

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

)	
Parents)	
)	
v.)	Decision and Order
))
)	[] Public Schools
)	

APPEARANCES

Hearing Officer: Sheila Mayberry, Esq.
For the Parents: Richard O’Meara, Esq.
For the School Department: Rachel Sears, Esq. and Eric Herlan, Esq.

I. PROCEDURAL BACKGROUND

This hearing was held and this decision was issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. On February 9, 2024, the Parents’ attorney signed the Parents’ Due Process Hearing Request (“Hearing Request”) form. The Hearing Request was received by the Maine Department of Education (“MDOE”) on February 12, 2024 and docketed on February 15, 2024.

The hearing took place on June 11, 13, and 18, 2024, via Zoom. Present for the proceeding were: [] and [] [], father and mother of the Student; Richard O’Meara, Esq., attorney for the Parents; Rachel Sears, Esq. and Eric Herlan, Esq., attorneys for the [] Public Schools; and [], Special Education Director for the School.

The following witnesses testified at the hearing:

- For the Parents:
 - The Student's Mother
 - The Student's Father
 - [], Interim Director of the [] School
 - [] [], independent evaluator and Founder of the [] School
 - [], Director of []
- For the School:
 - [], Special Education Teacher
 - [], Assistant Director of Student Support Services
 - [], Director of []

The School provided Parents and the Hearing Officer with 4468 pages of exhibits and 4 recordings. The Parents submitted 397 pages of exhibits. All exhibits were admitted.

I find that the official filing date was February 12, 2024. On May 7, 2024, the [] School Department ("School") filed a Motion for Partial Dismissal/Judgement of the Hearing Request based upon the IDEA's and Maine's two-year statute of limitations period. 20 U.S.C. § 1415(f)(3)(C)(ii); MUSER § XVI.12(E). The Parents submitted their Opposition to the Motion on May 22, 2024. The District submitted its Reply to the Parents' Opposition on May 23, 2024. The Motion was denied on June 2, 2024.¹

II. LEGAL ISSUES

1. Has the family established that, prior to February 15, 2022, they did not know and could not have known the underlying bases for alleged IDEA violations that they now seek to raise more than two years after filing their complaint? As part of that issue, at what point in time did they know, or should have known, those underlying bases, and did they timely file a claim once they knew or should have known of those claims?

2. If the family meets its burden on the statute of limitations issue, then during the 2018-2019 school year (the Student's [] grade year), did [] Public Schools ("School") fail to

¹ In addition, a motion to compel production of certain medical records by the Parents for an in camera review was approved on May 3, 2024.

timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

3. If the family meets its burden on the statute of limitations issue, then during the 2019-2020 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

4. If the family meets its burden on the statute of limitations issue, then during the 2020-2021 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

5. If the family meets its burden on the statute of limitations issue, then during the 2021-2022 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

6. Were the School's proposed IEP and placement offer from June 2022 reasonably calculated to provide the Student with an appropriate education in the least restrictive environment?

7. Were the School's IEP and placement proposals for the 2023-2024 school year reasonably calculated to provide [] with an appropriate education in the least restrictive environment?

8. Is the [] School placement proper under the IDEA, to the degree required by the IDEA, to support a reimbursement or compensatory education order for alleged past violations?

9. Did the family unreasonably obstruct the course of developing the Student's IEPs and placement proposals, justifying a denial of reimbursement under the IDEA?

III. FINDINGS OF FACT

The Student is [] years (born []) and is one of three children of African American descent who were adopted by the Parents. The family lives in [], Maine. The Student is a rising [] grader in the School District and attended the [] [] School (“[]”) for grades [].

[] (2017-2018)

1. The Student entered [] at [] in the fall of 2017. [] parents made a decision to enroll [] in the Spanish Immersion program with the understanding that all academic programming, except for music art, and PE, would be in Spanish. Enrolling [] in the program required their commitment to read to the Student in English to help develop English language skills at home. However, the Parents acknowledged that they did not work with [] on English at home in either [] or [] grade.
2. The School utilized the Fountas & Pinnell (“F&P”) reading monitoring system, which generates benchmark reading levels designated by letters, with each grade level being represented by multiple letters of the alphabet. By the end of [], the expectation is that a student should be reading at F&P level D; the Student finished [] at level A.
3. The School also administers the Northwest Educational Assessment (“NWEA”), which measures Measures of Academic Progress (“MAP”). It measures student achievement and growth in reading, language use, math, and science. The School administers the test three times a year.
4. By the end of [], the Student’s NWEA scores for literacy were in the “Below Expectation” range. [] level of math skills was “At Expectation.”
5. There is no evidence in the record indicating that the School or the Parents were concerned about the Student's literacy skills in [].

[] Grade (2018-2019)

6. The Student continued in the Spanish immersion program during [] grade. [] literacy development continued to be slow. At that time, he was “Meeting Expectations” in *Reading Foundational Skills in Understanding Organization and Basic Features of Print* and *Understanding Spoken Words, Syllables, and Sounds*. However, the Student was “Approaching” expectation with respect to *Applying Phonics and Word Analysis Skills to Decode Words*. In *Reading Accurately and Fluently to Support Comprehension*, [] continued to be at the “Beginning” stages. [] report card noted that reading was graded according to the district standards for English, even though they read in Spanish. [] met expectations at grade in reading comprehension in literature and informational reading and in speaking and listening. [] writing skills were at the “Approaching” level.

7. [] [] grade teacher reported to the Parents that the Student was struggling with reading. They acknowledged that they had not kept up their commitment to work with the Student on developing [] literacy skills. The Parents started to become worried that [] was falling behind in English while [] was in the Spanish Immersion program. In late May 2019, the Parents reached out to [] the former Principal of [], and discussed the Student’s reading struggles. On the recommendation of School staff, the Parents hired [], an educational technician at the School, as a private tutor. She went to the Student’s home one or two times a week to work on reading with []. [] also received reading tutorials throughout the summer of 2019.

8. On August 5, 2019, via email, the Parents asked [] to place the Student into a regular [] grade classroom. They believed that being the only Black child in [] Spanish immersion class was taking a toll on the Student’s well-being. They thought that a [] grade classroom with at least 30% students of color would be a better fit for []. [] offered to place the Student in a more diverse [] grade classroom, and stated that based upon [] “literacy lags,” [] new teacher could also help the student catch up on reading skills.

[] Grade (2019-2020)

9. At the start of the 2019-2020 year, [] the Student's [] grade teacher, found that the Student knew only "two sight words" from the 250-word []-grade list. She emailed [], a Reading Specialist, about this information:

[]: (The Student) came to me from a Spanish program this year. [] knows 2 English sight words. This seems interesting given that parents are supposed to be teaching English skills at home. Will [] be a candidate for LLI?

[]: Yes! We'll add [] to the list of students to assess. Thank you.

10. [] reported the results of the Student's reading assessment, stating that, "(The Student) was able to read 2 out of the 250 [] grade sight words. On [] reading assessment, I began testing [] at the beginning [] Level A. [] was not able to read it independently and scored below 90% - meaning that this level is 'Hard' for []."

11. The Student scored at the 29th percentile on the NWEA for the fall of 2019. There is no evidence in the record that the Student was assessed for a learning disability. It was decided that [] should receive literacy intervention services.

12. At that point in time, the School was using the F&P Leveled Literacy Intervention ("LLI") program as its response to an intervention ("RTI") approach. It is used as a short-term intervention to provide daily, intensive, small-group instruction to supplement classroom literacy teaching. It uses an alphabetic lettering system from A ([]) through Z. Subscores of independent and instructional levels were assessed. Thereafter, starting in [] grade, the Student was provided LLI services.

13. Based upon the need for intervention, the Student was provided with 30 extra minutes per day of reading instruction, five days each week. [] began at F&P Level A, which correlates to []. During 2019-2020, [] F&P levels increased as follows:

10/10 - Independent	D
10/25 - Independent	E
11/6 - Instructional	D
12/4 - Independent	D
12/13 - Independent	F

2/5 - Instructional H
2/25 - Instructional F
3/11 - Instructional I

14. The above scores were of concern to the Student's teachers during the year. By December 6, 2019, [] reported to [] that based upon [] Level D progress, she wanted to move the Student to a group "at [] level."

15. The comments in the School's report card at the end of [] grade summarized that, "Over the course of the 19-20 school year, (the Student) received LLI instruction from fall to spring, meeting in a small group, pull-out setting for 30 minute sessions 5 days/week. At the end of this intervention, (the Student) moved from reading Independent C texts to Independent F texts. This is approximately 6 months growth in a 9 month period."

16. In February 2020, The Student's standardized testing scores on the NWEA placed [] in the 14th percentile in reading.

17. In March 2020, the School was closed to in-person classes due to the COVID-19 lockdown in Maine. The Student received remote instruction from mid-March 2020 through the conclusion of the school year.

18. On April 3, 2020, [] reported to the Parents that the Student was feeling nervous about getting called on about [] work during remote sessions, and that the School was doing its best. She also stated, "... but the writing and the reading are def challenges that we're navigating with []. He's doing great at math and at prodigy and we're doing alternative reading programs with ABC Mouse too. It's coming but he's definitely nervous about it."

19. On May 1, 2020, [] reported to the Parents that the Student was reading at Level I, explaining that the reading levels for [] grade, as measured by F&P, ranged from I/J to L/M.

20. That spring, the Student also began art therapy with [], an art therapist at [] in [], Maine. The Parents felt that the Student needed to talk about [] feelings about being adopted. The intake information indicated that the Parents were concerned about the Student's emotional well-being and saw the need for [] to learn how to cope with anger in adaptive ways, have the ability to explore [] racial identity, and process grief or loss.

21. The Student's [] grade report card contained no progress rankings for the third trimester, but stated that for [] graders to "meet the benchmark, students need to read level K or L independently," whereas the Student was "reading level H independently and level I instructionally."

22. During the summer of 2020, the Parents continued private tutoring with Ms. []. She was given access to the School's reading materials to use over the summer. Ms. [] stated to Ms. []:

I think that's great that (the Student) is continuing with tutoring. [] ended the year reading level H independent & level i (sic) Instructional with Mrs. [] and I. Those are also the levels [] tested at in March before the school closure. I would recommend continuing working on [] self esteem when it comes to using strategies to decode unknown words. In terms of comprehension, I would recommend continued work on going back into the text to find evidence or answers to comprehension questions.

[] Grade (2020-2021)

23. In the [] grade, students, including the Student, were moved to a hybrid schedule due to the ongoing COVID-19 pandemic. On October 26, 2020, Ms. [] asked [] [], the Student's new teacher, for a "worry list" of students, those "you are concerned about in terms of reading." She explained that in selecting students for RTI programming, the school would "give priority on selecting students who have been making minimal gains. Typically we do not select students who are in Special Education and we will consult with M.R. and L. if any ELL students are recommended before we make any final determinations."

24. Between November 2020 and February 2021, the Student received LLI instruction in small group pull-out or remote settings for 30 minute-sessions, three days a week. At the end of this intervention, [] moved from reading independent H level texts to independent K level texts. The School approximated that this accounted for 10 months of growth in a 6-month period.

25. In the Student's second trimester report card, the School commented that [] had difficulty focusing on tasks, but was very energetic and active during group time reading. The School also noted that tracking and decoding texts were difficult, but [] strength was in comprehension skills.

26. However, by March 15, 2021, Ms. [] reported to Ms. [] and Ms. [] that the Student had regressed:

"Hi Ladies, I have to share some discouraging news. When (the Student) was dismissed from Lit Lab you had [] at an Instructional level L. Last week I tried [] at an M and it was way too hard and far below 95%. Today I went back to L and again [] came in much lower than 95%. That means the highest I can hope for is a K and that would probably be instructional, not independent. I will keep testing [] on Thursday but just wanted you to be aware that without your fabulous support [] has been regressing. I am bummed as [] had made such good progress.

27. In response, Ms. [] asked whether the Student had ever been referred for "Child Study" and whether there was a "Tier 1" intervention in place. She also stated that she would do further "testing." This regression was not reported to the Parents.

28. Ms. [] replied:

No haven't referred [] to Child Study because [] had been making good gains. [] was in the Spanish program for grades K and 1 so I assume some of the lag comes from missing out on those foundational skills. Did you have [] in LLI then or just last year? I have not had the same experience [] has with the remote -- [] seems very well supported and supervised with [] written packets. I do agree [] is easily distracted, though is able to be successful in math. I will try a Tier 1 in the classroom that might help-- a focus on sight words. [] seems to overly use sounding out and is not always successful with it. For example [] kept trying to sound out the character names -- [] and [], even though I had told [] those in the intro. (Yes, that probably relates to [] attention.) Finally I just told [] to remember who the story is about and stop trying to sound out the words each time. [] did better after that. If you have another idea for a Tier 1 that I can do I'm open to ideas. Just has to be something that I can do quickly as I

have so little time with them-- ugh! Kids are at specials at that Level J group time but thanks for offering! I just feel badly that we made such a big deal to [] family (and (the Student)) about how well [] had improved and was discouraged to see [] going backwards.

29. On March 22, 2021, Ms. [] emailed the Parents with suggestions for how to work with the Student at home using some accommodations, including a bookmark to keep [] place while reading. They reported that [] seemed more distractible and impulsive. She also stated:

We are encouraging [] to use more strategies when [] reads because [] seemed to be overly using the “sound out” strategy. We are asking (the Student) to think about what makes sense in the context of the story that might match the letters [] sees. Looking for smaller words inside bigger ones is another strategy I’m trying to get [] to use more (For example, today [] was trying to read the word nomads. When I asked [] to find smaller words [] couldn’t, but when I covered that mad [] read NO, and when I covered the no, [] read MAD and then [] was able to put them together. I also sent some sight words home with (the Student) today for [] to practice. I will practice with [] at School as well. When [] mastered those, I will send home others. Having a broader site vocabulary can help [] need to rely on those sounding out strategies less.

30. The Parents credibly testified that they were never made aware that the School teaching staff had concerns about the Student’s progress and regression. They also testified that the School staff never fully explained how the F&P leveling system worked or how it correlated with grade level. They stated that they relied upon what the teaching staff told them about the Student’s educational progress.

31. On April 15, 2021, once the School restarted in-person school days for four days a week, Ms. [] offered to continue to work with the Student on [] reading after school. She stated, “As you know, (the Student) made enough gains during the year to be ‘graduated’ from the in-school support, but is still reading below grade level expectations. Let us know how you'd like to proceed -- absolutely no pressure either way, it's really what you think will work best for you and (the Student).” The Parents agreed to this offer.

32. The Student’s third trimester report card noted that [] was reading at a level H and that the benchmark for [] grade was at an O level.

33. At no time before the 2020-2021 school year ended did the School inform the Parents that the Student had regressed in [] reading levels; nor did they discuss the Student's spring NWEA scores that placed [] in the 9th percentile.

[] Grade (2021-2022)

34. The School resumed fulltime in-person classes during the 2021-2022 school-year. The Student entered [] grade that fall. [] continued to receive private tutoring with Ms. [] through the summer of 2021 and into the school year. In September 2021, [] baseline reading assessment indicated that [] was reading at an independent K level and instructional L level. In October, [] NWEA score indicated that [] was in the 4th percentile for reading.

35. Between October and December 2021, the Student received LLI services in a small group pull-out setting for 30 minutes a day, five days a week. At the end of the intervention, [] was reading independent L texts. However, "reading behaviors" and data suggested that [] needed more intensive phonics instruction, which the LLI system did not target. Thereafter, [] received small group instruction within [] classroom that targeted foundational skills for students in grades 3-5.

36. The Student was also experiencing emotional issues at school and was being teased in the classroom, being called an "idiot" and a "cry baby" by a few other students. The Parents reported this in their email to the School on October 12, 2021:

[] and I wanted to check in and flag for this team that (the Student) is having a really hard time at school this year. It is VERY unlike [] to not want to go to school (which happens now frequently) or to say things like "I am stupid." [] has consistently complained about the behavior of students in the class - that several of them are mean and get in trouble all the time. [] expresses a lot of frustration about how badly behaved other classmates are and that [] doesn't want to be around them. In particular, [] articulates issues with ([] and []) - and struggles around things they say to []. We'd love any advice you might have about what to do. We are concerned because [] has always LOVED school and this reaction and stress is just totally out of character. Finally, [] LOVES [] and [] - [] speaks about you both a lot and how much [] likes you both. I think the issue really is the class dynamic. Thoughts?? Advice?? And as always - thank you for ALL you are doing :)

3 . The Mother testified that socially and emotionally, the Student had a very bad [] grade year. [] often did not want to go to school, cried, recounted that [] classmates were teasing [], and relayed that [] felt “stupid.” The Mother also stated that there were reports that [] expressed suicidal ideations.

38. On October 26, 2021, the Student reported to [] parents that a class peer was constantly calling [] names at the gym and in the classroom, upsetting [] and making [] unable to focus. The Student’s mother testified that the Student began to experience suicidal ideation, referring to himself as the “dumbest person in the class,” and “would come home in tears or refuse to go to school, and [] behavior and reaction to that was unlike we had ever seen before.” She testified that “[] told one of [] friends during a video game, you know, chat thing that they do that [] didn't see the [point] in going on.”

39. Thereafter the Student was then connected with the School’s social worker and began joining a group lunch. In email conversations, [] [], the Student’s [] grade teacher, acknowledged that there were negative behaviors coming from other students and that changes were being made.

40. By early November, the Parents and School staff met to discuss the continued negative behaviors that the Student was experiencing from other students and what actions could be taken. A type of “restorative justice” plan was discussed that would occur between the Student and other students.

41. In November 2021, the Student had a medical physical examination. [] was found to be in good health. [] had no difficulty with hearing or vision. [] had a history of asthma when [] was very young that had since resolved. There was no history of surgeries, hospitalizations, head injuries, seizures, blackouts, or loss of consciousness. There were no known family educational, medical or mental health problems.

42. The Student’s Term 1 report card reflected that [] was approaching benchmarks in reading foundational skills and reading and comprehending grade-level literature. However, on

November 30, 2021, Ms. [] and [] [], a literacy coach, emailed their concerns to each other about the Student's reading progress:

...Also, (the Parent) came to me about (the Student) and said she'd talk to you. She is wondering the next step for []. [] went up just one level since September. [] has been with me 3 years, has a (sic) Outside tutor once a week and is making very slow progress. I think they'd (sic) could be a learning issue there but also wondering about [] eyes. [] has tracking issues and skips words it (sic) lines at times. Your thoughts on both issues?

43. The Mother testified that she was never informed of the information being discussed among School staff regarding the Student's flagging academic progress. She stated that she never saw email communications on that topic before the discovery phase in preparation for the due process hearing.

44. On December 10, 2021, the Student was chosen for a "2nd round" of LLI intervention in the regular classroom focusing on phonics. At that point, [] was reading at an independent level M. [] was assigned to work with [] to start after the December 2021 break.

45. In her testimony, [], the School's Assistant Director, stated that by December 2021, the School should have referred the Student for a special education evaluation.

46. On or about January 21, 2022, the Mother found the Student's fall NWEA report in [] backpack. The scores placed [] at the 4th percentile in reading. At that point, the Parents considered whether to have the Student assessed privately. Ms. [], who continued to be the Student's tutor, thought it would be a good idea. The Parents also contacted Ms. [] [], stating: "We are so shocked by that score that we want to make sure that we're doing everything we need to do as parents."

47. The Mother testified that the NWEA score triggered the Parents to think about how to find out why the Student was struggling and whether [] should be evaluated by someone outside the School.

48. On or about January 22, 2022, the Parents contacted [] [], the former director of the [] (“[]”). [] is a private special purpose school located in [], Maine (formerly in [], Maine). Maine public schools have, at times, initiated placement of students at [] when they believe that they are not able to provide an appropriate program for some students. The Parents wanted to discuss their concerns about the Student’s reading progress.

49. On January 26, 2022, the Parents met with Ms. [] to discuss whether they wanted to hear the Student’s background information relevant to the testing she would do. She asked whether the Student had been receiving special education, and if [] had been evaluated for special education. Ms. [] also testified that at the time of this meeting, she was concerned that the Student had not been referred and evaluated for special education.

50. On January 28, 2022, the Student’s father wrote to Ms. [], stating that he and his wife had just received the Student’s MEA scores and reported to Ms. [] that [] was in the 7th percentile. Ms. [] responded the next day, stating, “Oh my! That is definitely cause for concern.”

51. The Student started art therapy in 2021. Notes from [] therapy sessions in the fall of 2021 indicated that the Student “has frequently stated that [] does not like school this year.”

52. On February 3, 2022, the Parents completed [] Client Intake Form and identified the Reason for Referral as “continued reading delay,” noting that both the Student’s reading and [] confidence were Major Areas of Need. Where the Intake Form asked, “Does School Identify Student’s Needs?” and the Parents stated, “not really.” They also stated that they did not “have clear sense of what [] issues are.” In that same document, the family was asked whether they had discussed an [] placement with the Student, and the family stated that they had, and that the Student wanted to “be done” with tutoring.

53. On February 6, 2022, the Parents wrote to School staff, stating that the Student’s NWEA score of 9% was alarming and stated that they believed additional testing and possibly an

Individualized Service Plan (“IEP”) were needed. This is also when the Parents notified the School that they were having the Student assessed by a provider at [].

54. On or about February 6, 2022, the Parents emailed the Student’s School staff, including Ms. [] and Ms. [], concerning [] NWEA results:

(Parent) and I wanted to circle up about [the Student’s] alarming 9% test score in reading. We are assuming at this point that qualifies for additional testing and possible IEP. We are having some independent testing done this week but are increasingly concerned about the slow improvement and want to talk about doing something different. Let us know what next steps there are. Many thanks. (Parent)

55. Ms. [] commented on the Parents’ email in a message to staff, stating: “I am asking [] to do an F&P and see how that compares to her data. Parents are wigged out over NWEAs.”

56. On February 17, 2022, Ms. [] explained to the Parents that while the benchmark for []-grade reading was at level O, the Student was reading at a level N, which was equivalent to a []-grade independent reading level. She indicated that she would plan out a strategy after the February break. She also stated, “Regarding your question about special education and IEP, that is not something that I feel qualified to respond to so I am going to let (Principal []) field that one.”

57. Ms. [] told the parents that [] would “alert our Special Education Coordinator, [][], about a potential referral.” Ms. [] spoke with the Parent, and they both agreed to “wait on the special education referral.”

58. During February and March 2022, the Parents went ahead and had the Student privately assessed by staff at [], including Ms. []. On March 16, 2022, the Parents notified Ms. [] and other School staff that preliminary results from the assessment indicated that the Student was showing signs of dyslexia and was being rechecked.

59. On March 28, 2022, Ms. [] issued her results of the Student’s evaluation. The testing methodologies used to evaluate the Student for a learning disability included the Kaufman Brief

Intelligence Test (“KBIT”); Kaufman Test of Educational Achievement (“KTEA-3”); the Symbol Imagery Test; the Gray Oral Reading Test (“GORT-5”); and the Feifer Assessment of Reading (“FAR”).

60. On the KBIT, the Student registered a high IQ score of 127, however [] literacy scores were significantly “delayed.” On the GORT-5, [] overall Oral Reading Index (Fluency and Comprehension Combined) standard score was 78, which correlates to the 7th percentile. Ms. [] described the Student’s GORT result as “a very, very low score for someone [] age, indicative of a fairly severe reading disability that hasn’t responded to the classroom instruction [] was getting.”

61. On the FAR, two of the Student’s scores were at the [] level: Nonsense Word Decoding (5th percentile) and Irregular Word Reading Fluency (1st percentile). The Student had very low scores in other areas such as Isolated Word Reading Fluency (2nd percentile) and Morphological Processing (1st percentile). [] overall FAR Phonological Index score fell in only the 5th percentile.

62. On the Symbol Imagery Test, Ms. [] noted that the Student’s performance was “a very low score for someone especially as bright as [] has tested out to be, with really no ability either to spell, to get the letters down on the page or something [] hears and to see and hold onto strings of letters and nonwords.” [] phonological processing skills were described as “an absolute weakness,” as were [] reading comprehension skills (13th percentile) and [] mixed skills (8th percentile). Ms. [] concluded that the results of the FAR and the SI suggested that the Student mastered neither the phonetic code nor the ability to access visual images of words (orthographic mapping) in order to rapidly recognize or spell them. While [] had “very strong” oral language, and some relative strengths in individual skills that are prerequisites to reading, the Student was not able to match the sounds in words to the letters that represented them in order to decode or encode nonsense words that followed the patterns of real English words, nor had [] mastered a sufficient number of sight words in order to read with Accuracy.

Ms. [] concluded that the Student showed “a pattern of very significant strengths and weaknesses characteristic of people with learning disabilities.”

63. She described the Student as “a student with exceptionally strong verbal skills who shows many characteristics of both dysphonic and orthographic dyslexia, known as mixed dyslexia. Many of the Student’s underlying language skills, including [] excellent vocabulary and strong auditory memory allow [] to pick up much of the information in the classroom by listening. While [] basic visual and auditory perceptual and memory skills appear to be intact, the Student has not yet mastered the basic skills of reading, from sound symbol relationships to syllable types and breaking rules to automaticity with frequently used sight words.”

64. She stated that “[W]e’re looking at a student in one test who has scores in the first percentile and scores in the 97th percentile. That’s just an incredibly unusual profile and one very typical for gifted students with severe learning disabilities.”

65. The [] report provided the following recommendations:

Intervention that targets not only phonetics, but also orthographic mapping and processing is indicated. The student’s intervention needs to focus on targeted, data-driven intervention strategies to improve orthographic processing, beginning with single-syllable words. [] spelling should be taught in tandem with reading, and contextual fluency should be practiced at a level that allows (the Student) to incorporate mastered phonological and sight word expectancies. Progress should be monitored by the milestones outlined in the structured literacy program.

Written language will need to be addressed through a combination of bypass strategies (ie the use of technology to bypass handwriting), and highly structured direct instruction in written language.

66. Specific Instructional Recommendations were also included in the Report:

Specific Instructional Recommendations:

1. (The Student) needs reading intervention that targets phonological awareness, orthographic and morphological processing, which would be best administered multiple times per week for 120 minutes per day during the school year, and/or through an intensive summer program of up to 20 hours per week. The frequency and intensity of intervention rather than the duration will yield the greatest results. Essential components of this instruction should begin with a review of basic phonological skills, but with intensive practice to create strong orthographic mapping of everything from basic

sound-symbol relationships through advanced phonetic and morphological skills at the multisyllabic level. Orthography, especially the visual aspect of word patterns also needs to be addressed in a truly multisensory way: first simple syllables, then prefixes and suffixes as well as fluency at the multisyllabic word, phrase, and passage levels.

2. Targeted spelling practice, using specific methodology aimed at stimulating symbol imagery should begin once [] basic phonetic and sight word skills are stable.

3. Fluency practice at the single word, phrase, and passage level will also be needed and should be added as soon as phonological skills has been fully developed. This would be indicated by an ability to consistently decode single syllable nonsense words. Targeted work with the Phyllis Fisher Speed Drills is specifically indicated to improve (the Student)'s reading accuracy and automaticity in differentiating visually similar letter word elements. Read Naturally, The Six Minute Solution, or similar fluency work should be utilized daily as (the Student) develops [] skills.

4. (The Student) needs to have access to a variety of technology tools in order to keep pace with [] school work. Both voice to text and text to voice applications should be available at all times except when the reading and writing are being addressed directly. Word prediction programs may be useful once the basic sound symbol associations are mastered.

5. (The Student) will need to learn very structured approaches to different types of writing, with specific graphic organizers for each type. Each of these should be practiced to mastery.

6. Typing skills, particularly with a program like <https://www.talkingfingers.com>, or <https://www.readandspell.com> will work on typing skills and sound symbol relationships simultaneously and are particularly appropriate for students with learning disabilities.

7. Using a program such as Read and Write for Google or the Don Johnston program Snap and Read, will allow (the Student) to have the computer read aloud to [] while [] follows the text along with the read aloud. These programs highlight the part being read, and can be adjusted for the length of phrases and the speed of presentation, and can assist students in the pacing and phrasing of their reading. These programs can access material from the internet, or from pdf sources.

8. At this time, (the Student's) workload should be reduced with a quality criterion used, such as doing only 5/10 questions but with a high accuracy criterion. [] needs to learn to slow down and self monitor as [] reads or listens.

9. Direct teaching of Executive Functioning skills for organization, time management, management of materials, and planning and executing school work, especially longer term assignments will be needed as (the Student) approaches [] school. The work of Sarah Ward (efpractice.com) is highly recommended.

67. Other recommendations included:

1. (The Student) would benefit from a full neuropsychological examination by a Board Certified Neuropsychologist to further evaluate (the Student)'s intellectual strengths, as well as the role that attention, processing speed and working memory and other neurological features play in (the Student's) educational presentation.

2. A full Assistive Technology evaluation will help determine the specific programs that are most useful for (the Student).
3. The Student will require a reader or recorded versions, extended time, a quiet space, multiple shorter sessions, and a scribe or voice to text technology for testing that is not directly assessing those skills.

68. On March 29, 2022, the Parents met with Ms. [] to review the testing results. Thereafter, they requested an IEP Team meeting to consider the Student's IDEA eligibility.

69. On April 1, 2022, the Parents informed School staff of the results of the [] evaluation. They stated:

We received (the Student's) test scores back from [] and (the Student) has some severe dyslexia. Happy to share more details with y'all. We're engaged with the District and [] on the topic and I thought you'd want to know as well. Happy to share additional details with you - hi [sic] IQ score is quite high and [] visual problem solving/analysis, as well as [] verbal skills are way above [] grade level. [] writing and reading is, um, not at grade level at all. We're working on helping [] learn the decoding techniques that [] needs as well.

70. In response, Ms. [] responded:

"Thank you for this update. This is tremendously helpful information to know. I'm glad that we're getting closer to understanding what is getting in (the Student's) way in reading and writing so that we can adjust our instruction to target what [] needs. If you'd be willing to share more details from the report, that would be great; that way we can make sure that our instructional plans are on the right track."

71. That same day, the Parents signed the Parental Consent for Evaluation form for an initial evaluation. The School noted in the Written Notice, dated April 1, 2022, that the Parents were referring the Student for the special education evaluation.

72. On April 5, 2022, Ms. [] [] , the School librarian, raised the possibility of a learning disability with [] classroom teacher: "Do you know if (the Student) has been screened for dyslexia? When I consider [] reading struggles (and now [] handwriting), it leaves me wondering."

3. On April 7, 2022, a Referral to Special Education form was signed by Ms. []. The form stated that the Student's reading was at F&P level M. "The Student demonstrates reading skills at level M, skills we would expect of children in fall of grade 3, despite 3 years of remediation and LLI support, as well as private tutoring. Writing is at a []-grade level." The form stated that it was the Parents who were requesting the referral to special education.

4. On May 2, 2022, the Parents informed the School that starting on May 3rd, they would begin picking up the Student from school at 12:00 p.m. on Tuesdays and Thursdays, and taking [] to [] for reading tutorials. [] used the "Seeing Stars" reading program with the Student, with a goal of bringing "symbol imagery to consciousness."²

5. On May 23, 2022, the Student's mother emailed Ms. [] asking about the "timing for deciding if we want to apply for (the Student) full time next year? We have our meeting with the school on 6/14 but no matter what they find – we remain unconvinced that they can meet [] reading needs." She told Ms. [] that she would "love to have" her join the meeting.

. In May and June 2022, the School conducted its own evaluation of the Student, which included a classroom observation, academic testing using the Wechsler Individual Achievement Test ("WIAT-4"), and psychological testing. The Student's scores on the WIAT-4 were as follows: 6th percentile for Word Reading; 12th percentile in Reading Comprehension; and 3rd percentile in a combined Written Expression Composite Score.³

. The report's recommendations included systematic spelling instruction and practice; instruction and practice with handwriting, focusing on letter formation and size; sentence writing using prepositions; journaling, or free writing for increasingly extended periods of time to develop [] writing stamina; and instruction and practice with time and elapsed time to help [] better understand how long it takes [] to complete tasks.

² The Student received 18 hours of tutorials in May 2022 and 8 more hours in June 2022, for a total of 26 hour-long session billed to the Parents at \$2,080.

³ Written Expression Composite test subscores: 2nd percentile for Essay Composition; 8th percentile for Spelling; 9th percentile in Sentence Combining

78. The results of the WISC-V psychological assessment indicated that the Student had a 122 full-scale IQ, placing [] in the 93rd percentile. On the Feifer Assessment of Writing (“FAW”), [] Dyslexic Index score fell in the 1st percentile. Dr. [] [], the School psychologist who administered the assessment, commented that the Student was bright.

79. In summary, the psychological assessment results indicated that the Student’s:

...cognitive skills range from the 99th to the 3rd percentile. [] did best on measures of verbal comprehension and fluid reasoning attaining scores above the average range. On measures of writing abilities, [] attained scores in the average range on most of the subtests with a couple of exceptions. [] attained a score in the above average range on an expository writing task. [] did least well on tasks related to spelling, attaining scores below the 2nd percentile. [] also scored less well on a task of copying speed, attaining a score in the 3rd percentile. This pattern of strengths and weaknesses is likely to impact most areas of academic functioning.

80. The summary further stated that:

Given that [] was in the Spanish Immersion program for [] and [] grade and then was in a hybrid learning environment for [] grade, some of [] skill deficits could be due to less exposure to them in English. The Spanish Immersion program taught students to read and write in Spanish. Due to COVID, during [] [] grade year, though [] was in a smaller class, [] also received less in person instruction due to safety precautions.

81. On June 12, 2022, the Student’s mother emailed Ms. [] expressing her views of the School’s evaluation process and whether Ms. [] should be present at the IEP meeting, stating:

Apologies for the delayed response! We’d love to go over the report at some point this week. Strange to say - but talking to [] last week - our goal for tomorrow is to be pretty passive and hope [] isn’t referred for services. That way we can just send [] to you and sue them for reimbursement. Given that goal - we won’t need you to join. Talking to [](who [] says is terrible) - I couldn’t really tell what her recommendation is..... I also haven’t seen the academic report so we’ll ask for it. Honestly- we just want [] out of there :(We’ll send an email after we talk to them tomorrow.

82. On June 13, 2022, an IEP Team meeting was held to discuss the Student’s eligibility for special education in the areas of basic reading skills, reading comprehension, and written expression. Based upon a review of its assessments and that of [], the IEP Team found

the Student eligible for special education and services. The School summarized its testing, stating that:

Current test results indicate (the Student)'s cognitive functioning ranges from the 99th to the 3rd percentile. [] scored in the above-average range on cognitive measures of verbal comprehension and fluid reasoning and attained average scores on many of the writing tasks administered. Prior testing from [] and current results suggest [] has some skill deficits in phonetic, orthographic and spelling skills.

83. The School further stated that:

- a. This pattern of strengths and weaknesses is likely to impact (the Student) in most academic areas.
- b. It is important to note that some of [] skill deficits could be the result of and/or exacerbated by [] participation in the Spanish Immersion program during [] [] and [] grade years, as well as the hybrid model of learning during [] [] grade year due to safety restrictions related to COVID.
- c. The IEP team should consider this information along with other evaluative data when making eligibility decisions.

84. The School determined that the Student struggled with reading and writing. Math skills were not an issue. The School made the following recommendations, which were accepted by the IEP Team:

1. Have explanations, directions, and instructions presented in a multi-sensory format using all information processing modes. Encouraging [] to use strategies which take advantage of all sensory input could improve [] success (i.e., tracing and speaking out loud quietly to himself). [] was observed to use some of these strategies already.
2. Ongoing phonological skill development to increase [] ability to recognize different sounds that make up words.
3. Combining phonological awareness training with explicit phonics instructions could further enhance [] learning.
4. Interventions focused on the visual component of word recognition. For example, teaching [] visual patterns of letters which impact how a word sounds.
5. Continued instruction which focuses on sound/symbol correspondence and word reading would be helpful.
6. Seating to allow [] to move freely without being a distraction to [] peers.
7. Provide social worker for support.

85. In addition, based upon discussion with the Parents, the IEP team made six determinations:

1. "Per parent request," 45 minutes/day individual specialized phonics instruction in the special education setting;
2. Wilson-specific decoding and encoding reading goals;
3. A new writing goal to include use of introduction, conclusion and transition words;

4. Monthly staff meetings unless an IEP meeting was also scheduled that month, to discuss (the Student's) progress and [] overall adjustment to school;
5. The IEP team would conduct a program review before end-December;
6. The annual review to be held by June 12, 2023.

86. The IEP Team discussed the Student's academic progress. During the discussion, the Student's regular education teacher reported that [] was a good math student, but that [] reading and writing tasks were difficult. [] had made progress in reading by reaching Level "O" and gained 21 points on the spring NWEA in reading and 20 points in math since the fall. She noted that [] did not move about the room, but that it did not have an impact on [] learning.

87. [] [], [] special education teacher, also stated that math was a relative strength, but that reading and writing portions were more difficult. Dr. [] queried whether the Student received RTI during the time the School was in a hybrid mode from COVID.

88. The Parents reported that the Student was attending [] two days a week, enjoyed [] time there, and wanted to attend school there full-time.

89. The IEP Team determined that the Student was eligible for special education and services under the eligibility category of the Specific Learning Disability and required "specially designed instruction in literacy in order to access the general education curriculum due to a specific learning disability in writing." The Team developed an IEP that included special education instruction in the special education setting for 30 minutes a day for reading and 30 minutes a day for writing in the resource room setting. The IEP goals included:

1. By 6/12/2023, given specially designed instruction in the area of reading, (the Student) will increase [] reading to a Fountas and Pinnell Level "T" as measured by Fountas and Pinnell benchmark texts.
2. By 6/12/23, given specially designed instruction in writing mechanics and sentence structure, (the Student) will write several sentences about a topic or picture using correct sentence structure, initial capitalization, and ending punctuation as measured by student work samples and teacher observation.

90. On June 29, 2022, the Parents consented to the provision of special education and services to begin on September 2, 2022, the start of [] grade for the Student.

91. During the summer of 2022, the student attended [] for tutorials under Ms. [], M.Ed. She reported at the end of the summer that:

[] word work has supported gains in decoding and encoding complex single syllable words and multisyllabic words and oral reading fluency and accuracy. Continued areas for instruction include decoding fluency practice with real, multisyllabic words, sight word recognition for [] and [] grade level sight words, oral reading fluency practice at the [] to [] grade level, sight word spelling, and sentence writing fluency. Direct instruction in paragraph writing is also recommended.

[] Grade (2022-2023)

92. On or about September 16, 2022, the Student began receiving special education reading instruction from Ms. []. The Student's fall NWEA reading scores placed [] the 2nd percentile, a decrease from [] NWEA reading score in the spring of the 2021-2022 school year.

93. The School was using the SPIRE reading program. SPIRE lessons require 60 minutes of instruction, but Ms. [] had only 30 minutes per day for the Student's group lesson, so [] was therefore taught at a half pace over a two-day period.

94. During [] grade, the Student showed signs of emotional distress. On library days, [] refused to go to school. The Parents described [] as "struggling with [] mindset with being so behind with [] reading and the social implications of that." Ms. [] would tell the librarian "this is a kiddo that isn't feeling good about being a reader." The Parents explained that the Student "would have to sort of self-nominate [] to go to a place where no one else in [] class was in the library to get books."

95. In early October, Ms. [] administered a F&P benchmark assessment of the Student's reading level. She determined that the most notable area of challenge was in decoding words and reading text with less than 95% accuracy. Her recommendations for instruction were:

- Repeated practice with orthographic mapping, systematically reading through the whole word and attending to all the parts and syllables
- Continued instruction in phonemic awareness, including practice manipulating sounds (i.e. segmenting, blending, and substituting phonemes)

- Systematic and explicit instruction to connect the phonological concepts with the alphabetic principle (i.e. connecting phonemes to graphemes)
- Practice with both decoding and encoding
- Multimodal instruction strategies

96. In early October 2022, Ms. [] emailed [] [], the Student's regular classroom teacher, stating, "Just checking in on (the Student) and how much [] is actually willing to do in your room. [] seems to avoid behavior with me at times I am hearing the 'I'm such a failure' when [] doesn't feel like doing work." Ms. [] replied that she "really struggles[d] getting [] to do any work when [] back after recess and lunch, which is our reading and writing time. I couldn't get [] on Lexia at all yesterday." The Student was making many negative comments and Ms. [] characterized [] as "a tough one for me for sure."

97. In October 2022, the Student's teachers were worried about [] "avoidance behaviors" in the classroom. [] special education teacher commented:

Hi [], Just checking in on (the Student) and how much [] is actually willing to do in your room. [] seems to do avoidance behavior with me at times and just wondering how much [] is actually producing during the day and following directions. Does [] follow redirection to get work done? Is [] trying to get away with as little as possible? I am hearing the "I'm such a failure" when [] doesn't feel like doing work...which with me is very appropriate and [] is capable of doing but is trying to not do. [] seems to have a repertoire of reactions to avoid working. I get that sometimes [] may feel overwhelmed, but other times [] just doesn't feel like it. How is math? Does [] follow through?

98. Also in early October, the Parents were allowed to have Ms. [] from [] observe the Student's special education classroom during a phonics lesson and interview the special education teacher. In her report, she stated that the teacher was using the SPIRE program with fidelity. She and Ms. [] discussed the differences between the SPIRE and Wilson reading programs. Ms. [] indicated to her that the School chose to use the SPIRE program because it allowed consistency from year to year.

99. Ms. [] observation report included the following:

This lesson was the second half of a 60-minute SPIRE lesson, performed with fidelity within those time constraints.

Multisensory instructional techniques in use were limited to verbal and auditory. The educator should consider being more explicit with strategies such as air writing/imagery, kinesthetic (tapping or moving), and/or tactile strategies.

(The Student) interrupted more than [] peers but not at a level that inhibited [] or the group's overall instruction. [] processed aloud frequently. (The Student) finished [] work much faster than [] peers, and would often interrupt to make connections at the time instructions were given, or once [] had finished.

Redirections by the educator were appropriate, calm, and kind and (the Student)'s response to redirection was good-natured.

Overall, this lesson was far too easy for (the Student). [] error rate was only 2 out of the 30+ prompts given and none of those were on encoding material. All of [] errors were related to conventions in the dictation sentences. The error rate of [] peers in this class was at least double that of (the Student's).

100. On November 4, 2022, the District convened a remote IEP team meeting to discuss Ms. [] report and the Parents' concerns about the "methodology, frequency and duration" of the Student's instruction. The Parents sent a detailed list of their concerns. [], the Parents' advocate, was also present during the meeting.

101. In summary, the Parents believed the School should be following Ms. [] recommendation, to implement the "Seeing Stars" reading program instead of SPIRE, and that the Student needed individualized attention. The discussion was difficult and did not result in an agreement. Through [], the Parents informed the IEP Team that the Parents would be unilaterally withdrawing the Student and placing [] at [] in order to receive what they believed to be the appropriate programming given [] needs.

102. The School staff urged the Parents to reconsider and stated that they were willing to share the Lexia reports and also set up the Student with Lexia for home use. They stated that the School wanted the Student to be successful and have the family gain trust and confidence in the School. [], Assistant Director of Student Support Services, noted that the Student was making progress in its program, but that [] had only been receiving intervention for two months, which, in her view, was not adequate time to determine the need for a possible change in program. She also stated that they had no data to indicate that the current programming was not

working, and that any program changes should be made based on data. She emphasized that SPIRE was based on the Orton-Gillingham program and was supported by research.

103. The School's recommendation was to keep the current methodology in place with increased frequency of progress monitoring and parental communication, and to increase service time to keep the Student in [] current school placement.

104. Ultimately, the School offered 45 minutes per day of individual reading instruction using the Wilson reading program⁴, with monthly staff meetings that included the Parents. While the Parents would have preferred the "Seeing Stars" program, they also wanted the Student to remain in public school if possible, therefore they agreed to try the new programming offered.

105. The determinations made at the IEP meeting also included:

1. Per parent request, 45 minutes/day individual specialized phonics instruction in the special education setting.
2. The IEP will be amended to have current reading goal replaced by goals in decoding and encoding specific to program levels.
3. The IEP will be amended to have present writing goal refined for more specificity in writing needs to include an introduction, conclusion, use of transition words.
4. The IEP will be amended to add this accommodation: The team will meet for monthly staff meetings to discuss (the Student)'s progress in programming and [] overall adjustment to school except if there is an IEP that month.
5. The IEP team will reconvene before the end of December for a program review.

106. The amended IEP for 2022-2023 provided 45 minutes per day of specially-designed reading instruction in a special education setting using the Wilson Reading Program. The stated goals in the IEP included:

1. By June 12, 2023, given specialized instruction using a systematic, multi-sensory phonics approach to encoding, (the Student) will use [] phonology skills, will demonstrate phonological processing skills by manipulating sounds in words (segmenting and blending) by applying previously taught cvc structure words as well as the following phonics rules for encoding:

⁴ The Written Notice indicated that the Wilson program could take 2-3 years or more to complete. It stated that the Student had some avoidance behaviors which delayed mastering [] lessons and required repetition to ensure [] mastered concepts before moving on to the next level. The priority was to maintain fidelity to the Wilson program, not to push [] to next steps before [] was ready. Because of this need for repetition, it was estimated it would take the Student "a little longer" to master the more challenging phonetic concepts.

- Adding suffix -s or -es to closed-syllable words of three sounds (e.g. bugs, chills, wishes, taxes)
- Adding suffix -s or -es to closed syllable words of four and five sounds (steps, brushes, crafts, branches) including digraph blends (e.g.: -nch)
- Use three letter blends up to six sounds in a closed syllable word (eg: sprint, scrap) with - s/ -es suffixes as well as latin base elements -ct ending (e.g.: -duct, -spect)
- Reading two-syllable words with two closed syllables including blends (eg: grand child, problem) including schwa sound (e.g: wagon)
- Reading two closed syllables ending in -ct blend (e.g.: connect, district)
- Reading multisyllabic rules combining only closed syllable (e.g.: establish, basketball)
- Adding suffixes of -ed, -ing to unchanging base words with closed syllables (e.g: shifted, expanding).
- Reading a two syllable word containing the vowel-consonant-e syllable combined with a closed syllable word (e.g.: sunshine, midsize, reptile) as measured by 80% or greater accuracy in word dictations for each step presented.

2. By June 12, 2023, given a systematic, multi-sensory approach to reading, (the Student) will use [] phonology skills, will demonstrate phonological processing skills by manipulating sounds in words (segmenting and blending) and previously taught cvc words structure with the following phonics rules for decoding:

- adding suffix -s or -es to closed-syllable words of three sounds (e.g. bugs, chills, wishes, taxes)
- adding suffix -s or -es to closed syllable words of four and five sounds (steps, brushes, crafts, branches) including digraph blends (e.g.: -nch)
- use three letter blends up to six sounds in a closed syllable word (eg: sprint, scrap) with - s/ -es suffixes as well as latin base elements -ct ending (e.g.: -duct, -spect)
- reading two-syllable words with two closed syllables including blends (eg: grand child, problem) including schwa sound (e.g: wagon)
- reading two closed syllables ending in -ct blend (e.g.: connect, district)
- reading multisyllabic rules combining only closed syllable (e.g.: establish, basketball)
- adding suffixes of -ed, -ing to unchanging base words with closed syllables (e.g: shifted, expanding).
- Reading a two syllable word containing the vowel-consonant-e syllable combined with a closed syllable word (e.g.: sunshine, midsize, reptile) as measured by charting of rules presented at each step of the program, 15/15 real words, 13/15 nonsense words when presented.

3. By 6/12/2023, given specially designed instruction in the area of reading, (the Student) will increase [] reading to a Fountas and Pinnell Level T as measured by Fountas and Pinnell benchmark texts.

4. By June 12, 2023, given specialized writing instruction focusing on high interest materials and provided with graphic organizers and a word bank of unknown words which do not adhere to [] phonics instruction rules, will write opinion pieces, informative/explanatory texts and/or narratives that introduce the topic or state an opinion, provide reasons/specific details or items that support the topic, use transition words, and provide a sense of closure/concluding statement as measured by work products and teacher observation.

5. By 6/12/23, given specially designed instruction in writing mechanics and sentence structure, (the Student) will write several sentences about a topic or picture using correct sentence structure, initial capitalization, and ending punctuation as measured by student work samples and teacher observation.

107. The IEP also included modifications for seating, allowing breaks (movement and mental), shortened writing assignments, breaking down assignments into smaller chunks, checking in frequently, and assisting with task initiation.

108. In January 2023, the Student's winter NWEA reading score placed [] in the 20th percentile. The Parents continued to be concerned about the Student's progress in reading and writing and about moving into [] school without having closed [] reading gap by [] grade. They began to consider [] need for an intensive summer reading instructional program at [].

109. On January 20, 2023, an IEP meeting was held to discuss the Student's programming. Progress on [] first goal, decoding, was reported as follows:

At this point (the Student) is working on firming up the consonant-vowel-consonant word structure using digraphs, floss letters (f/l/s such as cuff, fill, miss) and the welds an, am, all. Dictations of words are 34/35 correct (97% accuracy).

12/16/22- suffix -s, -es addressed and Step 1 Wilson completed/end of step assessment passed

1/3/23: Step 2.1 welds ang, ank, ing, ink, ong, onk, ung, unk.

As well as using suffix -s on words (rings, thinks, hangs).

Dictations: 93% accuracy for 2.1

1/13/23: Step 2.2 in process: adding consonant blends to the cvc rules and am/an welds (with/without suffix) (examples: trap, spans, blocks, crushes, twins, belts).

110. Progress on [] second goal related to writing, was reported as follows:

(The Student) is making progress on this goal. When material is of high interest [] will be much more eager to respond in writing. (The Student) has worked on studying the Titanic through literature as well as multi-media to attain a knowledge base before writing. [] then used organizers (some organizers providing an introduction, some with sentence starters or transition words) to write pieces including a topic sentence / introduction, supporting details, and a conclusion/ending statement. The beginning of the semester (The Student) needed to respond to comprehension questions using full sentences and using part of the question in the answer. This went along with the Titanic leveled book we were reading. [] then moved onto explaining the order of the sinking in [] own words. After studying the factors leading to the sinking, (the Student) was asked to explain these reasons. Transition words were provided in this organizer. [] was also asked to develop [] own conclusion to this piece. Other writing pieces were explaining safety rules enacted after the sinking. The most recent writing was an opinion piece on whether the artifacts should be brought up from the bottom of the ocean. (The Student) has great ideas to contribute to [] writing. [] is learning to use resources for spelling, re-read what [] has written, and check for mechanics (capitals/periods.)

December to January 18, 2023: (the Student) is being introduced to parts of speech (nouns, verbs, adjectives) in sentence structure, descriptive word use, story mapping (characters, setting, problem, solution), as well as 'summarizing' story structure (somebody..., wanted..., but..., so...). [] has also been studying Pompeii and the sequence of events of Mt. Vesuvius erupting/impacting the city. [] is focusing on adding description/details to each phase that occurred. This will culminate in a writing pieces using transition words (for example: first, then, next, after that, finally.) We are experimenting with voice to text on Google Docs to take out the demand of mechanics and focus solely on content, inclusion of appropriate details, and the writing process.

Wilson High Frequency Words:

12/21/22 Pre-assessed Step 2 high frequency words

Reads _52/55 correctly (errors: who, where, put)

Spells_ 38/55 correctly (Errors: asked, who, which, some, been, anywhere, putting, coming, becoming, said, very, work, two, word, everywhere, everyone, everything)

111. In summary, the Written Notice also stated:

(Ms. []) elaborated on all goals and progress. Making a connection with [] is a huge piece of working with (the Student). [] is doing well with [] programming but will sometimes get frustrated when charting words and [] gets something wrong. She emphasizes that we learn through our mistakes. (The Student) can show avoidance behaviors in her phonics lesson and can be whiney at times. [] needs expectations clearly delineated but will work toward a reinforcement. (The Student) needs to have a trusting relationship with the teachers. Hooking [] into a subject and building on [] enthusiasm for a topic is important for (the Student)'s participation in writing.

(Ms. []) explained progress monitoring within the Wilson program via built in charting and dictations. There is an End of Step assessment to ensure the skills per each step have been acquired before moving on. The Wilson WADE is a pre and post test to the implementation of the program for the school year. [] shared (the Student)'s Fountas & Pinnell benchmark running record- [] level started year at O, and [] is currently at level Q with 99% accuracy (this is considered 3rd quarter of [] grade.) During the day (the Student) is surrounded by literacy. (Ms. []) is seeing that [] is transferring skills to the classroom and beginning to generalize the skills into [] reading. The Wilson WIST (Word Identification and Spelling Test) is a possibility for standardized testing.

112. On February 6, 2023 the Parents emailed Ms. [], asking for an IEP meeting and stating that they were concerned about the Student's progress. They asked if her prognosis was for finishing the Wilson program during the school year, whether there was a plan for a summer program for [], and whether there was a transition plan for [] as [] entered 1[] school. Ms. [] replied that an IEP meeting was being scheduled for some time in May to discuss the Student's progress and potential summer programming, but that a March staffing meeting would be held. The Parents replied, stating that they were requesting a March meeting to discuss the Student's progress, another March meeting to discuss ESY programming, and an IEP meeting in April instead of May, given their concerns about the Student's slow progress with the Wilson program. They also asked for additional clarification on the Student's progress towards [] goals, information showing how [] IEP goal matched up with the 12 levels for the Wilson Reading program and the steps on the Lexia program, and how the levels of the two programs correlate with each other.

113. An IEP meeting was scheduled for April 10, 2023 to discuss the Student's progress. While preparing the meeting, Ms. [] and Ms. [] discussed whether they should provide the Parents with the Student's actual and projected pace of progress on the Wilson program's 12 steps. Ms. [] stated: "One more thing...I know the parents will ask where the written Wilson progression document is. How do I respond to them? 'I have been instructed to verbally share where we are and to not give any written progression since the scope and sequence can change based on (the Student's) attainment of the concepts and any need for review of material. There are many variables involved in [] progression through the program.'" Ms. [] advised: "We can chat Monday. I would leave out 'I have been instructed to.' So let's chat, I will

check in with you Monday and see when you have a few mins for a call. I would really not say any of that, just keep it simple. Also, you don't need to send another written notice as I am not sure who is available at this point. We can just say we will have a [] school rep at the meeting, we can chat about this too.”

114. During that IEP meeting on April 10, 2023, it was determined that the Student needed more instruction in writing. The Team added 150 minutes a week to writing and 225 minutes to reading. All of [] special education instruction would take place in the special education classroom. The School reported that the Student was working on step 3.2 of the Wilson program, with a goal of completing just the first four steps by the end of the school year. The School indicated that it expected [] to require all of [] grade to complete the next four steps of Wilson (steps 5 through 8), meaning [] would not complete all twelve levels within the typical two-year period. The Parents expressed concern with the slow pace and the Student’s lack of engagement with Wilson, questioning whether Wilson was the appropriate program given the Student’s mixed dyslexia profile. [] reminded the Team that the recommended program for the Student was Seeing Stars, not Wilson. She also noted that there was concern that Ms. [] had announced her retirement and it was unclear whether an experienced instructor would be available when the Student began [] grade.

115. The Written Notice explained the School assessment plan for the end of the 2023-2024 school year:

At the next IEP in late May, the team will review WADE results and amend IEP to include updated present levels and make any changes to goals based on data collected. Based on (the Student)’s progress, Ms. [] proposed reading goals that reflected (the Student) completing the skills contained in Step 8 of the Wilson program. The family expressed concerns that this goal was too ambitious. Ms. [] agreed that it was a challenging goal and the team could revisit it if the team felt that was prudent after the WADE is completed in May. The Student is using speech to text and is self monitoring for spelling on the computer when writing. The teacher provides support with the editing process for sentence structure, and encourages (the Student) to provide more details. (The Student) can be resistant to elaborating in [] writing. [Ms. []], classroom teacher reported out. At the beginning of the year (the Student) fought doing silent reading and now needs reminders to put the book away. In writing, [] still can be resistant and needs to add more details, but [] is writing more than at the beginning of the year when she had

to scribe for []. [] is using speech to text to output [] writing ideas now and is able to self monitor spelling.

116. At that meeting, the Parents notified the School that based upon the uncertainty of [] grade and their concerns about the pace of progress the Student was making, they would be unilaterally placing the Student at [] for tutoring during the summer of 2023 and then at [] for the 2023-2024 school year.

117. The IEP Team concluded its meeting by amending the IEP to include the goal of completing Levels 5-8 of the Wilson program during the 2023-2024 school year. It also included 20 hours of extended school year (“ESY”) services in the summer with 1:1 tutoring.

118. The NWEA was administered in the spring of 2023, which indicated that the Student's reading score was in the 48th percentile. At that point, [] was working at Level 4 of the Wilson program and reading poorly when observed. The NWEA administered in June 2023 placed [] in the 27th percentile.

119. In early June 2023, the School administered the Wilson Assessment of Decoding and Encoding (“WADE”). It indicated the following improvements from the initial fall scores in all categories:

Total Sounds: Fall 65% Spring 71%
Total Words: Fall 40% Spring 60%
Total Spelling: Fall 20% Spring 51%

120. However, the Student’s Lexile score continued to place [] at the [] grade reading level. The Student ended [] grade without completing Wilson Level 4.

121. On June 14, 2023, the IEP Team met to review the Student’s progress. While the Parents had already informed the School of their plan for unilateral placements outside the School, there was still discussion about sixth grade at the School. At that time, the School did not or could not identify a teacher trained in teaching the Wilson program due to Ms. [] retirement. The IEP was amended to include classroom and testing accommodation of Speech to Text.

122. Starting in mid-June 2023, the Student attended [] in its “[]” literacy program. [] received 92 hours of individualized tutoring. By the conclusion of the program, the final assessments in four targeted areas indicated:

- Symbol to Sound Test: The Student had a complete mastery of all of [] phonemes in isolation.
- Word Attack Test: Accurate at the four syllable level.
- Slosson Oral Reading Test: instructionally at [] grade level. For this evaluation the Student was asked to read lists of sight words at increasing grade levels.
 - Highest level with any correct: Grade []
 - Highest level with 50% accuracy: Grade []
 - Highest level with 80% accuracy: Grade []
 - Highest level with 100% accuracy: Grade []
- Fluency: Accurate at the [] grade level, fluent at the [] grade level. The Student was asked to read grade-leveled reading passages of increasing difficulty for one minute. [] accuracy as well as [] rate were calculated for an oral reading fluency score:
 - Grade : 131 correct words per minute with 96% accuracy
 - Grade : 123 correct words per minute with 96% accuracy
 - Grade : 124 correct words per minute with 96% accuracy
 - Grade : 94 correct words per minute with 93% accuracy
 - Grade : 88 correct words per minute with 97% accuracy
 - Grade : 63 correct words per minute with 91% accuracy
- The report summarized: “[] word work has supported gains in decoding and encoding complex single syllable words and multisyllabic words and oral reading fluency and accuracy. Continued areas for instruction include decoding fluency practice with real, multisyllabic words, sight word recognition for [] and [] grade level sight words, oral reading fluency practice at the [] and [] grade level, sight word spelling, and sentence writing fluency. Direct instruction in paragraph writing is also recommended.”
- During that summer, the Parent noted that the Student’s demeanor while in the [] program was very positive. “This is the kid who didn't want to go to school because of library [but] was now psyched to go to summer school reading when there were beautiful days outside.”

[] Grade (2023-2024)

125. The Student attended [] grade at the [] School.⁵ At [], the Student had an individualized plan that included measurable goals in literacy and math. [] received daily 1:1 literacy tutorials and [] progress was highly monitored. [] quarterly progress reports described a strong trajectory of improvement in [] literacy skills.

126. On October 23, 2023, an IEP meeting was held with staff from both [] and the School. [] [], [] new director, reported that the Student was doing “really well” there and had not had any negative feelings about school. She stated that [] had 1:1 reading instruction and math with other 3 students. The Parents agreed to have the School perform a classroom observation.

127. The Parents testified that the Student was more comfortable overall with literacy-based tasks and began reading graphic novels to [] for pleasure and reading street signs while traveling by car.

128. On April 8, 2024, an IEP Team meeting was held. No one from [] was present. The School reported on two observations conducted by its staff. The School staff believed that the School was able to provide a FAPE to the Student at its [] school, which would provide the least restrictive environment for []. The staff stated that they believed the Student would be able to attain the same goals as [] by using either the Wilson program or a different one, and that [] progress was not dependent on the Orton-Gillingham “Seeing Stars” program. The School also offered ESY programming for the Student.

129. The Parents responded that while they did not disagree with having the Student in the public school setting, they believed that [] was not ready to return. The School informed the Parents that Ms. [] from [] would be able to provide the Student with [] special education instruction at the [] school so [] could be in [] least restrictive

⁵ During the first semester, classes were held at the old school building in [] and during the second semester they were held at the school’s new campus in [].

environment. However, the Parents chose not to accept the School's offer for this provision of the Student's instruction.

130. Despite the Student's solid progress during the 2023-2024 school year, Ms. [] testified that the Student was not ready to learn in a less restrictive setting and continued to require the 1:1 literacy tutorial sessions, as well as the small group classes, especially to improve [] oral reading fluency. She stated that [] gains were currently fragile and at risk if [] were to return to a mainstream classroom experience too soon.

131. The Parents have incurred expenses as outlined in their expense spreadsheet. This includes:

- \$750 for the [] evaluation in March 2022;
- \$1,920 for the Seeing Stars tutorials at [] in spring 2022;
- \$52,500 for the day school tuition at [] for 2023-2024;
- \$1,250 for the [] evaluation report in June 2023;
- \$7,865 for [] tuition during the summer of 2023;
- Mileage reimbursement for associated transportation.

132. POSITIONS OF THE PARTIES

The Parents

The Parents argue that the School violated the Students' rights under the IDEA by failing to evaluate and identify [] as IDEA-eligible until June 2022. They assert that the School should have suspected the Student's disability and triggered the evaluation and identification process before the Parents did in April 2022, when the Student was in [] grade.

The Parents argue that as a result, the Student failed to receive a FAPE for at least two years before [] was identified as having a qualifying specific learning disability. As such, the Parents claims that the alleged FAPE violation warrants a compensatory award, including reimbursement for tutorial placements at [] in 2022 and [] in 2023, as well as [] day school placement at [] for 2023-2024.

More specifically, the Parents argue that the IDEA’s “Child Find” requirement obligated the School to ensure that the Student was identified and evaluated at public expense, despite having been advanced from grade to grade. Citing 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; MUSER, § IV.2.A. and *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009).

The Parents assert that the School was specifically required to screen the Student for dyslexia at some point in the [] grade, since [] teacher knew the Student was having “difficulty” with literacy-related skills, including 1) phonological and phonemic awareness; 2) sound-symbol recognition; 3) alphabetic knowledge; 4) decoding skills (knowledge of letter-sound relationships); 5) rapid naming skills; and 6) encoding or spelling skills. Citing Maine’s dyslexia screening mandate, 20-A Me. Rev. Stat. § 4710-B(2). The Parents point to []’s concern that in September 2019, the Student knew only two of 250 sight words that [] should have mastered by then.

The Parents argue that all that was required of the School to comply with its child find obligation was to have acted to evaluate the Student when School staff suspected that [] had a disability. Citing 34 C.F.R. § 300.304 (c)(4); 34 C.F.R. § 300.11(c)(1).⁶ The Parents cited Ms. [] testimony, wherein she acknowledged that the District should have referred the Student for evaluation in the Student’s second semester of [] grade, which was prior to the Parents’ request for a referral. However, the Parents argue that the School’s teaching staff and others should have suspected and evaluated the Student for a possible learning disability at the beginning of [] grade when [] was unable to read independently at F&P Level A ([] level) and knew only two of the 250 sight words expected of [] graders.

The Parents assert that under the IDEA and Maine’s dyslexia screening law, Ms. [] should have referred the Student for evaluation, or at least a dyslexia screening, at that time. The Parents argue that the School was not permitted to resort to RTI methods when there was obvious evidence sufficient to create a suspicion of a disability. It asserts that the School’s decision – to

⁶ Also citing *Bd. of Educ. v. M.N.*, 2017 U.S. Dist. LEXIS 169926 at *7 (S.D.N.Y. Oct. 13, 2017)); *D.K. v. Abington Sch. Dist.*, 696 F.3d 293 (3d Cir. 2012); *Dep’t of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001); *W.B. ex rel. E.J. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995)

ignore evidence of a suspicion of a disability and wait until RTI efforts failed to show progress – is not legally supported.

The Parents suggest that despite being provided with LLI services for 30 minutes a day and private tutoring, the Student remained more than a year behind [] grade peers. The Parents suggest that Ms. [] LLI report from the second semester of the Student's [] grade year, which showed that the Student had made only minor progress, also should have prompted her or other School staff to refer the Student for evaluation.

The Parents also argue there were several reference points in [] grade when the School's professional staff should have acted on suspicions that something, such as a disability, was impacting the Student's literacy progress. They cite Ms. [] addition of the Student to her "worry list" of those making only "nominal" progress; the continuation of LLI RTI, which was meant to be temporary; and Ms. [] mid-year report relaying the "discouraging news" that the Student's reading gains were not as high as others thought they were. They emphasize that by the end of [] grade, the Student had plateaued at Level K, which is equivalent to the early [] grade.

The Parents also point to the Student's NWEA results from the fall of 2021 that placed [] at the 4th percentile nationally in reading. They point to [] negative feelings of failure: describing [] as "stupid," helplessness (thoughts of suicide), and school avoidance behaviors as a result of being bullied.

By November 2021, the Student had taken a full calendar year to move one level in the F&P system, despite having constant extra instruction through RTI and private tutorials. While Ms. [] believed that it was only in December 2021 that the School should have suspected that [] may have a learning disability, the Parents hold that the evidence shows that the School was engaged in willful blindness to this suspicion long before then.

The Parents stress that the School's obligation to refer and determine if the Student had a learning disability existed independently of their own referral request. They suggest that their

request for a referral in the spring of 2022 had no bearing on the School’s child find liability under the IDEA. Citing *Z.J. v. Board of Education of the City of Chicago, District No. 299*, 2018 WL 4616347 (N.D. Ill. Sept. 26, 2018) (“Neither the [hearing officer] nor [the District] cite any authority suggesting that [parents’] alleged knowledge of [] learning difficulties absolved [the District] of its responsibilities under the IDEA, and the authority that Plaintiffs have brought to the Court’s attention holds the opposite.”).

The Parents argue that the School’s failure, until June 2022, to determine whether the Student was eligible for special education and related services, violated [] right to a FAPE, premised on a Child Find violation causing a deprivation of education benefits. Citing *J.M. v. Summit City Bd. of Educ.*, 39 F.4th 126, 138 (3d Cir, 2022). “Such a claim has three elements. First, the child must have a disability for which he or she needs special education and related services ... Second, the school district must breach its child-find duty ... Third, the school district's child-find breach must impede the child's right to a FAPE, or, alternatively, the child-find breach must either ‘significantly impede[]’ parental participation rights or ‘cause[] a deprivation of educational benefits.’” *Id.*

Compensatory Remedy for the Failure to Provide a FAPE

The Parents argue that a compensatory remedy for the School’s failure to identify [] as eligible prior to June 2022, and its failure to provide [] with a FAPE, is warranted for the 2022-2023 ([] grade) and 2023-2024 ([] grade) school years. They suggest that reimbursement for their own efforts to provide [] with supplemental educational services, to compensate for the allegedly inadequate services provided by the School, is a proper remedy. Citing *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184 (1st Cir. 1993).

These services included tutorials in May-June 2022 and enrollment in the [] day school for the 2023-2024 school year, which included compensatory instruction to target both [] phonological and orthographic processing deficits. It also included tutorials both at [] (26 hours in 2022) and at [] (92 hours in 2023) that provided compensatory programming in literacy skills using the Orton-Gillingham “Seeing Stars” program that focused

on phonics skills and multisensory programming to stimulate orthographic processing (air writing and tactile approaches), as well as individualized error correction techniques.

The Parents request reimbursement for the academic services provided at [] for the Student's [] grade. They believe that the program there provided the type of recommended programming cited in the [] report, including a focus on improving the Student's oral reading fluency and a low student-teacher ratio. They suggested that this environment, serving 27 students in grades [] through [], with 13 instructional staff, allowed the Student to relax, be [], and receive highly individualized assistance throughout the school day. The Parents stated that the Student was engaged in learning with appropriate accommodations without complaint. With effective and specially-designed instruction, the Student progressed academically and regained [] self-esteem. [] began to see [] as a “reader” for the first time. By the end of the 2023-2024 academic year, [] was reading grade []-[] passages for [] reading-in-context work. In April 2024, [] fluency on a []-grade passage was 80-90 correct words per minute, and by June 2024 that had grown to 107 correct words per minute. Likewise, [] performance on the Symbol Imagery Test, which is directly related to reading fluency skills, had risen to the average range at a standard score of 106. Based upon this success, the Parents believe that reimbursement of tuition and costs for attending [] for 2023-2024 is reasonable.

The Parents also assert that the Student continues to need additional compensatory services in the area of reading fluency and will require the most intensive specialized instruction moving forward to regain the position [] would have enjoyed had [] received appropriate services in a timely manner.

In the alternative, the Parents argue that the School must reimburse the Parents for 2023-2024 ([] grade) at [] because the School failed to offer the Student an appropriate IEP for that school year. They explain that they rejected the School’s IEP offer for 2023-2024 due to the School’s plan to provide the Student with the same services that failed to allow the Student to progress in [] literacy development, which included 45 minutes per day of instruction using the Wilson Reading program with the goal of getting [] only through step 8 of

Wilson’s 12-step program, which are generally designed to be delivered within a period of two academic years. The Parents were concerned that the slow pace of the Student’s progress in Wilson as [] approached [] school would not be enough for [] to handle [] school’s higher literacy demands. The Parents acknowledged that the Student made some progress in decoding skills between February 2022 and June 2023, during which [] also received 26 hours of Seeing Stars tutorials and 55 hours of Wilson tutorials, but [] had not substantially closed the literacy gap with [] grade peers. It became clear to them that “more of the same” would not be sufficient for [] to progress to or near [] grade level. To the Parents, this justified their rejection of the 2023-2024 IEP as being inappropriate.

In addition, the Parents claim that the proposed IEP omitted goals and services targeting the Student’s reading fluency skills, a separate area of achievement identified in the IDEA’s learning disability regulation. Citing 34 C.F.R. § 300.309(a)(1)(v) (separate from “basic reading skill” and “reading comprehension”). Citing *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69 (1st Cir. 2016).⁷ The Parents argue that without targeting the Student’s flagging reading fluency skills, the School’s proposed IEP and placement offer was inappropriate under the IDEA’s standards.

The Parents also argue that even if the Wilson program was appropriate, the School was not prepared to implement it for 2023-2024 due to its lack of staff trained to use it. They cite Ms. [] testimony, wherein she stated that she would contract with [] for the 2024-2025 school year, inferring that the School did not have anyone available to implement the Student’s IEP offer in 2023-2024.

⁷

The IEP must have “an eye toward ‘progress in the general education curriculum.’” *Endrew F.*, 137 S. Ct. at 1000, quoting 20 U.S.C. § 414(d)(1)(A)(i)(IV)(bb); see also MUSER § IX.3.A(1)(b)(i), (iii); (d)(ii) (IEPs must be designed to “[m]eet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum,” must “reflect the individual goals to successfully meet the content standards of the system of Maine’s Learning Results”). In this case, that means teaching (the Student) to read so [] can have effective access to the same general curriculum as [] peers.

For the above reasons, the Parents assert that the School could not meet the *Endrew F.* standard of substantive appropriateness, and that its plan failed to be reasonably calculated to enable [] to make appropriate progress in light of [] unique circumstances.

Unilateral Placement at [] Is “Proper” Under The IDEA

The Parents argue that their unilateral placement of the Student at [] satisfies the liberal test established by the courts for determining whether a unilateral placement is “proper under the Act.” [] is a nonprofit school, approved by the Maine Department of Education as a special purpose private school, specializing in providing reading programs, such as Lindamood-Bell (including Seeing Stars), and employs tutors trained and supervised in these methods to deliver intensive tutorials. They state that the Student progressed in that programming and now demonstrates an eagerness to read. The Parents argue that at this point, [] is still the least restrictive environment (“LRE”) because they believe [] continues to need the specialized programming provided by [].

In addition, the Parents request reimbursement of their independent evaluation expenses incurred both with [] and []. This testing was necessary due to the School’s failure to obtain critical information about the Student’s learning profile.

No Basis for a Defense of Parental Obstructionism

The Parents argue that the School failed to provide sufficient evidence that the Parents obstructed the School’s provision of FAPE to the Student. The Parents suggest this cannot be the case, since they were the ones who initiated an investigation into the Student's possible disability through a private evaluation despite the years of inaction on the part of the School. They also made the effort to provide the Student with specialized services in May 2022, even before the School evaluated and confirmed eligibility for an IEP at the very end of [] grade. The Parents state that they took no action to interfere with the School’s attempt to educate [] appropriately. They state that while they expressed their anger and disappointment with the School in 2022, they never acted to interfere with the School’s efforts. They state that anger is a

legitimate reaction by parties who believe that their rights have been violated or ignored. Citing *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.* 631 F.3d 1117, 1126 (9th Cir. 2011).

The Parents note that while there may have been an intent to remain “passive” at the Student's eligibility meeting in June 2022, the record demonstrated that they were not passive at that meeting. They collaborated with the School to establish the Student’s eligibility for IDEA services and advocated to ensure that the School educated the Student effectively. They advocated to have Ms. [] observe the SPIRE literacy instruction in October 2022 and advocated for more intensive 1:1 services at the IEP Team meeting in November 2022.

The School

Procedural Argument - Statute of Limitations

At the outset, the School renewed its request to dismiss the Parents’ claims arising before February 15, 2022, arguing that they are barred by the IDEA’s two-year statute of limitations.⁸

The School argues that for many years, the Parents had actual knowledge that the Student had not been learning to read as quickly as others and was well behind in [] reading (the “existence of the injury”) and that the School’s reading instruction was the “probable cause,” given that it had been delivering reading instruction and interventions. (Citing *Ouellette* at 136.) It cites portions of information the Parents received from the School prior to January 2022:

- May 2019: Parents believed the Student was “struggling” in reading. Tr. at 444-45.
- The School argues that the Parents could not have reasonably thought that anyone – except themselves, possibly – other than the School was responsible for the Student being behind in his reading.

The School argues that there were several reference points starting in September 2019 that should have led the Parents to believe that the Student should be evaluated, yet they failed to do so. The reference points included:

⁸ The School first raised this issue in a Motion to Partially dismiss the Hearing Request, which was denied on June 2, 2024.

- September 2019: the Student read below Level A ([]) and knew only 2 out of 250 [] grade sight words.
- December 2019: the Student's first Term report card stated that the Student was reading at Level I when J was the expectation for that point.
- Spring 2020: the Parents had difficulty keeping up with schoolwork and "the writing and the reading are def challenges that we're navigating" with the Student.
- April 2020: the Student's teacher confirmed the Student was reading at Level I, "[] grade" when the Student's father asked the teacher about which books he could buy on the Student's reading level .
- October 21, 2020: the Student's [] grade reading assessment "came out at Level H, which means [] is reading around the end of [] grade level."
- The [] Grade Term 1 Report Card indicated that the Student was "not yet" meeting the grade level reading standard; "Meeting the [reading] standard required a score at Independent Level L or higher. (The Student) scored an H."
- The [] Grade Term 2 Report Card stated the Student "not yet" meeting standards in reading foundational skills and that [] had "moved from Level H to a Level K. The report noted that the School was encouraging the Student to use a variety of strategies to decode new words.
- May 27, 2021: the Student scored in the 9th percentile in reading on the NWEA, and [] [] Grade Term 3 Report Card stated that, "The benchmark for meeting this standard is to read at Level O. The Student is reading at Level K."
- October 4, 2021: the Student scored in the 4th percentile in reading on the NWEA.
- On October 25, 2021: the Student's father was told that [] was on level L."
- On the Student's [] Grade Term 1 Report Card it was reported that [] was "approaching" grade level standards in reading foundational skills and reading and comprehending grade-level literature.

The School argues that the Student's progression through the leveled reading texts [] and [] grades was known to the Parents and that they were regularly informed about [] reading levels and the grade level expectations. It argues that as early as September 2019, they were told about the "Leveled" book system and that the Student was reading at a [] level. The School suggests that at any reference point, this information should have been sufficient to meet the First Circuit's "duty to inquire."

In the alternative, the School argues that by April 2020, the Parents knew that the Student was receiving "LLI" instruction, "leveled" texts, about the F&P measurement scale at what level the Student was reading. The School asserts that even if the Parents did not know how far below grade level the Student was reading, they knew from staff during IEP meetings and parent-teacher conferences that [] was behind based upon [] NWEA and MEA scores.

The School asserts that if the Parents had “Googled” the F&P benchmarking system, they would have found the December 2019 article discussing the reliability of the F&P system. The School states that pleading ignorance, even if they did not do their research, does not delay the accrual of the discovery rule.

The School argues that the explanation the Parents gave on the [] inquiry form shows that they had knowledge of an injury and the probable cause of that injury, stating that the School had not done a good job assessing or supporting the Student. They wrote that the Student had fallen behind in reading development and had been moved into a different reading program; they also explained that they hired a tutor to help with [] reading and writing. They reported that they were not comfortable with how the School was assessing or supporting [], and wanted to do everything to support the Student in getting up to speed and gaining confidence.

The School asserts that no later than January 28, 2022, the Parents knew that the Student was not reading as [] should have been, and also that [] had not been referred to special education. By then, Ms. [] had discussed with the Parents her concern that the Student had not been evaluated for special education eligibility, and her concern over the Student’s NWEA scores from over the winter.

The School notes that on or around February 6, 2022, the Parents had spoken to each other about whether the Student needed additional testing and an IEP.

The School identifies further evidence that the Parents started their inquiries regarding the Student’s reading struggle when, in early February, they completed a Client Intake Form and identified the Reason for Referral as “continued reading delay,” noting that both the Student’s reading and [] confidence were Major Areas of Need. Further down, the Intake Form asked, “Does School Identify Student’s Needs?” and the Parents stated, “not really.” They also reached out again to the School, commenting to the staff that, based upon the NWEA 9% test score in reading, they assumed that the Student qualified for additional testing and possible IEP.

The School asserts that by February 7, 2022, when Ms. [] reported to the Parents that she was contacting the special education staff to start the referral process, the Parents had enough information to take steps to preserve their rights in relation to their view that the School had failed to evaluate the Student and provide [] a FAPE.

The School bolsters its argument that the Parents knew, or should have known, of the School's alleged failure on or before January 28, 2022, because they are both intelligent, highly-educated, and sophisticated people. The Mother is an attorney and former social worker. As a social worker, she provided outpatient services to children with mental and behavioral health issues, including disabilities, for five to seven years at a facility that focuses on children with unfortunate circumstances. She also took an active role in the School's PTA group.

The School argues that even if the above knowledge was not sufficient for accrual, it may be sufficient to trigger a suspicion in a reasonable person in the plaintiff's circumstances regarding a putative defendant's role in causing the plaintiff's injury, and to trigger "a duty to either investigate or inquire further regarding "the injury and the party responsible for causing it." *Ouellette v. Beaupre*, 977 F.3d 127, 137 (1st Cir. 2020). In determining whether the facts necessary for the Parents to file an IDEA claim were or should have been apparent to a reasonably prudent person similarly situated, they are charged with knowledge of two "sets of data," including the "generally available information about the relevant facts" and "the likely results of any further inquiry that a reasonable plaintiff, knowing these facts, would undertake." *Ouellette* at 137. All of the facts listed above pre-date 2022, including the Mother's extensive professional training on and knowledge of procedures for evaluating and treating children who had disabilities. It asserts that knowing everything cited above should have triggered "a suspicion in a reasonable person" and "a duty to investigate further." The School suggests that the Parents received news of a "shocking" NWEA score and found [] within a week or so, had an intake interview, and got the Student in for testing weeks later.

The School asserts that the Parents then chose to wait more than two years, until February 2024, to file their claim, which could have been filed months if not years earlier. It states that by choosing to defer the filing of the due process complaint, the Parents missed the outer time limit

by two to three weeks. The School urges that based upon the failure to file the complaint, all claims from prior to February 15, 2022 must be dismissed.

The Merits

The School argues that it met its IDEA referral obligations pursuant to 20 U.S.C. § 1412(a)(3)(A).

The School argues that it neither failed to timely evaluate nor identify the Student for special education during the 2018-2019 school year ([] [] grade year). It states that the Student predominantly met expectations in English language arts throughout the school year, noting that [] phonics and decoding skills were at grade-level expectations in Term 2 and approaching expectations in Term 3, and that [] met expectations in reading and comprehending grade level literature and text. The School states that [] reading fluency was “approaching expectations” in Term 1 and beginning expectations in Terms 2 and 3, but noted that [] reading fluency was being graded according to English standards, even though he was reading exclusively in Spanish. S-11.

The School states that while the Parents felt that the Student may improve [] reading skills by having a tutor, the IDEA’s Child Find protections were not implicated at that time based upon the Parents concerns. Citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). The School asserts that there were no “clear signs” that the Student was impaired by a qualifying disability; though [] reading grades were not at or approaching grade-level expectations in April and May, many other students were “struggling” with reading as well. The School therefore insists that it was not negligent to neither evaluate nor identify the Student. Citing *Mr. F.*, at *1; and *Doe v. Cape Elizabeth Sch. Dep’t*, 382 F. Supp. 3d 83, 98-99 (D. Me. 2019).

The School further argues that it neither failed to timely evaluate nor identify the Student for special education during 2019-2020 ([] grade year). The School explains that the Student was not reading and comprehending grade-level English text when he entered [] grade, since [] had received instruction exclusively in Spanish for two years and received no

outside English phonics, reading, or writing instruction during either [] or [] grade. The School also states that in Term 1, [] exceeded expectations in phonics and decoding skills, and went from reading two [] grade high frequency words to 107, exceeding the benchmark. Despite [] fall NWEA reading score which placed [] in the 34th percentile in reading, the Student had had a relative strength in foundational skills. By mid-December, [] had moved from a Level C to a Level F and joined a more advanced LLI group. By the next term, [] had moved from a Level F to a Level H. By February, [] was reading at Instructional I with 94% accuracy and satisfactory comprehension. The School notes that this was 1% shy of Independent I and of grade-level expectations for the fall of [] grade, representing one school year of growth in reading accuracy / decoding and comprehension before schools closed two-thirds of the way through the school year due to COVID-19.

The School argues that the Student's teacher believed that the Student's skill gaps were attributable to [] complete lack of English reading instruction, and no reason to suspect [] had a disability for which [] required special education.

The IDEA calls for pre-referral strategies or early intervening services by staff prior to staff referrals into the special education system. See 20 U.S.C. §1401(c)(5)(F). This reflects the general standard that a student qualifies under the IDEA only if the student needs special education to benefit from the school program. Maine requires schools to implement general interventions that are "specific, timely, and based upon ongoing formative assessments that continually monitor student progress." 20-A M.R.S.A. § 4710. The School asserts that, while the Student struggled with the English language, it was proper for the Student to receive LLI for 30 minutes of small group instruction in a pull-out setting each day.

The School also explains that it was not unreasonable for the Student to still be at the "beginning" in expectations in English reading fluency, since as Ms. [] testified, "Oral reading fluency tends to come last because the student has to put all of the pieces together on the fly all at once."

The School explains that in Term 3 of [] grade, classes were interrupted by the COVID-19 pandemic. The School implemented a new kind of learning within the course of a few days, without much guidance. On March 31, Maine imposed a “stay at home mandate” and ordered public schools across the State to remain closed until at least May 1, 2020. Parent / teacher conferences were canceled and students and families tried to engage in education, but in some cases, it was impossible. Even the Parents were unable to keep up with schoolwork with the Student. They tried to engage in [] teacher’s class meetings and assignments. Everyone was in survival mode and teachers knew little about how, if at all, each of their students was progressing through the curriculum. The Student received no grades for the spring term; there was sparse LLI progress data, and no NWEA data.

The School stated that if the Parents had timely filed their IDEA claim, they would have placed the School and the Student in a better position to establish the facts of the spring of 2020. The School argues that even if the Parents met their burden on the statute of limitations issue, they have failed to demonstrate that the School violated its child find duty during the Student’s [] grade year, given that there were no clear signs that the Student was impaired by a qualifying disability.

2020-2021 ([] Grade)

The School argues that it did not fail to evaluate and identify the Student during the 2020-2021 school year ([] grade). It explains that the students encountered many obstacles to receiving their education that year. School “reopened” for hybrid learning two weeks later than usual; the Student was only in the school building twice a week for a total of 9.5 hours due to social distancing protocol; [] was on Zoom for online classwork for three days a week, while parents began to “co-teach.” The School noted that while the Student remained at level H by the end of the first Term, he moved up to Level K ([] grade level) in December 2020, less than a school year below benchmark. The School explained that since the Student achieved ten months’ growth in four months, [] was dismissed from LLI in February 2021. The Student was assessed at the beginning of Term 3, and was still at Level K. [] teacher noted that [] seemed more distractible, and asked the Parents not to have toys or distractions during reading, and that

[] use a bookmark or index card to keep track of [] place, and practice a list of sight words that were sent home. Ms. [] resumed remote reading sessions with [] twice a week. By mid-April, [] was reading Level M books.

While [] was still reading below grade level, the School acknowledges that it was not excused from its obligation to provide a FAPE during the 2019-2020 or the 2020-2021 school years, when the hybrid learning model was “calamitous” for some children. It explains that until late April, it provided all students with 9.5 hours a week of in-person instruction. Thereafter, in May, schools opened for an equivalent of three days a week. The Student returned to [] grade at the same level [] was when [] grade ended and restarted LLI. By the end of the Term 3, [] report card stated that [] was reading at Level K, despite reading Level M books.

The School argues that many students struggled that year, but as a [] grade student, the Student was reading “within the range” expected for [] graders, despite all of the obstacles. Based on [] progress toward grade-level expectations in spite of the hybrid model and in light of [] lack of foundational skill instruction in English, the School believes that it was not negligent for not evaluating [] that year. The School stated in its brief, “Staff might have wondered whether to refer [], simply because of the length of time [] had been in LLI, but it was reasonable for them to give LLI another go because more of that time in LLI had been remote instruction than it had been in person, and even when it was remote, [] was getting three sessions a week, not five.” It argues that there were no “clear signs” that the Student's educational performance was impaired by a qualifying disability.

The unique circumstances that year, and the Student’s “individual circumstances,” demand a measure of leniency in considering the School’s duty.

[] Grade (2021-2022)

The School acknowledges that it did not refer the Student in late December 2021 and that it should have done so. The reading assessment performed that month suggested that [] needed a more intensive phonics instruction that LLI did not target, which should have raised a suspicion

of a learning disability. However, it argues that this procedural violation did not impede the Student's right to a FAPE.

The School suggests that despite its failure to evaluate, the Student continued to make some progress for the balance of the school year and therefore the delay in the referral from December 2020 to June 2021 did not cause educational harm. It asserts that the record shows that the Student made growth relative to grade-level peers. In Ms. [] classroom, [] began to receive small-group instruction that targeted foundational skills. As a result, it asserts, the Student's winter NWEA scores went up and [] reading was approaching expectations.

[] Grade (2022-2023)

The School argues that once the Student was identified and eligible for special education services, the IEP Team created an appropriate IEP starting in the fall of 2022 ([] grade.) The School asserts that while the IEP did not specifically address the methodology to be used, there is no dispute that it used SPIRE, an evidence-based, multisensory Orton-Gillingham reading program, to address the Student's weaknesses in both phonological and orthographic reading issues. It was delivered in a small group setting of 2-3 students who were at similar reading levels.

The School argues that while there is no duty to include a specific methodology in an IEP, at the IEP meeting on November 4, 2022, it implemented the family's requests to increase the amount of reading instruction from 30 minutes to 45 minutes per school day; move the Student from small group to 1:1; and change the reading methodology from SPIRE to the Wilson program. The School explains that the Parents accepted this program and chose not to withdraw the Student from a public school placement at that time. The IEP also included monthly parental consultations with School staff.

The School claims that based upon most measures, the Student made significant gains during [] grade. Based upon these circumstances, the School argues that the IEP was

reasonably calculated to provide meaningful educational benefits in the least restrictive environment.

The School argues that while no IEP is a guarantee of success, in this case, the Student's IEP succeeded based upon most of the assessments done in the spring of 2022, including those administered by [] in order to make a comparison with Ms. [] from the prior year. The School notes that in all areas of comparison, the Student achieved growth, including significant growth in some areas. The School argues that these measures demonstrated that it implemented the agreed-upon IEP that allowed the Student to achieve growth in most areas, and showed that the School provided a FAPE to the Student in the LRE.

[] Grade (2023-2024)

The School argues that its IEP and placement proposal for the 2023-2024 ([] grade) school year was reasonably calculated to provide the Student with a FAPE in the least restrictive environment. It states that since the [] grade IEP was appropriate and implemented with fidelity to have a demonstrable impact on the Student's progress, the updated goals for the following year were also reasonably calculated to provide the Student meaningful benefit in [] grade.

The School states that the Student's [] grade IEP included 150 minutes a week of specialized instruction in writing (as in the previous year, 30 minutes a day), and 225 minutes a week of 1:1 specialized instruction in reading (45 minutes a day, as for most of the previous year). It also called for ESY services using the Wilson methodology for the summer of 2023 (reinforcing the methodology that had been used in 2022-2023). The IEP updated the goals for reading to reflect where the Student had finished the year in Wilson and the goal for growth in Wilson over the year. Thus, the IEP locked in use of the successful Wilson program and locked in the 1:1 service delivery. The team expanded the list of support and accommodations over and above the previous year. Again, given the success of the previous school year, there is no reason to view this programming offer as anything short of a reasonable calculation by the team.

The School states that the Parents' concern that the Student's [] grade special education teacher was retiring is no basis for concluding that the School could not implement the IEP with a Wilson-trained provider. The School informed the Parents that it would have filled this position with a trained Wilson provider, whether a provider was available within the District or not. The Parents therefore made the private placement at their own risk. Therefore, the School asserts, the Parents cannot demonstrate that it could not have provided this service. The School also states that even for the [] grade IEP, it offered to have Ms. [] provide 1:1 reading instruction to the Student, demonstrating that it would seek outside providers to fulfill its IEP obligations if necessary.

Reimbursement for [] Placement Unsupported Under the IDEA

The School argues the Parents' unilateral placement at [] does not meet the standard required by the IDEA to support a reimbursement or compensatory education order. Citing Mr. and Mrs. [] v. M.S.A.D. No. [] 480 F.3d 1, 24 (1st Cir. 2007), where the Court found that the unilateral placement did not "offer at least some element of special education services in which the public school was deficient." The School claims that [] is an inappropriate placement because it has almost no same-age peers. The facility, a former corporate office space surrounded by a parking lot, basketball hoop, and picnic tables, is inadequate. The course selection is minimal at best and very inadequate for a child as bright as the Student; neither does it offer physical education or health class.

The School also asserts that [] provided the Student with one hour per day of 1:1 reading tutorial delivered by an Educational Technician III. One of [] tutors for the 2023-2024 school year had no teaching experience and the only "lesson plan" for the Student was created by []; [] math teacher was also an Ed Tech III; and [] writing teacher only had a general education certificate, providing the Student no writing curriculum. [] did not have an IEP for the Student until October 15, and even then, it was not used. It notes that [] did not set up speech to text, an important accommodation in the Student's IEP, until the Parent requested it in mid-December.

The School argues that the reading program delivered by an inexperienced educational technician III has caused a regression in the Student's reading skills. It therefore asserts that the IDEA does not require reimbursing the Parents for the costs of a private placement that has failed the Student during the year for which they seek the order. It cites [] assessment that at the end of [] grade, the Student was reading at a [] grade level.

The School argues that even if it violated the IDEA and denied a FAPE to the Student, reimbursement for an expensive private program that has not provided gains for the Student over the levels that [] had achieved the previous summer should not be ordered, alleging it to be a failed program.

An Order to Place at [] in the Future

The School argues that because it alleges that the Student's programming at [] is inappropriate, any future placement at [] to remedy an alleged IDEA violation in the past should also be denied for the same reasons. The School also asserts that its own proposed IEP was improved by specifically requiring reading services by []. The School's intent is to get the Parents to return the Student to the School to provide [] programming in the LRE.

Unreasonable Obstruction of the IEP Process

The School argues that the Parents attempted to manipulate the IEP progress in order to place the Student in a day treatment placement and get reimbursed by the School. As such, they should be denied any remedy due to their obstructive behavior. Citing *C.G. & B.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 287-88 (1st Cir. 2008). It follows that by hiring a lawyer at the time they made a referral in 2022 is evidence that they were being strategically guided throughout the IEP process. It cites the email sent by the Student's father to Ms. [], which stated: "Strange to say – but talking to [] last week – our goal for tomorrow is to be pretty passive and hope he isn't referred for services. That way, we can just send [] to []

and sue them for reimbursement. Given that goal – we won't need you to join.... Honestly – we

just want [] out of there.” The School states that the Parent received this advice from their lawyer, and made it part of their plan to unilaterally place the Student at []. The School states that this behavior in handling the IEP Team process is antithetical to the principles of the IDEA.

The School also believes that once it identified the Student and agreed to provide 1:1 Wilson for 45 minutes per day, the Parents “reset their strategy” and waited until early February 2022 to assert that the placement had failed, and then gave notice in April that they were unilaterally placing the Student at [] for the summer and [] for the following school year. While it acknowledges that there is no evidence to cite, it believes that the Parents never intended for the Student to attend public [] school.

The School suggests that the Parents tried to prevent “apples-to-apples” comparisons between progress made at the School and at [] by: not having the Student take the fall NWEA; administering an assessment during the due process hearing; not challenging the 2024-2025 IEP and placement; and objecting to any consideration of that issue. The School surmises that if the Parent wins reimbursement in this matter, then they will seek payment of all their attorney fees and also challenge the current 2024-2025 IEP.

V. LEGAL FRAMEWORK

The IDEA generally requires that public school districts provide special education and related services to any child with a disability in conformance with an individualized education program. See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S., 137 S.Ct. 988, 994 (2017) (citing 20 U.S.C. § 1401(9)(D)). IEPs are “tailored to the unique needs” of a particular child by an IEP team, “which includes teachers, school officials, and the child's parents.” *Id.* The IDEA mandates “a detailed set” that “emphasizes collaboration among parents and educators and requires careful consideration of the child's individual circumstances.” *Id.* (citing 20 U.S.C. § 1414). If a dispute arises regarding a child's IEP, the IDEA allows the child's parents to request an impartial due process hearing. 20 U.S.C. § 1415(f). At this hearing, the appointed hearing officer is tasked with determining “whether the child received a free appropriate public education [hereinafter, “FAPE”].” *Id.* § 1415(f)(3)(E)(i). As the Supreme

Court has explained, “for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Endrew F.*, 137 S.Ct. at 1000.

Child Find - Statutory and Regulatory Framework

The IDEA requires states to "identif[y], locate[], and evaluate[]" all "children with disabilities" residing in the state, 20 U.S.C. § 1412(a)(3)(A), and in Maine, that responsibility lies with school districts, 20-A M.R.S. § 7202(1). This statutory requirement is known as the IDEA's "Child Find" requirement. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009). A "child with a disability" is defined as a child with an impairment "who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A). A child who has a disability but who does not need special education is not a "child with a disability" under the IDEA. *DOE v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 73 n.1 (1st Cir. 2016); 34 C.F.R. § 300.8(a)(2).

Each school district must have a plan to identify, locate, and evaluate at public expense students residing within the district who may be eligible for special education services. 34 C.F.R. § 300.111(a)(i) & (ii); 34 C.F.R. § 300.111(c)(1) & (2); MUSER § IV.2.A. A school district's child find process must include “obtaining data on each child, through multiple measures, direct assessment, and parent information, regarding the child's academic and functional performance, gross and fine motor skills, receptive and expressive language skills, vision, hearing and cognitive skills.” 34 C.F.R. § 300.532; MUSER § IV.2.C.

A state's child find obligation extends to "[c]hildren who are suspected of being a child with a disability ... and in need of special education." 34 C.F.R. § 300.111(c)(1). However, school districts need not "conduct a formal evaluation of every struggling student." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012); accord *W.A. v. Hendrick Hudson Cent. Sch. Dist.*, 927 F.3d 126, 144 (2d Cir. 2019), cert. denied, 140 S. Ct. 934, 205 L. Ed. 2d 522 (2020), or jump to the conclusion that any abnormalities in behavior denote a disability, *D.K.*, 696 F.3d at 251.

A school district's child find obligation is triggered when the district has reason to suspect three things: (1) that a child has a qualifying disability, (2) that the child needs special education and related services, and (3) that the need for special education is due to the disability. *Doe v. Cape Elizabeth Sch. Dep't*, 382 F. Supp. 3d 83, 99 (D. Me. 2019) (internal quotation marks omitted); see *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 5, 14 (1st Cir. 2007). A school district violates its child find obligation when "school officials overlook[] clear signs of disability and [are] negligent in failing to order testing, or [when] there [is] no rational justification for" the school's failure to evaluate the child. *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (internal quotation marks omitted); accord *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 750 (2d Cir. 2018); see *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016) ("[A] disability is 'suspected,' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability."). For example, "the informed suspicions" of a child's parents might trigger a school district's child find obligation, even where the school district questions these suspicions. See *Timothy O.*, 822 F.3d at 1120-21.

In assessing whether a district's child find obligation is triggered, the first question is whether the district had reason to suspect that the child has a qualifying disability. Qualifying disabilities are designated by federal law and include emotional disturbance ("ED"), autism, other health impairment ("OHI"), and multiple disabilities. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8. Federal and state regulations set the criteria for what constitutes each qualifying disability, see 34 C.F.R. § 300.8(c); 05-071 C.M.R. ch. 101, Me. Unified Special Educ. Reg. Birth to Age Twenty ("MUSER"), § VII(2) (2017), each of which, as relevant here, requires that the impairment "adversely affect[]" the "educational performance" of the child, see *Mr. I.*, 480 F.3d at 11.

Maine defines "adverse effect" as "a negative impact that is more than a minor or transient hindrance, evidenced by findings and observations based on data sources and objective assessments with replicable results." MUSER § II(3). While this adverse effect cannot be minor or transient, see *Id.*, it need not be substantial or significant, *Mr. I.*, 480 F.3d at 13.2. Normal, age-appropriate behavior is not considered to be an "adverse effect." MUSER § II(3) ("An

adverse effect on educational performance does not include a developmentally appropriate characteristic of age/grade peers in the general population.").

As for what comprises a child's "educational performance," Maine defines this term to encompass "performance in those academic and functional areas ... assessed through the local [school district's] own curriculum," which includes "how the child demonstrates []/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas." *Id.* § II(10), (15). Qualifying children are entitled "to services that target all of their special needs," not just academic ones, to include, for example, social and emotional skills and behaviors. *Mr. I.*, 480 F.3d at 12 (internal quotation marks omitted).

A child with a disability is eligible for an individualized education program. See *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017). And while an IEP need not address problems that are truly distinct from learning problems, because Maine defines "educational performance" to include more than just academics, a child may be eligible for special education due to deficits in non-academic areas. *Mr. I.*, 480 F.3d at 12.3

The second part of the child find obligation asks whether the district has reason to suspect that the child with a qualifying disability needs special education and related services. Maine considers a child to "'need[]' special education and related services when, because of the disability, the child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program in spite of other services available to the child." MUSER § VII(2). "If the child find process indicates that a child may require special education ... to benefit from regular education," a referral to determine eligibility is required. *Id.* § IV(2)(D) (emphasis omitted).

Finally, the third requirement of the child find obligation is satisfied if the district has reason to suspect that the qualifying disability is the cause of the child's need for special education and related services. Once a school district has "identif[ied]" a student through the child find process – that is, once it has reason to suspect that the child might require special

education due to []/her disability – the district must refer the child for a special education evaluation within a reasonable time. *W.A.*, 927 F.3d at 133; *D.K.*, 696 F.3d at 250.4

A violation of the child find obligation is a procedural violation, *Mr. P*, 885 F.3d at 750; *D.K.*, 696 F.3d at 249, and thus may not always give rise to a cause of action. Rather, a violation of the child find obligation is only cognizable if it impedes a child's right to a FAPE, results in a significant impediment to the parents' opportunity to participate in the IDEA decision-making process, or causes a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); see *Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 80, 87 (1st Cir. 2018).

In evaluating whether the child find obligation has been violated, and whether that procedural violation has substantive consequences, I must evaluate the reasonableness of the delay between the date the child find obligation was triggered due to notice of a likely disability and the date that obligation was satisfied. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 (5th Cir. 2020), cert. denied, 141 S. Ct. 1389, 209 L. Ed. 2d 129 (2021). "A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities." *Id.*

Statute of Limitations

The IDEA identifies the accrual date for the running of the limitations period for requesting a due process hearing. The IDEA states:

A parent . . . shall request an impartial due process hearing within 2 years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows. 20 U.S.C. § 1415(f)(3)(C)(ii).

Maine's special education rules mirror federal law. MUSER §XVI.12(E). Here, the statute of limitation question revolves around the IDEA's "knew or should have known" standard (i.e., the "discovery rule").

The Courts apply the discovery rule to IDEA claims. The limitations period of § 1415(f)(3)(C) “begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation—whichever comes first.” *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) *Merck & Co.*, 559 U.S. at 653.

Courts have routinely referred to the IDEA’s limitations trigger as a “discovery rule” and focused on the “reasonable discovery date.” See, e.g., *Ms. S. v. RSU 72*, 916 F.3d 41, 50 (1st Cir. 2019) (“We hold that the IDEA has a single two-year statute of limitations regulating the amount of time to file a complaint after the reasonable discovery date.”); *Avila v. Spokane Sch. Dist.*, 81, 852 F.3d 936, 940-941 (9th Cir. 2017) (same); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 614 (3d Cir. 2015) (limitations of section 1415(f)(3)(C) “begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation”); *B.B. by and through Catherine B. v. Delaware College Prep. Acad.*, 803 Fed. Appx. 593, 596-597 (3rd Cir. 2020) (“once the parent discovers a violation”).

Specifically, a plaintiff must, or should, be aware of both the fact of his or her injury and the injury's likely causal connection with the putative defendant. *Ouellette v. Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020); citing See *Jardín de las Catalinas Ltd. P'ship v. Joyner*, 766 F.3d 127, 133 (1st Cir. 2014) (citing *United States v. Kubrick*, 444 U.S. 111, 122); see also *Skwira v. United States*, 344 F.3d 64, 78 (1st Cir. 2003). In some cases, an injury may lie dormant without manifestation until days, months, or even years after it has occurred. *Id.*, citing *Kubrick*, 444 U.S. at 122. Under this circumstance, the federal discovery rule delays accrual until "a reasonably prudent person similarly situated" to the plaintiff would discover these two key pieces of factual information -- namely, the existence of the injury and its probable cause. *Id.*, quoting *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003).

In *Ouellette*, the Court relied on the rationale in *Kubrick* that a claimant, once armed with knowledge of the fact of injury and the identity of the parties that caused the injury, is no longer at the mercy of the defendant(s). At that point, doctors or lawyers can inform them whether they are victims of malpractice and cannot plead ignorance of their rights to delay accrual. *Id.* at 137, citing *Kubrick*. However, this may not be the case when plaintiffs are ignorant of the facts,

particularly when the defendant(s) may be in possession or control of the necessary information. *Id.*

In determining whether the facts necessary "are or should be apparent to a reasonably prudent person similarly situated," in order to file a complaint, such as this IDEA due process complaint, the Court in *Ouellette* requires that the plaintiff have knowledge of two discrete, but related, sets of data: (1) the "generally available information about the relevant facts," and (2) "the likely results of any further inquiry that a reasonable plaintiff, knowing these facts, would undertake," *Id.*, citing *Donahue v. United States*, 634 F.3d 615, 624 (1st Cir. 2011).

In some cases, the generally available information may not be sufficient for accrual, but it may be sufficient to trigger a suspicion in a reasonable person in the plaintiff's circumstances regarding a putative defendant's role in causing the plaintiff's injury. *Id.*, Citing *McIntyre*, 367 F.3d at 52 (explaining that "[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, but such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence" (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)). In that circumstance, a plaintiff, or in this case the Parents, have a duty to investigate or inquire further regarding a possible injury and the party responsible for causing it. *Id.*, citing *Donahue*, 634 F.3d at 624 ; *McIntyre*, 367 F.3d at 52. If, after considering all of the information available to the plaintiff during that relevant timeframe, it can be concluded that a duty to inquire has been established, if knowledge of the facts should have been uncovered through a reasonably diligent investigation, and it can be assessed whether that information would be sufficient for purposes of accrual. See *McIntyre*, 367 F.3d at 52. A claim will accrue at the point during an investigation when a plaintiff, acting diligently, obtained or would have obtained enough factual information about his or her injury and its cause to file suit against a defendant. It is also at that point that the statute of limitations begins to run. *Id.*, citing *Rakes v. United States*, 442 F.3d 7, 23 (1st Cir. 2006) (holding that if the plaintiffs had undertaken a diligent investigation after their duty to inquire was triggered, they would have discovered articles implicating the FBI in their wrongful death action by the end of the year 1998, and thus their claim accrued by late 1998). *Id.* at 138. The Court in *Ouellette* notes that the existence of a duty to inquire does not itself trigger accrual. A claim accrues only when a

plaintiff, through diligent investigation or inquiry, uncovers or should have uncovered enough facts to take the necessary steps to take legal action to preserve his or her rights, even if the plaintiff lacks knowledge of his or her legal rights. *Id.* at 139. And, subject to any tolling provision, the relevant statute of limitations period will then begin to run.

In [] v. *Timberlane Regional School District*, 22 F.3d 1186 (1st Cir. 1994), the First Circuit Court of Appeals held that a claim for compensatory education began to accrue when the parents knew or had reason to know of the "injury or the event" that was the basis for their compensatory education claim. *Id.* at 1995 (quoting *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1992); see also *James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 769 (6th Cir. 2000) (holding that the parents' "initial claim accrued when they knew of the injury to their child [i.e., the inadequate education]"); *York v. Parent*, No. 16.037, .046 (SEA Me. April 22, 2016).

Knowledge of a legal claim is not required. A plaintiff "cannot plead ignorance of his or her legal rights to delay accrual" of the "knew or should have known" standard. *Ouellette v. Beupre*, 977 F.3d 127 (1st Cir. 2020). *Reg'l Sch. Unit No. 51 v. John Doe*, 920 F. Supp. 2d 168, 197 (D. Me. Jan. 29, 2013); *aff'd*, 2013 WL 3781491 (D. Me. Jul. 18, 2013); *Parent v. Reg'l Sch. Unit No. 21*, No 23.020 (SEA Me. Dec. 2, 2022) (limitation period begins when the parent knew the school's actions were "injurious" to the student).

However, while the School argues that the Parents had many indicators to suspect that the Student may have a disability, suspicion is not enough to trigger the tolling of the statute of limitations. As in *Ouellette*, *Id.*, they needed a factual basis to have a viable claim. Parents are not expected to be experts in educating students with disabilities. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1288 (11th Cir. 2008). Their awareness of underlying facts "does not necessarily mean [they] 'knew or had reason to know' of the basis of their claims'" because some issues "'require[] specialized expertise a parent cannot be expected to have[.]'" *Avila*, 852 F.3d at 944 (citing *A.G. v. Paradise Valley Unified Sch. Dist.* No. 69, 815 F.3d 1195, 1205 (9th Cir. 2016)).

In *J.R. v. Ventura Unified Sch. Dist.*, 668 F. Supp. 3d 1054 (C.D. Calif. Dec. 21, 2023), a fifteen-year-old student with misdiagnosed autism was reading at only a []-grade level despite nine years of IDEA identification due to the district’s misdiagnosis of the student’s disability. Although the parents knew that the student struggled academically, the court found that they “earnestly adhered to the district’s purportedly expert guidance” and concluded that their “knowledge of the student’s inadequate education” was not “sufficient for a claim to accrue” because the IDEA’s “focus is on whether the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct had caused the harm.” *Id.* at 1070-1072.

VI. ANALYSIS

Issue: Statute of Limitations

Has the family established that, prior to February 15, 2022, they did not know and could not have known the underlying bases for alleged IDEA violations that they now seek to raise more than two years after filing their complaint? As part of that issue, at what point in time did they know, or should have known, those underlying bases, and did they timely file a claim once they knew or should have known of those claims?

[] Grade (2018-2019)

I find that the Parents neither knew nor should they have known that the Student had a learning disability during the 2018-2019 school year, given that [] was in a total Spanish Immersion program. In Term 3, while [] had poor assessment ratings in English, the Parents acknowledged that they were not working with the Student to help develop [] English literacy skills as they had committed to do. They believed that if they hired a tutor, the Student would catch up to [] same-age peers.

[] Grade (2019-2020)

I find that the Parents neither knew nor should they have known that the Student had a learning disability during the 2019-2020 school year. They knew that after two years of being in

the Spanish Immersion program, and without helping the Student at home with English development, [] started [] grade being behind in [] English skills. The Parents believed that taking [] out of the Spanish Immersion program and providing [] with LLI intervention services would bring [] up to grade level in reading and writing. During the year, there was no reason for them to have wondered if [] had a disability because they were informed by the School staff that [] was moving upward on the F&P reading skill level scale. What they did not expect was for the COVID-19 pandemic to impact the Student's education the way it did. School was closed in March 2021 and shifted to home co-teaching for the rest of the school year. I find that the Parents did not know that the Student had a learning disability at that time.

[] Grade (2020-2021)

In the fall of 2020, due to the pandemic, the Parents, Student, and School staff began the hybrid learning regimen, wherein class was held via Zoom three days a week and in person two days a week. The LLI intervention services did not begin until late October. The Parents were informed in early January 2021 that the Student had made good progress and had moved up 4 levels in the F&P system. By the end of Term 3, [] report card reflected that [] had moved from Level H to Level K. The Parents were never informed that these results could not be confirmed and were later discredited by further testing, which indicated that Ms. [] best hope for the Student was that [] read independently at Level I. They were also never informed that Ms. [] had inquired whether the Student should be referred to "Child Study." The Parents credibly testified that no one clearly explained the meaning of the F&P Levels with respect to grade correlation. Based upon what the Parents knew and were informed about, I find that they neither knew or should have known that the Student may have a learning disability at that point.

[] Grade (2021-2022)

Early in the [] grade year, the Parents were not aware that the School's teachers were communicating with each other about the Student's slow progress in reading, and questioning if there could be a "learning issue." The communication from the School focused on social issues

with other peers, including bullying and teasing. The Parent reported that [] was very unhappy with school.

In early January 2022, the Mother found the Student's fall NWEA scores in the bottom of [] backpack. They indicated that [] was in the 4th percentile in reading and the 50th percentile in math. Up to this point, the Parents believed that the Student's reading struggles were caused by all the disruptions at school, including [] prior Spanish Immersion program, the COVID-19 shutdown, on-line classes, hybrid classes, and social-emotional issues. It was at this point that they suspected that something else may be hindering [] progress. They sought help from Ms. [] to understand if there was an additional element no one had raised with them. It was not until March 16, 2022, that the Parents received the preliminary results of Ms. [] independent assessment, which included the statement that the Student is a person with "...exceptionally strong verbal skills who shows many characteristics of both dysphonic and orthographic dyslexia, known as mixed dyslexia." I find that it was at that point in time, March 16, 2022, that the Parents had the factual basis for submitting a claim for compensatory education based upon a violation of the School's Child Find obligation and the deprivation of a FAPE.

The Parents filed their due process hearing request on February 12, 2024, which was posted by the Maine Department of Education on February 15, 2024. Therefore, I find that the Parents filed the request within two years of the date that they knew or should have known about the alleged action that forms the basis of the complaint.

The School argues that there were several reference points during the years prior to March 16, 2022, that should have triggered a suspicion in the Parents that the Student may have a disability. However, suspicion of a disability is insufficient to form the basis of a viable claim. As in *Ouellette*, factual information is also needed. It would be folly to file a claim based upon a few trigger points which may suggest that the IDEA may have been violated. The Parents needed to investigate whether there was a factual basis to support their allegations. Through their investigation and their personally funded evaluation, the Parents believed that the data indicated that the Student most likely had a specific learning disability which resulted in [] inability to

make reasonable educational progress without specialized instruction. It was only during discovery in this case that they learned that the School staff were also quite concerned about the Student's "slow progress" and wondered if [] may have a "learning issue."

A. Procedural Violations

Issue: Alleged Procedural Violation for [] (2018-2019) and [] Grade (2019-2020)

If the family meets its burden on the statute of limitations issue, then during the 2018-2019 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

I find that the School did not fail in its Child Find obligations to evaluate the Student in [] or [] Grade. The Student was participating in the Spanish Immersion program, in which English literacy was not taught. As part of the program, the Parents agreed that they would be responsible for working with the Student to develop [] English language skills. The Parents acknowledged that they did not do this in either [] or [] Grade. While the School was concerned about the Student's lagging English language progress, the fact that there were clear guidelines for the Parents to follow, to which they agreed, diminished any suspicions that the Student may have a learning disability. The Parents took full responsibility for these circumstances and hired a tutor in order to compensate for what they and the School thought was their failure. Under these circumstances, I do not find a Child Find violation.

Issue: Alleged Procedural Violation for [] Grade (2019-2020)

If the family meets its burden on the statute of limitations issue, then during the 2019-2020 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

I find that the School should have acted upon the School staff's suspicion that the Student was not sufficiently progressing in [] English literacy in [] grade. The first piece of

information that was concerning for staff were [] initial fall assessments. [] knew only two English sight words despite being tutored during the summer. It was so concerning that [] classroom teacher and the reading specialist had a discussion about [] skill level. After a reading assessment, the reading specialist found that [] was reading with difficulty even at the [] reading level. Even though the School started LLI services, [] reading levels, as measured by the NWEA, fell throughout the year. [] went from the 34th percentile in October 2019 to the 29th percentile in November 2019 to the 14th percentile in February 2020. [] second trimester report card indicated that [] was reading at level H independently and level I instructionally. However, the F&P Literacy Progress Monitoring Data report indicated that [] was reading at level F independently in late February 2020 and at level I instructionally on March 11, 2020. By the end of the third semester, [] NWEA growth rate was at just the 3rd percentile.

I find that by late February 2020, the School's teaching staff understood that the Student continued having difficulty in [] literacy skills progress, despite addressing it through the LLI program within the regular curriculum, and with home tutoring. [] had virtually no growth during the second and third trimester of [] grade. [] was not "catching up" to [] peers at all. By March 11, 2020, the last F&P checkpoint of the year indicated that the Student was at an independent Level F. I find that the School had enough data to suspect that the Student may have a disability and refer [] for a special education evaluation.

On March 16, 2020, the School was shut down due to the COVID-19 pandemic, causing a massive upheaval for all students and staff. The School had never planned for anything like this catastrophe. The last three months of classes were held online. While parents with students in the School's district were urged to become involved in their children's educational processes, this was not a requirement. Despite COVID-19, the School still had the sole responsibility for educating its students during the pandemic, including the provision of a FAPE to identified students under the IDEA.⁹

⁹ See <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-covid-19.pdf>

I find that the School caused significant harm to the Student's education by failing to properly refer [] for evaluation within a reasonable time after they knew or should have known that [] likely had a learning disability. Despite the shutdown of the School on March 16, 2020, the School was still required to move forward with the IEP process. It could have started scheduling evaluations, holding IEP meetings online, and performing other functions of the process during the shutdown.

Therefore, I find that the School violated its Child Find obligations under the IDEA.¹⁰

Issue: Alleged Procedural Violation for [] Grade (2020-2021)

If the family meets its burden on the statute of limitations issue, then during the 2020-2021 school year (the Student's [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

I find that the School's failure of its Child Find obligations in the prior year carried over into the 2021-2021 school year ([] grade) and continued to deprive [] of a FAPE. The Student's progress continued to be "minimal." [] was placed on a "worry list" of students about whom staff were concerned, and [] was selected to receive LLI services because [] had been making only minimal gains. [] report card, NWEA placement, and LLI scores all indicated that [] was not sufficiently progressing, yet the School did not evaluate and identify [] with a learning disability that was impacting [] academic progress. This is despite a discussion between the teaching staff that [] was not progressing. In response to the Student's teachers reporting that the Student had stagnant growth in [] F&P levels, Ms. [] asked whether the Student had ever been referred for "Child Study" and whether there was a "Tier 1" intervention in place. She also stated that she would do further "testing." Ms. [] responded that she had not referred [] to Child Study because [] had been making good gains and assumed [] lag was due to being in the Spanish program for grades [] and []. She agreed that

¹⁰ Maine law provides that all school districts must screen students for dyslexia if, while in grades []-[], their classroom teacher has identified them as having "difficulty" with any one of six literacy-related skills. 20-A Me. Rev. Stat. § 4710-B(2). While I do not have jurisdiction to determine whether the School violated the statute, it is cited here for reference.

[] was easily distracted, but able to be successful in math. Despite this dialog between [] teachers about their suspicions, they still failed to refer [].

[] report card indicated that in Term 1, the Student was reading at a level H, [] grade level. In Term 3, he progressed to Level K, yet [] NWEA in May 2021 placed [] in the 9th percentile in reading and showed that he regressed to Level H. I find that for the entire 2020-2021 school year, the School continued to fail to evaluate the Student for a learning disability.

I also find that the harm caused by the School's failure to identify the Student was severe enough to deprive [] of a FAPE during [] [] grade year. Without any specialized instruction, it was difficult for [] to advance and progress, even with LLI instruction. At the end of the school year, [] had regressed to F&P independent Level H and was at the 9th percentile on [] NWEA. I find, therefore, that this is clear evidence of a significant impact on the Student's educational progress.

The School argues that while its staff might have wondered whether to refer [], simply because of the length of time [] had been in LLI, there were no "clear signs" that the Student's educational performance was impaired by a qualifying disability. I disagree. Ms. [] and Ms. [] were worried and should have referred [] to the special education evaluation process, despite the School's decision to provide [] more intervention than was supported by its LLI system.

Despite the COVID-19 pandemic, the School continued to be responsible for the Student's educational development. While it is understandable that teaching in a hybrid placement situation likely compounded the Student's ability to be educated, if [] had had appropriate specialized instruction during [] grade, even in a hybrid situation, the impact of [] disability would not have been so severe.

It should be noted that the School was also on notice that the Student seemed distractible and had run-ins with some of [] peers in [] grade. The School acknowledged that there were

some “tough” students. It also understood that the Student had feelings of failure, and of being “stupid.” They knew that [] Parents were seeking outside therapy for []. Even with all this additional knowledge, there was still no referral to special education forthcoming. The School missed a clear opportunity to start to understand the source of the Student’s difficulties and attempt to resolve them.

Issue: Alleged Procedural Violation for [] Grade (2021-2022)

If the family meets its burden on the statute of limitations issue, then during the 2021-2022 school year (the Student’s [] grade year), did the School fail to timely evaluate the Student as a student with a disability under the IDEA? If so, did the School violate the IDEA by not identifying the Student for special education at that time?

I find that that School continued to shirk its Child Find duties and responsibility to provide the Student with a FAPE during [] [] grade year (2021-2022). There were multiple indicators that should have continued to trigger suspicion among School teaching staff that the Student was not progressing in [] literacy as expected. In October 2021, [] NWEA score indicated that [] was in the 4th percentile for reading. While [] teachers were concerned at that point about [] “reading behaviors” and data suggesting to them that he needed more intensive phonics instruction beyond its LLI system, they inexplicably did not refer [] to be evaluated for a learning disability. Instead, the School provided more small group instruction within [] classroom.

Between October and December 2021, the Student received LLI intervention services in a small group pull-out setting for 30 minutes a day, five days a week. At the end of the intervention, [] was reading independent Level L texts; however, [] teachers continued to see weaknesses in [] “reading behaviors” and data suggested that he needed more intensive phonics instruction, which the LLI system did not target.

I find that the harm caused by the School’s failure to identify the Student continued through [] grade and significantly deprived the Student of educational benefits. The Student was falling further behind [] peers based upon [] NWEA scores and not being provided the

type of instruction that [] needed given [] circumstances, even despite the private tutoring that [] continued to receive at home through the summer and into the school year.

B. Substantive Violations

Issue: Alleged Procedural Violation for [] Grade (2022-2023)

Were the School's proposed IEP and placement offer from June 2022 reasonably calculated to provide the Student with an appropriate education in the least restrictive environment?

a. The IEP

I find that the School's proposed IEP, developed in June 2022, was reasonably calculated to provide the Student with an appropriate education in the least restrictive environment, at that time. Once the IEP Team evaluated and identified the Student as having a specific learning disability that substantially affected [] education, the IEP that was created provided adequate specially designed instruction in the areas of reading, writing mechanics, and sentence structure. The IEP included 30 minutes per day of pull-out group instruction in reading and writing. Although the IEP did not include goals and instruction in reading fluency, the Parents, who had become well informed about the Student's disability and what types of instruction [] needed, consented to the implementation of this proposed IEP to begin on September 2, 2022. In addition, when the Parents requested that the Wilson reading program be implemented later in the year, the School agreed to do so. Based upon these circumstances, I find that the IEP was reasonably calculated to provide a FAPE.

b. Implementation of the IEP during [] Grade

I find that the 2022-2023 IEP was properly implemented to the extent that the Student made adequate progress on [] IEP goals given [] individual circumstances. While [] still fell into the 27th percentile in literacy on the NWEA, [] had gained momentum from the fall's 2nd percentile placement. [] WADE score also saw improvement in the subscores of: Total sounds increased by 6%; Total Words increased by 20%; and Total spelling increased by 31%. The Student increased [] reading to a F&P Level T and was able to demonstrate the ability to write

several sentences about a topic or picture using correct sentence structure, initial capitalization, and ending punctuation by June 12, 2023.

While it is concerning that the Wilson program should take no more than two years to complete, and that it was apparent that [] was not going to reach that goal, this does not mean that the Student was not receiving a FAPE. I understand that the Parents wished that [] progress was faster. However, there is no evidence that it could have or should have been faster. There is no data showing that [] progress would have been swifter if the Seeing Stars reading program was implemented by the School. While it could be argued that the Wilson program was an improvement over using the SPIRE program during the fall, there is sufficient evidence to find that the Student was receiving a FAPE in [] grade.

Issue: Provision of an Appropriate IEP in 2023-2024 ([] Grade)

Were the School's IEP and placement proposals for the 2023-2024 school year reasonably calculated to provide [] with an appropriate education in the least restrictive environment?

The Parents decided to unilaterally place their Student at [] for the 2023-2024 school year because they did not believe that the School's proposed IEP was appropriate. They also did not believe there would be an appropriately trained teacher available, although this was unsubstantiated conjecture on their part. For the same reasons as above, I find the 2023-2024 IEP was appropriate.

Issue: Parental Obstruction

Did the family unreasonably obstruct the course of developing the Student's IEPs and placement proposals, justifying a denial of reimbursement under the IDEA?

The School argues that a remedy should be denied in this matter due to the Parents' actions in obstructing the IEP process starting in the spring of 2022. It asserts that the Parents were singularly motivated to place the Student at [] in a strategic way that would require the School to pay for the private placement.

I find that the record is insufficient to substantiate this claim. While there were emails that suggested that their attorney had advised them to remain “passive” at the IEP meeting in June 2022, I find that this is insufficient to show that the Parents were obstructing the IEP process. In fact, they participated in the process once the School confirmed the Student’s learning disability, although untimely, and worked with the IEP Team to develop an appropriate IEP. The School convinced them that the Student could stay in [] least restrictive environment given specialized instruction in literacy for the 2022-2023 school year. They were in continual communication with School teaching staff about the Student’s progress. They continually participated in the IEP meetings in the fall of 2022 and winter of 2023 to discuss what the School could offer in order for them to feel comfortable in bringing the Student back to the public school setting.

I find that the School’s suppositions about the Parents’ motivation to obstruct the IEP process lack factual foundation, and therefore its argument on obstruction lacks merit.

VII. REMEDY

When a school district violates the IDEA’s FAPE mandate for a period of time, the student is entitled to receive “such relief as the court [or hearing officer] determines is appropriate.” 20 U.S.C. § 415(i)(2)(B)(iii). Courts have ordered or approved a wide variety of compensatory awards for students. See, e.g., *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Lester H. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990). The First Circuit has recognized compensatory education services as an appropriate remedy since 1992. See *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184 (1st Cir. 1993).

In *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007), the First Circuit summarized the pertinent test as follows:

As we have recognized, a private placement need provide only “some element of the special education services” missing from the public alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit. *Berger [v. Medina City Sch. Dist.]*, 348 F.3d 513, 523 (6th Cir. 2003)] (emphasis added). Nor must the placement meet every last one of the child’s special education needs. *Frank G. [v. Bd.*

Of Educ. of Hyde Park, 459 F.3d 356, 365 (2d Cir. 2006), cert. denied, 552 U.S. 985 (2007)]. But the reasonableness of the private placement necessarily depends on the nexus between the special education required and the special education provided.

Reimbursement of educational expenses is a recognized form of compensatory relief when parents have acted unilaterally to compensate their child for past IDEA violations and have provided proper statutory notice. See, e.g., *SD v. [] Public Sch.*, 2014 WL 4681036 at 23 (D. Me. Sept. 19, 2014); *Regional Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 208-209 (D. Me. 2013). Further, in cases seeking reimbursement for a unilateral placement, the requirement of educating the student in the “least restrictive environment” does not apply. *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-1160 (9th Cir.) (“[E]quity does not require a reduction in reimbursement just because a parent or guardian cannot afford to give the child everything (or cannot find a program that does).”), cert denied, 132 S. Ct. 500 (2011)

The IDEA includes remedies for past as well as current failures to provide a FAPE in a timely manner. Schools may be ordered to reimburse the parents for the cost of enrollment at a private school if the school district failed to make a FAPE available to the student in a timely manner prior to that enrollment and if the private placement is appropriate. 34 C.F.R. § 300.148(c); see also 20 U.S.C. § 1412(A)(10)(C)(ii).

I find that the Parents are entitled to a reimbursement remedy for past expenses paid to help the Student’s educational progress due to the lack of specialized instruction that [] should have had in [] and [] grades, when the School knew or should have suspected that [] had a learning disability, but failed to refer [] for evaluation. These include expenses paid by the Parents for tutorials at [] during the spring of 2022 and summer at [] [] program in 2023. I find that reimbursement is also warranted for the cost of private placements for two full school years to remedy the lack of a FAPE in [] and [] grades. One year’s expense has already been incurred for [] grade; the second year’s expense for [] grade must also be provided or reimbursed.

Since the School provided a FAPE in [] grade and offered an appropriate IEP for [] grade, a remedy for future private placement is unwarranted. To be clear, the above

reimbursements are to remedy the School's past failure to identify the Student and thereafter provide a FAPE.

Issue: Appropriateness of the Private Placement

Is the [] School placement proper under the IDEA, to the degree required by the IDEA, to support a reimbursement or compensatory education order for alleged past violations?

I find that both [] summer program and the programming at [] provided sufficient educational benefit to the Student, given the type of specialized reading instruction he received in both places. Staff at both institutions worked with the Student on sound-to-symbol ability, the letter-combo sounds, decoding, word recognition, oral reading fluency, spelling, and paragraph writing. There is no evidence that either program was not sufficiently reasonable in their teaching methodologies to address the Student's needs.

The [] program is geared to tutoring students having difficulty learning to read and provide summer programming. [] is a licensed special purpose private school at which many schools in Maine have placed students who need special education instruction that cannot be provided by the school. It also accepts parentally placed students who believe their children need specialized instruction. The Student attended [] in 2023-2024 for [] grade.

I find that the School must also reimburse the Parents for the evaluation performed by Ms. [] in the spring of 2022. This was an appropriate evaluation that discovered that the Student was suffering from a specific learning disability requiring specialized instruction. The School, while clearly suspecting that the Student may have a learning disability, failed to administer an evaluation before the Parents sought out their own evaluation. Given these circumstances, I find it appropriate for the School to pay the cost of that evaluation.

Therefore, the School must reimburse the Parents \$121,168, as itemized below:

\$750	March 2022 evaluation;
\$1,920	Spring 2022 Seeing Stars tutorials at [];
\$52,500	2023-2024 day school tuition at [];
\$52,500	2024-2025 day school tuition at []; [] tuition
\$7,865	during the summer of 2023; Travel costs ¹¹
<u>\$5,633</u>	
Total: \$121,168	

VIII. ORDER

1. The School violated special education law by failing to provide the Student a free appropriate public education from March 16, 2020 through the 2020-2021 and 2021-2022 school years by failing to refer [] for special education services and failing to find [] eligible until June 13, 2022.
2. The School offered the Student IEPs for the 2022-2023 and 2023-2024 school years that were reasonably calculated to provide [] with a free appropriate public education in the least restrictive environment.
3. The School is ordered to reimburse the family \$121,168 for the cost of compensatory education and other expenses related to the Student's education, as outlined above.



Sheila Mayberry
Independent Hearing Officer
August 27, 2024

¹¹ Based upon cost estimates on p. 397 of the Parents exhibits.