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OCT 13 2016

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

SPECIAL EDUCATION  
SERVICES

[REDACTED]

Student,

v.

Case No. 2016-0011

[REDACTED]

SCHOOL DISTRICT No. [REDACTED]

School District,

Philip C. Misk,  
Impartial Hearing Officer

**FINAL DECISION AND ORDER**

**Background and Educational History**

[REDACTED] will be eleven years of age on October 15, 2016. She currently attends school in [REDACTED] Elementary School District No. [REDACTED] ("District [REDACTED]") and is in the fifth grade. During the 2011-2012 (kindergarten) and 2012-2013 (first grade) school years she was a resident of [REDACTED] School District No. [REDACTED] ("District [REDACTED]"). [REDACTED] and her parents moved to District [REDACTED] after the 2012-2013 school year. Her mother, [REDACTED] and father, [REDACTED] requested this special education due process hearing against District [REDACTED] seeking compensatory educational services. They allege that District [REDACTED] failed to meet its child find obligations under the Individuals with Disabilities Educational Improvement Act ("IDEA"), the Illinois School Code and applicable rules and regulations while [REDACTED] was in kindergarten and first grade and, as a result, it denied [REDACTED] a free appropriate public education ("FAPE") during all or a portion of those two school years.

[REDACTED] was adopted by [REDACTED] and [REDACTED]. Her birth mother was a teenager who had no pre-natal care, did not want to see or have contact with the baby, and would not hold her.<sup>1</sup> Adoption background information made available to [REDACTED] and [REDACTED] indicated that the birth mother was in remedial speech services from second grade to fifth grade, and that there was fetal exposure to second hand and possibly first hand cigarette smoke, caffeine and diet pills.<sup>2</sup>

In 2009, [REDACTED] was enrolled in the [REDACTED] School in [REDACTED]. [REDACTED] is a private pre-school. She was over 3 1/2 years old when she entered [REDACTED]'s pre-kindergarten program. Parents and her pre-kindergarten teacher noticed that she could not put words together into sentences or phrases, needed help with dressing and was not learning numbers and letters. She also had difficulty paying attention.<sup>3</sup>

<sup>1</sup> Testimony of [REDACTED]

<sup>2</sup> Id.

<sup>3</sup> Parents' Exhibits 1-5, identified by [REDACTED] as notes from pre-kindergarten teacher.

In 2010-2011 [REDACTED] moved into [REDACTED]'s junior kindergarten class. Junior kindergarten is for children too old for pre-kindergarten and too young for kindergarten.<sup>4</sup> On February 22, 2011, District [REDACTED] conducted a kindergarten screening for [REDACTED]. The screening was requested by [REDACTED].<sup>5</sup> The Kindergarten Screening Summary Sheet indicates that [REDACTED] performed at the 67<sup>th</sup> percentile in speech/language and at the 80<sup>th</sup> percentile on the Kindergarten Task Inventory (KTI).<sup>6</sup> This screening process consists of vision and hearing, a questionnaire for parents, an interview with parents, a speech/language screening, and the KTI, which is no longer used by District [REDACTED], but looked at the child's knowledge of shapes, colors, numbers and letters.<sup>7</sup> Following the screening [REDACTED] was not recommended for follow up by District [REDACTED] staff.<sup>8</sup> It should be noted that several children screened at the same time were recommended for varying levels of follow up including full case study evaluations.<sup>9</sup>

After [REDACTED] was screened by District [REDACTED] in February, 2011, [REDACTED] her junior kindergarten teacher, completed a District [REDACTED] "Referral for Preschool Screening" on March 17, 2011.<sup>10</sup> Ms. [REDACTED] pointed to certain "red flags" concerning [REDACTED] including her difficulty remembering and following directions, difficulty taking in and understanding information, inconsistent performance from day to day, inability to recall information, short attention span, and difficulty sequencing. She noted that [REDACTED] required frequent repetition of information, and that her overall development as compared to other children the same age was "not as good".

Ms. [REDACTED] testified that [REDACTED] also had socialization and communication issues. She frequently missed social cues, wandered off, did not interact with other children and daydreamed. She could not express her feelings, did not talk a lot, had difficulty explaining a story and sometimes gave off-topic responses. [REDACTED] could not focus for more than a couple of minutes, and most of her peers were able to focus for an average of 20 minutes. Self-esteem issues were also noticed, such as awareness that other children could do more, inability to answer when called on. She was part of the lowest functioning group in the class. [REDACTED] experienced social rejection that was difficult to watch.

Ms. [REDACTED]'s referral of March 17, 2011, caused someone from District [REDACTED] to come out to her classroom to observe, but she could not recall who it was or for what length of time. No record of this classroom observation was provided for the hearing record. [REDACTED] the Special Education Director at District [REDACTED] testified that the Preschool Screening is similar to the Kindergarten Screening the District had just conducted for [REDACTED] in February, 2011, and [REDACTED]'s performance on the Kindergarten Screening showed that she was ready for kindergarten.

For roughly a year starting in January, 2011, until January 2012, the Parents engaged the services of [REDACTED], a private educational business and system. [REDACTED] went to [REDACTED] once a week for thirty minutes. She brought home assignments, worked on sight words, phonetic skills and short phrases. The Parents spent \$1,650.00 for [REDACTED].<sup>11</sup> In the summer of 2011, while [REDACTED]

<sup>4</sup> Testimony of [REDACTED]

<sup>5</sup> Testimony of [REDACTED]

<sup>6</sup> Parents' Exhibit 10.

<sup>7</sup> Testimony of [REDACTED]

<sup>8</sup> Parents' Exhibit 11, PD 19.

<sup>9</sup> Parents' Exhibit 11, PDs 19 and 20.

<sup>10</sup> Parents' Exhibit 12, PDs 22-24.

<sup>11</sup> Testimony of [REDACTED]; Parents' Exhibit 66.

was going to [REDACTED]. Parents hired a private tutor, [REDACTED], a recent college graduate who earned a degree in special education. [REDACTED] worked with [REDACTED] until January, 2012. Sessions with [REDACTED] were a couple of hours per day with play breaks. The Parents paid [REDACTED] \$3,011.00. Megan worked with K.D. on reading and math. The only records provided concerning [REDACTED]'s services pertained to payments made to her by the Parents.

In April, 2011, [REDACTED]'s pediatrician diagnosed her as having Attention Deficit Hyperactivity Disorder (ADHD). The pediatrician prescribed medication for [REDACTED].<sup>12</sup>

In the Fall of 2011, [REDACTED] entered half-day kindergarten at [REDACTED] School in District [REDACTED]. The class had 34 students and lasted 2 ½ hours per day.<sup>13</sup> Her teacher was [REDACTED], an experienced teacher holding licenses in elementary education and special education with training in Orton-Gillingham. She used Orton-Gillingham and phonemic awareness in her classroom instruction and taught decoding using pictures.<sup>14</sup> Ms. [REDACTED] described [REDACTED] as a hard worker and a very happy child. She needed prompts and redirection, but so did other children. She was "eager to please", turned in her homework, and showed improvement during the school year. Ms. [REDACTED] was aware that [REDACTED] attended [REDACTED] received services from [REDACTED] and was privately tutored. Ms. [REDACTED] testified that she did not see letter reversals or problems with retention of information. Attention was an issue when [REDACTED] was off of her medication.<sup>15</sup> On the other hand, [REDACTED] testified that the 2011-2012 school year started out well, but things changed and [REDACTED] started to get upset and complained that school was "too hard" and it was hard to get her to go to school.<sup>16</sup>

[REDACTED]'s report card for kindergarten completed by Ms. [REDACTED] showed that by the third trimester [REDACTED] earned a "C" (constantly demonstrated understanding) in most areas, and earned a "P" (progressing towards independence) in four areas relating to use of time, working independently, listening and following directions and working and playing well with others.<sup>17</sup> [REDACTED] testified that she strongly disagreed with the report card for the third trimester.

During the 2011-2012 school year the Parents and Ms. Bartsch exchanged several email messages about [REDACTED].<sup>18</sup> One of these messages was sent by [REDACTED] on February 28, 2012, in which Parents requested an evaluation of [REDACTED]. Ms. [REDACTED] testified at the earlier Motion hearing that she did not receive this message. [REDACTED] testified that she also communicated with the Principal, [REDACTED] about her concerns for [REDACTED] during kindergarten and this is reflected in some of [REDACTED]'s email messages.

During kindergarten the EasyCBM screening was given to [REDACTED] and her classmates.<sup>19</sup> According to Ms. [REDACTED], this screening was administered by District [REDACTED] tutoring team members. [REDACTED]'s score on the phonemic segmentation portion of the screening dropped from the 65<sup>th</sup> percentile in the fall to the 19<sup>th</sup> percentile in the winter. It rose slightly to the 25<sup>th</sup> percentile in the

<sup>12</sup> Testimony of [REDACTED]

<sup>13</sup> Testimony of [REDACTED]

<sup>14</sup> Id.

<sup>15</sup> Parents' Exhibit 15.

<sup>16</sup> Testimony of [REDACTED]

<sup>17</sup> Parents' Exhibit 18.

<sup>18</sup> Parents' Exhibits 15, 16 and 17.

<sup>19</sup> Parents' Exhibit 19, PD 33.

Spring. Ms. [REDACTED] attributed the drop in [REDACTED]'s score to increased expectations as the school year progressed. [REDACTED], a school psychologist for District [REDACTED] testified that the 25<sup>th</sup> percentile is still within the average range, and noted that [REDACTED]'s raw score rose from 11 in the Winter to 33 in the Spring, showing progress. The Parents' expert witness, [REDACTED] testified that the drop in the phonemic segmentation in kindergarten was significant and should have raised a red flag for District 26.<sup>20</sup>

Before the end of kindergarten the Parents told Ms. [REDACTED] they wanted to find a tutor for [REDACTED] for the summer of 2012. Ms. [REDACTED] recommended someone who would have been a good fit for [REDACTED], but the Parents did not hire the tutor because she was too expensive.<sup>21</sup> The Parents ended up taking [REDACTED] to the SLANT Program. SLANT was recommended by [REDACTED], K.D.'s previous tutor. SLANT is a structured literacy program. [REDACTED] used the SLANT program from August 2012 until May, 2013. The name of the SLANT tutor was [REDACTED]<sup>22</sup> and the total cost of SLANT was \$480.00.<sup>23</sup>

[REDACTED] started first grade at [REDACTED] School in District [REDACTED] in the Fall of 2012. Ms. [REDACTED] was her classroom teacher. Ms. [REDACTED] is an experienced teacher and holds a masters' degree in administration and supervision. She testified that she uses tactile approaches to teaching letters and words and Pegasus pattern books for vocabulary. [REDACTED]'s report card for 2012-2013 completed by Ms. [REDACTED] indicated that [REDACTED] had no areas in which she "needed support". She had a number of areas in which she was "progressing towards independence", and in the others she was marked as "consistently demonstrates understanding".<sup>24</sup> Ms. [REDACTED] testified that the report card shows that [REDACTED] demonstrated growth in learning areas and socialization. She stated that she would have referred [REDACTED] for an evaluation if she was not making progress or losing ground, but she believed that [REDACTED] was making progress. Her main concern was that [REDACTED] would talk with her while she was teaching the class. She noted that [REDACTED] was happy and liked to play.<sup>25</sup>

However, according to [REDACTED], [REDACTED] continued to have anxiety and self-esteem issues in first grade and felt she was not as smart as the other students. Ms. [REDACTED] acknowledged that focus, organization and attention were issues for [REDACTED]. In addition, she recalled an incident when [REDACTED] cut her own hair in class. She also remembered one time when [REDACTED] wandered off and was looking into another classroom and went to the water fountain. She recalled [REDACTED] telling her that there were problems getting [REDACTED] out the door to go to school. In fact, [REDACTED] was absent thirty-two days in first grade.<sup>26</sup> Ms. [REDACTED]'s Third Trimester Comments on the report card indicated a struggle with concentration and recall of information and a preference for verbalization rather than written answers.<sup>27</sup>

[REDACTED] received some support services in first grade, but did not have an IEP or a Section 504 plan. She received some occupational therapy (OT) support from [REDACTED], an occupational

<sup>20</sup> Testimony of [REDACTED]

<sup>21</sup> Testimony [REDACTED]

<sup>22</sup> Id.

<sup>23</sup> Parents' Exhibit 65, PD 189-204.

<sup>24</sup> Parents' Exhibit 36.

<sup>25</sup> Testimony of [REDACTED]

<sup>26</sup> Parents' Exhibit 34.

<sup>27</sup> Parents' Exhibit 36, PD 62.

therapist employed by District [REDACTED]. The OT services consisted of brushing requested by the Parents for sensory issues and the use of headphones to reduce distractions. Ms. [REDACTED] testified at the Motion hearing that she did not have or need a prescription for OT services because she was teaching [REDACTED] to brush herself and not providing direct therapy.<sup>28</sup> According to Ms. [REDACTED], [REDACTED] was receiving outside OT services at this time. There are no OT evaluation reports or service records in the hearing record.

There was also testimony in the Motion hearing from [REDACTED], a District [REDACTED] school social worker, that he provided some school social work services to [REDACTED] during first grade. He recalled that [REDACTED] was having attention and focus issues, off-task behaviors, and had a hard time leaving home to attend school. Mr. [REDACTED] also remembered attending one meeting for [REDACTED] during the 2012-2013 school year. He was unable to recall how long he worked with [REDACTED]. There are no social work evaluations or reports in the hearing record.<sup>29</sup>

[REDACTED] also received some academic support in the first grade from [REDACTED], a learning disabilities resource teacher. Ms. [REDACTED] testified at the Motion hearing on December 4, 2015. She stated that she would work with children with IEPs in the classroom and occasionally [REDACTED] would join one of her small groups. She remembered working with [REDACTED] on math and writing, probably four to six times. Ms. [REDACTED] and Ms. [REDACTED] testified that [REDACTED] was not receiving RTI (Response to Intervention) in first grade, and there is no RTI data in the hearing record.

Another noteworthy event during [REDACTED]'s first grade school year was a meeting on March 12, 2013, described by [REDACTED] as the "Spanish Inquisition".<sup>30</sup> According to [REDACTED], this was a meeting requested by the Parents in an effort to find out what assistance could be made available for K.D. The Parents felt that no one was paying attention to their concerns. As a result of the Motion to Dismiss and a hearing held on November 19 and December 4, 2015, findings and a determination on several key procedural issues have been made and that will be discussed further in the Procedural History section of this decision.

[REDACTED] and her Parents sold their home and moved to [REDACTED] Elementary School District [REDACTED] in the summer of 2013. Parents testified that they believed they were never going to receive the special help [REDACTED] needed from District [REDACTED].

[REDACTED] has attended school in District [REDACTED] since the second grade. In 2013-2014 [REDACTED] was in Title I reading and RTI. She was not evaluated for special education eligibility in second grade and did not have an IEP.<sup>31</sup> According to [REDACTED], the second grade teacher told her that [REDACTED] was "far behind". There were some discussions about doing an evaluation, but, after waiting, the Parents decided to obtain two outside evaluations.<sup>32</sup> There are no documents in the hearing record regarding the concerns of District [REDACTED] staff, the services provided to [REDACTED] in second grade or her educational progress that year.

In July, 2014, [REDACTED] was evaluated via web-conferencing by [REDACTED], M.Ed. of Lexercise.<sup>33</sup> [REDACTED] testified that she learned of Lexercise on the Internet and the evaluation was done at the

<sup>28</sup> Testimony of [REDACTED], 11/19/15.

<sup>29</sup> Testimony of [REDACTED], 12/4/15.

<sup>30</sup> Testimony of [REDACTED], 11/19/15.

<sup>31</sup> Testimony of [REDACTED].

<sup>32</sup> Id.

<sup>33</sup> Parents' Exhibit 41.

request of the Parents. Ms. [REDACTED] found that [REDACTED]'s literacy skills were "not functional for grade level work"; she "cannot access printed curricular materials at grade level"; her oral language comprehension was below average range, and her reading comprehension is "complicated by neurolinguistics deficits (e.g., phonological awareness and phonological memory)." Among other things, she recommended individualized instruction using an evidence-based, multisensory, structured language approach, often referred to as the Orton-Gillingham approach. She also recommended assistive technology such as text-to-speech technology, sentence correction software and organizational software.<sup>34</sup>

Following the [REDACTED] evaluation, in September, 2014, the Parents retained [REDACTED] Ph.D., a pediatric neuropsychologist in private practice, to conduct a neuropsychological evaluation of [REDACTED].<sup>35</sup> Dr. [REDACTED] was given a health and developmental history by the Parents and used a number of assessment procedures in her evaluation of [REDACTED]. Dr. [REDACTED]'s conclusions were consistent with those of Ms. [REDACTED].<sup>36</sup>

Dr. [REDACTED] testified that [REDACTED] has an average IQ and should be able to learn at grade level, including reading, with proper instruction. She found that [REDACTED] has dyslexia, a language processing disorder and weak working memory, and requires appropriate intense evidence-based highly sequential multi-sensory interventions. She was not ready to find that [REDACTED] has a math disability, but recommended further assessments to rule it out. She also found that [REDACTED] has sensory issues that interfere with her ability to attend to tasks such as sensitivity to clothing and recommended an OT evaluation. She also recommended a speech and language evaluation.

In Dr. [REDACTED]'s opinion, [REDACTED] could have caught up to grade level in reading if she had received appropriate services in kindergarten or first grade. She also stated that the longer structured literacy interventions are delayed, the most difficult it is to catch up.

Dr. [REDACTED] identified as a key "red flag" for District [REDACTED]'s 32 absences during the first grade. She further stated that assistive technology is usually not recommended in kindergarten or first grade, and that it would be hard to predict how much [REDACTED] would have progressed with her ADHD and executive functioning had she received services in kindergarten or first grade. She noted that the ADHD did not cause [REDACTED] to make the types of reading errors she saw. She also pointed out that [REDACTED]'s progress on the 2012-2013 NWEA Student Progress Report conducted by District 26 was lower than the progress expected from the typical student even though [REDACTED]'s scores were in the average range and noted that this screening mainly looks at vocabulary and comprehension, not fluency, and is not timed.<sup>37</sup>

The Parents gave Dr. [REDACTED]'s evaluation report to District [REDACTED]. According to [REDACTED], District [REDACTED] conducted its own case study evaluation soon after it received the [REDACTED] report. The current District [REDACTED] IEP states that the District [REDACTED] evaluation was completed on February 9, 2015, approximately five months after Dr. [REDACTED] issued her report.<sup>38</sup>

The District [REDACTED] evaluation was not submitted into the record. District [REDACTED] developed an IEP for [REDACTED] for 2015-2016 that is also not in the record. The revised IEP of March 8, 2016 was

<sup>34</sup> Id., PD 82-84.

<sup>35</sup> Parents' Exhibit 44.

<sup>36</sup> Testimony of [REDACTED].

<sup>37</sup> Parents' Exhibit 37.

<sup>38</sup> PD 121.

Introduced as Parents' Exhibit 48. That IEP was revised on April 25, 2016, and again on May 27, 2016.<sup>39</sup>

is now in the 5<sup>th</sup> grade in District 15. She receives two hours per day of Wilson Reading instruction and thirty minutes per day of math resource services. She also uses assistive technology and has accommodations for her ADHD and executive functioning issues.

### Procedural History

The Parents and , by their attorney, filed a request for a due process hearing against District 26 on July 14, 2015. The request was forwarded to the Illinois State Board of Education by the District's attorney on July 20, 2015. On July 24, 2015, counsel for District 26 filed a Response to the Due Process Complaint Notice and a Motion to Dismiss on the grounds that the Parents' Due Process Complaint was not timely filed under the IDEA two-year Statute of Limitations.<sup>40</sup> This hearing officer was appointed on July 27, 2015, after one of the parties substituted the first hearing officer. On August 6, 2015, the Parents' and 's attorney filed a Response to the District's Motion to Dismiss, and the District filed a Reply to the Response on September 3, 2015. The parties agreed to use State-sponsored Mediation. Mediation was unsuccessful, but negotiations have continued throughout the course of this case.

After reviewing the Motion to Dismiss, Response and Reply, and discussing the pending Motion with counsel, this hearing officer determined that there were issues of fact that required a hearing to determine whether the withholding of information exception to the Statute of Limitations applied in this case.<sup>41</sup>

The Motion hearing was held at the administrative offices of District on November 19, 2015, and completed by teleconference on December 4, 2015. The parties submitted written closing arguments on December 11, 2015. On December 31, 2015, an Order denying the Motion to Dismiss was issued.<sup>42</sup> In that Order this hearing officer found that the Parents had established by a preponderance of the evidence that they had requested an evaluation of and had frequently raised concerns about , with District 26 staff. There was nothing in the record showing that they had ever received a notice of procedural safeguards from District 26, or that they had been given any proper written notice denying their request for an evaluation. In the Order there is also a finding that the Parents would very likely have filed for a request for a hearing if they had been informed of their rights while , was a student in District 26. Accordingly, the Parents were allowed to proceed to a due process hearing on their claims for compensatory services.

Pre-hearing conferences were convened on February 2, 2016, and May 19, 2016. The parties agreed to hearing dates of September 20, 21 and 22, 2016, after efforts to schedule a hearing prior to the 2016 summer break were unsuccessful due to the unavailability of witnesses.

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<sup>39</sup> PD 140-141.

<sup>40</sup> 20 U.S.C. 1415 (f)(3)(C).

<sup>41</sup> 20 U.S.C. 1415 (f)(3)(D).

<sup>42</sup> School District Exhibit 3.

## Jurisdiction

This hearing officer has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, et seq., and the Illinois School Code, 105 ILCS 5/14-B.02a, et seq.

## Issues and Requested Relief

The issues in this case are (1) should District ● have conducted a full initial individualized evaluation for ● in kindergarten or first grade (i.e., did District ● violate the "child find" requirements of IDEA), (2) would ● have been found eligible for special education at that time, (3) if so, as a result of the District's failure to evaluate ●, was she denied FAPE, and (4) did the procedural violations found as a result of the hearing on the Motion to Dismiss impede ●'s right to FAPE, significantly impede the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to ●, or cause a deprivation of educational benefits?

Parents are seeking an Order directing District ● to provide compensatory services to ●. Specifically, their Due Process Complaint requests (1) reimbursement for private tutoring and services from August, 2011 to July, 2013; (2) two summers of intensive intervention focusing on reading and writing; (3) one hour per week for two school years of therapy or intervention focusing on executive functioning and attention; (4) other relief as deemed appropriate.

In addition, their closing argument specifies that the two summers of reading and writing interventions should take place at Lindemood-Bell and also include math tutoring and transportation. They are also requesting two hours per week for two school years of reading, writing and math interventions and transportation. Finally, they are asking for payment of the costs of the ● School for the 2009-2010 and 2010-2011 school years, totalling \$10,945.00, and \$268.74 for records retrieval.

The District is requesting that relief be denied in this case.

## Burden of Proof and Standard of Proof

The party seeking relief has the burden of proof in a special education due process hearing. The Parents have the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49 (2005). The standard of proof is a preponderance of the evidence.

## Findings of Fact

1. ● will be 11 years of age on October 15, 2016. She attends school in District ● and is currently in fifth grade.
2. ● attended school in District ● in the 2011-2012 and 2012-2013 school years and moved to District ● during the summer of 2013.
3. ● did not have an IEP or a 504 plan during the time she attended school in District ●.

4. District [REDACTED] did not conduct an initial individualized comprehensive evaluation of [REDACTED] when she was a student in the District.
5. District [REDACTED] provided some support services for [REDACTED], such as social work, occupational therapy assistance and resource teacher services in first grade. She was given some accommodations for her ADHD such as preferential seating and repetition during kindergarten and first grade.
6. From the time [REDACTED] entered pre-school the Parents proactively sought services and supports to assist [REDACTED], including enrollment in a private pre-school, hiring of tutors, using the services of [REDACTED] and [REDACTED], obtaining an assessment by the [REDACTED], [REDACTED] arranging two private evaluations of [REDACTED] in 2014, and attempting to secure school-based services in District [REDACTED] and District [REDACTED].
7. The Parents incurred the following costs for private services from the Fall of 2009 to the Summer of 2013, when they moved out of District [REDACTED]:
  - [REDACTED] School: \$10,945.00<sup>43</sup>
  - Private Tutor([REDACTED]): \$3,015.00<sup>44</sup>
  - [REDACTED] Services: \$1,650.00<sup>45</sup>
  - [REDACTED] Tutor([REDACTED]): \$480.00<sup>46</sup>
8. District [REDACTED] conducted child find activities through advertising, enrolling children transitioning from the Early Intervention system, providing information on the District's web site, a pre-school census for parents, private school proportionate share services that included [REDACTED] School, and pre-kindergarten referral forms that are provided to pre-schools, such as the one Ms. [REDACTED] completed for [REDACTED].<sup>47</sup>
9. The District [REDACTED] child find process was adequate to inform [REDACTED]'s Parents of available services from District [REDACTED] when they enrolled [REDACTED] in [REDACTED] School in 2009-2010 and 2010-2011.
10. [REDACTED]'s parents did not request payment by District [REDACTED] for the [REDACTED] pre-school prior to or during her enrollment in Goddard.
11. [REDACTED]'s parents did not request tutoring services from District [REDACTED] or request payment for such services from District [REDACTED] prior to securing the services of [REDACTED], [REDACTED] and [REDACTED] or during the provision of such services. They asked Ms. [REDACTED] for a recommendation for a tutor for the summer of 2012 and she provided them with the name of a potential tutor for K.D.
12. The only information in the record regarding the private tutoring services obtained for [REDACTED] by her parents are the payment records and [REDACTED]'s testimony regarding the general subject areas of the tutoring.

<sup>43</sup> Parents' Exhibit 62.

<sup>44</sup> Parents' Exhibit 67.

<sup>45</sup> Parents' Exhibit 66.

<sup>46</sup> Parents' Exhibit 65.

<sup>47</sup> Testimony of [REDACTED].

13. [REDACTED] was in kindergarten for a half-day during the 2011-2012 school year and there were 34 children in the classroom. Ms. [REDACTED] is an experienced elementary school teacher who has training in Orton-Gillingham. She monitored [REDACTED]'s progress and communicated with the Parents. She did not refer [REDACTED] for a full evaluation based upon her observations and assessments of [REDACTED].
14. The EasyCBM screening results during kindergarten showing a drop in [REDACTED]'s phonemic segmentation scores from the Fall to Winter were not, in and of themselves, sufficient to have triggered a full evaluation of [REDACTED], given that this was only a screening, a student can have a bad day, her raw score increased from Winter to Spring and her percentile increased slightly during that time. Given the conflict between Ms. [REDACTED]'s testimony and Dr. [REDACTED]'s concerning the significance of the EasyCBM results, no definitive finding can be made that this was a red flag for the District.
15. [REDACTED] was absent 32 days during the first grade.
16. The Parents requested an evaluation of [REDACTED] during a meeting that occurred on March 12, 2013, that involved the Parents, Ms. [REDACTED] and several student support staff.
17. The finding in the December 31, 2015, Order that District [REDACTED] did not provide [REDACTED] Parents with notice of procedural safeguards as is required by IDEA is confirmed.
18. District [REDACTED] did not provide proper written notice to [REDACTED]'s Parents in response to their requests that [REDACTED] be evaluated by the District.
19. [REDACTED] and her Parents moved out of District [REDACTED] and into District [REDACTED] during the summer of 2013.
20. District [REDACTED] did not develop an IEP for [REDACTED] in 2013-2014 when she was in second grade. [REDACTED] was put into the Title I reading program and RTI.<sup>48</sup> There is no RTI data in the record for the second grade and no documentation of her performance in second grade.
21. [REDACTED]'s Parents obtained a private evaluation by [REDACTED] in July, 2014. The evaluation was conducted by [REDACTED], M.Ed., of Raleigh, N.C., by web conference.<sup>49</sup> The use of web conferencing to conduct an evaluation of a child with an attention deficit was questioned by Ms. [REDACTED], Ms. [REDACTED] and Dr. [REDACTED]. These concerns have validity and diminish the reliability of the testing results to some extent.
22. In September, 2014, [REDACTED], Ph.D. was retained by the Parents to conduct a neuro-psychological evaluation of [REDACTED].<sup>50</sup> The results were consistent with Ms. [REDACTED]'s findings. Some of Dr. [REDACTED]'s testing procedures were questioned by the District's witnesses.<sup>51</sup> The lack of teacher rating scales and in-school observations are of particular concern.<sup>52</sup> However, Dr. [REDACTED]'s findings are substantiated when

<sup>48</sup> Testimony of [REDACTED].

<sup>49</sup> Parents' Exhibit 41.

<sup>50</sup> Parents' Exhibit 44.

<sup>51</sup> Testimony of [REDACTED] and [REDACTED].

viewed in the context of the Salisbury evaluation and the 2015 eligibility determination by District [REDACTED]. The Parents gave Dr. [REDACTED]'s report to District [REDACTED].<sup>52</sup>

23. District [REDACTED] conducted a full evaluation of [REDACTED] during the 2014-2015 school year when [REDACTED] was in third grade, after it received Dr. [REDACTED]'s report.<sup>53</sup> The reports from the District [REDACTED] evaluation were not offered into the hearing record and there is nothing in the record about the findings and recommendations of the District [REDACTED] evaluation team. The District [REDACTED] IEP that is currently in effect for [REDACTED] states that the District [REDACTED] testing was completed on February 9, 2015.<sup>54</sup>
24. District [REDACTED] first developed an IEP for [REDACTED] on March 9, 2015. The date of the IEP is referenced in a document titled "Additional Notes/Information" dated May 27, 2015, and included as part of Parents' Exhibit 48.<sup>55</sup>
25. The March 9, 2015, IEP was not offered into the record and there was no testimony about its content.
26. Consistent with Dr. [REDACTED]'s and Ms. [REDACTED]'s evaluations, District [REDACTED] has determined that [REDACTED] has multiple disabilities, including dyslexia and ADHD. She is currently receiving two hours per day of special reading and literacy instruction using the Wilson Reading System<sup>57</sup> and thirty minutes per day of resource instruction in math. She uses assistive technology and receives many accommodations and modifications for her learning disabilities, ADHD and executive functioning disorder. [REDACTED] also receives extended school year (ESY) services in the form of individual tutoring.<sup>58</sup>
27. [REDACTED]'s Parents had [REDACTED] assessed by [REDACTED] Centers in June, 2014, December, 2014, May, 2015, and, most recently on September 10, 2016.<sup>59</sup> These assessments provide a snapshot of [REDACTED]'s academic achievement in reading and math by providing a grade level equivalent score. The September 10, 2016 grade level equivalent in reading was 2.6 (6<sup>th</sup> percentile) and 3.9 in math (27<sup>th</sup> percentile).<sup>60</sup> As Ms. [REDACTED] and Ms. [REDACTED] pointed out, these scores are of limited value because the reports do not indicate the testing instruments used, and checklists provided are not clear as to whether they are standard recommendations or specifically applicable to [REDACTED] Ms. [REDACTED] also expressed concern about the use of grade equivalency scores.
28. [REDACTED] testified that [REDACTED] can comfortably read a book written for the end of second grade or beginning of third grade level. While [REDACTED] is not a reading specialist, her observations in light of her consistently significant involvement in [REDACTED]'s educational process merit consideration in light of the other information on the record.

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<sup>52</sup> Id.

<sup>53</sup> Testimony of [REDACTED]

<sup>54</sup> Testimony of [REDACTED]

<sup>55</sup> Parents' Exhibit 48, PD 121.

<sup>56</sup> PD 141.

<sup>57</sup> Parents' Exhibit 49.

<sup>58</sup> PD 134-138.

<sup>59</sup> Parents' Exhibits 39, 40, 42, 43, 46, 47, 50 and 51.

<sup>60</sup> Parents' Exhibits 50 and 51.

29. The Parents are most concerned about [REDACTED]'s ability to read and write, according to [REDACTED]
30. The State Reading Instruction Advisory Group issued a "Reading Instruction Best Practices Related to Dyslexia" report in June, 2016, three years after [REDACTED] left District 26. The report cites research from the early and mid-2000s indicating that early phonemic awareness development is key if a young child is to become a reader. The report stresses kindergarten and first grade instruction in early literacy skills and the importance of identification of identifying students who may need additional small group instruction in phonemic awareness.<sup>61</sup> Consistent with Dr. [REDACTED]'s report and testimony, the report cites research from 2003 showing that brain scans of dyslexic kindergarteners and first graders who have benefited from a year's worth of targeted instruction start to resemble those of children who have never had any difficulty reading.<sup>62</sup>
31. Based upon the testimony of Ms. [REDACTED] and Ms. [REDACTED] District [REDACTED]'s practices regarding the early identification of children with dyslexia like [REDACTED] are out of step with research cited above that was available when [REDACTED] was a student in the District. Ms. [REDACTED], for example, could not recall any student who had been diagnosed with dyslexia before the third grade.

### Conclusions

District [REDACTED] should have evaluated K.D. to determine if she had a disability.

IDEA requires states to have in effect policies and procedures to ensure that all children with disabilities, regardless of the severity of their disability, who are in need of special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a)(1). While the District's general child find procedures as described by Ms. Thomas seem appropriate, the child find process as it pertained to [REDACTED] was flawed.

The standard in establishing whether a school district has failed to identify a student with a disability is that the district has overlooked clear signs of a disability, was negligent in failing to order testing, or had no rational justification for not deciding to evaluate the child. *Demarcus L. v. Board of Education of the City of Chicago, District 299*, 63 IDELR 13 (N.D. Ill. 2014) (quoting *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 313 (6<sup>th</sup> Cir. 2007)).

Clear signs of a disability started with the [REDACTED] referral in March, 2011. The Parents' requests and their determination and efforts to assist [REDACTED] starting with [REDACTED] were also red flags that should have been considered.

However, Ms. [REDACTED]'s reluctance to refer [REDACTED] for an evaluation in kindergarten was reasonable given the limited time she had with her students each day, the number of children in the classroom, the progress [REDACTED] seemed to be making, and the outcome of the Kindergarten Screening in February, 2011. Ms. [REDACTED] was aware of [REDACTED]'s attention deficit, but had reasonable justification for monitoring [REDACTED] during kindergarten and not referring her for an

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<sup>61</sup> Parents' Exhibit 57, PD 171.

<sup>62</sup> PD 172.

evaluation, just as Ms. [REDACTED] was justified in waiting until March of the 2010-2011 school year to make a referral to District [REDACTED] so she could observe and try different interventions.

The clearest sign that something was seriously amiss was during the first grade when [REDACTED] had an excessive number (22) of absences. The District was aware of her reluctance to go to school, and school social worker [REDACTED] assigned to provide some assistance for [REDACTED]. The Parents very clearly communicated to the School District their belief that [REDACTED]'s attendance issues and the difficulty getting out the door in the morning had to do with [REDACTED]'s learning problems and her self-esteem issues. This should have triggered a full evaluation when considered in the light of other available information.

**If K.D. had been received a comprehensive and individualized evaluation by District 26, she would have been found eligible for special education services.**

We may not have a complete diagnostic profile of [REDACTED]. All of the screenings and evaluations in the record have some limitations and flaws, and we are missing some information, most notably the District [REDACTED] evaluation in 2015 and the IEP written during the third grade. However, the Parents have established by a preponderance of the evidence that [REDACTED] has multiple disabilities, including dyslexia and ADHD. Dr. [REDACTED]'s conclusions appear to be on target and are remarkably similar to Ms. [REDACTED]'s. In addition, District [REDACTED] has found [REDACTED] eligible due to multiple disabilities and its current IEP services reflect the major recommendations of Dr. [REDACTED]. Granted that Dr. [REDACTED] and District [REDACTED] did not evaluate [REDACTED] until the third grade, when symptoms of dyslexia might be more apparent. However, the research presented by the Parents cited by the State Board of Education's reading advisory committee clearly shows that dyslexia can be diagnosed at the kindergarten or first grade levels and addressed through appropriate interventions. In addition, Dr. [REDACTED]'s testimony was persuasive as to the importance of early intervention for dyslexic children.

**The failure to evaluate K.D. resulted in the denial of FAPE.**

Clearly, if [REDACTED] had been evaluated and identified early as having the disabilities she is now known to have, an IEP would have been written for her in first grade and more structured and intensive interventions in reading, spelling and writing would have been provided with measureable goals and benchmarks. It is hard to say whether she would be reading at grade level now had she received structured literacy training in the first grade<sup>63</sup>, but it is very likely that the failure to provide such individualized and structured literacy services caused educational loss and she would be reading at a higher level now. In regard to math and other areas now addressed in her IEP, it is unclear whether she lost educational benefit. The most apparent area of loss for [REDACTED] is in reading and language arts.

**The District's procedural violations denied the Parents a meaningful opportunity to participate in the decision-making process regarding the provision of FAPE and resulted in the denial of FAPE.**

Given the record of parental involvement in this case, there is a strong likelihood that, if the Parents had been advised of their procedural safeguards, including the right to request independent educational evaluations, seek mediation or file for a due process hearing, these parents would have done everything in their power to seek services for [REDACTED] from District 26.

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<sup>63</sup> Testimony of Dr. [REDACTED]

The record supports the conclusion that the Parents would have utilized the procedural tools available to them to secure services for [REDACTED], if they had been aware of them.

### Compensatory Services

A hearing officer may award aggrieved parents and students appropriate relief including the equitable remedy of compensatory education. *Demarcus L. v. Board of Education of the City of Chicago District 299*, 63 IDELR 13 (N.D. Ill. 2014). The Seventh Circuit has not as yet determined a standard for determining the nature, amount or duration of compensatory services. However, Illinois federal district courts have followed the subjective approach adopted by the D.C. Circuit in *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). *Minor T.G. v. Midland Sch. Dist. 7*, 848 F.Supp. 2d 902 (C.D. Ill. 2012). Compensatory education should be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place". *Id.* (quoting *Reid*, 401 F.3d at 523).

District [REDACTED]'s counsel correctly argues that compensatory education is an equitable remedy, requiring the hearing officer to weigh the equities for and against each party. [REDACTED] should receive some compensatory education services. The key question is how much, what type and for how long.

Parents have requested specific compensatory services and cost reimbursement. Their request for reimbursement for tutoring and other private services they obtained can be addressed as follows:

1. There is no support in the record for ordering District [REDACTED] to pay for the cost of [REDACTED] School. The record supports a conclusion that the District's general child find procedures were adequate. Therefore, Parents should have been able to obtain information about the availability of pre-kindergarten services offered by the District before they enrolled [REDACTED] in [REDACTED]. There is no evidence in the record showing that the Parents were not aware of the District's early childhood (ages 3-5) services. There is also no record of the Parents ever requesting services from the District before they enrolled [REDACTED] in [REDACTED]. In either of the two years [REDACTED] attended [REDACTED]. The District is not responsible for the cost of the Parents' choice to place [REDACTED] into [REDACTED]. These costs are denied.
2. Reimbursements for the services of [REDACTED] and the private tutoring services of [REDACTED] and [REDACTED] ([REDACTED]) are also denied. The Parents obtained these private services without notifying the District. The School District had no opportunity to provide services directly, to consider whether the services were appropriate for [REDACTED] or to explore other options. In addition, there is nothing in the record that shows the specific services [REDACTED] received from these providers other than payment records and [REDACTED]'s testimony about the general subject matter of the tutoring.
3. Parents have asked for reimbursement for "records retrieval" in the amount of \$268.74. These appear to be litigation costs rather than educational expenditures for [REDACTED]. There is an invoice in the record, but no testimony was given about the expense. In addition, the District was never put on notice prior to the hearing that the Parents would be seeking the reimbursement of these expenses. It would be inappropriate to

order the District to pay expenses as a compensatory service that are not related to the educational needs of [REDACTED]. Reimbursement for records retrieval is denied.

[REDACTED] should be awarded some compensatory educational services. Determining the amount, type and duration requires a balancing of equities. First, there are factors that support the Parents' request for services. These include the loss of educational benefits especially in the areas of reading, writing and spelling due to the District's failure to evaluate [REDACTED] by the first grade and not providing the structured literacy interventions she needed. They also include the violations of important procedural rights under IDEA such as proper written notices and notice of procedural safeguards.

On the other hand, there are equitable considerations that weigh in favor of District [REDACTED]. [REDACTED] last attended school in District [REDACTED] three years ago. She has started her third year in District [REDACTED]. She did not have an IEP in second grade and most of third grade. She was not evaluated by District [REDACTED] until February, 2015. We do not have the District [REDACTED] evaluation findings and recommendations which, according to [REDACTED] included evaluations in OT, speech/language and assistive technology. It is reasonable to conclude that part of [REDACTED]'s educational loss can be attributed to District [REDACTED] not District [REDACTED]. On cross-examination Dr. [REDACTED] the Parents' expert witness, admitted she could not offer an opinion as to the responsibility for educational loss between District [REDACTED] and District [REDACTED].

The compensatory services should focus on literacy skills. According to [REDACTED] this is the Parents' main concern. There is insufficient evidence to conclude that compensatory services are warranted in other areas such as math, ADHD, OT, speech/language or executive functioning because we have insufficient information in the record upon which to conclude that she suffered a loss of benefit in those areas that is attributable to District [REDACTED].

[REDACTED] is currently receiving two hours a day of Wilson reading instruction. If the goal is to advance her closer to grade level in reading faster so she is "reading to learn instead of learning to read",<sup>64</sup> it is reasonable to conclude that she needs additional Wilson instruction to supplement what she is receiving in school and through her ESY services. These supplemental services will hopefully enable her to move through the Wilson steps more rapidly. District [REDACTED] is responsible for a reasonable share of the costs associated with the compensatory structured literacy services.

Parents have requested two summers of intensive interventions in the Lindemood-Bell program, plus additional tutoring sessions. The cost of Lindemood-Bell alone is in excess of \$20,000 per summer, according to [REDACTED] and [REDACTED], the Parents' and [REDACTED]'s education advocate. [REDACTED] estimated the cost of a Wilson-trained tutor at between \$50 to \$60 per hour. In balancing the equities in this case, Parents' request exceeds what is reasonable and equitable. A more modest level of services for a shorter duration of time is fair and appropriate.

#### Decision and Order

1. District [REDACTED] shall provide twenty one-hour individual structured literacy tutorial sessions to K.D. either directly or through a private tutor.

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<sup>64</sup> Testimony of Dr. Dawson.

2. The tutor must be trained in the Wilson Reading program and provide instruction to [REDACTED] using the Wilson program.
3. The Wilson tutorial services must be provided in coordination with the Wilson instruction [REDACTED] receives in school and through her ESY services. The compensatory Wilson tutoring may be provided by [REDACTED]'s ESY Wilson tutor, if that can be arranged.
4. The compensatory Wilson tutorial sessions shall be provided for 10 weeks over the Summer of 2017, two one-hour sessions per week, if practicable. The parties may agree on other mutually convenient scheduling such as after-school or weekend sessions during the current school year or during the 2017-2018 school year. However, unless the parties otherwise agree, the twenty tutorial sessions shall be completed no later than December 31, 2017, to ensure that [REDACTED] is able to benefit from the sessions as soon as possible.
5. District [REDACTED]'s responsibility for the cost of the compensatory Wilson Reading program tutorial sessions shall not exceed \$60 per hour.
6. District [REDACTED] shall arrange or provide transportation, or reimburse the Parents for the reasonable cost of transportation, necessary for [REDACTED] to receive the compensatory Wilson Reading program tutorial services. Reimbursement shall be made in accordance with District [REDACTED] travel reimbursement policy and procedures.

#### **Appeal Rights**

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

#### **Compliance**

Pursuant to 105 ILCS 5/14-8.02a(h), the School District shall submit evidence of compliance with this Order to the Illinois State Board of Education upon the implementation or completion of the services as provided in this Order, but no later than December 31, 2017.

#### **Right to Request Clarification**

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

ENTERED this 6<sup>th</sup> day of October, 2016.

*Philip C. Misk*

Philip C. Misk, Impartial Hearing Officer

[REDACTED]

**CERTIFICATE OF E-MAIL SERVICE**

I, Philip C. Misk, Impartial Hearing Officer, hereby certify that the foregoing Final Decision and Order was served on the following counsel of record in this matter and the Illinois State Board of Education by e-mail on October 6, 2016:

[REDACTED]

[REDACTED]

Andy Eulass  
Due Process Hearings Coordinator  
Illinois State Board of Education  
100 North First Street  
Springfield, IL 62777-0001

*Philip C. Misk*

Philip C. Misk

**CERTIFICATION OF CERTIFIED MAIL SERVICE**

I, Philip C. Misk, Impartial Hearing Officer, hereby certify that the foregoing Final Decision and Order was served on the following individuals by certified mail return receipt requested on October 7, 2016:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Philip C. Misk*  
Philip C. Misk