

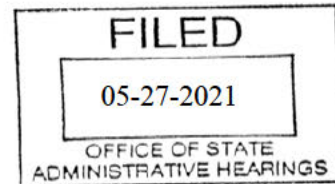
**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

█ **BY AND THROUGH** █ **AND** █
AND █
Petitioners,

Docket No.: 2006914
2006914-OSAH-DOE-SE-56-Barnes

v.

**FAYETTE COUNTY SCHOOL
DISTRICT,**
Respondent.



FINAL DECISION

I. INTRODUCTION

Petitioner █ by and through her parents, █ (“Father”), and █ (“Mother”) (collectively, “Parents” or “Family”) filed a due process complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”, 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. (“IDEA”). After a stay, the due process hearing was held via videoconference before the Office of State Administrative Hearings (“OSAH”), on January 11-15, 2021. Jonathan Zimring, Esq. and Debra Haverstick, Esq. represented Petitioners. Beth Morris, Esq. and Reagan Sauls, Esq. represented Respondent Fayette County School District (“FCSD” or the “School District”). The record remained open until April 8, 2021, in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

The following witnesses testified at the hearing:

- Petitioner █
- Rosalind Gwin (District Representative), Director of Exceptional Children’s Services,

FCSD

- Leslie Stuart, Psy.D., Clinical Psychologist
- Jessica Smith, School Psychologist, FCSD
- Warren Walter, PhD., Pediatric Neuropsychologist
- Michelle Deutscher, Licensed Occupational Therapist
- Petitioner [REDACTED] Father of [REDACTED]
- Amy Zaring, Director, [REDACTED] Academy [REDACTED]
- Petitioner [REDACTED] Mother of [REDACTED]
- [REDACTED] Former Fourth Grade Teacher, [REDACTED] Elementary School
- [REDACTED], Third-Grade Teacher at [REDACTED] Elementary School
- [REDACTED], Special Education Lead Teacher, FCSD
- [REDACTED], School Counselor, [REDACTED] Elementary School
- [REDACTED] Assistant Principal, [REDACTED] Elementary School
- [REDACTED], K-5 Early Intervention Program (“EIP”) Teacher, [REDACTED] Elementary School
- Stacy Croft, Coordinator, School Psychology Department, FCSD
- Sheila Autry, Instructional Support Teacher for the Exceptional Children’s Services Department, FCSD
- Beth Huber, Coordinator, Exceptional Children’s Services Department, FCSD

From their testimony and other admissible evidence, the undersigned makes the following findings of fact:

1.

At the time the due process request was filed in this matter, Petitioner [REDACTED] was a 10-year-

old student entering the fifth grade at [REDACTED] Elementary School in Fayette County School District. Tr. 49:1, 7-15; 70:1, 3-5.

2.

[REDACTED] is 12 years old and resides in Fayette County, Georgia with her mother, [REDACTED] father, [REDACTED] and brothers. Tr. 45, 547-48, 723. [REDACTED] attended [REDACTED] Elementary School in FCSD through fourth grade. In the summer of 2019, [REDACTED]'s parents withdrew [REDACTED] from FCSD and enrolled her at [REDACTED] Academy, a private school. Tr. 49:1, 7-15. From as early as kindergarten, [REDACTED] struggled learning to read. Tr. 51, 737. She has faced difficulties with reading fluency, math fluency and computation, and written expression, including spelling, punctuation, and capitalization. Tr. 193-96, 361-62, 407-08, 876; Ex. P-61 at 6-8.

3.

[REDACTED] has been diagnosed with dyslexia, dysgraphia, and dyscalculia. Tr. 88, 202-03. Dyslexia is a neurobiological disorder characterized by difficulties with accurate and/or fluent word recognition and poor spelling and decoding abilities, typically resulting from a deficit in the phonological component of language. Tr. 155-56, 167. Students with dyslexia struggle to learn letters and letter sounds. They also face difficulty with recognition and memorization of sight words as well as spelling and sound-symbol relationships. Tr. 158. Dysgraphia impacts written expression, affecting grammar, spelling, punctuation, and capitalization. It may also have a motor component that impacts letter and word spacing, penmanship, and legibility. Tr. 168. Dyscalculia manifests as similar weaknesses in math on a processing level, including difficulties with visual-spatial skills, visual-motor integration, and number sense in conceptualization. Tr. 168-69.

4.

[REDACTED] began to struggle with reading in kindergarten, and FCSD provided her an Early

Intervention Program (EIP) in reading beginning in first grade. Tr. 51, 726-27, 737, 1133, 1396. Despite the EIP, [REDACTED] continued to struggle with reading fluency. Reading fluency is a component of academic fluency that measures the speed and accuracy of an individual's reading. Tr. 441. During the 2016-2017 school year when [REDACTED] was in the second grade, [REDACTED] requested an evaluation for special education service for [REDACTED] and a comprehensive evaluation was completed. Tr. 965, 1396, 1301; Ex. P-58.

2016 - 2017

5.

FCSD psychologist Jessica Smith evaluated [REDACTED] in Fall 2016. Tr. 109; Ex. P-58. She reported that [REDACTED] had a Crystallized Intelligence score on the Differential Ability Scales-2nd Ed. (DAS-II) of 129, in the 97th percentile, which was in the upper end of the "superior" range. [REDACTED]'s full-scale General Conceptual Ability (GCA) score was 111, which was in the 77th percentile. Tr. 184, 264; Ex. P-58 at 3-6. In contrast, [REDACTED]'s scores on formal achievement measures were below average, including percentile rankings on the Woodcock Johnson-IV Achievement (WJ-IV ACH) tests that included:

- Letter -Word Identification – 10th percentile
- Basic Reading Skills – 22nd percentile
- Passage Comprehension – 17th percentile
- Reading Comprehension – 23rd percentile
- Oral Reading – 14th percentile
- Sentence Reading Fluency – 12th percentile
- Reading Fluency – 10th percentile
- Calculation – 22nd percentile

- Spelling – 17th percentile, and
- Written Language – 25th percentile.

Ex. P-58 at 10-12.

6.

Though achieving “A” and “B” grades in all subjects, ██████’s oral reading fluency scores on the Dynamic Indicators of Basic Early Literacy (“DIBELS”) assessment were in the “at-risk” range. Testing of “essential orthographic skills necessary for reading and writing” found ██████ to be “below average” on several measures. Ex. P-58 at 2, 6-7. Ms. Smith determined that the “below average” combined phonological processing deficits indicated that ██████ was among students “at greatest risk of reading problems.” Ex. P-58 at 7-8. Typically, a child who is not a fluent reader has difficulty retrieving words and must decode every word, leading to a slower reading pace and higher potential for errors. Tr. 159, 1137, 1244-45. Ms. Smith recommended that ██████ receive “specialized instruction.” Tr. 266-68; Ex. P-58 at 14-17.

7.

The Individualized Education Program (“IEP”) Team convened in November 2016 to review the evaluation results and consider special education eligibility for ██████ Ex. R-6; Tr. 292, 912. The IEP Team found ██████ eligible for special education through the IDEA in the category of Specific Learning Disability (“SLD”) for reading fluency. Tr. 292, 9-12, 966; Ex. R-6. ██████’s parents did not request an Independent Educational Evaluation (“IEE”) at this IEP Team meeting. Tr. 966.

8.

The IEP Team developed an IEP for ██████ with a goal/objective targeting reading fluency and recommended special education services utilizing accommodations, interventions, and a

specialized reading program. Ex. R-7. The IEP Team found that deficits in orthographic processing and rapid symbolic naming impacted ██████'s reading fluency.

9.

Under the IEP, ██████'s progress was to be monitored utilizing the DIBELS assessment for grade level reading passages. Tr. 968-69. The goal was for ██████ to read aloud “a hundred words per minute on a grade-level passage, a cold read, one that she’s never seen.” Tr. 969, 1144; Ex. R-6. The IEP Team agreed that ██████ would receive reading instruction through a resource class, 45 minutes per day, five days each week, using the Read Well program. Tr. 970. Ms. D ██████ described the Read Well program as “a comprehensive systematic reading program that incorporates phonemic awareness—phonemic awareness, phonics, vocabulary, fluency, and then comprehension. It’s explicit instruction daily and it incorporates—incorporates multisensory strategy approaches throughout the units each day.” Tr. 971.

10.

Additionally, Ms. Autrey testified that Read Well:

[is] not based on Orton-Gillingham, but it aligns with Orton-Gillingham in that it is multisensory, it’s developed based on phonograms, it’s sequential and incremental and cumulative, which is what Orton-Gillingham Approach is.

...

The multisensory component, it can be individualized which is a fantastic piece of Read Well. It can be individualized to meet students’ needs, either move them up and challenge them more or step back and provide extra intervention as needed.

Tr. 1260-61. Ms. Autrey testified that Read Well is an appropriate research-based program for students with dyslexia. Other structured and research-based programs and approaches available in FCSD to address dyslexia include Language Live, REWARDS strategy, Read Naturally, and Step Up to Writing. Tr. 1261-67.

2017-2018

11.

At the beginning of [REDACTED]'s third grade school year (2017-2018), her DIBELS score was 76 words read per minute. This was not considered to be a regression due to the fact that the reading passage was a third-grade passage, not a second-grade passage. Tr. 331, 1156. One month into the school year, [REDACTED]'s parents withdrew [REDACTED] from FCSD to provide home study with Lindamood-Bell ("LMB") instruction. Tr. 612. LMB is a private reading program that provides intensive reading instruction based on the LMB reading methodology; however, LMB is not a school and does not provide a full academic curriculum. Tr. 79, 614.

12.

Evidence shows that, prior to [REDACTED]'s withdrawal from FCSD to study with LMB, [REDACTED] had asked her parents for additional help and expressed that she was still struggling academically. Tr. 52, 556, 738-40, 921. [REDACTED]'s parents did not indicate that they were unhappy with the IEP or the services that were provided by FCSD at the time that they withdrew [REDACTED] from [REDACTED]. Tr. 982-83, 612. They did not ask the school or FCSD to pay for LMB. Ex. R-39B (21:00-22:07).

13.

[REDACTED]'s parents hoped that the intensive LMB program would help her catch up in reading, and [REDACTED] received 8 weeks of LMB instruction in Fall 2017. Tr. 555-57, 912, 983. The parents viewed LMB as "the magic that would fix her based off of everything that we knew and our discussions with Lindamood-Bell and our discussions with people that had had an experience with Lindamood-Bell." Tr. 613. Petitioners were pleased with [REDACTED]'s progress with LMB, with [REDACTED] proud that she "could finally read." Tr. 53, 556, 744. Although [REDACTED] did not receive math education through LMB, she did math using online programs during this time. Tr. 614.

14.

The Family and ██████████ were in contact regarding ██████'s return to FCSD. Tr. 983. The Family inquired about the process for re-enrollment and discussed a re-evaluation to assess ██████'s current needs. The parents thought, after ██████'s progress at LMB, that “[m]aybe [██████] won’t even need a full IEP and maybe just extra time,” a sentiment that ██████ conveyed to the School. Ex. R-35; Tr. 990.

15.

██████ shared ██████'s LMB data, including assessments, with FCSD. Tr. 608-09, 636-37, 984-85. When ██████ re-enrolled at ██████████ on November 7, 2017, the IEP Team convened and discussed ██████'s educational needs, as well as options for an IEP and a Section 504 plan related to the re-evaluation. Ex. R-12 at FCSD0077. The Team agreed to keep ██████'s then current supports in place until the Team reconvened in January 2018 after gathering updated functioning data. Tr. 985. ██████ raised concerns about mathematics, as ██████ had fallen behind in the previous two months without classroom education. The school offered support including tutoring and math strategies. Tr. 985. The Team agreed to lower ██████'s word count per minute goal from 100 to 75 words. Tr. 1045-46, 1180-83; Ex. R-12. Ultimately, the Family agreed with the decision to maintain the IEP and to meet again after monitoring and obtaining more information. Tr. 986.

16.

On January 9, 2018, the IEP Team reconvened to discuss the following information relevant to ██████'s re-evaluation: the 2016 Smith evaluation (then the current evaluation), LMB assessments, progress monitoring, ██████'s grades, DIBELS, Lexile,¹ Star Math and Reading

¹ Lexile is a measure of reading comprehension determined by the Scholastic Reading Inventory (SRI), an untimed assessment. Tr. 339, 822-26, 835, 934.

Inventory scores, teacher updates, and [REDACTED]'s classroom performance. Ex. R-15; Tr. 337-39, 981, 986-88, 992, 1039-40, 1167. As of the December of [REDACTED]'s third grade year, her reading Lexile score was proficient for a student at the end of the third grade. Tr. 988, 924-25. Despite the lack of formal math instruction during the two months [REDACTED] was at LMB, her teachers at [REDACTED] [REDACTED] believed that she was making progress and was capable of catching up with her class. She tested in the average range on her Star Math assessment. Tr. 988, 920-21. The IEP Team, including [REDACTED] agreed with the decision that Petitioner no longer required an IEP. Tr. 925-26, 989. FCSD did not reevaluate [REDACTED] Tr. 992, 1039. Ms. Smith, the FCSD school psychologist who attended the January redetermination meeting, testified:

My recollection is that Mrs. [REDACTED] felt that [REDACTED] had made significant progress from Lindamood-Bell and that she was – she was questioning that [REDACTED] did not need specialized instruction anymore. And she had expressed that she felt that [REDACTED] had made such significant progress that she was not comparable to peers in special education.

Tr. 345-46.

17.

Based on [REDACTED]'s test scores and the other evaluated factors, the IEP Team determined she did not qualify for EIP. Tr. 989. At the close of the meeting, the parents were provided with the re-evaluation form as well as a Notice of Parental Rights. Ex. R-42. The form the parents received contained the following language: “The parents understand their right to request an assessment to determine whether the child continues to be a child with a disability.” Ex. R-14; Tr. 131.

18.

Ms. Rosie Gwin is the Director of Exceptional Children’s Services for FCSD. Tr. 85, 1370. Ms. Gwin testified as an expert in FCSD special education procedures and the School District’s implementation of the state and federal requirements for special education. Tr. 1384-85. Ms.

Gwin testified that, at the time of the January 2018 IEP meeting, the FCSD's re-evaluation and re-eligibility determination procedures required an IEP Team to discuss re-evaluation at every annual meeting. Tr. 1405. At every annual meeting, an IEP Team would follow the procedures to determine "if we had sufficient information in order to make a decision about re-evaluation, whether or not we needed additional information, whether or not we had sufficient information to – to look at a student's eligibility for special education or any needs that they might have to be addressed in the IEP." Tr. 1405. As discussed above, the IEP Team reviewed all relevant information, including data from the November 15, 2016 psychological evaluation, as well as newer progress monitoring data, new benchmark assessments, and teachers' observations. Tr. 1405.

19.

Ms. Gwin testified that the review conducted by the IEP Team, including the parents, constituted a "re-evaluation" under the FCSD requirements in place as of January 9, 2018. Tr. 1410. Ms. Gwin further testified that no additional information was necessary to terminate special education services during the January 2018 IEP meeting. Tr. 1411. When questioned at the hearing about the information used to make the determination at the January 2018 IEP meeting, Ms. Gwin testified as follows:

Q: Based on your review of records in this matter, in your training and expertise, do you believe the team needed additional information to make the determination it made?

A: No. I – I don't believe that they do – they did. They had the evaluation that Ms. Smith had conducted. They have the information from Lindamood-Bell which were updated assessments in reading. Actually, it was a little more comprehensive than that. They did more – more assessments than that, that we had that information from Lindamood-Bell. We had updated performance on IEP goal – her IEP goal and objective, which was about oral reading fluency. So, we had current information regarding her oral reading fluency, that progress monitoring data. They had benchmark data, which was – they had just a Reading Inventory that showed

that ■■■ was in the proficient range for reading comprehension. So, the team looked at that information, information from the teacher, information from the parents. And the parents had actually, according to the emails that I reviewed, came back when ■■■ came back to the school system, were even hopeful that she would no longer require special education.

Tr. 1411.

20.

In February 2018, a Section 504 meeting was held to discuss the deficits identified by Ms. Smith's evaluation. Tr. 349. The Team determined that ■■■ was eligible under Section 504 for SLD for dyslexia. Ex. R-18. To make this determination, the Team reviewed ■■■'s grades, applicable assessments, teacher reports, and other relevant information. Although ■■■ was qualified under Section 504, the Team determined that based on her performance on grade level without accommodations, she did not require a plan with accommodations. Ex. R-18, FCSD1338-140. ■■■ agreed with the Team's decision. Tr. 350.

21.

■■■ made As and Bs during the 2017-2018 school year and "performed well on a standardized test [Georgia Milestone] that is for third graders that year." Ex. R-18; Tr. 931-33. Despite achieving As and Bs, ■■■ continued to struggle with math and spelling, Tr. 728, 866, 876, 993, and sometimes redid work and quizzes to get a passing grade. Tr. 55-57, 767-73, Ex. P-27. Additionally, it took ■■■ longer than her peers to complete work. Tr. 55, 62. Although the teacher told ■■■ that ■■■'s math homework should take 20 minutes to complete, ■■■ worked on homework at least 1-2 hours per day. Tr. 775. When ■■■ contacted FCSD with concerns, ■■■'s former special education teacher, Ms. D■■■■, told ■■■ to bring ■■■ to school early so that Ms. D■■■■ could provide extra help with ■■■'s homework. Tr. 759, 993-94. ■■■ began

arriving at school 40 minutes before school started to receive this extra help, though Ms. D [REDACTED] was not always available. Tr. 599, 759.

22.

In the summer of 2018, the Parents again provided [REDACTED] with LMB instruction and virtual LMB classes in August 2018. Tr. 58, 79, 556, 753-54. The Parents felt that LMB services were critical to [REDACTED]'s educational needs. No testimony was presented from LMB about their program, their services, or any progress [REDACTED] made there. This was a unilateral placement, and the Parents did not ask FCSD to pay for LMB. Ex. R-39B (21:00-22:07).

2018-2019

23.

[REDACTED] P [REDACTED], who has considerable experience and training in reading education, was [REDACTED]'s fourth grade general education teacher at [REDACTED]. Tr. 803. Ms. P [REDACTED] described [REDACTED] as follows:

[REDACTED] was just a delight to have in class. She was happy and bubbly and just the sweetest kid. She worked very hard. She was a perfectionist. She likes things to be perfect and done just right, but she was always eager to learn and participate in class discussions. She would raise her hand to participate. She would participate in small groups, always had her work done on time and always strived to have it done well or to understand the learning if it was – if she made a mistake.

Tr. 804. Ms. P [REDACTED] was aware that [REDACTED] had received instruction at LMB that summer and that she continued virtual LMB classes in August 2018. Tr. 58, 79, 556, 753-54, 811.

24.

In September 2018, [REDACTED] sent an email to [REDACTED]'s principal and teacher stating that [REDACTED] was struggling and requesting to reinstate the IEP or Section 504 plan. Tr. 754-55, 994-95, 1093-94, 1112-15; Ex. P-42. On September 9, 2018, the Section 504 Team met to review [REDACTED]'s grades and needs. Ex. R-18. During that meeting, the Team shared that [REDACTED]'s Fall 2018 DIBELS benchmark

was low—scored as “at risk”—and that she was struggling in writing, specifically with complex sentence structure, spelling, higher order math, and multi-step math problems. Ex. R-18, FCSD116. ■■■■■s Star Math benchmark was a scaled score of 619, which is the 63rd percentile. Tr. 805. Her score on the Scholastic Reading Inventory was at an 859 Lexile, the 74th percentile, which is considered “proficient.” Tr. 805; Ex. R-18.

25.

At the 504 meeting, the Team added accommodations to ■■■■■s 504 plan, including extra time and small group assessment, and noted that “Ms. P ■■■■■ does not count off for spelling errors unless it is copying.” Ex. R-18 at 2. Additionally, ■■■■■s “fluency is low (DIBELS [oral reading fluency] is 77). . . . Parent shared reading aloud is still difficult. Fall 2018 fluency benchmark is significantly lower than Spring 2018 (114 wpm) or last IEP progress point (94 wpm).” Ex. R-18 at 1; Tr. 830-31, 864-65.

26.

During the September 2018 meeting, the Family shared that ■■■■■ was anxious at home. At the hearing, ■■■■■ testified that she felt anxious when completing a test or assignment. Tr. 55. She described feeling physical effects of anxiety. Tr. 50 (“I felt like I wanted to run. I would get really hot and feel prickles in my neck and then just having my stomach feel like it’s being twisted into a knot.”). ■■■■■ and her parents testified that ■■■■■ often felt depressed and cried about school, routinely sobbing in the car on the drive home. Tr. 61-62, 758-59. ■■■■■ tried “never to cry in class,” but on bad days, she went to the bathroom to cry. Tr. 61, 554-55. ■■■■■ had tantrums and meltdowns at home that were attributed to school-related anxiety and homework struggles. Tr. 553-54, 615, 758. The Team agreed to develop a Section 504 accommodations plan to meet ■■■■■s

needs. Tr. 805, 809-10. “The parents asked about IEP,” but no IEP or specialized instruction was provided. Ex. R-18 at 2; Tr. 756.

27.

The Parents did not share any reports from LMB with the Team nor with Ms. P [REDACTED] during Petitioner’s fourth grade school year. Tr. 811. The Parents did not share that [REDACTED] was crying in the bathroom² or that any students had called [REDACTED] names. Tr. 810-11. The Parents did not provide notice to Ms. P [REDACTED] or the Team of their concerns regarding [REDACTED]’s motor skills during her fourth-grade year. Tr. 810-11. Ms. P [REDACTED] did not have concerns about [REDACTED]’s motor issues. Tr. 810-11.

28.

About midway through [REDACTED]’s fourth grade year, [REDACTED] contacted Ms. Y [REDACTED] at [REDACTED] [REDACTED] and indicated that she desired to have [REDACTED]’s IEP reinstated based on a private evaluation conducted by Dr. Stuart. Tr. 994. In response, the school clarified that [REDACTED] did not have an IEP in place but scheduled a Section 504 meeting for March 4, 2019 to review the evaluation. Tr. 994, 1316. The Petitioners had not requested an evaluation from the District before obtaining the private psychological evaluation. Tr. 633, 756. The Team conducted a Section 504 re-evaluation review using the private evaluation and other data available. Ex. R-24, FCSD204-16. Information and recommendations from Dr. Stuart’s evaluation were incorporated into [REDACTED]’s 504 plan, including an accommodation that [REDACTED] would not be penalized for spelling errors in her assignments. Tr. 1316, 995-96; Ex. R-24. Additionally, [REDACTED] received extended time on assignments, up to 50 percent, as a “safety blanket” if needed. Tr. 995-96; Ex. R-24. Further accommodations included small group assessments, repeated directions, a copy of class notes on

² [REDACTED] testified, “I think it was mostly related to math. Like, if there was a problem or a worksheet that I was just terrified of doing, I would go into the bathroom and cry.” Tr. 61.

her desk instead of a copy from the whiteboard, and preferential classroom seating. Tr. 995-96; Ex. R-24.

29.

During the March 4, 2019 meeting, the parent also requested a re-evaluation under IDEA so that eligibility could be reconsidered. Tr. 1314. The Team agreed to review the private psychological evaluation and consider it for eligibility purposes; the Team was also to conduct additional assessments in unevaluated areas that were necessary to meet eligibility requirements. Tr. 994-96, 1314. On March 18, 2019 and March 27, 2019, Ms. Smith conducted a psychological evaluation addendum. Ex. P-60. A speech-language evaluation was conducted as well. Tr. 996; Ex R-39A (59:45-1:02:47). The parents did not request an occupational therapy evaluation. Tr. 605, 1011. FCSD did not conduct an occupational therapy evaluation or provide occupational therapy services to [REDACTED] Exs. P-58, P-60, R-23.

30.

On May 1, 2019, the IEP Team convened to re-consider [REDACTED]'s eligibility under IDEA. Ex. R-23; P-117; Tr. 1100. [REDACTED] attended the IEP meeting with an educational advocate, Kristina Anderson, and Beth Huber attended as FCSD's LEA representative. Ex. P-117; Tr. 784-85, 1014, 1317. Additionally, Dr. Stuart was on [REDACTED]'s phone when she arrived at the meeting. Tr. 1317. The IEP Team received Dr. Stuart's input into the eligibility determination, as she was available via phone during the first portion of the IEP meeting. Ex. R-39A (0-23:30). During that meeting and in conjunction with [REDACTED] and her advocate, the IEP Team reviewed Dr. Stuart's private evaluation (Ex. R-39A (0-23:30)), an addendum to FCSD's evaluation (Ex. R-39A (1:03-1:40)), speech language evaluation (Ex. R-39A (59:45-1:02:47)), current progress and reports from [REDACTED]'s

teacher (Ex. R-39A (29-32)), and parent concerns throughout. Dr. Stuart testified that her private evaluation of ■■■ was similar to the evaluation that Ms. Smith conducted. Tr. 213.

31.

At the hearing, Ms. Smith testified that the recommendations contained in her report and addendum could be implemented in the general education classroom. Tr. 323-24. ■■■ indicated that ■■■ was performing so well because the parents had supplemented school with additional instruction with LMB. Ms. Huber told ■■■ that if she wished to provide any additional documentation from LMB, the Team would consider that information in its determination. Tr. 1337. However, further documentation regarding ■■■'s most recent instruction with LMB was never provided to the school. Tr. 1337.

32.

Ms. P■■■ testified regarding ■■■'s reading level at the end of fourth grade, stating "at the end of fourth grade, ■■■ was reading above fourth-grade level. In fact, she was reading at about a seventh-grade level if you look at the charts for where she falls at the end of the school year." Exs. R-32, R-39A (30:03-30:40); Tr. 826. ■■■'s DIBELS scores indicated that ■■■ made progress over the school year with oral reading fluency, increasing from a cold read of 77 words per minute to 113 words per minute over the course of the year. Tr. 831; Exs. R-32, R-33. However, ■■■'s oral reading fluency score was in the at-risk range for the DIBELS assessment. Tr. 831 ("■■■ was below the cut score for where we wanted her for fourth graders for oral reading. . . . I know she was below the aim line."). According to Ms. P■■■, ■■■'s performance was affected by the use of a timer, but she still made progress. Tr. 833 ("■■■ did not like the timer. You could almost see her visibly shaking and getting nervous whenever she knew that I was timing her. . . ."). The Team also discussed ■■■'s math performance during the eligibility

meeting, which was considered at grade level and showed progress. Tr. 834. The IEP Team also discussed support [REDACTED] was receiving from the school counselor, [REDACTED]. Ex. R-39B (1:30-2:42); Tr. 1055.

33.

At the May 2019 meeting, the Team discussed that [REDACTED] had not demonstrated the need for interventions in the school environment and had continued to make educational progress in all areas without specialized instruction. Tr. 844. The team recognized that [REDACTED]'s psychological evaluation identified strengths as well as weaknesses but determined that [REDACTED] did not demonstrate the need for specialized instruction, as she was meeting grade level standards at the time of the eligibility meeting. Tr. 844. Ms. P [REDACTED] explained her opinion that [REDACTED] did not require specialized instruction: "She was performing successfully in the classroom with the accommodations that we had in place under her Section 504 plan. She was successful, she was getting good grades, she was learning and – and growing." Tr. 845. Such classroom performance occurred without any specialized instruction. Tr. 845.

34.

The Team discussed the "at risk" DIBELS score for oral reading fluency. Ex. R-39B (13:00-16:51). After considering her performance in light of eligibility requirements, the Team found that [REDACTED] did not meet the eligibility requirements under IDEA. Ex. R-23; Tr. 1010-11, 1337, 843. Ms. Gwin, an expert in FCSD's special education procedures and the School District's implementation of the state and federal requirements for special education, agreed with the eligibility decision of the IEP Team. Tr. 1413.

35.

The May 2019 meeting also involved a discussion of other areas of potential eligibility, including speech language and emotional behavior disorder,³ with the Team determining that [REDACTED] did not meet those eligibility requirements. Ex. R-23. The Parent agreed that [REDACTED] did not meet the requirements for those areas. Ex. R-39B (0-2:42, 23:30-24:30). Ms. Huber explained at the meeting that the school recognized that [REDACTED] has an SLD, but that [REDACTED] did not meet all of the prongs of the state eligibility requirements. Ex. R-39B (24:30-25:15).

36.

[REDACTED] disagreed with the Team's decision and withdrew her consent for the Section 504 plan as well. Exs. R-24, R-39B (24:30-25:15). In advising [REDACTED] to withdraw consent for the Section 504 plan, her advocate commented, "You have to fail and kill yourself" in order to be eligible for special education in FCSD. Ex. 39B (32:00-32:47).

37.

Ms. P [REDACTED] testified that [REDACTED]'s demeanor changed in the weeks after the May 2019 Team meeting:

[REDACTED] was a different child after that meeting. Prior to that meeting, she came to school with a smile on her face, happy every day, almost a bounce in her step. She would skip down the halls. She did not come to school the day after the meeting. I received an e-mail from Dad [REDACTED] stating that she was too upset to come to school because we weren't willing to give her any help.

And after that, the last – I guess there were probably three weeks of school left, [REDACTED] would – she didn't smile. She lost the skip in her step. She wouldn't even talk to me. She seemed discouraged and upset, a completely different child than I had known before that meeting.

Tr. 846. Ms. P [REDACTED] told the Parents that she would continue to support [REDACTED] through the end of the school year, even without a Section 504 plan. Tr. 847, 632.

³ At the hearing, Dr. Stuart testified that she did not identify an anxiety diagnosis in her evaluation of [REDACTED] Tr. 225.

38.

The Parents placed █████ in the █████ Academy Transition Learning Support Program beginning in Fall 2019, believing that █████ could provide specialized instruction for █████ Tr. 567-68, 718, 790. █████ Transition Program is for students with higher abilities⁴ but learning disabilities in reading, math, and written expression. Tr. 644, 656. Teachers in the program are trained to work with students with complex learning profiles are trained in the Orton-Gillingham or Wilson Reading programs. Tr. 644, 657-58, 688, 696-97. The █████ program includes chunking assignments, Learning Ally, and the use of graphic organizers. Tr. 697, 708-711.

39.

Ms. Zaring testified as an expert in special education and related services provided to children with specific learning disabilities. Tr. 644, 654. Ms. Zaring testified that █████ has a classic dyslexia profile, including deficits in fluency and difficulty with math facts and significant difficulty with spelling, Tr. 663; she is hard working but struggles with academic fluency, Tr. 666-67; her work is accurate but slow, Tr. 668; her anxiety is consistent with dyslexia, Tr. 663; she has processing and working memory deficits, Tr. 663-64; and her strengths hide her weaknesses. Tr. 664-65. Both Dr. Stuart and Dr. Walter offered expert testimony that reading fluency deficits are clear in █████'s evaluations, Tr. 189, 351, 431, which identify significant impairment in basic reading and reading fluency. Tr. 436, 441, 445. The evaluations are consistent with a dyslexia

⁴ █████ testified at the hearing and the undersigned found her to be bright and intelligent, with an impressive vocabulary and awareness. Tr. 48 (“Tame Your Brain . . . also taught me about my brain that – and how – and how to understand it, like my – like how to understand when my amygdala reacts in the prefrontal cortex, hippocampus, and what dopamine is.”), 50 (“I felt very anxious, trepidatious, and worried.”), 52 (“Well, it felt like more – it was still very difficult for me, and it felt more like they were just giving me a cane when I really needed a wheelchair.”).

diagnosis and show █████ struggled with writing, punctuation, and capitalization. Tr. 296, 351, 361-62, 404-06. █████ excels in motivation, persistence, and organization but struggles to complete work in a reasonable time. Tr. 679; P131. She is “an excellent reader if she takes an enormous amount of time.” Tr. 667.⁵ █████’s grasp of math concepts is excellent, but her knowledge of math facts is well below grade level. Tr. 667.

40.

In November 2020, at the request of the Parents, occupational therapist Michelle Deutscher evaluated █████ Tr. 471, 483-84, P62. At the hearing, Ms. Deutscher testified that █████’s dysgraphia diagnosis gave FCSD notice that occupational therapy is an area of suspected need, as did concerns with her reading, writing and sensory issues. Tr. 485, 489-91. However, █████’s fine motor, visual motor, and sensory processing needs as assessed by psychologists showed █████ to be functioning in the average range. Tr. 605, 810-11, 1011. Ms. Deutscher reported █████ is exerting tremendous effort to do things her body should do automatically, impacting the pace of her learning. Tr. 506-07. She exhibits tactile defensiveness and cannot concentrate if, e.g., clothing bothers her. Tr. 492-94, 497, 509; P62 at 4. She has difficulties with kinesthetic awareness, which can impact education. Tr. 499-501. Her primitive reflexes are not integrated, impairing her ability to cross the midline of her body, impacting reading and writing. Tr. 502-04. She has an inefficient grasp when writing and deficits in motor skills. Tr. 504-05, 512-14. According to Ms. Deutscher, these issues can all be remediated by school-based occupational therapy. Tr. 497-507.

⁵ Per Ms. Zaring, █████ excelled on a reading assessment but took three times longer than others, Tr. 668; most students finish iReady in a day, █████ took three days, Tr. 694; █████ did well on Star Reading but took the maximum time allowed, Tr. 675; P127; █████ got 51% accurate on Star Math, which increased to 86% untimed, but took 29 minutes instead of five. Tr. 677; P127.

III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. Ch. 16-4-7 (“Ga. DOE Rules”).

2.

This Court’s review is limited to the issues raised by Petitioners in their due process hearing request. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

3.

Petitioners bear the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(1); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. Ga. DOE Rule 616-1-2-.21(4); OSAH Rule 616-1-2-.21(4).

4.

Under IDEA, students with disabilities have the right to a free appropriate public education (“FAPE”). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. DOE Rule 160-4-7-.01(1)(a). “The purpose of the IDEA generally is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living’” *C.P. v. Leon County Sch. Bd.*, 483 F.3d 1151 (11th Cir. 2007) (quoting 20 U.S.C. § 1400(d)(1)(A)). The IDEA requires school districts to provide an eligible student with FAPE in the least restrictive environment (“LRE”). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114-300.118.

5.

The United States Supreme Court developed a two-part inquiry to determine whether a school district has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). “This standard, ... has become known as the *Rowley* ‘basic floor of opportunity’ standard.” *C.P.*, 483 F.3d at 1153 (citing *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991)); see *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (2008).

6.

Regarding the first inquiry, the Eleventh Circuit has held that “violation of any of the procedures of the IDEA is not a per se violation of the Act.” *Weiss v. Sch. Bd.*, 141 F.3d 990, 996 (11th Cir. 1998). Therefore, not all procedural breaches are IDEA violations. Indeed, FAPE is only denied if the procedural inadequacy (1) impeded the child’s right to FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a).

7.

Under *Rowley*, a student with a disability “is only entitled to *some* educational benefit; the benefit need not be maximized to be adequate.” *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001) (emphasis added); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003) (ruling FAPE “need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him to benefit from

instruction.”); *see Rowley*, 458 U.S. at 197 n.21.

8.

Moreover, the Eleventh Circuit has held that an “appropriate education” under IDEA “means ‘making measurable and adequate gains *in the classroom*.’” *L.G. ex. rel. B.G. v. Sch. Bd. of Palm Beach County*, 255 Fed. Appx. 360 (11th Cir. 2007) (quoting *JSK*, 941 F.2d at 1573 (emphasis added)). The Eleventh Circuit “has specifically held that generalization across settings is not required to show an educational benefit. ‘If “meaningful gains” across settings means more than making measurable and adequate gains in the classroom, they are not required by IDEA or *Rowley*.’” *Devine*, 249 F.3d at 1293 (quoting *JSK*, 941 F.2d at 1573); *see also M.W. v. Clarke County Sch. Dist.*, 2008 U.S. Dist. LEXIS 75278 (M.D. Ga. 2008) (finding parent training and home behavioral plan only required as “related services” under IDEA to the extent necessary to allow the child to progress *in the classroom*) (emphasis in original). In order to satisfy its duty to provide FAPE to a disabled child, a school district must provide “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *WC v. Cobb Cnty. Sch. Dist.*, 407 F. Supp. 1351, 1359 (N.D. Ga. 2005).

A. **Eligibility**

9.

To be eligible under IDEA, a “child with a disability” must “need special education and related services” as a result of her disabling condition. 20 U.S.C. §1401(3)(A); 34 C.F.R. § 300.8. In *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1193 (11th Cir. 2018), the Eleventh Circuit held that “to establish an entitlement to FAPE, a student . . . must show (1) that her [disability] adversely affects her academic performance; and (2) ‘by reason thereof,’ [she] *needs* special education. *See* 20 U.S.C. §1401(3)(A)(ii). In *Durbrow*, the student could “not demonstrate a need

for special education” even though he suffered from ADHD, because the student’s “overall academic performance ranged from mediocre to extraordinary.” *Durbrow*, 887 F.3d at 1194. “[N]either the IDEA nor the federal regulations define the term . . . ‘adverse effect on educational performance,’ leaving it to each State to give substance to [this term].” *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000).

10.

In order to determine whether an adverse effect occurred, courts have reviewed a variety of aspects of the student’s education. A school district must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations. . . .” 34 C.F.R. § 300.306(c); *Durbrow*, 887 F.3d at 1193-94. One purpose of a FAPE is to “ensure access . . . to the general curriculum so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3)(ii). “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.” *Rowley*, 458 U.S. at 203.

11.

As discussed herein, when enrolled in FCSD, ■■■ accessed the general education curriculum without the need for special education instruction. She made good grades, met grade level standards on statewide assessments, and demonstrated grade level progress on benchmark assessments. At the end of fourth grade, her reading level was approximately at a seventh-grade level. Her DIBELS scores showed progress in oral reading fluency over the school year. ■■■ made progress, despite her performance being affected by the use of a timer. ■■■s anxiety was

being addressed by support from the school counselor. ■■■ performed at this level without specialized instruction. Even after two months with no math instruction in the third grade, ■■■ performed at grade level and made progress in math.

12.

A student is unlikely to require special education if: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material. *Durbrow*, 887 F.3d at 1193-94; *see D.K. v. Abington Sch. Dist.*, 696 F.3d 223, 251 (3d Cir. 2012); *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007); *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 313-14 (6th Cir. 2007). In *Durbrow*, even though the student displayed some weaknesses, the student was not readily amenable to special education remediation, had the capacity to comprehend “general curriculum” course material, and did not need special education. 887 F.3d at 1193-94; 34 C.F.R. §§ 300.306(c), 300.39(b)(3)(ii). Furthermore, the court in *Durbrow* found it to be “significant” that “none of [the student’s] teachers testified that special education was appropriate for him.” *Durbrow*, 887 F.3d at 1194 (“Since none of his teachers or counselors thought that he needed special education, [the student] was less likely to qualify as a ‘child with a disability.’”). Here, none of the teachers at ■■■■■■■■■■■■ thought that special education was appropriate for ■■■■■■■■■■

B. Reimbursement for Private Placement

13.

The Supreme Court established a two-part test for plaintiffs seeking reimbursement for the costs of a unilateral private placement under IDEA. *L.G. ex. rel. B.G.*, 255 Fed. Appx. at 365-66. “First, the parents seeking reimbursement must show by a preponderance of the evidence that the

school district has failed to offer a free appropriate public education to the student.” *Id.* (citing *Schaffer v. Weast*, 546 U.S. at 62; *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370 (1985)). If the parents prove that a school district denied FAPE, they must then prove that their alternative private school placement was proper under the IDEA. *Id.*; 34 C.F.R. § 300.148(c).

14.

Although the court sympathizes with the Petitioners and appreciates the enormous sacrifices that ██████’s parents have made and the heavy burdens that they have borne on behalf of their daughter, the court is obligated to apply the law as Congress has written it and as the courts in this circuit have interpreted it. In so doing, the court concludes that Petitioners did not prove that the School District failed to offer ██████ a free appropriate public education. The evidence in the record shows that while in the public-school setting, ██████ made adequate gains in the classroom.

15.

The court does not dispute that ██████ Academy offers an impressive program for children with higher abilities who also have learning disabilities in reading, math, and written expression. However, the evidence does not show that a private placement is *necessary* for ██████ to receive educational benefit. According to ██████’s own academic records, ██████ was already reading on grade level when she arrived at ██████ upon leaving FCSD. While ██████ Academy uses the Orton-Gillingham Approach, the evidence shows that similar structured, research-based instructional programs and strategies are available at FCSD. *See D.G. v. Cooperstown Cent. Sch. Dist.*, 4269127 (N.D.N.Y. 2010) (finding that the school district’s reading programs were sufficient where they were research based and multisensory and would have

conferred an educational benefit to a student with dyslexia, even if the parent preferred a different methodology). Petitioners argue that [REDACTED] can meet needs that FCSD allegedly could not; however, the parents are paying for an outside tutor and have contracted for private occupational therapy services, in addition to the instruction [REDACTED] receives while enrolled at [REDACTED].

16.

The evidence shows that [REDACTED] is not receiving specialized instruction at [REDACTED]. The [REDACTED] program includes chunking assignments, Learning Ally, and the use of graphic organizers. These services, however, are accommodations, not specialized instruction. Such accommodations are consistent with the recommendations that the Section 504 made, which the Parents rejected. Ex. R-24. The math tutoring that [REDACTED] receives outside of the school day is not part of a specialized instructional program.

17.

The court concludes that FCSD offered FAPE to [REDACTED]. Accordingly, it is not necessary to decide whether the placement at [REDACTED] was proper under IDEA.

[T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. §1412(a)(10)(C); see Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 ST. JOHN'S J.L. COMM. 171, 188 n.93 (2006) (“Where the tribunal determines that a FAPE was offered, the parents’ case is effectively over and analysis of the merits of the unilateral placement and the equities will not ordinarily be required . . .”).

C. **Reimbursement for Private Evaluation**

18.

█'s parents are not entitled to reimbursement for the private evaluation by Dr. Stuart. Reimbursement is not warranted because Petitioners failed to prove that the School District denied █ a FAPE.

19.

Furthermore, the record shows that Petitioners never requested an occupational therapy evaluation from FCSD. Petitioners allege that █'s dysgraphia diagnosis gave FCSD notice that occupational therapy is an area of suspected need, giving rise to an obligation to evaluate. However, █'s fine motor, visual motor, and sensory processing needs as assessed by psychologists showed █ to be functioning in the average range. Tr. 605, 810-11, 1011. Accordingly, the School District is not obligated under IDEA to reimburse █'s parents for the cost of the occupational therapy evaluation or occupational therapy services.


20.

This Court finds that █ made appropriate educational progress, and Respondent met its legal obligation to provide █ with FAPE in the LRE. Therefore, Petitioners are not entitled to the reimbursement they seek of costs and expenses of █ for the 2019-2020 and 2020-2021 school years. They similarly are not entitled to reimbursement for LMB or for other costs and expenses incurred, such as Dr. Stuart's private evaluation. Petitioners are also not entitled to reimbursement of costs and expenses for Tame the Brain Therapy, math tutoring for 2019-2020, the occupational therapy evaluation, or occupational therapy services.

IV. DECISION

Respondent Fayette County School District offered Petitioner [REDACTED] a free appropriate public education under IDEA. Accordingly, Petitioners are not entitled to reimbursement of the costs they seek. Petitioner's request for relief is **DENIED**.

SO ORDERED, this 27th day of May, 2021.



Shakara M. Barnes
Administrative Law Judge

