to confer educational benefit when it is 'likely to produce progress, not regression or trivial educational advancement.'" *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 615 (7th Cir. 2004.) [T]he progress contemplated by the IEP must be appropriate in light of the child's circumstances. . . . The instruction offered must be '*pecially designed*' to meet a child's '*unique needs*' through an '*individualized* education program.'" *Andrew F.*, 137 S.Ct. 988. The IEP is to provide a statement of the "special education and related services and supplementary aids and services . . . to be provided to the child." 34 C.F.R. 300.320(a)(4).

The testimony and documentary evidence presented at hearing illustrate the following: District staff working with the Student in co-taught general education and special education classrooms during his 1st and 2nd grade years fundamentally misunderstood this Student's disability. (FF# 24.) At the end of second grade/beginning of third grade, the Student could not read. (FF# 3.) Parents' expert, Dr. O, and District staff all agree upon this Student's deficit areas. (FF#3-5.) However, the testimony and documentary evidence presented at hearing clearly indicates that the District staff did not know how to remediate those deficits. SPED1 believed that a reading recovery program would support the Student. SPED2 was under the mistaken belief that if they just continued with the Fountas & Pinnell guided level reading program, once the Student reached level "C" or "D", his reading skills would suddenly start to advance exponentially. However, two years of Fountas & Pinnell instruction, along with unmeasured Wilson Foundations instruction, yielded reading foundational skills at the kindergarten level. (FF# 6-7.) The Student was unable to meet his 1st grade reading goals during the 2018-2019 school year. (FF# 8.) The law is clear. The IEP must be reasonably calculated to produce progress, not merely trivial educational advancement. See *Alex R.* at 615. Pre-reading skills at Fountas & Pinnell level "B" at the end of 1st grade, and level "C" at the end of 2nd grade, for a Student with at least average intellectual abilities, are trivial progress at best. The IDEA, *Alex R.* and *Andrew F.* simply demand more.

The IEP must include certain information: present levels of performance; measurable annual goals, including academic and functional goals; the goals must meet the child's needs and allow him to progress; it must confer educational benefit; the progress contemplated must be appropriate in light of the child's circumstances. Dr. O credibly testified to this Student's specific disability and deficits. He has Developmental Coordination Disorder; Specific Learning

Disorder with impairment in reading decoding and fluency, severe; and a Specific Learning Disorder with impairment in written expression, moderate. (FF#11-14.) The Student's writing goal in the June 10, 2019 IEP, to be implemented in the 2019-2020 school year, envisioned the Student writing a 5-sentence passage telling his opinion by the end of the school year. However, at the time the goal was drafted, the Student could not write more than a string of five words and his present levels of performance at the sentence level were completely absent from the IEP. As the Student was only able to write simple three-word sentences at the time the goal was drafted, he did not meet the writing goal or benchmarks. The goal was inappropriate given the Student's disability and present levels of performance. (FF#9, 21.)

The May 11, 2020 IEP reading decoding, fluency, and written expression goals were vague, lacked information regarding what the Student was being assessed on, were not appropriate given his level of functioning. Further, the goals provided for a guided reading approach that research has shown does not benefit students with severe dyslexia such as this Student. (FF# 17-21.) The reading comprehension goal is inappropriate as it does not address the Student's deficits. The Student had a relative strength in comprehension when information was read to him or text to speech software was used. The goal did not use a researched based measurement, did not apply a consistent metric over time which could be clearly measured. (FF 22.) Both the May 11, 2020 June 10, 2019 IEPs did not provide a high enough level of support for this Student's deficit areas. Neither co-taught general education and special education classes or pull-out self-contained classroom support for English/Language Arts/Reading provided the require level of support necessary. (FF#23.) Due to his severe dyslexia, among one of the most severe cases Dr. O has seen in his extensive years of practice and over 6,000 student evaluations, the Student requires an intensive, systematic, multi-sensory approach to reading intervention

such as the Wilson Reading Program, provided with fidelity. A multi-sensory approach provides and utilizes tactile modalities and simultaneously combines the development of visual and auditory systems. (FF#15.) This was not provided in the Student's IEPs or the District's placement determinations. Remote learning which took place from April through June 2020 provided no educational benefit to this Student. (FF#9, 41.) From the testimony and documentary evidence presented at hearing, it is clear that the IEPs at issue were *not* the carefully considered analysis of the child's present levels of achievement, disability, and potential for growth which results in the development of an individualized educational program as envisioned by *Andrew F.* and required by IDEA. Thus, the District denied a FAPE to this Student.

After Parents provided notice to the District of their unilateral placement decision, the District sent a letter to Parents offering to place the Student at a different elementary school, MES, in the District's multi-sensory program. (FF#25, 35.) Prior to the due process hearing, Parents knew nothing of this school or its multi-sensory programming as it was never mentioned or discussed at the May 11, 2020 IEP meeting. (FF# 36.) While it appears that this general education school with a mix of general education students, a low intellectual profile student cluster program, and a multi-sensory program may have offered some degree of Wilson Reading System instruction, it was hardly that recommended and envisioned by Dr. O. (FF#15, 37-40.) PRIN, the principal of MES, and SJ, a District Special Education Administrator, provided confusing and unclear testimony regarding the qualifications, credentials, experience and training of the teacher(s) and teaching assistant(s) delivering Wilson instruction to the Student and the extent to which the Wilson Reading System would be implemented with the fidelity envisioned and recommended by Dr. O. (FF#38-39.) While PRIN testified that she was familiar with the

Wilson program and believed that her teachers were all appropriately trained in same, it was clear that she was unfamiliar with whether said teachers were Wilson trained or actually Wilson Certified. Further, during her testimony she repeatedly referred to the Wilson Reading System as a ten (10) step program when in actuality it is a twelve (12) step program. The District had not collected any data related to student success in the multi-sensory reading program at MES. (FF#40.) Based upon this, it is the determination of this Hearing Officer that this, after the fact offer by the District, was “too little, too late.” There was no evidence introduced at hearing to illustrate that this program would have met this Student’s specific, unique educational needs thus enabling him to make educational progress in light of his circumstances as required by *Andrew F.*

Therefore, it is the determination of this Hearing Officer that the District was unable to provide an appropriate placement that could meet this Student’s needs thus denying him a FAPE.

Appropriateness of Parents’ Unilateral Placement

As this Hearing Officer has determined that the District did not make a FAPE available to this Student in the June 10, 2019 and May 11, 2020 IEPs, the inquiry turns to the second prong of the *Burlington-Carter* inquiry and the appropriateness of Parents’ unilateral placement.

The second prong of the *Burlington-Carter* inquiry requires the Parents’ unilateral placement to be appropriate. In determining whether a unilateral placement is appropriate, the relevant inquiry is “whether it is reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, No. 15-827, 137 S.Ct. 988 (U.S. Mar. 22, 2017.) More specifically, based on a totality of factors, “[a] unilateral private placement is only appropriate if it provides ‘educational instruction *specifically* designed to meet the *unique* needs of . . . the child [with a disability].”

Bd. of Educ. V. Risen, 61 IDELR ¶130 (N.D. Ill. 2013); *Jenna R.P. v. City of Chicago Sch. Dist. No. 229*, 3 N.E.3d 927 (Ill. Ct. App. 2013)(both citing the *Rowley* quotation in *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)). “A unilateral private placement cannot be regarded as ‘proper under the [IDEA]’ when it does not, at a minimum provide some element of special education services in which the public school placement was deficient.” *Jenna R.P.* at 941. The testimony and documentary evidence presented at hearing illustrate the following.

HPDS is a private therapeutic day school which services bright students who have language-based disabilities with expressive and receptive language, such as dyslexia. The program is designed to provide services to these students and to transition them back to public or private general education environments. The typical length of a student’s stay at HPDS is two to three years. This is based upon 21 years of data collected by HPDS. (FF#27.) HPDS is a Wilson Reading System Certified provider. It uses the Wilson Reading System which is a twelve step, multi-sensory, research based reading program that benefits significantly dyslexic students such as this Student. The Wilson program is implemented with fidelity and is implemented throughout the Student’s day in other areas including writing, math, science and social studies and speech language services. Teachers and the speech language pathologist are all Wilson Reading System Certified. (FF#28-29.) HPDS provides the Student with academic instruction in reading, writing, and math via a multi-sensory, researched based Wilson Reading System program, delivered in a small group setting. HPDS also provides speech language, occupational therapy, social work and independent functioning services to the Student. (FF# 30.) The Student’s HPDS Individual Learning Plan provides individualized academic instruction and goals for the Student in his areas of deficit including reading, writing, speech language, occupational therapy, social work, and independent functioning consistent with his specific

learning disability. (FF# 31.) Multi-sensory, researched based programs including Step Up to Writing, Handwriting without Tears, and Visualize to Verbalize are used to deliver handwriting and speech language services to the Student. The social work model implemented focuses on self-esteem issues, black and white thinking, stress and frustration due to reading deficits in order to build self-confidence, awareness of strengths and weaknesses, and to teach students to self-advocate in the classroom. (FF#32.) The Student has transitioned very well to HPDS and is again enjoying attending school. (FF#26.) This Hearing Officer finds the respective testimony of Dr. O and Dr. C to be credible and persuasive. This finding is based upon their respective educational backgrounds, credentials, experience, and demeanor at hearing.

While the District attempts to argue that placement at HPDS is the not the least restrictive environment and is therefore not appropriate, this argument is simply without merit. IDEA does not require Parents to make such a selection. IDEA simply requires that, based on a totality of factors, “[a] unilateral private placement is only appropriate if it provides ‘educational instruction *specifically* designed to meet the *unique* needs of . . . the child [with a disability].” *Bd. of Educ. V. Risen*, 61 IDELR ¶130 (N.D. Ill. 2013); *Jenna R.P. v. City of Chicago Sch. Dist. No. 229*, 3 N.E.3d 927 (Ill. Ct. App. 2013)(both citing the *Rowley* quotation in *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)). “A unilateral private placement cannot be regarded as ‘proper under the [IDEA]’ when it does not, at a minimum provide some element of special education services in which the public school placement was deficient.” *Jenna R.P.* at 941. HPDS provides the Student with academic instruction in reading, writing, and math via a multi-sensory, researched based Wilson Reading System program, delivered in a small group setting. The Student’s HPDS Individual Learning Plan provides individualized academic instruction and goals for the Student in his areas of deficit including reading, writing, speech language,

occupational therapy, social work, and independent functioning consistent with his specific learning disability, severe dyslexia. (FF#30-32.) Based upon the testimony and documentary evidence introduced at hearing, it is the determination of this Hearing Officer that Parents' unilateral placement of the Student at HPDS is appropriate.

Balancing of the Equities

In a tuition reimbursement case, the final consideration is the balance of the equities. The Hearing Officer must consider the actions of the parents and school district including (1) whether Parent provided the District with timely notice of rejection of the proposed placement, including Parent's concerns and intent to enroll the Student in a private residential facility at public expense; (2) whether, prior to the removal, the Parent made the Student available to the District for evaluation; (3) whether the Parent's actions were unreasonable; (4) whether the cost of the private placement is unreasonable; and (5) whether there was a lack of parental cooperation with the District. *See 34 C.F.R. 300.148(d), Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 16.

With respect to whether Parents provided the District with timely notice of rejection of the proposed placement, including Parents concerns and intent to enroll the Student in a private residential facility at public expense, the Parents provided timely notice of their intent to unilaterally place the Student at HPDS on July 24, 2020. This was uncontroverted at hearing. (FF#25.) The Student's triennial evaluations were conducted in 2019 and results of same were reviewed at the June 10, 2019 IEP meeting. No testimony was presented at hearing to indicate that the District had the intent to conduct any additional evaluations of the Student. (FF#3.) Further, Parents provided to the District the private evaluation they obtained from Dr. O and same was reviewed and considered by the District at the May 11, 2020 IEP meeting. (FF#10-

16.) There was no evidence introduced at hearing indicating that Parents acted unreasonably or that the cost of the private placement is unreasonable.

The District attempts to cast the Parents as uncooperative with the District regarding the Student's educational programming it appears simply because Parents chose to place the Student at HPDS. The District alleges that Parents were impatient, frustrated and unwilling to consider MES as a placement option. However, these allegations are disingenuous and without merit. The Student had been enrolled in a District school since three year old preschool and at the beginning of 3rd grade could not read. It is the finding of this Hearing Officer that, after four years of the Student in a District school, and still a non-reader at age 7, this does not constitute a lack of patience on Parents' part. With respect to the Parents' unwillingness to consider MES as a placement option, it was simply never presented to Parents until after they made their decision to place the Student at HPDS. Mother credibly testified at hearing that she did not know anything about MES until the due process hearing when testimony from PRIN was presented. (FF#36.) Further, Parents have several other children who all attend District schools, including this Student's sister, who is also dyslexic, but not as severely so as the Student. It is the determination of this Hearing Officer, based upon the testimony and evidence presented at hearing and her opportunity to observe the demeanor of Parents at hearing and during their respective testimony, that the District's allegations of parental lack of cooperation are unfounded and without merit.

This Hearing Officer finds that the balancing of the equities favors Parents and therefore no reduction or denial of the reimbursement award is necessary as it relates to the Student's placement at HPDS.

At the Prehearing Conference and again at the Due Process Hearing, Parents confirmed that they were not requesting compensatory education beyond placement of the Student at HPDS. Parents confirmed that placement of the Student at HPDS would remediate the compensatory education claims. No testimony or documentary evidence was presented at hearing that would lead this Hearing Officer to believe that compensatory education beyond HPDS tuition reimbursement would be appropriate.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law, the District denied the Student a free and appropriate public education (FAPE) in the least restrictive environment when it failed to provide IEPs which included the Student's present levels of performance, measurable annual goals related to the Student's identified needs, related services and appropriate service minutes, and an appropriate site that could implement the Student's IEP and enable him to make educational progress in light of his unique educational needs.

Further, Parents' unilateral placement at HPDS is appropriate and the balancing of the equities favors Parents.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

Parents are hereby granted the following relief:

- a. Reimbursement for unreimbursed costs related to placement at Hyde Park Day School (HPDS) from August 1, 2020 through the date of the due process hearing in the amount of \$9,259.15 and prospective placement and corresponding funding through the end of the 2020/2021 school year, including any extended school year programming;
- b. Reimbursement and prospective costs related to Student's transportation to and from Hyde Park Day School for the 2020/2021 school year.

The District shall reimburse Mother and Father, or pay directly, the above ordered costs within 30 calendar days of receipt of proof of same (i.e. statement for services or invoice from provider, facility, or transportation provider).

NOTICE OF RIGHT TO REQUEST CLARIFICATION

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL 62777. The right to request clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within one hundred and twenty (120) days from the date the decision is mailed to the party.

Dated: October 30, 2020

/s/ Janet K. Maxwell-Wickett
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