

STATE OF VERMONT
AGENCY OF EDUCATION

Special Education

Due Process Hearing

Case DP # 22-03 (J.S.)

FINAL ORDER

INTRODUCTION

A special education due process hearing request was filed by the Parent in this matter on November 23, 2021. The Parent was not represented by an attorney. The District was represented by Attorneys Adrienne Shea and Pietro Lynn (hereafter, “the District”). An initial scheduling conference call was held on December 2, 2021. The District filed a Motion for Summary Judgment on December 6, 2021. The Parent filed a response to the Motion for Summary Judgment on December 14, 2021. The Hearing Officer ruled in favor of the Parent’s Response to the Summary Judgment Motion on December 20, 2021. The District filed a Motion to Exclude based on the Parent’s Detailed Written Statement of Issues. The Hearing Officer ruled partially in favor of the District’s Motion on January 9, 2022. The District filed a Motion for Extension of Time to File Exhibits Related to Parent’s Expert Witnesses, due to the unavailability of the Parent’s principal witness, and the Parent agreed to this Motion by email on January 15, 2022. The Hearing Officer granted the Motion at the request of both parties. The Hearing Officer issued a Prehearing Order and ruling on the Motion on January 17, 2022. The District file a Motion to Exclude Exhibits on January 18, 2022. The Parent responded to the Motion to Exclude on January 18, 2022. The Hearing Officer ruled partially in favor of the District’s Motion on January 20, 2022. The District filed a Motion to Clarify on January 20, 2022. The hearing was held on January 21, 2022; January 24, 2022; and January 26, 2022. The hearing was held remotely via Zoom, due to the COVID-19 pandemic.

ISSUES

As determined in the Prehearing Conference, held on January 11, 2022, and clarified subsequent to the Order for Clarification, the issues in this case are:

- 1) Does the Parent have a legal entitlement to reimbursement, for the private evaluations of the Student which occurred around the December 2020 change of placement, specifically for the evaluation areas of reading, writing, anxiety, executive functioning, and literacy skills, as an Independent Education Evaluation (“IEE”).

- 2) Has the Student received a Free Appropriate Public Education (“FAPE”) from December 2020 to the present, specifically related to her services and supports related to literacy, spelling, anxiety, and executive functioning.

FINDINGS OF FACT

- 1) The Due Process complaint was filed with the Vermont Agency of Education on November 23, 2021.
- 2) The Student is currently attending a virtual high school program and is in the 10th grade.
- 3) During the 2020-2021 school year, the Student was in the 9th grade at a District high school. During the 2020-21 school year, the Student attended school on a hybrid model, where she attended school in-person two days per week and remotely three days per week.
- 4) The Student has an extensive history of IDEA eligibilities and services for her dyslexia and auditory processing issues.¹
- 5) The Parent and District agree that the Orton Gillingham method of instruction has worked well for the Student, and this method of instruction has been used for her literacy goals and services for many years.
- 6) During the 2014-2015 school year, the Student was in the 3rd grade. The Student’s Individual Education Program (“IEP”) dated 11/12/14 to 05/27/15 (“the 2014-2015 IEP”) includes the following literacy goals:

Goal 1: By November 15, Student will improve her basic reading skills to decode closed-syllable words with up to five sounds, vowel-consonant-e words, and two syllable words with 80% accuracy.

- The Vermont Literacy standards of CCSS.ELA-Literacy.RF.3.3/3.3c are listed for the goal along with evaluation procedures of reading class assignments.
- This goal includes four objectives: Objective 1- When given a list of ten closed-syllable words with welded sounds (list includes all 5 vowel sounds), Student will read them with 80% accuracy, on 4 of 5 occasions by January 2015; Objective 2- When given a list of ten vowel-consonant-e words with consonant blends and digraphs, Student will read them with 80% accuracy, on 4 out of 5 occasions by April 2015; Objective 3- When give a list of ten closed-syllable words with five

¹ To comply with the state and federal IDEA Due Process hearing timeline requirements and applicable statute of limitations, information that precedes November 23, 2019 will only be reviewed contextually for the substantive issues presented in the two timely allegations that were argued in this Due Process Hearing.

sounds (list includes all 5 vowel sounds), Student will read them with 80% accuracy, on 4 out of 5 occasions by June 2015; and, Objective 4- When given a list of two-syllable words that include closed, v-c-e, and open syllables, Student will read them with 80% accuracy, on 4 out of 5 occasions by November 2015.

Goal 2: By November 2015, Student will read sight words on the third grade District high-frequency word list, with 100% accuracy.

- The Vermont State Standard CCSS.ELA standard RF.3.3. d is listed with the evaluation procedures of reading class assignments.
- This goal includes Objective 1- When given a list of thirty new sight words from the third-grade high frequency list, Student will read them with 100% accuracy by November 2015.

- 7) The 2014-2015 IEP includes notes for the progress area of written expression, which includes the following information: 1/20/15 After listening to examples of various types of topic sentences, Student can verbally identify if it is a general, clueing, or specific topic sentence. She can orally generate her own general, clueing, and specific topic sentences. Goal 2: Student can write 15 first grade sight words with 100% accuracy. 4/10/15

Goal 1: When choosing her own topic, Student can write a general, specific, or topic sentence, independently. She is working on writing lead-off sentences that match her topic sentence and that use transition words. Goal 2: Student can write 20 first grade sight words with 100% accuracy. 6/16/2015: Goal 1: Student can write lead-off sentences with transition words that match her topic. She can write follow-up sentences that add details, but sometimes the details do not match the main topic. Goal 2: Student can write some of the first-grade words correctly, but has not learned to spell 20 new trick words this marking period. 10/30/2015: Goal 1: Student can write a concluding sentence for her paragraph that is general, clueing, or specific. Goal 2: Student has not learned to spell 20 new trick words this marking period.

- 8) The 2014-2015 IEP includes the following written expression goals:

Goal 1: the Student will write a paragraph that includes a topic sentence, three main detail sentences (lead-offs), follow-up sentences, and a concluding sentence.

- The Goal includes the applicable Vermont State standards and the evaluation procedures are noted as classroom assessments, Speech Language Pathologist (“SLP”), and SLP paraeducator data.
- The Goal includes the following objectives: Objective 1- When given a topic or selecting a topic, Student will write at general, clueing, or specific topic sentence in the third-person-point of view, by April 2015; Objective 2- After writing a complete topic sentence, Student will write at least three lead-off sentences that each convey one sub-topic, by June 2015; Objective 3- After writing three main lead-off sentences, Student will write two follow-up sentences for each lead-off,

by June 2015; Objective 4- After writing a topic sentence, three lead-off sentences and detail sentences, Student will write a concluding sentence that is general, specific, or clueing by November 2015.

Goal 2: By November 2015, Student will spell sight words on the first grade District high frequency list, with 100% accuracy. This Goal includes the following objectives:

- Objective 1- When given a list of twenty words from the first grade District high frequency word list, the Student will spell them correctly, with 100% accuracy, by April 2015. The progress monitoring portion of this Goal shows that sufficient progress was achieved or that the Goal was achieved.
- Objective 2- When given a list of twenty new words from the first-grade high frequency word list, Student will spell them correctly, with 100% accuracy, by November 2015. The progress monitoring portion of this objective states that the student was first emerging in this area, then the Goal not yet introduced, and finally that sufficient progress was being made and the Goal was likely to be achieved.

9) The 2014-2015 IEP includes progress monitoring information for each goal that states that the goals were either achieved or that sufficient progress was made toward the objective, and that the Student was likely to achieve the goal.

10) The IEP dated 11/03/2015 to 04/11/2016 (“2015-2016 IEP”) also includes numerous goals and objectives related to literacy and writing. The Literacy Goal 1 states that, by November 2016, Student will improve her basic reading skills to decode closed-syllable words with up to five sounds, vowel-consonant-e words, open syllable words, and two syllable words that include these three syllable types with 90% accuracy.

- The Vermont State Standards of Phonics and Word Recognition are listed as CCSS.ELA-Literacy.RF.4.3 and the evaluation procedures include reading class assignments.
- The following Objectives are listed for this Goal: Objective 1- When given a list of 10 closed-syllable words with suffixes -s, -ing, -ed/ed/, Student will read them with 90% accuracy, on 4 out of 5 occasions by April 2016; Objective 2- When given a list of ten vowel-consonant-e words with consonant blends and diagraphs, Student will read them with 90% accuracy, on 4 out of 5 occasions, by June 2016; and Objective 3- When given a list of ten two syllable words with open, closed, and v-c-e syllables, Student will read them with 90% accuracy, on 4 out of 5 occasions by November 2016.
- The Progress Monitoring area for these objectives’ notes that for each objective, the Student made sufficient progress or achieved the goal as written.

11) The 2015-2016 IEP also included Written Expression Progress Area information which states that: Student is completing a planner for an informational writing piece. She is

learning to spell the last three words on the first-grade sight word list (these are words that she can already read). 4/8/16 Student scored a 3 on her informational writing piece with organization and editing. Nice work, Student! 6/8/2016: Student is spelling 46/49 words from the first-grade sight word list. She wrote an opinion writing piece with assistance with organization and editing.

- 12) The written expression goals and progress monitoring portions of the 2015-2016 IEP show that the Student either achieved each goal and objective or that she made sufficient progress toward the goal/objective as written.
- 13) The IEP dated 10/31/2016 (“the 2016-2017 IEP”) was for the Student’s 4th grade year, and included a Reading Goal to improve her basic reading skills to decode two-syllable words with up to five sounds, vowel-consonant-e words, open syllable words, and two syllable words that include five syllable types (open, closed, v-c-e, r-controlled, vowel teams) with 90% accuracy.
 - The Vermont standard listed for this Goal was CCSS.ELA-Literacy.RF.5.3 and the evaluation procedures listed were reading class assessments.
 - The objectives for this Goal include: Objective 1- When given a list of ten two-syllable words with suffixes, Student will read them with 90% accuracy, on 4 out of 5 occasions by January 2017; Objective 2- When given a list of ten two-syllable words with r-controlled syllables and with suffixes, Student will read them with 90% accuracy, on 4 out of 5 occasions by April 2017; Objective 3- When given a list of ten two-syllable words with prefixes, Student will read them with 90% accuracy, on 4 out of 5 occasions by June 2017; and Objective 4- When given a list of ten two-syllable words with vowel team syllables and with suffixes and prefixes, Student will read them with 90% accuracy, on 4 out of 5 occasions by November 2017.
 - The Progress Monitoring data for each of these objectives shows that the Student was making sufficient progress on the goals or that she had achieved the goals as written.
- 14) The 2016-2017 IEP includes progress for the area of Written Expression and states that the Student is spelling words from Fry’s second hundred list of sight words. 4/7/17 Student can spell forty words from Fry’s second hundred list correctly.
- 15) The 2016-2017 IEP includes two Writing Goals:

Goal 1: By November 2017, Student will demonstrate written expression skills at a level 3 on the CCSS writing rubrics for grades 5 for argumentative, informative, and narrative writing pieces.

 - The state standards for the Goal are listed as CCSS.ELA-Literacy.W.5.3 and the evaluation procedures are listed as classroom assessments.

- The progress monitoring data for this Goal shows that sufficient progress was made on the Goal for three grading periods.

Goal 2: By November 2017, Student will spell sight words on the Dr. Fry's high frequency word list, with 100% accuracy.

- The Vermont standard listed is CCSS.ELA Literacy.RF.5.3. d and the evaluation procedures listed are classroom assessments.
- The progress monitoring for this Goal's two objectives shows that the student made sufficient progress on the Goal or achieved the goal as written.

16) The IEP dated 10/16/2017 ("the 2017-2018 IEP") includes one Reading Goal and three Writing goals. They are as follows:

Goal 1 Reading: By November 2018, Student will improve her basic reading skills to decode words that include six syllable types (open, closed, v-c-e, r-controlled, vowel teams, and consonant-le) with 90% accuracy.

- The Vermont standard listed for the goal is RL.6.10 CCSS.ELA-Literacy.RL.6.10 and the evaluation procedures listed are reading class assessments.
- Each of the four objectives for this Goal show that the Student made sufficient progress on the objective or that the goal/objective is achieved as written.

Goal 2 Written Expression: By November 2018, Student will demonstrate written expression skills at a level 3 on the CCSS writing rubrics for grades 6 for argumentative, informative and narrative writing pieces.

- The three objectives for this Goal were achieved as written, per the progress monitoring data on the 2017-2018 IEP.

Goal 3 Written Expression: By November 2018, the Student will demonstrate the ability to write a paragraph with sentences of varied patterns, including at least two of the following simple, compound, complex, and compound-complex.

- The state standard of CCSS.ELA-Literacy.L.6.3 Use of Language and its conventions when writing, speaking, reading, and listening was listed for this goal along with the evaluation procedures of classroom assessments.
- The progress monitoring data for this Goal and its objectives shows that the student achieved the objectives and Goal as written.

Goal 4 Written Expression: By November 2018, Student will improve her editing of spelling and grammar in sentences by writing complex sentences with correct spelling with 90% accuracy.

- The Vermont State Standard listed for this Goal is 1.6- Student's independent writing demonstrates command of appropriate English conventions, including grammar, usage, and mechanics.
- The first objective for this Goal is that by April 2018, the Student will edit sentences to correctly spell one and two syllable words with all six syllable types,

excluding irregularly spelled words, with 90% accuracy. The Progress monitoring notes indicate that the Student achieved this Goal as written.

- The second objective for this Goal is that by November 2018, Student will edit sentences in a paragraph to correctly spell one-and-two syllable words with all six syllable types, excluding irregularly spelled words, with 90% accuracy. The progress monitoring notes for this Goal, show that the Student was making sufficient progress on the Goal.

17) The IEP dated 10/02/2019 (“the 2019-2020 IEP”)² a goal for reading and a goal for written expression.

Goal 1 Reading: By October 2020, Student will improve her basic reading skills to decode multi-syllable words that include six syllable types (open, closed, v-c-e, r-controlled, vowel teams, and consonant -le) and roots, prefixes, suffixes, and Greek combining forms with 90% accuracy.

- This Goal includes state standard RL.8.10 CCSS.ELA-Literacy.RL.8.10 and the evaluation procedures listed are class assignments.
- The progress monitoring data for the goal shows the Student achieved all four objectives for the goal.

Goal 2 Written: By June 2019, Student will demonstrate written expression skills at a level 3 on the CCSS writing rubrics for grades 7 for argumentative, informative, and narrative writing pieces.

- The state standards listed for this Goal are CCSS.ELA-Literacy.W.7.1, CCSS.Literacy.W.7.2, and CCSS.ELA-Literacy.W.7.3.
- The Progress monitoring data for the Goal shows that the Student achieved the Goal for argumentative writing, that the Student was making sufficient progress for informative writing, and no data was recorded for the third objective related to narrative writing.

18) The IEP dated 6/9/2020 to 6/9/2021 (“the 2020-2021 IEP”) states that the IEP will be in effect from 9/8/20 to 6/10/21. The IEP includes the following goals:

Goal 1 Reading: By June 2021, Student will improve her basic reading skills to decode multi-syllable words that include six syllable types (open, closed, v-c-e, r-controlled, vowel teams, and consonant -le) and roots, prefixes and suffixes, and Greek combining forms with 90% accuracy.

- The Vermont standards listed for the Goal are RL 8.10, increase text complexity/know and apply grade-level phonics and word analysis skills in decoding words.
- The evaluation procedures listed are reading class assignments.

² The 2018-2019 IEP was not included in the core exhibits, by either party, as required by VSER 2365.1.6.11(a)(4) or VSER 2365.1.6.13, so this IEP was excluded from the analysis.

- There are four measurable objectives listed for the Reading Goal on the Student's IEP which include elements of Latin grid endings, connective letters and suffixes, chameleon prefixes, Greek Prefixes, combining forms, and other elements of Orton Gillingham style reading and literacy instruction.

Goal 2 Writing: By 6/21 Student will independently produce (following peer review, editing, and revising phases, as in a writing class) a meaningful paragraph with sentences of varying structure, including at least two compound-complex sentences, each containing two independent clauses, a dependent clause, a coordinating conjunction, and a subordinating conjunction with appropriate use of commas on 4 of 5 occasions.

- The Vermont standard listed for the Goal are W.9-10.4 CCSS ELA-Literacy.W.9-10.4 and the evaluation procedures listed are teacher observations and informal assessments.
- The Writing Goal includes three measurable objectives which include labelling elements of sentences, labelling types of sentences, and using commas appropriately.

Goal 3 Reading Fluency: When encountering high frequency words, the Student will read the words automatically (within 3 seconds) with 90% accuracy 3 out of 4 trials by the end of the school year.

- The Goal lists the Vermont standard of RF.4.4. CCSS.ELA-Literacy.RF.4.4. Read with sufficient accuracy and fluency to support comprehension.
- The evaluation standards listed are formal and informal assessments.
- The Goal includes three measurable objectives related to automaticity with high frequency words and increasing levels of proficiency required throughout the school year.

- 19) The 2020-2021 IEP includes the following services and supports: case management once per week in the resource room for 30 minutes; direct instruction in reading 45 minutes per session two times per week in the resource room; direct instruction in reading teleservice one time weekly for 30 minutes; and direct instruction in writing in a small group two times per week offered remotely.
- 20) The District sent a Prior Written Notice ("PWN") to the Parent dated June 16, 2020 which states that the District was not providing extended school year services ("ESY") to the Student that summer, because the Student did not meet the District's ESY eligibility requirements. The document states that the District's reading specialist did not find data to show that the Student demonstrated regression in her reading skills after the December 2019 winter break.
- 21) The Student's IEP team met on September 3, 2020 via Zoom for the Student's annual IEP review. The meeting notes indicate that the Parent was in attendance.

- 22) On October 28, 2020, the Student's Evaluation Planning Team ("EPT") convened to discuss the Student's three-year special education reevaluation.
- 23) At the October 28, 2020 meeting, the EPT discussed the Student's eligibility reevaluation and agreed to assess for a specific learning disability ("SLD") in all areas of writing and reading (and math, if indicated), in addition to an assessment of speech and language skills and cognitive testing.
- 24) At the October 28, 2020 EPT meeting, the Parent shared that the Student was going to undergo a neuropsychological evaluation that would take place in January of 2021.
- 25) At the October 28, 2020 EPT meeting, the Student's English teacher reported that the Student participated in a reading assessment in her English class and that the "results indicate that the Student is on grade level with most skills (vocabulary, overall reading level, and writing strategies). Some skills she scored in the 10th grade level (reading strategies). In the areas of mechanics and grammar, she scored a bit lower."
- 26) The District sent the Parent a Prior Written Notice ("PWN") dated 11/02/2020 which states that the District proposed to evaluate the Student for continued eligibility for special education services. The PWN states that the Parent signed a consent for the reevaluation on 11/2/2020.
- 27) As part of the triennial evaluation, the District's Speech Language Pathologist ("SLP") conducted a speech and language evaluation on November 11 and 20, 2020.
- 28) As part of the triennial evaluation, a school psychologist conducted a psycho-educational evaluation of the Student in December of 2020. He issued a report for his evaluation dated December 12, 2020.
- 29) On December 1, and December 8, 2020, a special educator conducted an educational assessment for the triennial evaluation of the Student. The special educator administered the Comprehensive Test of Phonological Processing- 2nd Edition ("CTOPP 2"), the Woodcock Johnson Test of Achievement- Fourth Edition ("WJ-IV"), and the Gray Oral Reading Test- 5th Edition ("GORT-5").
- 30) The Special Educator issued an Educational Assessment Report dated December 13, 2020, subsequent to her evaluation.
- 31) On December 17, 2020 the EPT met to review the results of the evaluations and assessments and to discuss whether the Student should continue to be IDEA eligible and if so, for which eligibility category.

- 32) At the December 17, 2020 meeting, the special educator and school psychologist shared their results with the EPT. The SLP also shared her results with the EPT.
- 33) At the December 17, 2020 meeting, the EPT determined the student would still qualify for IDEA services, however, the EPT determined that her eligibility category should change based on the most recent evaluative data. The EPT determined that the Student did not meet the eligibility criteria for an SLD eligibility. This was due to the Student's cognitive testing scores, which did not place her in the deficit range for eligibility as having a SLD³ as well as her academic success and other measures that the EPT reviewed. The EPT determined that the Student did meet the IDEA eligibility criteria for the Speech and Language eligibility category, with an adverse effect in basic reading skills.
- 34) The record does not demonstrate that any concerns about anxiety or executive functioning were mentioned during the reevaluation meetings during December of 2020, or the related evaluation planning. There is also no evidence that the Parent objected to any of the specific evaluative reports that were presented in the December of 2020 meetings and correspondence.
- 35) On December 21, 2020 the Student had an intake appointment for the private neuropsychology evaluation with Neuropsychology & Education Services ("NESCA") in New Hampshire.
- 36) On February 4, 2021 Parent emailed District to request home tutoring services for the Student, related to her dyslexia. The Parent stated that her tutor would work with the Student five hours per week, and requested that the school district provide funding for his work. The District responded to clarify this request.
- 37) On March 2, 2021 the Parent emailed the District's special education director ("the Director") stating, "Is it too late to request that the school pay for Student's IEE? I would request that Student have an educational evaluation at public expense by NESCA."
- 38) On March 3, 2021, the Director responded to the Parent stating, "I am seeking clarity about the parts of the evaluation with which you disagree. Pursuant to Rule 2362.2.8(e), I am required to provide you with notice of any District criteria relating to Independent Education Evaluations ("IEEs"), including the location of the evaluation and qualification of the examiner. I will need a better understanding of the scope of the independent evaluation that you are seeking so that I can provide you with the relevant criteria. Once I give you the District criteria under which an independent evaluation may be obtained, you will be able to find an evaluator who meets the criteria and schedule the independent evaluation."

³ The parties mediated this specific issue and the Parent's concerns about the eligibility and cognitive testing prior to the hearing.

- 39) On March 5, 2021, the District emailed the Parent [regarding her IEE request for a different child] provided the Parent with a copy of the District's IEE procedure.
- 40) During the hearing, the District's Special Education Director testified that the District's IEE protocol, which was shared with the Parent, requires that evaluations be conducted either within the State of Vermont or otherwise within a 60-mile radius of the student's public school. The protocol further states,
"Under special circumstances (for example, where either scheduling or uniqueness of the issue to be evaluated render assessment within designated area impracticable), evaluations may be sought outside the designated area, with the prior written approval of the Superintendent."
- 41) The Student's team convened via Zoom on April 28, 2021 to consider the results of the Parent's NESCA evaluation.
- 42) The Student's annual IEP review was scheduled for June 7, 2021. Both Parent and Student were invited to attend the virtual meeting.
- 43) During the June 7, 2021 IEP meeting, the team decided to increase the frequency and duration of the Student's direct instruction in reading and writing. The team offered the Student 1:1 direct instruction with a special educator in reading and writing for 60 minutes, five times per week. The Team also offered the student counseling services at the high school.
- 44) The Student's final report card for the 9th grade shows that she met or exceeded proficiency in all general education classes. The high school grades students based on proficiency and using a 4.0 scale. A 4.0 indicates that a student exceeds proficiency and a 3.5 and a 3.0 both exceed proficiency. The Student received a final grade of 3.95 in English, a final grade of 4.0 for Health, a final grade of 3.74 for Ninth Grade Academy, a final grade of 3.41 in Global Studies, a final grade of 3.76 for Algebra I, and a final grade of 3.79 for Science 9. In addition, the Student passed her Literacy Lab.
- 45) The Student's teachers who testified all commended her work ethic and dedication to her schoolwork when she was in class.
- 46) The Student's final 9th grade final Grade Point Average ("GPA") was a 4.06.
- 47) During the hearing, the District's high school administrator stated that the high school uses a Multi-tiered System of Support ("MTSS") to provide extra interventions for students who need extra help related to academics or emotional support. The MTSS process includes a multidisciplinary team that meets regularly to discuss any concerns about students. None of the Student's teachers, her counselor, or the administrator that chairs the High School MTSS

team recalled ever discussing the Student for any concerns during any of the school's MTSS meetings that were held during the Student's 9th grade school year.

- 48) The Student's teachers who testified at the hearing reported that they did not have any concerns about the Student's executive functioning. The teachers reported that the Student was very organized in class and always met her deadlines for assignments.
- 49) The Student's teachers also testified that they did not observe any emotional distress or overt anxiety in the classroom or at school. They said the Student was able to successfully complete her coursework and tests.
- 50) The Student's current IEP was finalized via Zoom on August 25, 2021. This IEP is for the Student's 10th grade year.
- 51) During the hearing, numerous District staff testified that the Student had not attended much of her remote instructional day or special education services for the 2021-2022 school year. The Parent and District agreed that the Student had not accessed any of the counseling services that were offered by the school.

CONCLUSIONS OF LAW

I. Reimbursement for Parental Evaluation as an Independent Education Evaluation

The first issue of this hearing, focuses on if the Parent has a legal entitlement to reimbursement as an Independent Education Evaluation ("IEE"), for her private evaluations of the Student which occurred around the December 2020 change of placement, which occurred subsequent to the triennial reevaluation. Specifically, the hearing focused on the Student's evaluation areas of reading, writing, anxiety, executive functioning, and literacy skills.

Parents have the right to an Independent Education Evaluation ("IEE") at public expense if they disagree with an evaluation obtained by a school district, unless: [T]he districts demonstrates in a due process hearing that its own evaluation of the child was appropriate; or the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. See 34 CFR 300.502 (b)(1) through 34 CFR 300.502 (b)(2). The Vermont State Education Rules ("VSER") also state that, "Upon completion of a LEA evaluation, a parent may request an independent education evaluation at public expense if he or she disagrees with the evaluation obtained by the Local Education Agency." See VSER 2362.2.8.

The applicable federal and state regulations governing IEEs explicitly contemplate that a school district may establish its own criteria under which an IEE may be obtained, including the location of the evaluation and the qualifications of the examiner. See 34 C.F.R. § 300.502(e) and VSER 2362.2.8(e). During the hearing and in its post-hearing brief, the District reported that it has

established such procedures to ensure that an evaluation obtained by a Parent, at public expense, complies with the Vermont Special Education Rules, so that the District and an IEP team may legally rely on the results of the IEE.

District courts in the Second Circuit have held that where state and federal law require parental disagreement with a district evaluation, such disagreement is a prerequisite to any claim for reimbursement. Therefore, parental disagreement with a specific evaluation is a threshold issue for an IEE claim. See *M.E. v. N.Y.C. Dep't of Educ.*, No. 15-CV-5306 (VSB), 2018 WL 582601 at *7 (S.D.N.Y. Jan. 26, 2018). See also *M.C. v. Katonah/Lewisboro Union Free Sch. Dist.*, No. 10 CV 9170 VB, 2012 WL 834350 (S.D.N.Y. Mar. 5, 2012) and *K.B. v. Pearl River Union Free Sch. Dist.*, No. 10 CV 9170VB, 2012 WL 234392 (S.D.N.Y. Jan. 13, 2012).

In the instant case, the District evaluation in question occurred in December of 2020, for the Student's required triennial IDEA reevaluation. There is no evidence in the record to show that the Parent objected to the District's evaluations for this timeframe. While the Parent's NESCA evaluation did provide helpful additional information about the Student, there is no evidence that it was conducted in response to a specific failure on the part of the District or that the NESCA evaluation was made directly in response to the triennial evaluation. To the contrary, the record and testimony at the hearing demonstrated that the NESCA evaluation was scheduled prior to the District's completion of the December 2020 reevaluation.

Additionally, the private NESCA evaluation did not meet the District's specific IEE criteria and was conducted out-of-state. During the hearing, the Parent stated that she needed the out-of-state evaluation because that was the only evaluative organization near her that would make its evaluators present to testify for Due Process hearings, and she wanted to use the evaluation and evaluator as a witness in a Due Process hearing. However, the state, federal, and District rules do not take such a circumstance into account for the legal IEE requirements, nor is this reason an approved exception for the District's policy related to an out-of-state IEE. Additionally, the Congressional intent behind the IDEA, and its regulatory dispute resolution mechanisms, is for parents and districts to work together on behalf of children with disabilities, not to increase litigation. As such, this hearing officer is unable to interpret silence in this area as an indication that the IDEA should allow parents to seek IEEs that do not meet state or district requirements, specifically for the sole purpose of future litigation. Finally, the Parent did not attempt to request an IEE exception from the District or inquire about any available options for an IEE in-state before scheduling and completing the out-of-state examination or filing for a due process hearing.

As the threshold legal inquires related to the IEE were not met in this case, this order does not need to also examine the appropriateness of the District's December 2020 evaluations and the Parent's burden of proof related to their inappropriateness for IEE purposes. Nor should this order preclude any future parent's possible legal defenses or rationale related to the potential necessity of an out-of-state IEE, as some facts and the District's own policy, could possibly necessitate an out-of-state IEE under different circumstances.

The NESCA evaluation from 2021 is not appropriate for IEE reimbursement.

II. Free Appropriate Public Education (FAPE)

The second allegation in this case looks at the student's FAPE specifically, has the Student received a Free Appropriate Public Education ("FAPE") from December 2020 to the present, specifically related to her services and supports related to literacy, spelling, anxiety, and executive functioning.

The IDEA requires states, through their local education agencies, to ensure that a FAPE is available to all children with disabilities who require special education and related services, even if those children are advancing from grade to grade. See 34 C.F.R. § 300.101 (c)(1). A FAPE must provide "special education and related services" tailored to meet the unique needs of a particular child, "See 20 U.S.C. § 1401[9], and be, "...reasonably calculated to enable the child to receive educational benefit." [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982)]." [*Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998).] In order to provide FAPE, a District must ensure that eligible children have an IEP which must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. An IEP should be reasonable but does not need to be ideal. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017). While the federal circuits differ on what exactly constitutes "appropriate progress", the 2nd Circuit Court of Appeals' opinions (which apply to Vermont) have consistently provided a heightened FAPE standard for Student progress. Measures of this FAPE progress include that, "...the IDEA is satisfied if the school District 'provides an IEP that is likely to produce progress, not regression,' and if the IEP affords the Student with an opportunity greater than mere 'trivial advancement'." [*A.S. v. Trumbull Bd. of Educ.*, 414 F.Supp.2d 152, 173 (D. Conn. 2006)]. Additionally, social, emotional, and behavioral progress and a Student's grades, are all valid components for measuring progress in some students with disabilities. [*Mr. P v. West Harford BD. of EDUC.*, 885 F.3d 735 (2018)]. Courts have also held that reusing the same IEP services from previous years, that did not produce meaningful gains for a student, cannot meet the FAPE standard. *R.N. v. Board of Educ. of the Iroquois Cent. Sch. Dist.*, 116 LRP 48440 (W.D.N.Y. 2019). Federal precedent has also held that a school district's IEPs for a student with dyslexia are appropriate when the IEPs are reasonably calculated to help a student progress, despite the fact that the District may not use a Parent's preferred teaching methodology. See *Crofts v. Issaquah School District, No. 19-35473* (9th Cir. 2022).

In IDEA Due Process hearings, the burden of proof resides with the Parent or the moving party who files the complaint. See Vermont Special Education Rule ("VSER") 2365.1.6.15(e) and *Schaffer v. Weast*, 546 U.S. 49 (2005).

A. FAPE for the Student's Literacy and Spelling Needs

In this case, the Parent did not demonstrate that the Student's IEPs were insufficient to enable her to make educational progress, [nor that they did not enable her to progress] or that she was unable to make progress appropriate in light of her individual circumstances. To the contrary, the IEPs that were presented in the record show that the Student made significant progress in both literacy and spelling in addition to her other writing skills. The District was able to demonstrate that the student was progressing from grade to grade and that she had high marks in her courses in all areas related to literacy and spelling, during the times when she attended school regularly.

While some of the IEPs did include some substantively similar language from year-to-year in the reading and writing areas, the IEP goals always increased in difficulty to some degree and each year had different and appropriate grade level standards for each goal. Additionally, the goals included at least some new language or standards annually related to the Student's work with prefixes, suffixes, or phonological processing requirements. During its testimony, the District relayed that some of the language in the literacy goals appeared to be similar, in order to use the Orton Gillingham style language that the Parent preferred for the Student's reading instruction and program.

Additionally, while the Parent was concerned that the Student did not receive an explicit spelling goal in the most recent IEPs in effect, there was no evidence to demonstrate that such a goal was necessary. The IEPs that were presented in the record showed that the Student achieved success on all of her prior spelling goals with satisfaction and that spelling was addressed in other written expression goal areas related to editing and use of mechanics and other conventions. The Student demonstrated high marks in her academic courses. During the hearing, the District staff also explained that the Student was permitted to use a variety of voice-to-text tools and technology tools for her written work and for editing as needed, which could also help her to catch and correct any potential spelling errors. There was no evidence presented in the record or in the hearing to demonstrate that the Student is unable to meet any requirements for writing or spelling in any of her current or previous courses. Finally, the Parent was unable to demonstrate with specificity why exactly the Student required an explicit spelling goal on the current IEP or why the goals as written did not enable the Student to make progress that was appropriate in light of her circumstances.

The Parent also raised concerns that the Student's reading and writing goals and services were reduced after the December 2020 evaluation. The Parent and her expert witnesses claimed that the Student continued to require the additional supports and instructional time, due to the severity of her disability. While their testimony was useful in understanding the Student and her unique needs, no information was provided during the hearing to discredit the District's evaluation for the Student's performance in reading and writing. Additionally, the District offered ample evidence in each IEP from 2017 to the present to demonstrate that the Student was working very hard and that she made excellent grades as well as progress on each of her IEP goals and objectives. In light of the Student's academic success and progress with reading and writing, it would not have been unreasonable or inappropriate for the District to reduce some of the Student's service time in reading or writing. This notwithstanding, the District again increased the Student's direct instruction in reading and writing at the June 7, 2021 IEP meeting, after reviewing the Parent's data and based on the Parent's request. The District is currently offering the Parent the amount of direct instruction in reading and writing that the Parent had specifically requested with the private tutor. The Parent testified that the private tutor is highly trained in Orton Gillingham and that he has had great success working with the Student. However, the District's special educator is also trained in the Orton Gillingham method and in general literacy instruction. During the hearing, the District's special educator teacher demonstrated that she uses these skills in her tutoring sessions with the student and offered many lesson plans into the record, showing that the Student's literacy and written expression needs were met during their sessions together.

Therefore, the evidence is not sufficient to indicate that the Student was deprived of a FAPE with respect to her reading, literacy, or written expression areas of need.

B. FAPE for the Student's Executive Functioning Needs

As noted above, there is no evidence in the record, nor testimony from the hearing illustrating that the Student has any unmet needs in her Executive Functioning skills. To the contrary, the record shows that the Student has achieved great success in each of her classes, that she is well organized, and that she meets her deadlines and plans out all of her schoolwork. There is also no evidence that the Parent requested more assistance with Executive Functioning or an evaluation in this area during the December 2020 EPT.

The Parent did not present any specific evidence or testimony that illustrated why the Student was failing to make progress appropriate in light of her circumstances related to Executive Functioning skills. Therefore, no deprivation of FAPE was shown in this area.

C. FAPE for the Student's Anxiety

The record and testimony also did not demonstrate that the Student was deprived of a FAPE related to her anxiety. The school staff testified that they did not observe any signs of anxiety or impaired performance for the Student that may have been attributed to social anxiety. The record of submitted materials did not show that there were any unaddressed issues related to school anxiety for the Student. After the Parent expressed concerns related to the Student's anxiety, the IEP team acted quickly to offer school counseling services as an anxiety support, but the Student did not access the school counseling services. While the Parent and District agreed that the Student missed a good deal of school and services in recent years, and there is no evidence that the IEP team has addressed this new high frequency of Student absences, there was also no evidence presented to indicate that these absences were due to the Student's anxiety, social anxiety at school, or any other unmet needs in this area. Overall, the Parent did not prove that the Student was not making appropriate progress due to unaddressed anxiety needs.

ORDER

1. Based on the above Findings of Fact and Conclusions of Law, the Parent does not have a legal right to an IEE reimbursement for the December 2020 private evaluation of the Student.
2. Based on the above Findings of Fact and Conclusions of Law, the District has provided the Student with a Free Appropriate Public Education from December 2020 to the present.

So ORDERED.

Dated and Signed in Seattle, Washington this 19th day of February 2022.



C. Rushing, Hearing Officer

Parties have a right to appeal the hearing decision by filing a civil action pursuant to 20 U.S.C. § 1415(g) and Vermont State Rule 2365.1.8. Such an appeal must be commenced within 90 days of the notice of this decision.