

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
<p><b>[Student] by and through his parent [Mother],</b> Complainant,</p> <p>vs.</p> <p><b>EL PASO SCHOOL DISTRICT #49,</b> Respondent.</p>	
<b>AGENCY DECISION</b>	

On December 21, 2023, the Colorado Department of Education (“CDE”), Exceptional Student Services Unit, received a Due Process Complaint filed by [Mother] (“Complainant”) on behalf of her minor son, [Student], alleging that the El Paso School District #49 (“District”) violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (“IDEA”), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act, 1 CCR 301-8, (“ECEA”) by failing to provide [Student] with a free appropriate public education (“FAPE”). On December 21, 2023, the due process complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Tanya T. Light.

The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held by video and Google Meet in Denver, Colorado on October 8 through 11, 2024. Complainant was represented by Conor O’Donnell, Esq., of Kishinevsky & Raykin, and the District was represented by John R. Stanek, Esq., of Orten Cavanagh Holmes & Hunt, LLC. [Director of Special Education], Director of Special Education Services for the District, served as the District’s advisory witness. At hearing, the ALJ admitted into evidence the following exhibits: Complainant’s exhibits 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 16, 17, 18, 19, 20 (only page 3 of exhibit 20 is in evidence), 21, 23, 26, 28, 29, 31, 32, 36, 37, 38, 42, 45, 46, 47, 48, 51, 52, 58, 60, 61, 69, 70, 72, 75, 79, 81, 85 ([Father]’s statements in Exhibit 85 are not in evidence), 88, 90, 98, 103, 125, 130, 145, 149, 174, 176, and 194; and the District’s exhibits: A, B, C, D, E, F, G, H, I, J, K, L, M, N, R, S, T, U, W, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, KK, LL, MM, OO, PP, and QQ.

## **ISSUE PRESENTED**

Whether Complainant has met her burden of proof establishing that the District failed to provide [Student] FAPE and if so, what remedies are appropriate.

## **FINDINGS OF FACT**

[Student]

1. [Student] is a 10 year-old boy (date of birth [D.O.B.]) currently in the fourth grade in a District school called [School].
2. [Student] has been diagnosed with dyslexia. Complainant, [Student]'s mother, has also been diagnosed with dyslexia.
3. [Student] struggles with impulsivity and hyperactivity. He has been tested for ADHD and ADD, and the tests indicated [Student] does not have ADHD or ADD.
4. [Student] has severe food allergies and needs to be able to read so that he can read food labels.
5. [Student]'s parents are divorced and they divide their parenting time 50-50, with [Student] living every other week with Complainant.

### **First Grade: the 2021-2022 School Year**

6. Complainant began to suspect [Student] had an educational disability in the fall of his first grade year. She testified that she requested [Student] be evaluated for special education at that time but was ignored.<sup>1</sup> The statute of limitations in this case is December 23, 2021, and therefore events prior to that date are outside the statute of limitations. However, for reasons explained below, the court finds as fact that even if Complainant requested the District evaluate [Student] for special education in the first semester of first grade, there was not enough of a body of evidence warranting an identification of [Student] as having one of the 13 categories of educational disability at that time.
7. In first grade [Student] attended [Other School] (“[Other School]”), a District school.
8. On December 14, 2021, which was first semester of [Student]'s first grade year, he took the Star Early Literacy test. According to the Star Reading Diagnostic

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<sup>1</sup> It should be noted that at hearing, Complainant had a difficult time answering a number of fairly straightforward questions on cross-examination, and testified that she was struggling with her memory. For this reason, the court finds that Complainant, while credible in the sense that she believed what she testified about to be true, was not a reliable witness.

Report, [Student] scored in the 32<sup>nd</sup> percentile overall. He was able to read 18 words per minute, and based on national norms, [Student]’s early literacy skills were comparable to those of a typical kindergartner in the eighth month of the school year. Exhibit 26.

9. On February 14, 2022, [Student] was screened for dyslexia. He scored below average on the dyslexia screener in letter knowledge, oral reading fluency rate, oral reading fluency accuracy, and non-phonetic spelling. Exhibit 31.

10. [Student] had previously taken the Cogat IQ test, which was incorporated into the dyslexia screener. [Student]’s full scale cognitive/academic ability score was 86, which was in the below average range. Exhibit 31.

11. [School], the school [Student] currently attends, is a District “choice” school for children who struggle with dyslexia. A requirement for entrance into [School] is a full scale cognitive/academic score of 90 or above. A score below 90 indicates that the student will not have the cognitive ability to be successful at [School] because of its rigorous demands.

12. At the time [Student] took the dyslexia screener, his cognitive/academic score of 86 prevented him from being eligible to enroll at [School]. See Exhibit 31.

13. On March 9, 2022, during the second semester of [Student]’s first grade year, the District sent Complainant the following email:

We have completed a variety of academic activities at [Other School] with your child and we gained some valuable information. We do our best to match students with the most appropriate intervention to better help them learn and grow. While we have determined the Lex programming targeting certain reading challenges is not the most appropriate intervention for your student, we will continue to support your student in the classroom and through other more appropriately matched interventions here at [Other School]. Exhibit HH.

14. [School Director] is the founder and director of [School]. She has been a literacy coach and a Special Education teacher. [School Director] has a master’s degree in elementary education and a special education certificate. At hearing, she was deemed an expert witness in [School], literacy, and test interpretation. See Exhibit LL.

15. [School Director] credibly explained that the March 9, 2022 email is a letter the District sends to parents when the District believes [School] is not the best fit at that time, and that the child’s current school has the best curriculum for that child.

16. [School Director] further credibly testified, and the court finds as fact, that [Student] was in the SPIRE program at [Other School], which was the best program for him at the time. “SPIRE” stands for “Specific Program of Individualized Reading Excellence.” It is based on Orton Gillingham and is recommended for students showing

characteristics of dyslexia. Students in SPIRE receive specialized reading instruction four days per week, 50 minutes per day. [School Director] credibly testified that SPIRE is highly effective in helping students grow in reading. She also explained that it follows the same expectations and rules of the “Take Flight” program, which is the program used at [School].

17. [School Director] credibly testified that the dyslexia screening given to [Student] showed some, but not all, characteristics of dyslexia, and that none of the results were unexpected in light of [Student]’s cognitive score.

18. The District believed, and the court finds as fact, that SPIRE was the appropriate intervention to address [Student]’s reading difficulties in first grade. The court further finds that [School] was not the appropriate placement for [Student] in first grade due to his cognitive/academic ability score falling below 90.

19. [Other School Principal] is the [Other School] principal. She became aware of Complainant’s concerns about [Student]’s reading and spelling difficulties, and therefore she reached out to Complainant and explained to her that the District would perform assessments of [Student], and then would determine the appropriate next steps.

20. [Other School Principal] credibly explained that another intervention used with [Student] to address his reading difficulties was the Read plan, beginning his first semester of first grade. The Read plan included specific goals for [Student] with frequent progress monitoring throughout his first grade year.

21. [Other School Principal] credibly testified that the Read plan is a reliable intervention based on Star reports, teacher observations, instructional coaches’ observations, and the Dibels test. [Other School Principal] credibly testified, and the court finds as fact, that the Read program was an appropriate intervention for [Student] in first grade, and that he made progress in reading in first grade.

22. [Student]’s Objective 1 on the Read plan was to receive a score of 27 by May 6, 2022 or earlier. His latest score as of April 21, 2022 was 44, which meant he met the goal. Exhibit GG at 7.

23. [Student]’s Objective 2 on the Read plan was also to receive a score of 27 by May 6, 2022. He scored 44, prior to that date, meaning he met that goal. *Id.*

24. There were many additional goals on [Student]’s Read plan. He met or exceeded some of them. Of the goals [Student] did not meet, his scores all trended upward. [Other School Principal] credibly testified that [Student]’s scores showed he was making growth despite not meeting the goals, and that the goals were set intentionally high. See Exhibit GG.

25. [Other School Principal] credibly testified that in the areas where Read progress monitoring showed gaps, [Student]’s teachers were notified, and they tailored

their instruction of [Student] specifically to close the gaps that were identified.

26. [Other School Principal] credibly testified, and it is found as fact, that [Student] received “double dipping” of interventions in first grade. He received four days per week, 50 minutes per day of Read plan interventions, and he received an additional 45 minutes of SPIRE time.

27. SPIRE and the Read plan are part of the body of evidence that the District relies upon to determine if a child should be evaluated for special education. [Other School Principal] credibly testified, and the court finds as fact, that based on how [Student] was performing in SPIRE and on the Read plan – the body of evidence – the District had no reason to suspect [Student] needed to be evaluated for special education at the time.

28. [Other School Principal] credibly testified that [Student] finished first grade well based on the body of evidence.

Second Grade: 2022-2023 School Year

29. On August 7, 2022, Complainant emailed [Other School Principal]:

I am very concerned with [Student]’s reading and writing ability. He will be turning eight years old in a few months and does not know how to spell simple words like self, mother, school, etc. He is also having a hard time reading basic words. It will take him almost 40 minutes to read very basic paragraphs with words that children learn in kindergarten/first grade, and when he finally finishes reading the paragraph, he has no idea what he read about because he is trying so hard to just read, I feel very sad for him. Because reading is so hard for him, he is losing desire and he is becoming embarrassed. He sees that his peers are doing better than him, and his confidence is being affected. I am at a loss and asking for help beyond small group reading. I won’t accept anything less at this point due to my level of concern. Exhibit 42.

30. Complainant testified that at the time she sent this email, [Student] was struggling “immensely” and was looking to her for help, but she could not deliver. He would look at her and ask, “when will I get better?” Complainant explained that the above email was her plea to the District for help. Complainant was upset that [Student] was not placed on an IEP at this time.

31. On August 11, 2022, Complainant wrote to [Teacher], one of [Student]’s teachers, “I was wondering if you and I can talk next week to go over his results. I did purchase ‘Hooked on Phonics’ curriculum so I can work with him on my parenting weeks.” Exhibit 45.

32. [Teacher] responded, “I would love to meet with you next week to discuss [Student]’s reading assessment results. By the time we meet I will have all of the data I will need to discuss his strengths and areas of growth with you in depth. I look forward

to developing a plan for [Student] that will help him grow as a reader! Would a time before or after school work best for you?" *Id.*

33. On August 12, 2022, [Student] was given the Dibels Deep Word Reading and Decoding test. Exhibit 46. He scored well in each section, which showed he had mastered many skills. The Dibels Deep Word Reading and Decoding test was given at the beginning of the school year to help formulate reading goals for [Student] in second grade.

34. On August 15, 2022, [Student] took the Star Diagnostic Reading test and scored at the 30<sup>th</sup> percentile, with a grade equivalent score of 1.7, and an Instructional Reading Level of "P" which meant, "[Student] would be best served by instructional materials prepared at the kindergarten level." Exhibit 48.

35. [Student] was on the Read plan in second grade and made progress. His Read scores were above the trend line throughout second grade. Exhibit GG.

36. Complainant had [Student] evaluated by [Hospital], which included dyslexia testing. On October 4, 2022, Complainant sent the District the [Hospital] evaluation report including [Student]'s dyslexia testing results. The report positively identified [Student] as having dyslexia. Exhibits 60 and 5.

37. On October 4, 2022, Complainant emailed [School Director], the [School] principal:

Now that [Student] has been officially diagnosed with dyslexia, what is the next step I need to take to get him enrolled in the [School]? I recall you mentioning in our meeting that he would be guaranteed a spot pending his diagnosis. I am feeling very overwhelmed, stressed and sad by his current results, and the severity of how delayed he is. I don't know how to navigate this on my own. I feel like I am trying to teach someone how to walk who has no legs. :( I am at a complete loss. I am asking for help." Exhibit II.

38. [School Director] responded:

Please do not feel that you are all alone in this. Children with Dyslexia comprise 15-20% of our population so there are many, many parents trying to navigate this journey. We will walk with you as best we can, whenever we can. Remember to call anytime you are feeling overwhelmed and need a listening ear or to get your questions answered...Your next step is to go to [School Website] and fill out an Application for Enrollment Consideration. We will reach out to you with more details at our enrollment time in April/May. *Id.*

39. In October of 2022, [School Director] met with Complainant at [Other School] because Complainant was very upset that [Student] could not start at [School]

immediately. He started the following fall in August of 2023. Special education testing was not discussed at this meeting.

40. On October 5, 2022, [Learning Specialist], MA, Learning Specialist, conducted a “learning evaluation” of [Student]. Complainant had [Student] evaluated because she believed she was not getting help from the District, and she wanted to know why [Student] could not read. The court finds as fact that [Student] could read, but that his scores were in the below average range.

41. The following are some of the results of [Student]’s October 5, 2022 learning evaluation by [Learning Specialist]:

- a. Diagnostically, “[Student]’s history and current evaluation results are consistent with a specific learning disability in reading (also known as dyslexia).” Exhibit 5 at 3.
- b. Concerning phonological awareness, [Student] scored in the 14<sup>th</sup> percentile. [Learning Specialist] explained that “phonological awareness is the ability to pay attention to and manipulate sounds of spoken language.” Exhibit 5 at 5.
- c. [Student]’s short term memory was in the 5<sup>th</sup> percentile. Short term memory in the educational setting is “the ability to keep verbal information active in short-term memory.” *Id.*
- d. Rapid automatized naming “is the ability to name a small set of familiar items under time pressure.” [Student] scored in the 21<sup>st</sup> percentile. *Id.*
- e. [Student] scored in the 5<sup>th</sup> percentile in academic achievement. *Id.*
- f. On the WIAT-III Pseudoword Decoding test, [Learning Specialist] explained that [Student]’s scores reflected his mastery of phonics rules, and were in the average range. Specifically, his scores were in the 34<sup>th</sup> percentile. [Learning Specialist] wrote, “this [score] indicates that [Student] is responding to his reading interventions at school and is having more success decoding words which follow a regular phonics pattern...However, his ability to read more complex syllable patterns and less regular words, such as sight words...is lagging.” Exhibit 5 at 5.
- g. [Student]’s reading fluency was at the 10<sup>th</sup> percentile. *Id.* at 6. [Learning Specialist] explained, “[Student]’s reading errors were notable for whole word guesses (mixing up visually similar words) and function words (confusing ‘little words’ like and, the, of, and, for). These errors reflecting insecure phonics/decoding skills are characteristic of dyslexia.” Exhibit 5 at 6.

- h. On the Comprehensive Test of Phonological Processing (CTOPP-2), [Student]’s phonological memory score was 5, which was “Poor.” His phonological awareness was 14, which was Below Average. [Student]’s Rapid Symbolic Naming was 21, or Below Average. *Id.* at 14.
- i. [Student]’s reading comprehension raw score was 16, with a grade equivalency of the sixth month of first grade. [Student]’s reading raw score was 8 with a grade equivalency of less than first grade. [Student]’s spelling raw score was 13 with a grade equivalency of the eighth month of first grade. *Id.*
- j. On The Gray Oral Reading Test-5 (GORT-5), [Student]’s Rate was 2%; his Accuracy was 9%; his Fluency was 9%; his Comprehension was 25%; and his Oral Reading Index was 14, or “Below Average.” Exhibit 5 at 15.
- k. [Learning Specialist] summarized that, “Overall, [Student] has difficulty understanding the meaning of what he reads because of his weaknesses in decoding. Further, difficulties in sustaining attention and endurance, especially with the heavy cognitive load that it takes for him to sound-out words, will likely make comprehension tasks more difficult for him.” *Id.* at 7.

42. On October 7, 2022, Complainant emailed the District, “I want [Student] transferred over to [School] immediately even if he spends the rest of the year just getting familiarized.” Exhibit OO.

43. [School Director] told Complainant that [School] would save a spot for him the following school year, as opposed to inviting him to start at that time in October, because a student cannot start [School] at any time other than the beginning of a school year. [School] is rigorous and each week builds on the week prior, and therefore had [Student] been permitted to start [School] in October of second grade, it would only have frustrated him further because he would not have been able to catch up or follow along with his peers.

44. On October 7, 2022, Complainant emailed the District asking if [Student] was receiving support through the Multi-Tier System of Support, or “MTSS.” [Literacy Interventionist], the Lead Literacy Interventionist at [Other School], responded, “You asked about MTSS. We do not currently have [Student] in MTSS as he is demonstrating some good growth patterns with the interventions we have in place.” Exhibit OO.

45. The court finds as fact that [Student] was showing a trend line of growth and progress in second grade on the Star Student Progress Monitoring Report for Early Literacy. See Exhibit CC.

46. On October 8, 2022, [Other School Principal] wrote to Complainant:



Thank you for speaking with me yesterday. We hear and understand your great need to support [Student]. Every member of the team is deeply concerned and are actively addressing his reading needs in multiple ways. As we spoke yesterday, I have reached out to the team and we are planning to meet after break. Are there any days and times that work best for you? Would you please send me a couple of options? As we stated in our last meeting together, based on the testing results we reviewed, [Student] is receiving SPIRE which is an excellent program for him at this time as it is designed to support any student who has symptoms of or has been diagnosed with Dyslexia. We know your heart's desire to have him transferred to [School] and that this is very, very difficult to hear but, after reviewing our meeting notes, [School] was not considered the best choice based on the testing data we reviewed and [School], based on the program design, is unable to accept students in October. I know this is very hard to read but please know that we have put much in place to support [Student] and we are actively monitoring his growth. Exhibit 69.

47. On October 9, 2022, Complainant wrote the District:

I would like to add that any and all communication regarding my son [Student] on or about this matter whether it be via email, phone call, meetings or Zoom that I am present. I do not give permission for anyone at this time to conduct any more testing or evaluations without my prior knowledge and consent, and I must be present if and when they are conducted. Exhibit 70.

48. [Other School Principal] and [Student]'s teachers and interventionists were concerned that Complainant stopped all testing of [Student]. Despite this concern, none of [Student]'s teachers or District leadership or staff saw evidence that led them to believe [Student] needed to be evaluated for special education and related services at this time. He was on the Read plan and SPIRE and was showing growth in reading. As part of these programs, [Student] was receiving reading pull-out services four times per week, 50 minutes per day, specifically targeting his reading difficulties.

49. On October 25, 2022, Complainant met with [District Zone Superintendent], District Zone Superintendent, and [School Director]. They explained the screening process for [School]. There was no discussion of evaluating [Student] for special education at this meeting.

50. On December 2, 2022, [Student] took the Star Diagnostic Report in reading. He scored in the 3<sup>rd</sup> percentile and his grade equivalent was .9. [Student]'s instructional reading level was "PP" which meant, "[Student] would be best served by instruction materials prepared at the pre-kindergarten level." Exhibit 81.

51. On December 13, 2022, Complainant wrote to the District:

I have reviewed [Student]’s recent MOY [middle of year] dibbles testing, and despite many interventions he is still well below grade level reading and is currently in the red zone in all areas of his current Dibbles testing. I would like to politely ask who is in charge of his reading intervention plan and who does [Student] spend his reading time with, and how many days and hours is he with the intervention team each week. I would also like to know what the next plan of action is going to be, since the current interventions for the past year and a half are not working at an acceptable level. This email is a formal request asking that the special ed team start the process of creating an IEP for [Student], and that [Student] immediately be offered a special curriculum for his learning disabilities from as soon as possible through the rest of the year. [Student] is obviously not keeping up with the state standards in terms of reading, writing, math, speech, spelling etc. and each day that passes I am becoming more and more concerned for him. I have sent the entire team his learning disability and ADHD disability diagnosis almost 3 months ago and the evaluator emphasized numerous times in the report that [Student] is in need of critical academic interventions on multiple levels. Exhibit W.

52. [Other School Principal] immediately shared this email with the [Other School] special education teacher, [Special Education Teacher].

53. On December 16, 2022, [Special Education Teacher] responded, “Thank you for your written request for an IEP evaluation. It has been received. Due to winter break, we will get the needed signatures when we return to allow my team permission to evaluate.” Exhibit W.

54. On December 19, 2022, [Hospital Staff Member] of [Hospital] performed a Psychiatric Diagnostic of [Student]. She wrote in part:

When considering diagnoses, [Student] does not conclusively present with adequate symptoms for ADHD. Working diagnosis is unspecified anxiety disorder, unspecified disruptive, impulse control, and conduct disorder given his presentation in the classroom and what [Student] endorses as symptoms...At this time, treatment for ADHD is not warranted...MOC [mother of child] reports increased difficulty in the classroom, feels the teacher [Student] has in 2<sup>nd</sup> grade has been very helpful in identifying behaviors and addressing concerns. Exhibit 90 at 16-18.

55. On December 20, 2022, Complainant emailed [School Director], “I am wondering if there’s any additional paperwork you need from us for [Student]’s enrollment for next school year?” Exhibit 90. [School Director] responded, “I believe that we have everything that we need up to this point. As enrollment gets underway in April and May we will reach out to you if there are any final details. Thank you for checking in.” *Id.*

56. After the winter break, on January 16, 2023, Complainant emailed [Special

Education Teacher] and [Other School Principal], stating, “I was wondering where we are at in the process of getting started with [Student]’s IEP. It has been almost a month since the last I have heard anything, so I want to follow up.” Exhibit 88.

57. On January 17, 2023, [Other School Principal] responded:

Thank you for reaching out to all of us regarding where we are in the process of beginning the assessments for an IEP for [Student]. The team is putting together the permission paperwork for you and [Father] to sign. Our goal is to send this to you both by the end of the day Thursday, January 19<sup>th</sup>. I’d love to meet with you and [Father] after you have received the permission paperwork to go over any questions you might have about the process. Exhibit 88.

58. On January 17, 2023, [School Director] wrote to the [Parents]:

As we began looking through applications today I noticed that we needed to follow up on the discussion we had at [Other School] with final documentation and plans regarding [Student]’s attentional issues. I know that we discussed factors that can cause Take Flight Therapy to not be successful for a child due to the intensity of the program. One of these of course is cognitive achievement and another one of these factors is that of unaddressed attentional struggles that cause the brain to be unavailable for learning. If we are not clear about addressing these issues, this can cause a child and family to feel one more sense of failure and I want to be sure that [Student] is set up for success in every way possible. Both of these areas were discussed at our meeting but I wanted to check in with you regarding [Student]’s attentional struggles at this time.

I know that you were very excited about [Student]’s joining [School] so I wanted to be sure we followed through on plans. If you have paperwork from [Student]’s diagnosis of an attentional issue and a plan for how the attentional issues will be addressed please email these to me and I will place them with [Student]’s application. If you are not at this point yet, please let me know and I will check in with you again in April/May to see if everything has been finalized. Exhibit 90.

59. Complainant responded in part, “[Student] was recently evaluated by the neuropsychological department at [Hospital] and he is currently in therapy through [Hospital] as well. Upon completing their evaluation they have reversed [Student]’s ADHD diagnosis as they do not believe that he has it.” Exhibit 90.

60. On January 19, 2023, Complainant informed [Other School Principal] that she was available to meet on January 27, 2023. Exhibit 98.

61. On January 19, 2023, the District sent Complainant a Prior Written Notice

and Consent for Initial Evaluation. The areas for [Student] to be evaluated were General Intelligence and Social and Emotional Status. The reason for evaluation was that “[Student] was diagnosed with Dyslexia and parent requested testing.” Exhibit B. On January 19, 2023, Complainant gave the District consent to evaluate [Student]. Exhibit F.

62. On January 27, 2023, Complainant and [Father] signed that they had received Procedural Safeguards. *Id.*

63. On February 1 and 13, 2023, and March 1, 3, 8, and 9, 2023, the District performed an IEE of [Student]. The Evaluation Report included results from [Student]’s October 4, 2022 [Hospital] report. The tests and findings from this IEE included, but are not limited to the following:

- a. On the WIAT-III, [Student]’s reading comprehension score was 85, which placed him in the 16<sup>th</sup> percentile.
- b. Concerning [Student]’s Social/Emotional/Behavioral functioning, the Conners-4 scored in the Slightly Elevated range of Hyperactivity and Inattention. There were no home concerns related to [Student]’s ADHD Index score; however, his teacher saw significant ADHD concerns and rated that index as High. Exhibit 4.
- c. The MASC-2 was administered concerning Anxiety. There were mild concerns based on the rating scale from Complainant, and no concerns from [Father] at the time. *Id.* at 15.

64. [School Psychologist] is a nationally certified, licensed school psychologist and was deemed an expert witness in school psychology. Exhibit MM. He performed some of [Student]’s evaluations noted above. At hearing, [School Psychologist] was a very credible witness.

65. [School Psychologist] credibly testified that cognitively, [Student] scored in the average range. His full scale IQ on the WISC-5 was 98, which is right at average. [School Psychologist] credibly testified that this score told him as a school psychologist that [Student] has the ability to learn how to read, write, graduate, and go to college or trade school.

66. [School Psychologist] performed two classroom observations of [Student]. For 10 minutes, he marked every 15 seconds whether [Student] was on task or off task. [Student] was on task 34 out of 40 times, or 85% of the time.

67. [School Psychologist] reviewed the [Hospital] report. He explained that the CTOPP-2 looks at the foundations of reading. [School Psychologist] testified that [Student] mostly tested in the average range. [Student]’s strength of expressive vocabulary testing was at the high end of average. His listening component was in the

average range, as was his receptive vocabulary.

68. [School Psychologist] credibly testified that he reviewed all of the interventions the District had been using with [Student] up to this point, and that the District was doing everything right. The court agrees.

69. [School Psychologist] saw [Student]'s weaknesses, but nothing he saw triggered any need for special education testing because of the growth [Student] was making. [School Psychologist]'s recommendation at the time was to stay the course with the interventions that were already in place.

70. [School Psychologist] credibly testified that while dyslexia is under the Specific Learning Disability ("SLD") category of educational disability, the analysis must be whether or not the dyslexia is stopping the student from making growth. At the time [School Psychologist] evaluated [Student], [Student]'s dyslexia was not stopping him from making growth as evidenced by many of [Student]'s scores being in the average range.

71. [School Psychologist] credibly explained that there is a distinction between dyslexia and SLD. He explained that 20% of students have dyslexia and the majority of those students are not in special education.

72. [School Psychologist] credibly testified that [Student]'s team needed a body of evidence in order to determine whether [Student] needed testing for special education and related services. The body of evidence should include evidence that interventions were tried and were unsuccessful. In first grade there was not a body of evidence sufficient to trigger the need to test [Student] for special education. By March of [Student]'s second grade year, [Student]'s team had enough of a body of evidence to begin evaluating him for special education.

73. On March 1, 2023, a Notice of Meeting was sent to Complainant and [Father] inviting them to a meeting to be held on March 10, 2023, "in order to discuss the educational needs of [Student]." Exhibit D. The purpose of the meeting was:

To discuss appropriate evaluation data to determine whether [Student] is eligible for special education services. If eligible, an individualized education program (IEP) will be developed that will include [Student]'s present levels of academic achievement and functional performance, needs, and goals, and a plan to provide special education and related services. *Id.*

74. On March 10, 2023, [Student]'s team met at [Other School]. See Exhibit F. Paperwork for this meeting included this statement:

The attached evaluation report must contain documentation of the following: IDEA 34 CFR section 300.311: A body of evidence that demonstrates 1. Academic skill deficits, and 2. Insufficient progress in response to scientific,

research-based intervention in the area(s) identified above. An observation of the student's academic performance in the areas of difficulty in the learning environment including the relevant behavior and relationship of that behavior to the student's academic functioning. Exhibit F.

75. The March 10, 2023 meeting lasted so long that another meeting had to be scheduled to develop [Student]'s IEP.

76. On April 7, 2023, [Student]'s team met again and [Student] was placed on an IEP at that time. Exhibit E. By this time [Student]'s testing showed that he could be successful at [School], and the team planned for him to begin [School] in the fall of 2023. [School Director] explained that [School] uses the "Take Flight" program specifically designed for students with dyslexia. Notably, [School] is not a special education placement. It is a school of choice that any District student can apply to.

77. [Director of Special Education], the District Special Education Director, credibly testified, and it is found as fact, that SLD is one of only two of the 13 educational disabilities that requires that a body of evidence be developed and analyzed prior to identification of SLD. In other words, it is a requirement of the SLD identification that non-special education interventions have been used and were unsuccessful. This means that [Student] could not have received an SLD identification before there was a body of evidence to review. The body of evidence included [Student]'s performance on the Read plan and SPIRE interventions. Thus, the court finds as fact that [Student] could not have received an SLD identification in first grade because there was not an adequate body of evidence at that time.

78. On April 10, 2023, the District officially informed Complainant that [Student] was accepted at [School] for the 2023-2024 school year. Exhibit T.

79. At hearing, [School Director] credibly testified, and the court finds as fact, that dyslexia is not a special education diagnosis, and that many students who have been identified as having dyslexia are not in special education. The majority of [School] students are not on IEPs.

80. Following [Student]'s IEP meeting, Complainant requested a second Independent Educational Evaluation ("IEE") of [Student] at District expense.

81. On May 21, 2023, [Director of Special Education] wrote Complainant:

I have been informed that you are requesting an independent educational evaluation (IEE) for [Student] in all of the areas we previously evaluated. I will grant that request. Attached is an IEE request form and a list of providers. Please complete the form and return it to me with your chosen provider and areas of assessment that you disagree with listed. We completed evaluations in the areas of social and emotional status and general intelligence. If you have any questions about this process please

feel free to reach out to me. Exhibit 125.

Third Grade – 2023-2024 school year

82. On August 17 and 31, 2023, [Student] had another IEE at District expense. See Exhibits I and J. [Student] had a total of three IEEs.

83. [Student] started at [School] in August of 2023 and currently attends [School]. According to Complainant, [Student] is proud of himself now.

84. [School Director], the founder of [School], credibly explained that [School] was a school developed for students who have dyslexia, dysgraphia and co-morbidities such as ADHD. She credibly testified that [School] provides language therapy five days per week, 50 minutes per day. Students do not need a diagnosis of dyslexia to attend [School], and they do not need to be on an IEP. She explained that 125-128 students attend [School] and only a small number, approximately 30, are on IEPs.

85. [School Director] further credibly explained that [School] uses the “Take Flight” programming, and testing and monitoring is done throughout the year to ensure that Take Flight is the correct programming for the students.

86. On September 26, 2023, another IEP meeting was held to review the IEE results and amend [Student]’s IEP as appropriate. This meeting was also to determine if [Student] needed additional services. There were 11 participants, including a speech language pathologist, the [School] special education case manager, [School] general education teacher, a District school psychologist, [Director of Special Education], an occupational therapist, the [School] principal, and others. The team determined that [Student] did not need occupational therapy or speech therapy. Exhibit K.

87. At this meeting, “[Mother] noted she appreciates that and wishes there are more schools like [School], she’s glad [Student] is where he needs to be and it’s good to hear good things about her son.” Exhibit K.

88. On October 27, 2023, the District sent Complainant a Notice of Meeting for an IEP meeting scheduled for November 28, 2023. Exhibit L.

89. On November 28, 2023, [Student]’s annual IEP meeting was held. [Student] had been at [School] approximately three months, and the team reviewed his Take Flight assessments. From August of 2023 through the end of the first quarter, [Student] showed improvement in every area except one, letter naming fluency. The score in letter naming fluency remained the same. All of [Student]’s other scores went up. See Exhibit M

90. [School Director] credibly explained that these scores demonstrated [Student] was performing exactly where he should be at that time of year.

91. [School Director] credibly testified that Complainant's information about [Student] was considered at the November 28, 2023 IEP meeting, specifically in the IEP team's formulation of [Student]'s goals. The team also considered the IEEs in order to formulate accommodations for [Student]. [Student] was given 17 accommodations, including preferential seating, reminders to be on task and focus, breaking big tasks into smaller tasks, pre-teaching when available, and others, all designed to help with [Student]'s attention. Exhibit M at 16.

92. [School Director] credibly testified that [Student] has been doing "fabulous" on this IEP and continues to improve at [School]. His testing and progress monitoring trend lines are all moving up from where [Student] started at the beginning of the year. See Exhibit BB.

93. In third grade, [Student]'s report card showed that in academic performance and life skills he demonstrated mastery, and that he was doing excellent in areas that could be impacted by his dyslexia. A grade of "3" on [School] report cards means "demonstrates mastery," and the majority of [Student]'s grades were 3's by the 4<sup>th</sup> quarter of third grade. Exhibit R.

94. [School Director] credibly testified that "absolutely [Student] is being successful at [School]."

## **DISCUSSION**

### **Burden of Proof**

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) (stating that, "[t]he burden of proof...rests with the party claiming a deficiency in the school district's efforts"). Complainant therefore bears the burden of proving by a preponderance of the evidence that the District failed to provide [Student] FAPE in violation of the IDEA.

### **Discussion**

#### **The Requirement of a FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). To satisfy FAPE's requirement, the school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District RE-1*, 580 U.S. \_\_\_; 137 S.Ct. 988 (2017).



The appropriateness of a child's IEP is determined according to a twofold standard: (1) has the State complied with the procedures set forth in the IDEA; and (2) is the student's IEP reasonably calculated to enable the child to make progress that is appropriate in light of his circumstances. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 25 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017).

The IDEA also mandates that districts have in place effective plans to identify and evaluate children for special education, which is known as the "Child Find" obligation. 34 CFR 300.111 states:

- (a) (1) The State must have in effect policies and procedures to ensure that
  - (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
  - (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

In this case, Complainant asserts that the District failed to provide [Student] FAPE because it failed in its Child Find obligations; namely, that the District failed to test [Student] for special education in first grade. Complainant believes the District had reasons to suspect [Student] was a student in need of special education and related services as early as his first semester of first grade, but that he did not receive an IEP until late in the second semester of second grade. It is in that timespan that Complainant believes the District failed to provide [Student] FAPE, and she seeks compensatory education for that period.

The court concludes as a matter of law that the District did not fail in its Child Find obligation and did not fail to provide [Student] FAPE. At hearing, all of the District's witnesses were sequestered and did not hear each other's testimony. Yet, every District witness credibly testified to the same key fact: that [Student] was accessing and making growth in the general education curriculum in first and second grades such that there was no reason to suspect he was a child with an educational disability. [Other School Principal] and [School Psychologist] were particularly credible and persuasive on that point. [School Psychologist] persuasively testified that in first and second grades [Student] was progressing and was receiving the most appropriate reading interventions for him at the time, namely the Read plan and SPIRE. [Student] received intense reading intervention four days per week, 50 minutes per day, and those interventions were working.

Additionally, [Other School Principal] clearly cared about [Student], and every student in her building, and was a passionate and credible witness about the fact that she saw [Student] making steady, appropriate growth in the general education curriculum.

[School Director] was another particularly persuasive witness. As founder and director of [School], she credibly testified that the majority of students who have been identified as having dyslexia are not on IEPs. Therefore, the fact that [Student] was identified as having dyslexia did not automatically mean he should have been tested for special education and related services. Indeed, as explained above, a body of evidence needed to be created prior to an identification of SLD as [Student]'s educational disability. A body of evidence, by definition, takes some time to develop, and in this case, [Student]'s performance on the Read plan, SPIRES, and various tests such as Dibels and STAR constituted a portion of the body of evidence that was eventually sufficient to warrant testing [Student] for special education and related services.

The court recognizes that Complainant had reasons for concern: STAR testing showed that [Student]'s grade equivalency was below average in several areas. However, the credible evidence in the record demonstrates that the District used appropriate interventions for [Student] in first and second grades to address his below grade equivalency scores, and that [Student] was making steady growth with those interventions. Also, the District correctly wanted to avoid falsely over-identifying students as special education students, which is another reason the District wanted a body of evidence before identifying [Student] as a special education student. Complainant saw [Student]'s low grade equivalency scores and wanted him immediately placed on an IEP because of those scores. However, low grade equivalency scores are not a body of evidence in and of themselves, and in this case did not warrant testing [Student] for special education.

Moreover, when Complainant asked that [Student] be tested for special education, the District did not delay. She made the request in late December, immediately prior to the winter break. The District said it would get back with her upon return from winter break, and it did. The next January the District gathered the required paperwork for Complainant's signature, and the evaluations began. Evaluations cannot be done immediately, and here, the court concludes there was not an unreasonable delay between the time Complainant signed the permission to evaluate form in January, and the dates in March when [Student]'s evaluations occurred. Then, the very next month, in April, [Student]'s first IEP meeting was held. The team agreed that [School] was the appropriate placement, and the credible and persuasive evidence in the record is that [School] only works if a student starts at the beginning of the year. Thus, it would not have been appropriate for [Student] to have started [School] in April of 2023. He began [School] at the start of the 2023-2024 school year, and by all accounts, including Complainant's, he is flourishing there. For this reason, the court concludes as a matter of law that [Student]'s April 2023 IEP was reasonably calculated to allow [Student] to make progress appropriate in light of his circumstances pursuant to *Endrew F.*

Finally, the court concludes that Complainant had the burden to prove that the District did not provide [Student] FAPE, and she did not meet her burden of proof. Complainant's case was based almost entirely on his low grade equivalency scores on the STAR tests. For all of the reasons explained above, those scores are not sufficient

evidence that the District failed in its Child Find obligation or failed to provide [Student] FAPE.

### **DECISION**

It is the decision of the ALJ to dismiss all of Complainant's claims and deny all of her requests for relief. This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**DONE AND SIGNED:** December 20, 2024

*/s/ Tanya T. Light*  
TANYA T. LIGHT  
Administrative Law Judge