

UTAH STATE BOARD OF EDUCATION  
SPECIAL EDUCATION SERVICES  
DUE PROCESS HEARING

In the Matter of:	)	
	)	
██████, a Minor Child,	)	
( <i>"the Student"</i> ), by and	)	
through ██████████	)	Case# DP2122-08
<b>and</b> ██████████,	)	
( <i>"the Parents"</i> )	)	
	)	
<i>Petitioners,</i>	)	<b>Memorandum Decision Including</b>
	)	<b>Findings of Facts and Conclusions</b>
	)	<b>of Law and Order</b>
	)	
vs.	)	
	)	
<b>Park City School District</b>	)	
( <i>"the District"</i> )	)	
A Utah Public School District,	)	
	)	
<i>Respondent.</i>	)	

**INTRODUCTION**

A Due Process Hearing pursuant to the Individuals with Disabilities in Education Act ("IDEA") was held on May 25, 2022, through May 28, 2022, at the Park City School District ("the District") Administrative Offices. The Petitioners are often referred to collectively as "the Parent" or "the Parents" and, where appropriate, "Mother" and were represented by Attorneys Amy Martz and Mark Adamson, both of whom participated in the presentation of the Parents' Case. The Attorneys of Fabian VanCott, Joan Andrews and Catherine Bramble, represented the District.

Fourteen (14) witnesses were called who are identified by their job or professional titles for purposes of preserving the confidentiality of the individuals involved in this matter pursuant to the Family Education and Privacy Act ("FERPA"). 20 U.S.C. § 1232g. FERPA provides unique confidentiality protection for persons who participate in the provision of public education and particularly special education. A Personally Identifiable Information Cover Sheet is attached to this Memorandum Decision but is not part of the record and is intended to be removed as an attachment to this Memorandum Decision to protect the confidentiality of the individuals who testified in this matter. Efforts were made in the Memorandum Decision to limit gender identification to further protect the identity of participants in the Student's education process.

- The Parents called as witnesses:
- The Student's Mother
  - The Student's ██████████ Teacher (English)
  - The Elementary School Principal
  - The School Nurse

The District Superintendent  
The District Director of Student Services  
The District School Psychologist  
The Elementary School Social worker  
The Student's Teacher (Spanish)  
The Student's Teacher (English)  
The Student's Father  
The District Speech and Language Pathologist  
The Elementary School Special Education Teacher

The District was given some latitude in the cross-examination of the District employees called by the Parents to include the direct examination that might have occurred if the District had called the District employees in the District's case in chief. The Parents' redirect included the cross-examination of the District employees.

The District, in addition to the witnesses identified above, called as witnesses:

The District Director of Special Education  
The District School Psychologist

One hundred and fifteen (115) exhibits were introduced into the Record. The Exhibit lists submitted by the Parties are made part of the Record and are included in the Transmittal of the Record.

The Parents did not identify or offer a number of the Exhibits which were included on their Exhibit List. The Parents' Exhibits made part of the Record are identified in the Parents' Hearing Exhibit List, which was prepared by the Hearing Officer. Paper copies of the Parents' Exhibits were not provided, and the Exhibits were projected on a screen for the witnesses. Attached to the Parents' Hearing Exhibit List are the Exhibits which were identified, offered, or admitted to the Record, which were reproduced from the digital exhibits submitted by the Parents. The Parents' Exhibit List identifies which Exhibits were identified, whether or not offered and whether or not admitted to the Record. The Parents' Exhibits often contained labels which were argumentative or illustrative of the point to be made by the Exhibit. The labels of the Exhibits are not made part of the Record.

Several Parent Exhibits were redacted prior to their introduction and are identified as "redacted" on the Parents' Hearing Exhibit List. The Parents' Exhibits on several occasions duplicated the District's Exhibits. Where appropriate, reference is made to the Parents' Exhibits which were identified by a number 1-12 and a corresponding letter for identification purposes and the District's Exhibit number.

The Exhibits offered by the District's Proposed Exhibit List were admitted to the Record by the Parents' Stipulation. There are Exhibits which were either prepared or referenced events which occurred after the filing of the Parents' Request for a Due Process Hearing. Though made of part of Record by the admission of the entirety of the District's Exhibits, those Exhibits referencing events or documents after March 28, 2022, were not considered by the Hearing Officer and are identified in the Hearing Officer's Addendum to the District Exhibit List.

The Hearing was recorded by court reporters who were provided copies of the Exhibits which are to be attached to the official transcript of the Hearing. IDEA provides that parents are entitled to the

transcript of the Hearing at no charge, which for this purpose will include Exhibits; however, the Transmittal of the Record includes the Official Record of the Exhibits admitted to the Record.

During the course of the Hearing, the admitted District Exhibits were often identified for the witness by reference to the 'tab' number of the bound exhibits and not the exhibit number on the Exhibit List. Every effort was made to reflect in the Record the relationship of the 'tab number' and the 'exhibit number.' Several of the District's Exhibits were tabbed with duplicated 'tab numbers' and for the witnesses' purposes were identified with '.1 and .2' reference.

IDEA permits parents of a child with a disability to challenge the "identification, evaluation or educational placement of a child with a disability, or the provision of FAPE [a free and appropriate education] to the child." 34 C.F.R. § 300.507(a)(1). IDEA limits the Hearing Officer's consideration of alleged violations to events that occurred not more than two (2) years prior to the filing of the Hearing Request. 34 C.F.R. § 300.507(a)(2).

The date for the completion of the Hearing Officer's Decision is a function of IDEA. 34 C.F.R. § 300.515(a). The Decision is due within 45 days of the completion of the Resolution Period, which the Parties advised was April 18, 2022. The Hearing Officer's Decision is due June 4, 2022.

As a result of the necessity to comply with the decision timeline required by IDEA, the stenographic record was not available. When factual findings are made in this Decision, the basis of that finding if it is based on a witness's testimony is identified by the witness's title or relationship to the Student.

IDEA and the education of a child with a disability contain a language and acronyms which are unique to special education, are often puzzling, and, where appropriate, are referenced by those initials and acronyms, and efforts are made to explain the significance of the special education vocabulary.

The Hearing Officer acknowledges that the issues raised by the Parents of behalf their Child, who for these purposes is identified as "the Student," are complicated, often emotional, and involve a number of issues and public agencies other than the District.

The Parents are passionate, zealous, and caring advocates on behalf of the Student. The Student was described as active, physically larger than peers, compliant, eager to please and helpful.

The Utah State Board of Education (USBE) requires the individual Utah school districts to adopt Special Education Rules consistent with the USBE Special Education Rules ("the Rules"). The District has adopted a Special Education Policies and Procedures Manual ("the Manual") approved by the USBE. (Testimony of District Special Education Director and found at Exhibit 82). No argument was presented that the District's Manual was inappropriate or had not been approved by the USBE.

### ***ISSUES BEFORE THE HEARING OFFICER***

The Parties submitted Prehearing Motions and supporting Memorandums to explain or limit the issues before the Hearing Officer based on the Parents' Due Process Hearing Request. The Hearing Officer entered a Memorandum Decision and Order dismissing Parent Causes of Action which were either time-barred or were beyond the scope of the identification, evaluation, educational placement, or the provision of FAPE to the Student.

For purposes of identifying the issues to be addressed in this Memorandum Decision, the Parents' Causes of Action numbered 8, 9, 10, 11,12, and 13 as set out in the Request for Hearing were considered by the Hearing Officer and are set out below.

This description of the Causes of Action is taken from the Parents' Request for a Due Process Hearing captions and, where appropriate, additional information is included based on the narrative provided in each of the Causes of Action or the proof offered by the Parents. These Causes of Action form the issues resolved by this Memorandum Decision and Order.

The analysis of the Parents' claims begins with a general discussion of the District's obligation to provide FAPE to the Student.

Cause of Action 8: The District failed to identify and evaluate the Student's other disabilities. This cause of action also in the narrative alleges that the District failed to implement the Student's Individual Education Plan ("IEP") as a failure to properly identify the Student's disabilities and that the Student failed to make progress on the goals provided in the Student's IEP. This cause of action is discussed under the failure to evaluate analysis.

Cause of Action 9: The District failed to conduct a three-year evaluation of the Student. The narrative also referenced the alleged failure of the District to timely evaluate the Student's disabilities and is discussed under the failure to evaluate analysis.

Cause of Action 10: The District provided misinformation about the IDEA Procedural Safeguards. The Parents argue that their consent to an amendment to the Student's IEP was involuntary and reference the allegation that the District failed to timely reevaluate the Student. This cause of action is characterized as a 'parental participation' cause of action.

Cause of Action 11: Parents incurred expenses for private educational evaluations in September 2021 which are claimed to be Independent Educational Evaluation ("IEE") expenses for which the Parents are entitled to be reimbursed. This cause of action is addressed under the right to reimbursement analysis.

Cause of Action 12: The District failed to find the Student eligible for services under a Specific Learning Disability ("SLD"). This is essentially an allegation that the District failed to properly evaluate the educational effect of the Student's disabilities and is discussed under the failure to evaluate analysis.

Cause of Action 13: The District failed to evaluate and service the Student's social emotional needs. This cause of action is discussed under the failure to evaluate analysis and includes consideration of whether the Student was bullied and whether the alleged bullying impacted the District's alleged failure to provide FAPE.

Every effort is made in this analysis to address the Parents' claims and to resolve the IDEA issues. There are numerous and continuing issues between the Parents and the District that will not be resolved by this decision.

The analysis of the Parental claims concludes with a determination of whether the District provided FAPE to the Student.

## **BURDEN OF PROOF**

The Parents as the Petitioners in challenges made under IDEA have the burden of proof, *Schaffer v. Weast*, 126 S. Ct. 528 (2005), and are required to establish that the District failed to meet its obligations as required by IDEA by a preponderance of the evidence.

## **MEMORANDUM DECISION AND ORDER**

This is the Memorandum Decision and Order of the Hearing Officer. This Memorandum Decision constitutes the Hearing Officer's Findings of Fact and Conclusions of Law regardless of the form of the Memorandum Decision.

What follows is the chronology of the relevant events and facts for context and to provide a timeline. The Chronology sets out Findings of Fact for purposes of identifying the dates of events or documents that form the analysis included in this Memorandum Decision. Due Process Hearing decisions under IDEA are required to consider the specific timelines and requirements for the education of a child with a disability.

To the extent that the Chronology contains Findings which occur on dates occurring before March 28, 2020, the Findings are for context or are included where the effect of the decision or event may have had an effect on the provision of FAPE within two years of the filing of the Request for a Due Process Hearing.

## **THE CHRONOLOGY**

The Student had been identified as a child with a disability in preschool by the [REDACTED] Public Schools ("[REDACTED]"). The Student had been determined to be eligible for special education as a result of a speech or language impairment and was provided an Individual Education Plan (IEP) dated May 30, 2019. (Ex 501 and 1C).

The Student enrolled in the Park City School District (the District) to begin [REDACTED] in the Fall of 2019.

The Parents provided the District with a copy of the Student's [REDACTED] IEP. (Ex 1D).

The Student was planning to attend [REDACTED] elementary school, which is a dual language immersion school with a variety of academic subjects taught in exclusively Spanish-speaking classrooms and exclusively English-speaking classrooms, depending on the academic subjects. (Testimony of Mother).

The Student had been provided with numerous private therapies in addition to the speech and language services provided in [REDACTED] prior to the Student's enrollment in the District. The Student had experienced the dual language teaching model in [REDACTED]. (Testimony of Mother).

The District requested the Student's Cumulative File from [REDACTED] on August 8, 2019. (Ex 502). The District did not receive the Student's Cumulative File from [REDACTED]. (Testimony of the Speech Language Pathologist ("SLP")).

The District made a referral for Evaluation for Special Education Services on August 8, 2019, referencing the [REDACTED] IEP provided by the Parents. (Ex 503).

The District determined that it did not have sufficient information to accept the Student's [REDACTED] IEP and proceeded to determine whether the Student would be eligible for special education and related services in Utah. (Testimony of the SLP).

The District provided Prior Written Notice ("PWN") and a Consent for Re-evaluation executed by the Parent on September 19, 2019. (Ex 504).

The District also provided PWN dated September 19, 2019, of the existing data to be reviewed to consider the Student's Eligibility for Special Education, including information from the Parents, classroom-based assessments, and a copy of the Student's [REDACTED] IEP. (Ex 505).

The District prepared an Evaluation Summary Report dated September 20, 2019. The Evaluation Summary Report indicated that the Student was performing as expected in the classroom except for speech articulation, specifically /k/ and /g/sounds. Phonemes and Palatals were emergent and stimulative (referencing the process of making sounds). (Ex 506 (Ex 2G was admitted to supplement Ex 506, which was missing page 12 of 14)).

The Student was determined to be eligible for special education as a student with a speech/language impairment. (Ex 508).

The Parent executed PWN and Consent to Initial Placement in Special Education on September 20, 2019, and an IEP dated September 20, 2019, was created. The IEP provided for one articulation speech and language goal. (Ex 509 and 2E).

The District's IEP provided the Student with less speech and language services based on the number of service minutes than had been provided by the [REDACTED] IEP. (Ex 501 and 509).

The [REDACTED] Progress Report showed the Students' progress toward the Student's goals. Relevant here, the SLP reported that the Student had made progress over the school year in sound production and the use of those sounds in sentences. (Ex 510).

The Student [REDACTED] Assessment of Skills (a Report Card) indicated no behavioral concerns, complimenting the Student on kindness, staying on task, and engaging with peers and staff. (Ex 511).

Sometime in March 2020 (and not clearly reflected in the record as to when the injury might have occurred), a photograph of the Student's knee was taken showing bruising on the Student's knee. (Ex 9N).

The Student's IEP was revised on September 18, 2020, updating the Student's Speech and Language Services. The IEP provided for a speech sound development goal and a targeted morphological development goal addressing correct syntax in sentence production. (Ex 513 and 514).

Progress Reports indicated that the Student made progress toward the [REDACTED] IEP speech sound development goal and had mastered the targeted morphological development goal. (Ex 515).

The District sent the Parents a Notice of the Student's Performance on a DIBLES Assessment at the conclusion of [REDACTED]. (Ex 7F). The DIBLES is a standardized assessment administered to all District students. (Testimony of SLP).

The Parent responded to the DIBLES Notice, asking the Principal if the Student had passed [REDACTED]. (Testimony of Mother).

The Parents in an email to the Principal requested that the Student be evaluated for special education services on July 28, 2021. (Ex 2P).

The Parents then requested that the Student be evaluated for eligibility for special education services in an email to the District's Special Education Director on August 12, 2021. (Ex 2Q). The Parents also requested that the District not provide any "Tier 2 Interventions" prior to testing for eligibility, with the exception of the present IEP speech services.

An IEP Team Meeting was held on August 27, 2021. The IEP Team heard the Parents express particularized concerns about the Student and how those concerns affected the Student's progress in school. (Ex 519).

PWN dated August 27, 2021, proposed to evaluate the Student in the areas of academic achievement, social/emotion, hearing, observations, vision, communication, intellectual/cognitive and psychomotor, potential categories of special education eligibility. (Ex 517).

PWN and Consent to Evaluation was signed by the Parent on August 30, 2021. (Ex 520).

The District SLP followed up by email with the Parent on September 2, 2021, indicating what tests were anticipated to be performed in connection with the District's proposed speech testing and following up on information that the Parents were preparing to have the Student privately tested. (Ex 9M).

An Amendment to the IEP Without a Meeting was provided to the Parents dated September 7, 2021. (Ex 523).

While the District was preparing to conduct the evaluations contemplated by the August 30, 2021, PWN, the Parents had a private speech and language evaluation by Sweethouse Speech (referred to as "the Sweethouse Evaluation"). The Sweethouse Evaluation was dated September 9, 2021. (Ex 524).

The District conducted a Physical Therapy educational assessment (Ex 521) and an academic observation (Ex 526) and prepared a Psychological Educational Evaluation Report dated October 6, 2021. (Ex 522, 525, and 528).

The School Psychologist reviewed the Woodcock-Johnson Test of Achievement 4<sup>th</sup> (Ex 522), concluding that the Student demonstrated average, low average, and low Reading skill levels; average, low average and low Writing skills; and average Math skills. (Ex 528). The School Psychologist's evaluation was conducted in early September 2021.

The School Psychologist conducted a Wechsler Intelligence Scale for Children 5<sup>th</sup> (WISC-V) which indicated high average composite index scores in verbal comprehension, visual spatial, and fluid reasoning; average scores in working memory and full-scale IQ; and a low average score in processing speed. (Ex 528).

The Student's General Education Teachers and Mother completed the Behavior Assessment System for Children 3rd (BASC 3) forms. The rater forms were completed in a valid and consistent manner. (Ex 528).

The Teachers' scores were all in the normal range. The Parent scores indicated at-risk in the areas of depression, atypicality and withdrawal, leadership, functional communication, and activities of normal living.

The School Psychologist recommended relaxation training identifying emotional triggers and teaching the relaxation techniques; functional communication training; more time to complete and the reduction of quantitative assignments; activities to increase fluency; ensuring the Student's understanding of directions; study aids; overlearning; memory strategies; classroom materials to match the Student's reading levels; reading for time not number of pages; phonemic awareness; and other language strategies. (Ex 528).

Utah uses a Discrepancy Analysis among other information to determine eligibility for a specific learning disability, which considers the relationship of cognitive/intellectual ability and academic achievement. The results of the Woodcock-Johnson and the WISC-V indicated a severe discrepancy in Reading Comprehension (Ex 529) and in Reading Fluency (Ex 530).

The Parents referred the Student for private psychological testing and provided an Evaluation Report dated October 8, 2021. The Private Psychological Evaluation was conducted on September 16 and September 29, 2021.

The Parent indicated that the Student had been refusing to go to school, was struggling academically, with memory problems and autistic tendencies. (EX 531 and 3J).

The Private Psychologist administered a Stanford Binet 5 for intelligence and cognitive abilities; a Vineland 3 for adaptive functioning; the Kaufman Test of Academic Achievement 3; the California Verbal Learning Test, children's version; BASC-3; a Children Depression Index; and an Autism Diagnostic Test. (Ex 531).

The Private Psychologist indicated caution on the consistency of how questions were answered on the BASC-3 without specifying which rater was being addressed. The Student's strengths were good expressive language skills and the ability to work hard and a supportive and involved family system.

The Private Psychologist's diagnostic impressions were a Specific Learning Disability in reading and writing according to the Diagnostic and Statistical Manual of Mental Disorders 5<sup>th</sup> (DSM-V) and diagnosed a Specific Learning Disability in Reading and Writing.

The Private Psychologist recommended assisting the Student with working memory; an Occupational Therapy evaluation to consider handwriting; an assistive technology evaluation; parental contact of school providers to see if the Student qualified for a 504 Plan or an IEP; a subsequent reading assessment; memorization of sight words; and various consultation with other private or public providers to provide additional reading opportunity and to be aware of worsening mental health related to depression. (Ex 532).

An Occupation Therapy ("OT") Evaluation was conducted, and a Report was dated October 17, 2021. (Ex 533). The Occupational Therapist identified Student weaknesses in a combination of non-motor visual perception, visual motor and manual dexterity creating handwriting challenges, and observed difficulty in the Student's shoe tying.

Under the Elementary School Principal's signature, the results of the Student's benchmark performance on Acadience Reading and Acadience Math were provided to the Parents on October 21, 2021. The standardized results indicated that the Student's performance was well below the testing benchmark for the Student's peers. (Ex 2M).

An IEP Team Meeting was scheduled for October 22, 2021, to consider the evaluation data and renewed eligibility. (EX 532).

Undated drafts of the Notice of Meeting and the Team Evaluation Summary and Written Notice of Eligibility determining the Student's eligibility for special education under the category of a reading SLP were provided to the Parents. (Ex 8F).

A Severe Discrepancy Analysis dated October 22, 2021, was performed using the Private Psychologist's results, indicating that a severe discrepancy did not exist in the area of written expression. (Ex 536).

The Student's IEP Team met on November 2, 2021, to consider eligibility for specific learning disability in reading or writing. An IEP Team decision was not made on the disability category for eligibility. (Ex 539.1).

An IEP dated November 2, 2021, based on the IEP Team Meeting discussion of November 2, 2021, finding the Student eligible as a student with a specific learning disability was discussed. However, the Parents did not consent to the Special Education services proposed. (Ex 548).

The IEP goals included a reading fluency goal for reading 70 words per minute; the retelling of a grade-level passage on a retell rubric including story elements, sequencing, coherence, and overall understanding; the production within a 2-minute conversation using age-appropriate phonemes (L, S, Z, and TH); generation of a complex sentence using targeted conjunctions; and increasing the Student's ability and fluidity to produce a handwritten communication.

The Elementary School Social Worker notified the Student's General Education Teachers in an email copied to the Principal of a November 16, 2021, recess incident involving the Student and two other students who had indicated that one of the other students was going to bring a knife to school the next day and make the students pay who had taken his coat. (Ex 4U).

The Social Worker had discussed the restorative practices used by the District to resolve potential issues with all of the students involved and believed that whatever issues existed between the students had been resolved.

The Parents notified the Special Education Director in an email on November 19, 2021, of their concerns about the lack of sufficient services for the Student and referencing the Parents' request that the Student not receive MTSS (the Rti interventions). (Ex 6Q).

The Parents requested a Communication Evaluation including assistive technology, and the Consent for Evaluation was dated November 22, 2021. (Ex 541).

The Student's Physician reported that the Student was being treated for dyslexia and dysgraphia and recommended a 504 plan on November 23, 2021. In an addendum dated November 23, 2021, the Physician recognized the validity of the private neuropsychological testing and made suggestions for accommodating the Student's disability. (Exhibit 7M).

An IEP Team Meeting was held on December 3, 2021. The proposed IEP goals were not discussed in any detail, but the eligibility decision designating the Student as eligible as a student with a SLD in reading continued to be discussed. The Parents continued to object to the administration of any interventions. (Ex 8V).

The District made an Offer in writing on December 3, 2021, of Free Appropriate Public Education (FAPE) determining that the District would not continue past the 30-day time period for developing an IEP based on the receipt of the District and Private evaluations and would be providing the special education services that the Student had been determined to be eligible as a student with a specific learning disability (SLD) including services in speech, occupation therapy, reading fluency and, reading comprehension. (Ex 547.1).

The District also provided PWN detailing the rationale for the District's refusal to find the Student eligible under the SLD category of written expression and offering to continue to meet as an IEP Team. (Ex 547.1).

An IEP Team Meeting was held on December 9, 2021, to review the November 2, 2021, IEP. (Ex 546). Among the Parents' concerns was the inclusion of parental input in the minutes of the IEP Team Meeting. The District provided PWN of their refusal to add parental-provided information which was not provided to the IEP Team at the time of meeting to the IEP Meeting Minutes. (Ex 547.2).

The necessary Consent and Parent Information Form for an assistive technology assessment had not been provided by the Parent to the District in the December IEP Team Meeting.

The District implemented a Communication Plan dated December 14, 2021, asking the Parents to direct all future communication involving the Student to the District Special Education Director. Responses to the Parent communications would be addressed every two weeks. IEP Team meetings could be arranged at approximately two-week intervals. (Ex 9G).

Parental Consent to the Initial Placement in Special Education was signed January 3, 2022, based on the District's PWN and offer of FAPE pursuant to the November 2, 2021, IEP. (Ex 539.2).

The Parent objected in a hand-written comment to the signature for consent, indicating that the IEP was inadequate and noting that the reading, writing and math eligibility determination was inadequate. (Ex 7E).

A meeting identified as a clarification meeting without a complete IEP Team in attendance was held on January 7, 2022, and attended by District general education and special education staff and the Parent. Handwritten notes of that meeting indicated that the Parent had expressed concern that the Student was suffering injuries at school. (Ex 550).

A meeting with the District's Behavioral Specialist was held on February 9, 2022. The Parent detailed concerns that the Student had been bullied and was refusing to come to school. The Behavioral Specialist suggested ideas to address the Parent's concern. (Ex 552).

Another meeting with the District's Behavioral Specialist was held on February 15, 2022. The Parents expressed concern about the Elementary School's dual language immersion program and after looking at other elementary schools in the district decided to leave the Student at the present elementary school. (Ex 554).

The Assistive Technology Initial Referral form dated February 15, 2022, was provided by the Parent to the District. (Ex 555.1).

An IEP Team Meeting was held on February 18, 2022. The District's Behavioral Specialist offered a behavior plan which provided increased supervision on the playground but did not include a 1:1 aide to accompany the Student as requested by the Parents. (Ex 555).

Subsequent PWN was provided of the District's refusal to provide a 1:1 aide based on a least restrictive environment analysis (Ex 556) and the refusal to change the Student's schedule for special education. (Ex 557 and testimony of the Special Education Director).

Bullying of the Student continued to be a Parental concern, and the District reported that a review of specific incidents was ongoing. (Testimony of the Student Services Director).

The Parents notified the District of situations where the Student was a victim of bullying incidents and noted a call from the School Nurse on March 16, 2022. (Ex 2U).

The Student had seen the School Nurse within the time period relevant here on December 1, 2020, complaining of a stomachache; on May 3, 2021, reporting the Student had been kicked in the groin; on August 25, 2021, after being accidentally kneed in the lip; on September 21, 2021, as a result of another student experiencing a behavioral meltdown throwing a desk in class striking the Student's back; and on September 27, 2021, after falling off a playground glider. (Ex 584).

## **MEMORANDUM DECISION**

### **1. GENERAL CONSIDERATIONS OF THE PROVISION OF FAPE TO THE STUDENT**

The consideration of whether a student receives FAPE begins with an appreciation that the IEP does not provide ideal education but instead requires an analysis of whether the IEP is reasonable considering the unique circumstances of the student. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

The determination of whether a student's IEP substantially complies with the IDEA considers four factors: is the student's IEP individualized based on the student's assessments and performance; is the IEP administered in the least restrictive environment; are the special education services provided in a coordinated and collaborative manner by the educational stakeholders (including the parents); and positive academic and non-academic benefits are demonstrated (for these purposes progress). *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5<sup>th</sup> Cir. 1997).

A school district is not required to offer the best educational program available. So long as the district complies with the IDEA procedural requirements and provides an IEP that allows for appropriate progress, the district has provided the student FAPE. *A.P. v. Sch. Bd. of Fairfax Cnty.*, 122 LRP 12486, 2022 WL 1105076 (E.D. Va. Apr. 13, 2022).

Determining the progress of the student requires more than reliance on a standardized test, which by definition is designed to measure a student's progress without considering the student's individual circumstances. *G.D. v. Swampscott Pub. Schs.*, 27 F. 4th 1, 80 IDELR 149 (1<sup>st</sup> Cir. 2022).

Progress should be determined based on the entire school year. *Lamar Consol. Indep. Sch. Dist. v. J.T.*, --- F. Supp. 3d ---, 80 LDEL 73, 2021 WL 6197312 (S.D. Tex. Dec. 31, 2021).

## 2. THE DISTRICT'S ALLEGED FAILURE TO TIMELY OR APPROPRIATELY EVALUATE THE STUDENT

The Manual consistent with the USBE Special Education Rules (the Rules) provides that a reevaluation of a student with a disability is conducted when the District determines that education or related service needs of the Student warrants a reevaluation or when a parent requests a reevaluation. A reevaluation is to occur not more than once a year unless the parent and the district agree but must occur at least every three years based on the student's date of the determination of eligibility. (Manual II.G).

The Parents claim that the Student should have been reevaluated for special education services based on the date of the reevaluation established in the [REDACTED] IEP, May 30, 2021, three years after the date that [REDACTED] determined that the Student was eligible for special education. (Ex 1b).

When the Student was enrolled in the District, the Student's [REDACTED] IEP was made available to the District. However, the District elected not to adopt the [REDACTED] IEP and made its own eligibility determination. (Testimony of the District's SLP and Ex 504 and 505).

The District adopted a Utah IEP on September 19, 2019, and determined that the reevaluation date was September 19, 2022.

The result of the District's evaluation of the Student "resets" the date of the Student's triannual evaluation. (Manual III. C). The Student's triannual evaluation was to be conducted no later than September 19, 2022.

There was no proof offered by the Parents that the Student was in some fashion underserved by the September 19, 2019, IEP reduction of the service minutes provided in the [REDACTED] IEP. The issue of the reduction of minutes would have been time-barred since the District's adoption of an IEP was September 19, 2019.

The Eligibility Decision made when the District determined in September 2019 that the Student was eligible for speech and language services is beyond the two years the Hearing Officer may consider and could not be challenged in this Due Process Hearing.

The District within the relevant timeframe of this action is not yet required to conduct a triannual evaluation. (Cause of Action 9).

The Parents also allege that the District failed to reevaluate the Student based on the Parents' written and oral requests.

The IEP Team considered the Parents' request for a reevaluation and provided PWN of the District's intention to conduct a reevaluation of the Student's academic achievement, social/emotion, hearing, observations, vision, communication, intellectual/cognitive and psychomotor based on the IPE Team Meeting held on August 27, 2021. (Ex 517).

The School Psychologist conducted a psychoeducation evaluation of the Student consisting of, in the Psychologist's opinion, the necessary tests to determine the then present status of the Student's social and emotional needs and the intellectual and cognitive needs of the Student. (Ex 523-528).

The Parents contended that the Student's Private Psychologist diagnosis of the Student with a specific learning disability in reading and written expression should have been sufficient to qualify the Student for eligibility as a student with a specific learning disability in both reading and written expression.

Evaluations intended to diagnose a child's disability do not entitle the Student to a particular eligibility category. *See, e.g., L.C. v. Tuscaloosa Cnty. Bd. of Educ.*, 67 IDELR 213, 2016 WL 1573269 (N.D. Ala. Apr. 19, 2016), and *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 72 IDELR 1 (11<sup>th</sup> Cir. 2018).

The diagnosis of a disability only addresses one of the prongs required by the District to determine if the Student is a child with a disability and eligible for special education. The District must also assess the educational needs of the Student. (Manual II.I.).

The IEP Team considered the Private Evaluation, acknowledged that the evaluation had been received, included reference to the Private Evaluation in the IEP Team minutes, and included the Private Evaluation in the Student's educational record.

The Parents' Private Evaluation did not identify any clinically significant social and emotional needs of the Student other than a recommendation that the Parents continue to be cautious of the Student's risk of depression.

The Private Psychologist performing the private evaluation did not testify in this matter.

The School Psychologist performed educational tests appropriate for the Student and used a variety of assessment tools, did not rely on a single procedure, used testing instruments that were technically sound and are consistent with the producer of the test and specifically were administered and interpreted by a trained and qualified school psychologist consistent with IDEA. (Testimony of the School Psychologist and Manual II.F).

The District's SLP found that the diagnostic tests performed by the Sweethouse Speech SLP were sufficient for the IEP Team's consideration of the impact of the Student's disability on the Student's education. The District's SLP indicated knowledge of the Student's private evaluator and expressed confidence that the Sweethouse Speech evaluation results were consistent with the District's evaluation procedures and Manual.

The District SLP appropriately and consistent with the SLP's professional judgment did not perform the District's evaluation to avoid the risk that the Student would perform differently on a second SLP evaluation conducted so close in time to the Private SLP evaluation.

The District accepted the results of the Sweethouse Speech evaluation for purposes of the District considering the speech, language, and communication needs of the Student.

The District also conducted a Physical Therapy Evaluation (Ex 521), an Occupational Therapy evaluation (Ex 553), and an Academic Observation (Ex 526) consistent with the District's Manual.

The District timely reevaluated the Student's educational needs completely and consistently with the Manual's requirements and completed the reevaluation in a timely fashion consistent with the IDEA. The District's reevaluation was conducted by a group of qualified professionals and included the Parents.

The Parents failed to demonstrate that the evaluation of the Student was not timely or was incompletely conducted. (Cause of Action 8).

The Parents did not call any educational experts to create any factual or evidentiary question about the District's reporting the Student's progress. The Parents attempted to impeach or cast dispersions on the District's employees called to testify by the Parents. There was nothing provided by the Parents which indicated that the District staff providing educational services to the Student conducted themselves in an unethical, unprofessional, or inappropriate manner.

The Parental concerns about the behavior of the Student at home or the Student's concerns about attending school were appropriate and without more, did not call into question the District's Progress Reports for [REDACTED] and [REDACTED].

The District provided regular and consistent progress reports of the Student's progress toward the annual IEP goals consistent with the Student's IEP.

Progress is determined based on the totality of the student's progress toward the annual goal. *Lamar Consol. Indep. Sch. Dist.*, --- F. Supp. 3d ---, 2021 WL 6197312.

Sometimes progress is not demonstrated by an increasingly elevated linear line. (see Ex 563 for example).

Student progress is measured from the beginning of the school year to the end of the school year. The reports of the Student's [REDACTED] and [REDACTED] progress demonstrated that the Student was making annual progress and was receiving an educational benefit from the speech and language services provided to the Student. The time for reporting annual progress for the Student's [REDACTED] has not arrived.

The Parents failed to demonstrate that Student did not make annual progress toward the Student's IEP Goals. (Cause of Action 8).

The Parents contended that the Student should have been eligible for a Written Expression SLD eligibility determination (not just a Reading SLD eligibility), suggesting in closing argument that if the District would have "just checked the box" it would not have been necessary to file the Request for a Due Process Hearing.

The Federal Regulations implementing the IDEA contain additional procedures for identifying children with specific learning disabilities which are not required to determine eligibility in the other categories. 34 C.F.R. §§ 300.307-300.311.

The determination of the existence of a specific learning disability in Utah employs a Combination Model using Response to Intervention (Rti) demonstrating that the student has not made sufficient progress to meet age or State approved grade level standards and a discrepancy analysis which indicates that a severe discrepancy exists between a student's intellectual ability and the student's academic achievement. (Manual II.J).

The Parents' Psychological Evaluation provided a diagnosis of a SLD, but a diagnosis does not establish eligibility. See *Tuscaloosa Cnty. Bd. of Educ.*, 67 IDELR 213, 2016 WL 1573269. The Student's Psychologist was not called to testify.

The District appropriately used the Combination Model Tool approved by the USBE and consistent with the Rules and the Manual. (Ex 548 and the testimony of the District's School Psychologist and the Special Education Director).

The ability of the District to completely evaluate the Student's eligibility for a written language SLD determination was also affected by the Parents' refusal to permit the Interventions (Rti) necessary to determine the Student's eligibility. The Student's absences beginning in 2022 also affected the District's ability to gather sufficient information to make the SLD eligibility determination requested by the Parents.

Again, the Parents did not introduce any evidence contrary to the testimony of the District employees which could have formed a basis for their claim.

The District cannot "just check the box." The District is required to perform the Combination Model and not consider just one assessment to determine eligibility for SLD. The District considered an appropriate variety of assessments and properly utilized the Combination Model Tool for determining eligibility for a SLD.

The Parents failed to prove that the Eligibility Re-evaluation by the District was insufficient or contrary to the Manual or Rules or the IDEA. (Cause of Action 12).

The District has properly, timely, and completely evaluated the Student's social and emotional needs as previously determined. The remaining question is whether the Student was a victim of bullying and whether that alleged bullying should have been a basis for additional special educational services.

The question of the existence of bullying and the impact on a student's education has become a difficult road for a school district to navigate. The only information available here was the Student's reports of being bullied to the Parents and the anecdotal testimony of the Parents' observations and unsupported but understandable opinions about the behavior of the Student's peers.

The District conducted an investigation of reported bullying incidents and concluded that the reported incidents did not establish that the Student was a victim of bullying. (Testimony of the District Director of Student Services).

The Parents did not call an educational expert on bullying but instead sought to discredit the District Administrators' failure to consistently implement the District's bullying policies. The argument without any additional expertise other than that demonstrated by the District's Superintendent, Director of Student Services, Special Education Director, and the Elementary School Principal failed.

The Parents also argued that the number of the injuries apparently suffered by the Student could only be as a result of the Student being a victim of bullying. The Student was described as physically active and an active participant in recess.

No expert testimony was offered to demonstrate that the Student's injuries were consistent with bullying. The School Nurse's testimony about the circumstances and nature of the Student's alleged injuries was not challenged and was reasonable.

The IEP Team offered the consultation of the District's Behavior Specialist after the District was made aware of the Parents' claims that the Student's attendance was a result of the Student not feeling safe at school or being bullied. (Ex 552 and 553).

The Parental Private Psychologist did not suggest that there were any significant social emotional needs and did not diagnosis any disabilities other than the SLD. (Ex 521).

The District also changed the manner that the [REDACTED] recess was observed and supervised in response to the Parental concern that the Student was not safe, particularly at recess. (Testimony of the District Special Education Director).

Another investigation of alleged bullying was being conducted by the Director of Student Services; however, the results were not available at the time of the Hearing.

There was no showing by the Parents that the Student's social emotional needs were aggravated or the Student's school attendance refusal is a result of being a victim of bullying. (Cause of Action 13).

The Parents failed to meet their burden in Causes of Action 8, 9, 12 and 13.

*3. DID THE DISTRICT ACT TO IMPEDE OR RESTRICT THE PARENTS' ABILITY TO PARTICPATE IN THE STUDENT'S EDUCATION*

IDEA address parental participation in two specific contexts applicable here.

Prior written notice (PWN) of a district's proposal or refusal to initiate or the change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child is required. 34 C.F.R. § 300.503(a).

IDEA requires that the content of the notice include specific information of the district's proposed intent to act or refusal to act. The District provided sufficient and compliant written notice.

The Record clearly reflects the completeness, timeliness, and appropriateness of the PWN provided to the Parents. The District's PWN complied with the IDEA and provided sufficient information as required by IDEA to the Parents.

The Parents also contended that the District provision of written Procedural Safeguards in October 2021 was insufficient.

The District's Special Education Director acknowledged that the USBE had amended the form of the Procedural Safeguards. The District had not received the newest version of the Procedural Safeguards at the time of the October 2021 IEP Team Meeting, and the version provided to the Parents was an outdated version, not the current version.

The Parents did not indicate the difference between the two versions or how the unidentified differences may have affected the Parents' decision making. Without such a showing, there cannot be a procedural violation.

The Parents also argued that the Communication Plan implemented by the District in December 2021 (Ex 9G) impeded and restricted their access to the Student's Educational Providers. The testimony was quite consistent that the Parents frequently emailed District Staff and that the number of 250 emails sent in the [REDACTED] school year may have been a low estimate.

The Communication Plan anticipated that District responses to the Parental emails would include collected information from District Staff and be made within two weeks. IEP Team Meetings could be requested and held every two weeks. Emergency contact from District Staff was permitted.

No evidence was submitted by the Parents that the District failed to respond to a Parental request for an IEP Team Meeting after the implementation of the Communication Plan.

There was no testimony that the District failed in the implementation of the Communication Plan or that the Communication Plan in some way restricted the Parents' participation in the Student's education.

The implementation of a Communication Plan often generates parental objection. It was reasonable for an Oregon School District to require the parent to consolidate her questions and concerns to a single, weekly email to the student's case manager in *Forest Grove Sch. Dist. v. Student*, 73 IDELR 115, 2018 WL 6198281 (D. Or. Nov. 27, 2018).

The District's Communication Plan did not affect the Parents' participation in the Student's education.

The question of whether the Parents may have been retaliated against as a result of their advocacy on behalf of the Student raises issues which are not before the Hearing Officer.

The Parents also alleged that the manner in which the District persuaded the Parents to execute the Amendment to the IEP Without a Meeting form misled them as to the effect of the Amendment of the IEP.

Assuming for the sake of argument, since there was no testimony offered as to how the circumstances of the Amendment of the IEP Without a Meeting would constitute a procedural violation of the IDEA, the Parents did not show that the Student's special education was affected if such a procedural violation has occurred.

The District continued to provide special education and related services consistent with the Student's IEP during the pendency of the Evaluation requested by the Parents. (Testimony of the Special Education Director).

The District further implemented the IEP based on the Student being found eligible as a student with a Reading Comprehension and Fluency Specific Language Disorder.

The District's Offer of FAPE to implement the November 2, 2021, IEP was appropriate and based on the Student's unique educational needs.

The Parents failed to meet their burden as to Cause of Action 10.

#### 4. *THE PARENTS' RIGHT TO REIMBURSEMENT FOR PRIVATE EVALUATIONS*

The IDEA provides for a procedure for parents to request at public expense independent educational evaluations (an IEE). 34 C.F.R. § 300.502.

A parent is entitled to an IEE when the parent disagrees with an evaluation performed or obtained by the district. When requested, the district must either provide the necessary information to the parent on the circumstance of the IEE or file a Due Process Hearing Request.

The District in response to the Parents' request for an IEE provided names of qualified evaluators to perform the evaluation. The potential evaluators on the District list for any number of reasons could not provide the evaluations in a timeframe acceptable to the Parents. The Special Education Director then contacted potential evaluators' offices to determine if the evaluator was available in a reasonable time frame.

The Parents alleged that the District had tainted several of the potential evaluators by the circumstances of the District contact with the potential evaluators. None of the potential evaluators were called to testify.

The Parents provided a private speech evaluation and a private psychological evaluation which were performed without notice to the District. (Testimony of the SLP and Special Education Director).

The Parents did not indicate what evaluations performed by the District they disagreed with or were unacceptable to them. Specifically, the Parents' SLP evaluation was performed before the District had commenced the District's SLP Evaluation.

The Parents did not call as witnesses the private providers nor did they provide any evidence of the cost of the private evaluations. Such proof is necessary to award reimbursement of expenses incurred by the Parents.

The Parents did not meet their burden of proof to show that they were entitled to reimbursement of Private Evaluations. (Cause of Action 11).

## **CONCLUSION**

The Parents failed to meet their burden to demonstrate in the time relevant to this Due Process Hearing Request that the District failed to comply with the IDEA in the identification, evaluation, placement, or provision of FAPE to the Student.

The Parents' proof in each of the Causes of Action before the Hearing Officer was insufficient to establish either a procedural violation or substantive violation of IDEA.

The District demonstrated that the Student was provided a Free Appropriate Public Education.

## **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered that the Parents shall take nothing by way of their Request for a Due Process Hearing and that the Request for a Due Process Hearing shall be and is hereby dismissed in its entirety.

Dated June 3, 2022

/s/ Edwin L. Litteneker

Edwin L. Litteneker  
Hearing Officer