INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT
BEFORE THE STATE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA)	
COUNTY OF SPARTANBURG)	
In the Matter of:)	**DECISION OF THE STATE REVIEW OFFICER**
A.R. and J.R. on behalf of their child L.R., Appellant)	
V.)	
Spartanburg County School District 2, Appellee.)	

This matter is before me pursuant to an appeal by the ("Parents," "Mother," or "Father"), on behalf of ("Student") from a decision by Douglas Dent, the Local Hearing Officer ("LHO"), determining that Spartanburg County School District Two ("District") did commit a procedural violation of the Individuals with Disabilities Education Act ("IDEA") but that this violation did not cause the child to be denied a Free Appropriate Public Education ("FAPE") and denying the Parent's request for reimbursement for both an Independent Educational Evaluation and private school tuition and services.

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision issued on October 7, 2019. The LHO found the District committed a procedural violation of the Individuals with Disabilities in Education Act ("IDEA") but this violation did not cause any substantive harm and thus the District had not denied the Student a FAPE. He thus denied the Parents' request for reimbursement of both the private evaluation and cost of the private school placement. The

Parents filed a notice of appeal on October 18, 2019. The Parents submitted a brief on October 30, 2019. The District filed a reply brief on November 6 and the Parents submitted a reply brief on November 11, 2019. In addition, on October 29, the Parents filed a Motion to Admit Additional Evidence, asking to submit the Student's report card that had been issued by his private school after the hearing date. The District filed an opposition to this motion. I denied the motion in an order submitted on November 4, 2019.[1]

2. Factual Background

The Student attended Elementary School in the District for Kindergarten, First Grade, and Second Grade.

In June of 2018, on the recommendation of the Student's pediatrician at his well-check, the Parents contacted the school principal, with a request to test the Student for dyslexia or other reading difficulties. The principal responded that the Parents should work with his teacher at the beginning of the year to keep a close eye on the Student's progress, and they should remain on a wait list with their pediatrician for further testing. The principal also said that a team could be convened if the start-of-the-year data suggested a need.

[1] While the IDEA does suggest that a party can bring additional evidence on appeal, *Town of Burlington v. Dept. of Educ,* 736 F.2d 773, 790 (1st Cir. 1984), makes clear that additional evidence should be for "gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." This law, of course, focuses on the trial level, but the standards remain at the administrative appeal level – new evidence that was not introduced at the hearing, and that cannot be properly interrogated by both parties for matters of credibility or contradicted or put in context by evidence from the other party cannot be introduced.

The Student began the school year in his assigned classroom. Mother spoke with the Student's teacher about her concerns at the start of the year and again at the interim of the first quarter. In December 2018, the Parents sent the principal a formal request for an evaluation via email. -

The school held a meeting to review the request for an evaluation on January 18, 2019, with the Parents, teacher, principal, a special education teacher and a school psychologist. The notes from this meeting indicate the Student did have some omissions and did not self-correct consistently, but that he had strengths in reading comprehension. (Parent Exhibit 3). Mother reported the Student would leave out full words at home, and that she had concerns with the Student's writing. She said the Student would spend hours on homework. The team suggested the Student use a finger to space words. Mother also reported concerns with writing and the school suggested using a finger to space words and an organizational system to help with homework. The team decided that they did not suspect a learning disability and would not evaluate the Student. (Parent Exhibit 3). The team said they would check in again in 6-8 weeks and would set up a formal Response to Intervention ("RtI") meeting. (Testimony Parent Exhibit 4). The District issued a Prior Written Notice ("PWN") explaining their decision-making. (Parent Exhibit 3).

For the RtI cycle, the school set two goals for the Student: 1) to increase comprehension from a level 5 to level 6, and 2) to increase self-corrects from 20% to 85% on a second-grade level text. Six weeks later, the RtI team met and discussed the Student's progress. Mother was not at this meeting but the teacher called to update her afterwards and said the District felt like he had made progress and thus found no need to evaluate. The meeting notes indicated the team felt he had made progress and would meet again at the midterm of the fourth quarter. The Student had met the comprehension goal. He did not meet the self-correct goal but went from 20 to 40 self-corrects. No data was collected relative to these targets after February 28, 2019.

On May 31, the Director of Special Services, Ms. Metta, received an email from the state ombudsperson for special education informing her that the Parent had raised concerns. Ms. Metta suggested that the team meet in August at the start of the new school year, but the Mother insisted on a meeting immediately. Ms. Metta convened a team for a June meeting. Ms. Metta also told the Mother at this time that the Student qualified for gifted and talented services because of his scores in mathematics.

An evaluation planning meeting occurred on June 20, 2019 (outside of the school year) made entirely of a team of people who had not worked with the Student directly, outside of the Mother. (Parent Exhibit 6). This team again decided not to evaluate the Student. The meeting notes suggest that the team was aware the Mother was unhappy with that decision. (The District exhibited a PWN after this meeting.

Over the summer, the Mother talked with her pediatrician again who continued to suggest the need for an evaluation. The Mother arranged for extra tutoring for the Student over the summer and saw some progress. Mother called the a private school in June. The

Student was assessed by the private school on June 27, 2019. The assessment indicated the Student was behind in reading and recommended that the Student repeat the 2nd grade at the private school as well as receive extra tutoring services through their Vistas program. The private school suggested that the Student be evaluated by a private psychologist. That assessment took place on July 22, 2019, and feedback was provided to the Parents on July 31, 2019. The private evaluator diagnosed the Student with mild dyslexia, moderate dysgraphia, mild Attention Deficit Hyperactivity Disorder ("ADHD") and a generalized anxiety disorder.

On August 6, 2019, the Mother filed a due process hearing request and sent a letter with notice that the Student would be attending the private school. The Student began attending the private school on August 21, 2019, and receives extra tutoring through their Vistas program.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a state review officer ("SRO") and that the SRO must "[e]xamine the entire hearing record" and "[m]ake an independent decision on completion of the review." 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The state review officer must also consider the hearing officer's advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.; Shore Reg'l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.,* 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the local hearing officer are entitled to deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.,* 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.,* 953 F.2d 100, 105 (4th Cir. 1991). However, the state review officer must determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663* (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parent, as the party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

4. Hearing Officer's Findings

The LHO concluded the District provided a FAPE to the Student. The LHO found the District committed a procedural violation of child find for not evaluating the child, but that this violation was harmless because the Student was not in need of special education services. He did not provide a rationale for the finding of a procedural violation; his decision focused on the Student's need for special education services. His finding that the Student does not need special educations services depended heavily on the hearing testimony of the teacher who said the Student was performing in the average range of others in the class. Even though the independent evaluation may suggest that the Student qualifies for special education services, the Student was not underachieving and was progressing normally. No special services were needed, as the current practices were working effectively.

The LHO found that because the District did not know about the private evaluation nor receive the results until after the Due Process Hearing notice was filed, the Parents are not entitled to a reimbursement of costs for the evaluation. Further, the District is not required to reimburse the Parents for the private placement because the Student was making reasonable progress, and thus the District did not deny the Student a FAPE.

5. Discussion

The IDEA protects the rights of children by requiring Districts to identify and effectively educate children with disabilities, or pay for their education at a private institution if they require services that the district cannot provide. *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.,* 585 F.3d 727, 734 (3rd Cir. 2009). 20 U.S.C. §1412. "Child find" is the term used to describe the requ~~ir~~ement of schools to identify children in need of special education services. 34 CFR §300.111(a)(1)(i). Once identified, a school must provide a FAPE to that student. The IDEA does not require schools to provide accommodations to every student who experiences a disability, but only to those who "by reason [of a specific disability], needs special education and related services." 20 U.S.C. § 1401(3)(A) (emphasis added); 34 C.F.R. § 300.8(a)(1). This special education means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . ." 34 C.F.R. § 300.39(a)(1). Specially designed instruction means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3). To summarize: the IDEA does not require school districts to formally evaluate every student with a known disability. Districts must only evaluate those students who, because of their disabilities, are suspected of needing specially-designed instruction to address their unique needs or ensure their access to the general curriculum.

DID THE DISTRICT FAIL TO PROVIDE A FAPE?

The LHO ruled that the District committed a procedural violation by not evaluating the Student. However, the LHO ruled that because the Student was making reasonable progress, he was not in need of special education services and therefore, there was no substantive harm and thus the District provided a FAPE. The Parents are not challenging that there was a procedural violation – but they do challenge the decision that the District provided a FAPE. The response to this challenge turns on the question of whether the Parents have met their burden to prove that the Student is indeed a student with a disability in need of special education services. My review finds the District committed a procedural violation of its child find obligation by failing to evaluate the Student, and that this failure did rise to a substantive violation of the requirement to provide a FAPE.

Child Find Violation

The regulations governing the IDEA Child Find provision require that States have procedures to ensure that all children with disabilities residing in a state are identified, located, and evaluated. 34 CFR §300.111(a)(1)(i). This includes "children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade." 34 CFR §300.111(c)(1). While the regulations do not have specific deadlines for the child find requirement, child find must be "done within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *W.B. v. Matula*, 67 F. 3d 484 (3rd Cir. 1995).

The U.S. Department of Education has also made clear that high cognition and good grades do not rule out the possibility that a student has a disability. In fact, students who have high cognition, have disabilities, and need special education services, are referred to as twice exceptional students and "are protected under the IDEA and its implementing regulations." Melody Musgrove, Ed.D., Director Office of Special Education Programs. *Letter to Delisle*: December 20, 2013, p. 1.

The District argues that they did not suspect a disability because the Student had good grades (As, and Bs), scored within what the school deemed to be average ranges on standardized tests, and was making progress. The Parents argues that the Student had been struggling with specific reading skills since first grade and that they were not seeing improvement in those skills, despite raising the concerns several times with the teacher and administrator. The LHO found the District had committed a procedural violation by not evaluating the Student, but did not provide a detailed rationale for that decision, instead focusing on the next prong - whether this violation was harmless error. (LHO Decision). Below, I explain my rationale for upholding the finding that the District committed a procedural violation. A careful analysis of the Student's test scores, Response to Intervention (RtI) data, teacher's testimony, and Mother's testimony demonstrate that the District should have suspected that the Student had a disability that could be addressed through special education services.

Standardized Test Scores: The school administered three tests throughout the year – the Measures of Academic Progress (MAP), iReady, and Fountas & Pinnell. The Student also took the CoGAT as part of state identification of gifted and talented students. MAP and iReady are computer-based tests. Fountas & Pinnell is a test in which a student reads aloud to a teacher and the teacher tracks their reading and asks questions about comprehension. These tests do not paint a consistent picture of the Student's skills and abilities. Alone, they may not have led to enough of a suspicion of disability to trigger an evaluation, but when taken together with the RtI data, and the teacher and mother's data, are suggestive.

The Student's CoGAT scores were within the average range. The CoGAT is a cognitive screener.

The MAP is taken at least two times every year. In 2016, the Student was in the 75th percentile on the ELA MAP. By 2018, he was only in the 22nd percentile. When questioned, the District said that the 22nd percentile was still in the average range and that his decline in MAP scores could be explained by the fact that the 2nd grade MAP required more reading in second grade and was therefore more difficult. The school psychologist, Ms. Biggers said that average was 25-75th percentile and that 22nd would be low average, but that they typically "look at whether or not a student is within the average range." This dismissal of a low-average score as simply within the average range is concerning especially when looked at in the context of high math MAP scores at the same time and such a sharp decline from 2016 to 2018. Further, if the test was simply more difficult, we would expect a drop in the absolute score – but not the percentile, as it should have been more difficult for all students. The Student did not experience a similar decline in his math scores.

The Student's iReady scores show he moved from grade 1 only to early grade 2. The District testified they only get concerned about iReady scores when they are at least 1.5 or more grade levels behind. However, this student with apparently high cognition was nearly a full grade level behind at the end of second grade.

The Student did make progress in Fountas & Pinnell testing from an instructional level K to a level O over the course of the year. However, in his final test, he had zero self-corrects, which was one of his major goals when going through the RtI process. His fluency remained the same throughout the year.

The teacher's Observations: The Student's second grade teacher, wrote in her referral to RtI that "the Student has a weak phonetic foundation. This interferes with his fluency and comprehension. He does not self-correct when he makes an error. His sight word bank is also very low which affects his reading. Reading his writing is very difficult. He does not put the correct letter sounds together to build words." During testimony, she said that the other students in her class who had number reversals did have IEPs. The Student received A's and B's in her class and he had strengths in comprehension and was excited to write. The Student's teacher saw omissions and some errors in self-correction. The Student's teacher did say the Student was a strong student in her classroom and that she had to work hard to challenge him.

Response to Intervention Goals: After the January meeting, the Student completed one RtI cycle. He had two goals and he met one goal but did not meet the other. The school did not continue interventions after this cycle.

However, a lack of response to RtI should either trigger another round of RtI with more intensive interventions, or an evaluation. Michael K. Yudin, Office of Special Education and Rehabilitative Services, *Dear Colleague*, October 23, 2015.

Testimony of Mother: The Mother raised concerns proactively before the start of the school year and early in the school year, informed by medical advice from her pediatrician. She raised concerns regarding number reversals, writing and spacing, and phonetic skills. At the first meeting to review the request for an evaluation, she raised a concern that homework took 5 hours. She said that the Student would need to take many breaks during spelling homework, and "He missed extracurricular activities because he would not be prepared for a spelling test after we had worked on the same words for days and days." The District's witness remembered that this time was often spent not on homework but on the work of memorizing words for spelling tests. The Student also attended an extra reading program over the summer, and was attending a reading program after school.

This statement should raise significant red flags for a second grader. Further, in identifying children with high cognition who also have disabilities, the U.S. Department of Education instructed that "it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child's current academic achievement reflects the service augmentation, and not what the child's achievement would be without such help." *Letter to Anonymous,* January 13, 2010 (55 IDELR 172), p. 2. I see no evidence that the evaluation team considered the question of what the Student's progress would have been and what his grades would have been without such intensive help from his parents after school and these extra tutoring and reading programs.

District estimony emphasized the importance of the triangulation of data and said that if data pointed in two different directions, then more exploration would be necessary. However, despite the inconsistencies in the data above, the school psychologists who testified about the data used only the data reports to guide their analysis. The special education coach had not looked at the Student's work specifically or met with the student to look for some of the concerns raised by the Mother. They never observed the Student in an academic setting. At a minimum, the data above for the Student does not paint a clear picture of his skills and thus suggests a need for further evaluation. Given the persistence of the Mother's concerns despite an initial attempt at intervention, the amount of effort the Student was exerting at home in order to have A's and B's at school, and the lack of the Student's consistent significant growth in reading, the District should have suspected a disability and should have evaluated the Student. I thus uphold the LHO's finding that the district committed a procedural violation by not appropriately carrying out its child find obligations[2].

Provision of a FAPE

Both parties cite *T.B. v. Prince Goerge's Cnty. Bd. Of Educ.*, 897 F.3d 566 (4th Cir., 2018) in their analysis.[3] In *T.B.*, the court found a procedural violation but did not assign remedies because they found the procedural violation did not amount to substantive harm. In

[2] Note that I have reached this conclusion without any analysis of the evaluations that came over the summer. I am looking solely at whether the District had enough evidence to suspect a disability. Whether the evaluations demonstrate that the Student has a disability will be discussed later; however, I do want to note that they raise enough flags that they support the Mother's belief that an evaluation was necessary.

[3] The District also asserts that *R.F. v. Cecil County Public Schools*, 919 F3d 237 (4th Cir. 2019) should apply. That case involves a claim that the parents were not properly involved in the decision-making around the student's educational plan. The Parents do not make that claim, and thus this case does not hold sway here.

making this decision, T.B. referred to several 4th Circuit examples of when the court has decided that a procedural violation does not amount to substantive harm: 1) Whether the procedural violation causes the student to "lose any educational opportunity." *Burke Cty. Bd. Of Educ. V. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); 2) Whether there were detrimental effects on the substance of the IEP. *Tice v. Botetourt Cty. Sch. Bd.,* 907 F.2d 1200, 1207 (4th Cir. 1990); 3) Whether parents refused to cooperate with the school. *M.M. v Greenville Cnty. Pub. Sch.*, 303 F.3d 523, 535 (4th Cir, 2002)) Whether the student was actually entitled to services. *DiBu v. Bd. Of Educ. Of Worcester Cnty.*, 309 F.3d 184, 191 (4th Cir., 2002). In short, a procedural violation imposes a substantive harm when it causes a student to lose an educational opportunity or have detrimental effects on the substance of the IEP.

The LHO said that there was harmless error here because the child was not in need of special education services. The Parents argue that *T.B.*'s analysis is not whether the child was in need, but whether there was a substantive effect on the child's education. While their analysis is in fact more precise than that of the LHO, it is important to add that a loss of educational opportunity or effect on the IEP can only amount to substantive harm when the student is a student with a disability under the IDEA. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 892 (5th Cir. 2012, unpublished); *Burnett v. San Mateo-Foster City Sch. Dist.,* 739 Fed.Appx. 870 (9th Cir. 2018, unpublished). The substantive harm raised by the parents is a deprivation of the opportunity to benefit from special education and related services, which requires a need for special education. Therefore, the ultimate question is one of need – does the Student qualify as a student with a disability who needs special education services?

Classification of the Student: While the LHO ruled that the Student did not meet the criteria for having a specific learning disability, the Parents argue that the Student should be classified as both having a Specific Learning Disability ("SLD") and as having anxiety disorder and Attention Deficit Hyperactivity Disorder ("ADHD") that would fall within the Other Health Impairment ("OHI") category.

A SLD is defined as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 20 U.S.C. §1401(30), 34 CFR §300.8(c)(10). A multi-tiered system of supports (MTSS) such as RtI can be an acceptable strategy for addressing an SLD. *Dear Colleague* Letter by Yudin p.1. However, if students do not respond, or minimally respond, to interventions, they must be referred for an evaluation. 34 CFR §309(c)(1).

The criteria for determining whether a child has an SLD state that the team must find evidence that the child does not achieve adequately for his/her age or to meet state-approved grade level standards and either 1) does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention, or 2) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments. S.C. Code Ann. Regs. 43-243.1, K, 1&2. Further, the adverse effects of the learning disability on the child's educational performance must require specialized instruction and/or related services. *Id*. The team must also determine that the underachievement is not due to lack of appropriate instruction in reading or mathematics. 34 CFR §300.309(a)(1) and (b).

The South Carolina Code of Regulations standard for Other Health Impairment state that eligibility requires evidence of the chronic or acute health problem, evidence that this problem “results in limited alertness to the educational environment” and that the “adverse effects of the OHI on the child’s educational performance require specialized instruction and/or related services.” S.C. Code Ann. Regs. 43-243.1, 2.

The LHO’s determination that the Student does not have an SLD seems to be based on the following arguments. First, that the Student was not underachieving and was progressing normally in the 2nd grade setting, and that underachievement is necessary under the law. Second, that the private evaluator did not explicitly find that the Student met the South Carolina criteria for a need for special education services. Finally, he said that even with a disability, the District may use RtI before placing the child in special education and therefore the District was already intervening appropriately. S.C. Code Ann. Regs. Sec. 43-132.1(K). The LHO did not rule on whether the Student has an OHI.

These arguments are not sufficient to determine that the Student is not a student with a disability as a legal matter. On the first, as stated earlier, high cognition or progressing grade to grade is not enough to rule out a disability. We must look more deeply at whether the Student is in fact making sufficient progress. Further, the evaluation is raising concerns about the Student not just as a student with a SLD but also as a student with Generalized Anxiety Disorder and ADHD. On the second, the private evaluator's report was meant to present psychological expertise on the Student’s skill but the determination of whether the Student meets the criteria for special education is one that should happen as part of a team meeting reviewing the evaluation. Finally, the regulations do not state that RtI can be used in place of special education, but that lack of progress in RtI can be used as evidence of a need for special education services. 34 CFR §309(c)(1).

Given that the LHO's legal reasoning about whether the Student has an SLD is flawed, I must conduct an independent analysis of whether the Student is a student with a disability that requires special education services. This analysis is necessary to answer the question of whether the procedural violation caused substantive harm and therefore triggers a remedy. This analysis does not upend the facts that the LHO found.

The private psychologist who the Student's parents hired to evaluate the Student conducted the evaluation on July 22., 2019. She was properly qualified as an expert during testimony. She diagnosed the Student with ADHD, an SLD with an impairment in reading, dyslexia, an SLD with an impairment in writing, dysgraphia, and an unspecified anxiety disorder. An assessment expert from the private school who administered the Woodcock-Johnson Achievement test to the Student found the Student significantly behind in reading skills. The District's school psychologist who testified in detail about the validity of both private assessments and said she would not agree with the diagnoses. We have, at this point, a battle between the experts.

I must first look to credibility determinations made by the LHO. While not explicitly stating so, the LHO seems to have determined that the private evaluator was credible. He said the evaluator was qualified to perform the evaluation and administered appropriate tests. This, even in light of the District's school psychologist questioning whether the private evaluator should have conducted more tests where the District's school psychologist saw discrepancies or a need for greater triangulation.

Further, the LHO did not question the validity of the private evaluator's diagnoses and in fact found them to be persuasive in his determination that there was a procedural violation. “Even if there is some question in the light of [the private] evaluation that the District committed a procedural violation by not performing its own violation at parent’s request, the fact that he was progressing normally in the 2nd grade in a general education setting with non-disabled peers shows that the procedural violation is not a determining factor in considering whether the district provided the child was making ‘meaningful’ educational progress.”

I agree with the conclusion that the private report is credible and indicates that the Student has mild dyslexia and moderate dysgraphia. The District's school psychologist’s concerns with the evaluation are not persuasive, as the private evaluator's testimony often addressed the concerns specifically. Further, the District's school psychologist has not seen the Student’s work specifically or worked with him specifically. She also has only looked at the numerical data points. We find explanation for the patterns that she claims are missing in the private evaluation. For example, on the WISC-V, the Student scored average or above average in verbal comprehension, visual spatial and working memory. However, his processing speed was in the 3rd percentile. the private evaluator administered three subtests – on one, the Student scored in the 75th percentile, in another the 37th, and in the final one at the 0.1 percentile. The District's school psychologist said that kind of discrepancy is an issue with the test. However, the private evaluator explained the rationale behind each of these subtests and that the Student was focused throughout all three. However, the final test was the most intensive and challenging, requiring him to copy and do more intensive physical work and looked for reversals. The private evalauator did not use this data to make a generalization, but used it to triangulate with other evidence of dysgraphia and dyslexia by specifically focusing in on the specific skills this subtest looked at.

On other tests, the Student struggled most when asked to write out answers, or when reversals were an issue. He struggled with hearing specific sounds in words and in reading nonsense words. Further, when asked to read out loud, his rate of reading was average but his accuracy was at the 3rd percentile because he skipped or substituted a number of words. These findings correlate with what the Parents notices, as well as explained why the Student may have lower scores on MAP testing in reading than in mathematics. Finally, an outside test also showed that the Student struggled significantly with nonsense words. The District challenged the grade equivalencies in the Woodcock-Johnson outside tests that were used. The percentiles – not the grade levels – reveal concerns that support the private evaluation results. The Student scored at the 1st percentile in word attack, the 8th in spelling, the 11th in written language, the 15th in basic reading skills, and the 16th in writing samples. Both outside assessments validated the Student's strengths in math and math problem solving as well.

The next question is whether his dyslexia or dysgraphia rise to the level that the Student either 1) does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention, or 2) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments. S.C. Code Ann. Regs. 43-243.1, K, 1&2. The pattern of strengths and weaknesses in performance relative to the Student's intellectual development suggests that there is SLD.

The Student's math ability is high enough that he is considered gifted and talented. His comprehension of text and interest in writing is high. However, his disabilities cause him to struggle with the act of writing in particular. The outside assessments demonstrate that the Student has specific areas where reading and writing continue to hold him back. The Student's continued relatively low MAP scores indicate concern and the Student has not yet met grade level goals on iReady. These facts together suggest the Student does in fact have a SLD and qualifies for specific special education services.[4]

Reimbursement for Evaluation

Beginning in the 2019-2020 school year, South Carolina law requires first graders to undergo evaluation for dyslexia. 8 S.C. Code Ann. §§ 59-33-510 through 59-33-550. This change in practice demonstrates how important the state believes it is to identify these concerns in children immediately. The Student was working hard but struggling because of a disability over which he had no control, and the Parents were spending hours working with the Student to overcome this disability without the appropriate level of support. The District failed in its Child Find obligations to the Student, and the Student suffered substantive harm as a result. An earlier evaluation would have helped the Student get services quicker and develop skills more quickly. The Parents should not have had to go to a private psychologist to receive a thorough evaluation.

I therefore order the District to pay for the evaluation conducted by the private evaluator.

[4] I am not providing an analysis of whether the Student has ADHD or an Anxiety Disorder, as I did not hear enough testimony regarding these two concerns. Further, it is unnecessary given that he qualifies for special education services with a SLD. A future IEP team should study the ADHD and Anxiety evaluations and determine whether to add those to the Student's diagnosis.

The Parents are not entitled to reimbursement for private placement.

Generally, "[t]he IDEA grants district courts broad discretion in fashioning a remedy for a denial of a FAPE." *Sch. Dist. of Phila. v. Post.,* 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (Baylson, J.) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)). Among the remedies to which parents may be entitled is a qualified right to tuition reimbursement. When a school district fails to provide a FAPE to a child with a disability "in a timely manner," the parents may unilaterally remove their child to private school and seek reimbursement from the school district. 20 U.S.C. § 1412(a)(10)(C)(ii). However, the reimbursement may be reduced or denied "if the equities so warrant," *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 247-48 (2009). Relevant here, reimbursement may be reduced or denied if "the public agency informed the parents, through the notice requirements described in section 1415(b)(3) . . . of its intent to evaluate the child . . . but the parents did not make the child available for such evaluation . . ." 20 U.S.C. § 1412(a)(10)(C)(iii)(II), or "upon a judicial finding of unreasonableness with respect to actions taken by the parents," 20 U.S.C. § 1412(a)(10)(C)(iii)(III), or based on other equitable considerations. And "[i]n considering the equities, courts should generally presume that public-school officials are properly performing their obligations under the IDEA." *Forest Grove,* 557 U.S. at 27.

This evaluation was conducted on July 22, 2019. The Parents received the results on July 31 and filed for due process on August 6. The District received a copy of the evaluation on August 19, 2019. The Student started school at the private placement on August 21, 2019. In that interim time period, the District offered to hold an IEP meeting to discuss the results of the evaluation and develop a plan. The Parents did not respond to this request.

District payment for a unilateral private placement is intended to occur when the District fails in its duty to provide a FAPE and when they are unable to develop a plan to provide a FAPE. See *Florence Cty. Sch. Dist. 4 v. Carter*, 510 U.S. 7 (1993). While the District did not conduct a timely evaluation, once that evaluation occurred, they were never given the opportunity to develop a plan for how to address the evaluation. The District may be able to meet the needs of the Student within the public school setting, and the Parents were unreasonable in not providing the District with that opportunity. If, on remand, the District fails to provide a FAPE, and if a private school setting is appropriate for the Student, then a claim for private school tuition reimbursement would be appropriate. But those facts are not present here.

Therefore, I deny the Parent's request for payment for the private placement.

6. Conclusion

I affirm the LHO's decision that the District failed in its child find obligations to evaluate the Student. I overturn the LHO's decision that the Student suffered no substantive harm from this failure to evaluate and order the District to reimburse the Parents for the $1,850 cost of the evaluation. I affirm the LHO's denial of a claim for private school tuition reimbursement.

Now, nearly one and a half years after the Student's parent first raised concerns with the school about his disability, the Student has not yet been provided with an IEP. Unless the parents choose to keep him in a private school at their own expense, it is now the District's obligation to convene an IEP team meeting and provide the Student with a FAPE consistent with this decision.

7. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.

Avni Gupta-Kagan

Avni Gupta-Kagan
State Administrative Review Officer

Columbia, South Carolina
November 17, 2019