
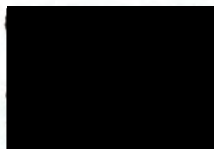


IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D16-013

Parties Requesting Hearing
(Petitioner)


Parent of the Student


Student



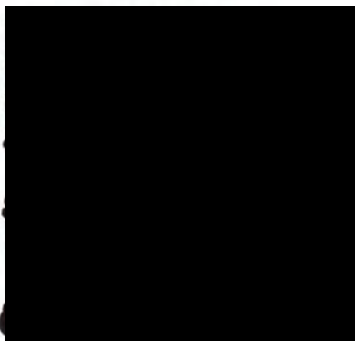
Counsel for Student and Parent



Local Educational Authority (LEA)
(Respondent)

 County Schools

Counsel for Educational Authority



Hearing Location

Hearing Dates

Type of Hearing

Open to the public

Transcription Method

Court Reporter


Student Present

Yes


Hearing Officer

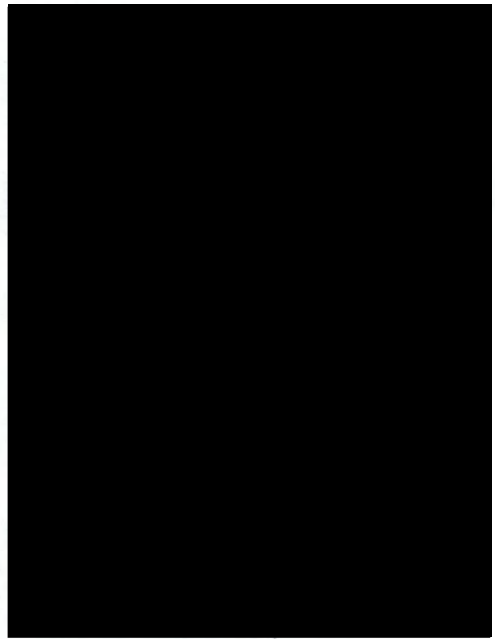
Janet A. Sheehan, Esq.
41 15th Street
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Witnesses


Student


Parent





**IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D16-013**

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I. Procedural History

The original complaint in the matter was filed by the student's mother on April 26, 2016 and was assigned to this hearing officer on April 27, 2016. An initial status and scheduling conference was held telephonically on May 12, 2016. At that time, the counsel for both parties agreed that the issue of the child's eligibility under the Individuals with Disabilities Education Act (hereinafter "IDEA") had been settled affirmatively and that they were in the process of drafting an Individual Education Plan (hereinafter "IEP") document. Counsel for the student requested a continuance of the hearing dates from May 31 - June 2, 2016 to June 23 and June 24, 2016. That request was granted.

A follow-up telephone status conference was subsequently held on June 2, 2016. At that time it was felt by both counsel that the efforts at resolution of the case had altered the issues and stance of the case. Therefore Student's counsel moved that she be allowed to amend the complaint and more accurately reflect the issues outstanding between the parties. That same day, an Order was entered granting the motion to permit filing of an amended complaint, which amended complaint was filed the following day, June 3, 2016. In that Order, June 14, 2016, was set as the date for the next Scheduling Conference. Therefore, all timelines for the conduction of the hearing began again as of June 3, 2016, when the Amended Complaint was filed on Petitioner's behalf.

An additional telephone conference was held with counsel for the parties on June 14, 2016. Because the petitioner's Amended Complaint was a narrative of alleged events, without expressly stated issues, the hearing officer directed that all issues to be considered for hearing should be identified and communicated to the Court and opposing counsel. Submission of the

issues by Petitioner was to be completed by June 16, 2016. The Respondent was given until June 23, 2016 to write and submit an answer to the Amended Complaint and identified issues. Hearing dates were set for July 18 - 20, 2016. A Scheduling Order documenting these timelines was entered on June 15, 2016. The Petitioner's Issues and the Respondent's Answer to Amended Complaint were both timely filed.

On July 8, 2016, a written request was made by Respondent's counsel indicating that the parties jointly wished for the hearing set for July 18 - 20, 2016, to be continued to August 24 - 26, 2016. An Order of Continuance was entered granting this request on July 12, 2016, for the purpose of allowing the parties to participate in mediation.

Thereafter, on August 9, 2016, personnel from the West Virginia Department of Education ("WVDE") contacted the Hearing Officer and said the parties had engaged in mediation, but that no mediation agreement had been reached.

On August 13, 2016, Petitioner's Counsel communicated with the Hearing Officer's office requesting a telephone conference because her expert witness was not available to give testimony on any of the dates then reserved for the hearing of the case. An emergency telephone conference was set and held on August 17, 2016. At that time, Counsel for the two parties indicated that September 13 - 15, 2016 was the earliest date on which Petitioner's Education Expert could be available for testimony, and that both counsel could be prepared and in attendance. Written confirmation of this Joint Motion for Continuance was received and an Order of Continuance granting the Motion was entered on August 26, 2016.

September 10, 2016, was the date of a final telephonic conference at which counsel acknowledged timely receipt of evidentiary materials from their opponent.

The hearing was held as scheduled beginning at 9 am on September 13, 2016. Two days of hearing were held with proceedings concluding at 4:45 pm on September 14, 2016.

The testimony of Petitioner's expert was taken telephonically on the morning of September 14, 2016. Notably, that expert was sworn in by the court reporter present in the W. Va. Hearing room. The witness was testifying from [REDACTED]

The parties both chose to waive their right to give closing arguments, and alternatively, elected to submit their concluding arguments in written form via post-hearing legal briefs, due October 14, 2016. On October 12, 2016, the petitioners filed a motion requesting an extension of time for the filing of briefs, to October 17, 2016, citing vision difficulties, and lack of support staff as reasons for the request. The motion was granted extending the deadline for briefs. Both parties filed briefs electronically by the October 17, 2016 deadline, and those submissions have been fully considered in the writing of this decision. This extension of time did not effect the deadline for the issuance of this decision which remained October 28, 2016.

II. Issues Presented

1. Whether LEA violated IDEA and/or Policy 2419 by failing to grant Parent's request for an Independent Educational Evaluation ("IEE") or filing request for due process to determine if the school's evaluation was appropriate.
2. Whether LEA violated IDEA and/or Policy 2419 by failing to consider the entirety of the IEE by [REDACTED] at the eligibility meeting and/or the IEP meeting.
3. Whether LEA violated IDEA and/or Policy 2419 by failing to identify Student as a disabled child eligible for special education services for at least two years prior to the filing of the original due process request.
4. Whether LEA violated IDEA and/or Policy 2419 by failing to identify Student as a disabled child eligible for special education services within a reasonable time after the parent provided the school with the [REDACTED].
5. Whether LEA violated IDEA and/or Policy 2419 by testing Student with STAR math as part of eligibility determination without obtaining permission from Parent.
6. Whether LEA violated IDEA and/or Policy 2419 by having Parent sign waiver of time period for notification of eligibility meeting by telling her it was for a "SAT" meeting.
7. Whether the LEA's proposed Individualized Education Plan ("IEP") is reasonably calculated to provide Student with a Free Appropriate Public Education ("FAPE") where it fails to provide accommodations and/or services for Student's documented disability in reading fluency, attention deficit hyperactivity

disorder/inattentive subtype, speech sound disorder, weakness in long-term memory for facts and details and short-term auditory/visual working memory, automatic/accurate number facts recall, inability to transfer written information, and inability to separate relevant from irrelevant detail.

8. Whether Math 180 as contained in the LEA's proposed Individualized Education Plan ("IEP") is reasonably calculated to provide Student with an educational benefit by adequately closing the gap between Student's current achievement level in math and her current grade level and math requirements.
9. Whether the IEP contains compensatory education services sufficient to make up for failure to identify and provide special education services and accommodations when first sought by the parent.

III. Findings of Fact

1. Student is a female, 16 years, 4 months of age at the time of hearing. LEA Exs. 11, pg 1, [REDACTED] and 58 at pg 1 [REDACTED] 86)
2. Student is enrolled full time in the general education environment of the LEA's High School. LEA Ex. 58 at pp 1 and 12 [REDACTED] and 199). Student was in the eleventh grade at the time of hearings. [Testimony of Student, Transcript Volume 1, pg 21, lines 13-14 (hereinafter TR, Vol I pg _) and has a grade point average of 3.35714 as of the close of the 2015-16 school year, LEA Ex. 1 at pg 2. [REDACTED] 002) She had grades of A for both Math and English that year.
3. Student's mother has long believed that Student suffers from some type of learning disabilities. She requested testing of Student in February 2012, LEA Ex. 3, [REDACTED] and in April 2012 Student was tested for intellectual ability using the Wechsler Intelligence Scale for Children - 4th Ed (WISC-IV) and for achievement using the Woodcock-Johnson Test of Achievement, 3rd Ed. (WJ-III). The Intelligence test results placed Student in the average range on all subtests with scores between 97 and 104, and with percentile scores ranging between 42% and 61%. Her full scale IQ was found to be 99. LEA Ex. 11 [REDACTED] 022)

On the achievement test, all areas were in the average range except for Reading fluency which was in the low average range at the 18th percentile, and math calculation, also in the low average range at the 23rd percentile. LEA Ex. 11 pp 2-4 [REDACTED] 23-25). The evaluator concluded Student did not appear to be eligible for special education services because the WVDE recommended that scores below the 8th percentile from multiple data

sources be considered when specific learning disabilities were suspected. Further, regarding Student's rate of learning, the evaluator noted Student had had no "Tier 2 or Tier 3 sessions" and that area, consequently, could not be addressed. LEA Ex. 11 at pg 5 (██████26). These events took place near the end of Student's 6th grade year. LEA Ex. 11 (██████022).

4. An eligibility committee, which included Student's mother, convened on May 22, 2012 and concluded that Student did not have a qualifying exceptionality. LEA Ex. 14, (██████29). Prior Written Notice of the Eligibility Committee's decision was sent to the parent on the same day. LEA Ex. 15 (██████30). That notification indicated "Her scores do not meet criteria."
5. The evidentiary record is devoid of any documents between May 22, 2012 (LEA Exs 14 and 15, Parent's Exs 9 and 10) and March 26, 2015. (Parents' Ex. 11, LEA Ex. 16 (██████44)).
6. While Student was in the 9th Grade, a Student Assistance Team convened on March 30, 2015, after notice being given 4 days previously, on March 26, 2015. Student's mother attended. The stated reasons for the SAT meeting were the mother's concern that Student needed to be tested to determine if she had dyslexia, and to identify interventions that would assist Student to succeed in "higher level classes." The problems cited on the report were the large amounts of time Student required to do homework, especially when reading text, Student's need to read and reread the text to understand it, Students "hyper-neat" organizational style, her poor spelling, and the anxiety and poor performance Student experienced when confronted with timed reading or writing tasks.

It was noted Student's current grades were mostly A's and B's, but with a C Grade (81%) in English Language Arts and a C Grade (77%) in World History. Interventions ordered included a separate/quiet site for testing, extra time allowance for tests, extra day for reading assignments, directions to be given in both oral and written form, that feedback should be given to Student within one week after taking tests, and "Live Grades to provide notes and assignments in classes available." LEA Ex. 16 [REDACTED] 44) and Parent's Ex. 9 at item 11.

7. On August 1, 2015, prior to the start of Student's 10th grade year, Student's mother completed an LEA Parent Information form indicating that Student "has trouble with reading," which intensifies with distractions or environmental stresses. The mother also indicated Student reverses letters and words when writing and/or reading, and also has trouble discerning left versus right directions. Student's mother also noted Student takes longer reading in testing situations because the emotional pressure exacerbates what the mother called "dyslexia" symptoms. LEA Ex. 17 [REDACTED] 45-46).
8. Twenty-three days later, on August 24, 2015, the LEA gave Prior Written Notice of their proposal to do a psycho-educational evaluation. The data to be collected were identified as including individual cognitive and achievement tests, teachers reports, observations, information from parents, and a self-report scale LEA Exs. 18 and 19.
9. A report of a SAT meeting, also held on August 24, 2015, indicates recognized problems Student was having in Math during the previous school year (2014-15) particularly that accommodations ordered that year were not followed. Writing and Spelling problems were also noted, as well as difficulties Student was having demonstrating what she has

learned. LEA Ex. 20, [REDACTED] 053). Interventions to be implemented were: Tests to be read aloud to Student as needed, getting timely feedback to Student regarding her papers, testing in a quiet environment - separate if needed, oral and written directions, doubling available time on tests, and not grading Student's spelling unless it is a spelling test. LEA Ex. 20 [REDACTED] 055). Three days later, these interventions were communicated to Student's teachers on August 27, 2015. LEA Ex. 22 [REDACTED] 052).

10. One week after the prior SAT meeting, on August 31, 2015, another SAT meeting was held. Student's mother attended. The SAT plan was then altered. The Interventions then identified were "tasks, assignments clarified as needed; feedback from formative and summative assessments will be provided as needed; testing in a quiet environment (separate if needed) with prior arrangements; oral and written directions (either paper or on smart board or chalkboard) so that Student can take notes for clarification; Extended time on tests within the same day (timeframe) of the test coordinated with the teacher; Extra textbooks if available)." LEA Exs. 23 and 24 [REDACTED] 051 and 058). These changed interventions were communicated to Student's instructors on September 4, 2015. LEA Ex. 23. These changes to Student's interventions were made at the unilateral insistence of the Coordinator of High Schools for the LEA. LEA Ex. 24 [REDACTED] 058) and Testimony of Parent TR Vol I, at pg 103, lines 9-19, and LEA's school psychologist TR Vol II at pg 82, line 22 – pg 84, line 16.
11. On August 28, 2015, in between the SAT meetings on August 24, 2015 and August 31, 2015, the LEA sent a request for permission to evaluate Student for Academic Information including her achievement and teacher reports, information from the parent,

intellectual ability, observations and self rating scales. The mother signed the permission to evaluate and added that she was requesting "a full battery including a neurological exam to evaluate for dyslexia." That permission was received back by the school on September 4, 2015. LEA Ex. 21 [REDACTED] 066).

12. The LEA, on September 9, 2015, notified the parent that they did not intend to perform the additional testing the mother had requested (full battery including neurological exam). She was given 10 days to notify the LEA if she wished to withdraw her permission, (i.e., until 9/19/15). Otherwise, the testing originally identified on the permission form would be performed. LEA Ex. 25 [REDACTED] 065). There is no evidence that the parent withdrew her permission at any time.

13. A psycho educational evaluation was performed by an LEA school psychologist on October 8, 2015. The stated reasons for the evaluation were a referral from an SAT meeting, and that Student's mother believed her daughter had dyslexia. Tests administered to Student included the WISC-V for intelligence, the WIAT-III for achievement and the Behavioral Assessment System for Children, 3rd Edition (BASC-III). The evaluator also collected teacher interviews, a student interview and looked at Student's existing file. LEA Ex. 29 [REDACTED] 038-039).

The WISC-V test given to Student left out some subtests of the intelligence test battery, including all of the mathematics subtests. (Compare LEA Ex. 29 to Parent's Ex. 29).

On the testing given by this evaluator, the student was found to have a full scale IQ of 96 which places her at the 39th percentile which is in the average range. LEA Ex. 29 [REDACTED] 039).

On the WIAT-III achievement test battery, she scored in the average range (between 30th and 55th percentile) for all subtests, with the exception of oral reading fluency which was scored in the low average range (16th percentile). The WIAT-III test given was also incomplete, giving only 8 subtests out of 26 including in that test's battery (compare LEA Ex. 29 to Parent's Ex. 29 [REDACTED] 040)). The self report scores on the BASC-3 found Student to be at risk with regard to attitude to school, and relations to parents. She was ranked as "borderline" on sensation seeking, school problems, focus of control, social stress, self esteem, and personal adjustment. LEA Ex. 29 [REDACTED] 040). Notably, nothing in any of the documentary evidence or testimony indicated Student was having any behavioral issues at school.

The LEA's evaluator concluded that Student's achievement was average and therefore was commensurate with her average intelligence. She also stated Student had A's and B's in Advanced Placement classes. LEA Ex. 29 [REDACTED] 042).

14. Following the issuance of the LEA Evaluator's Report, an Eligibility Committee meeting was held on October 14, 2015, at which the majority opinion was that Student did not meet the 3-pronged test of eligibility as an exceptional student who needs special education services. Student's mother attended the meeting and dissented, writing "I don't agree that there is no disability." LEA Ex. 31 [REDACTED] 035). Prior written notice was then sent to the parent confirming the LEA's refusal to identify Student as disabled. LEA Ex. 50 [REDACTED] 102).
15. Via a letter dated October 14, 2015, and received by the LEA 33 days later, on November 16, 2015, the Student's mother requested an Independent Educational

Evaluation, at public expense. She indicated her position that the school district's evaluation "was not comprehensive and appropriate." She further explained the evaluation she was requesting was neuropsychological and she planned to consult [REDACTED] [REDACTED] contact information was provided and a response was requested within 5 days. LEA Ex. 32 [REDACTED] (033).

16. On November 19, 2015, the LEA sent Prior Written Notice to the parent refusing her request for an IEE at public expense. The reason stated for the refusal was "The full and legally compliant evaluation and eligibility process has been completed for the student on two separate occasions. The parent has provided no information regarding what, if any, additional information may be gleaned from a neuropsychological evaluation relative to the eligibility criteria for any of the disability categories that was not present in the multiple existing evaluations." The form also indicated "the student is not exhibiting academic difficulty." LEA Ex. 33 [REDACTED] (031). No further action was taken by the LEA with regard to Parent's IEE request.
17. The parent made her own arrangements with [REDACTED] for an IEE which was performed on March 17, 2016, effectively four months after the LEA's refusal to provide it. Parent's Ex. 29.
18. On March 17, 2016 [REDACTED] tested Student again using the Wechsler Intelligence Scale for Children - 5th Ed. (WISC-V) which was previously administered by the LEA in its valuation on October 8, 2015. However, the WISC administered by the LEA was missing numerous subtests. For instance, in the category of working memory, an area frequently mentioned as a concern by both Student and her mother, the LEA administered

the "Digit Span subtest, but left out the "Picture Span" and "Letter-Number Sequencing" subtests. The LEA evaluation also left out the math subtests. In the 5 categories of testing contained in the WISC-V, the LEA administered 7 subtests. [REDACTED] Evaluators administered the remaining 12 subtests. [Compare Parent's Ex. 29 at pg 2 and LEA Ex. 29 at pg 2]. Both testers found Student's functioning intelligence to be generally in the average range, with the exception of "working memory" which [REDACTED] found to be in the low average range.

The most significant difference between [REDACTED] report on the WISC-V results and the LEA's is in the analysis provided, concerning what each subtest measures, and her very thorough analysis of the educational implications of the test results for Student. In all, [REDACTED] report contains 27 separate discussions founded on Student's performance on the test, including the challenges Student faces with school work, and in numerous instances, learning approaches which might assist Student. (Parent's Ex. 29 pp 11-13). The LEA evaluation is devoid of analysis concerning her intellectual functioning, save to say that her full scale IQ is "average" which is "commensurate with earlier testing." LEA Ex. 29 [REDACTED] 041).

19. The Wechsler Individual Achievement Test - III (WIAT-3) was partially administered by the LEA on August-8, 2015, and included in the considerations by both evaluators. Scores on this evaluation tool were average with the exception of oral reading fluency which tested "low average," "16th percentile" for Student. LEA Ex. 29 at pg 3. The IEE also contained results of a complete administration of the WIAT-3 achievement test, including sections on Oral Language Comprehension and Expression, the Essay

Composition portion of the Written Expression Battery, and all the tests of mathematics achievement which were not administered by the LEA (Compare LEA Ex. 29, [REDACTED] 040, with Parents Ex. 29, pg 4). The areas of Oral Reading Accuracy (5th percentile), Numerical Operations (7th percentile), Math Problem Solving (10th percentile), Math Fluency - Addition (5th percentile) were all found to be in the below average range, indicating areas of achievement divergence from expectations based on Student's average measured intelligence. Parent's Ex. 29 at pg 4.

20. The Independent Evaluator administered the BASC-2, an earlier formulation of the BASC assessment tool. Findings included clinically significant anxiety ratings, and at risk scores for depression, somatization and withdrawal. She also scored in the "at risk" range for functional communication skills. Clinically significant rankings were found for Student on the "Internalizing Problems Composite" which incorporates ratings on anxiety, depression, and somatization. Parent's Ex. 29 pp 20-21.
21. The Independent Evaluation tested Student in numerous areas not addressed by the LEA's testing. Receptive and Expressive Language was tested using the Comprehensive Receptive and Expressive Vocabulary Test: Second Edition (CREVT-II). The findings in this test revealed that although scoring within the average and low average ranges, Student understands spoken language best when "content is short, specific, to the point" and coupled with pictures. She also needs "wait time" to "formulate her thoughts for speaking." Parent's Ex. 29 pp 13-14.
22. Phonological Processes were tested by the Independent Evaluator which are skills needed for mastery of written language. On the Comprehensive Test of Phonological Processing

Second Edition (CTUPP-2), Student scored in the Very Poor Range on the Rapid Digit Naming and the Rapid Letter Naming subtests, achieving scores at second grade equivalencies. Parent's Ex. 29 pg 15. Student was two months shy of her 16th birthday and completing 10th grade at the time of testing. Poor scores on rapid naming tasks frequently are associated with poor reading fluency. Parent's Ex. 29 pg 15.

23. Orthographic Processes were tested by the Independent Evaluator using the Jordan Left-Right Reversal Test - 3d Edition (Jordan-3). Student scored below the 1st percentile, indicating she has severe misperception of symbol directionality. The evaluator noted that "students with orthographic processing problems cannot retain symbolic information long term, must re-learn it over and over again and may reverse letters and not notice that they look wrong." Parent's Ex. 29 at pg 15.
24. The IEE also included results of the Bender-Gestalt Test-2 (Bender-2), a test of visual-motor integration. This testing device revealed that Student can visually copy from a model at near . . . average accuracy" but "recall of symbol directionality is impaired." Parent's Ex. 29 at pg 16.
25. Student was tested for Neurocognitive Processes using subtests from the Holstead Reitan Neuropsychological Test Battery. Results from these tests showed Student to be seriously impaired in the areas of complex non-verbal reasoning, attention, concentration and non-verbal concept formation. These results indicate poor learning efficiency and impaired non-verbal learning from complex visual spatial stimuli."

The Speech-Sounds Perception Test found Student had seriously impaired auditory discrimination of speech sound, and the Seashore Rhythm Test showed mild impairment in

the areas of non-verbal auditory discrimination, auditory attention/concentration. These tests indicate problems for Student forming sound-symbol relationships and also in processing heard information presented at a fast pace. Finally, the "Trail Making" subtest results showed Student to have mildly impaired skills for complex tasks. This result suggests "bilateral frontal insufficiencies that adversely affect handwriting and spelling." Parent's Ex. 29 at pg 16 and 2. Writing and spelling problems have been recognized in Student and were noted in the SAT Report in August 2015. LEA Ex. 20-26.

26. The Independent Evaluator also administered the Nelson-Denny Reading Test under both regular timed and extended time conditions. Student scored in the below average range on the "Vocabulary" subtest, scoring at the 7th grade, 9th month, respectively on the regular timed and extended time testing. Parent's Ex. 29 at pp 3 and 18.
Her "Total Reading" scores which combined the "Vocabulary" scores with a "Comprehension" test score, yielded results in the "below average" range on the timed test version, and on the "Average Range" on the extended time test. Notably, Student's "Reading Rate" scores placed her at the 3rd percentile, "which indicates significant weakness." Parent's Ex. 29 at pg 19.
27. In Mathematics Testing (an area not tested by the LEA on October 8, 2015) (See LEA Ex. 11), using the WIAT-3, the IEE shows that Student performed at only the 7th percentile for numerical operations (4th grade, 7th month equivalent), and the 5th percentile (4th grade, 4th month) on the math fluency-addition subtest. Overall, Student's composite on "Mathematics fluency" was in the 10th percentile, below average range, and the "Mathematics Composite" yielded a 7th percentile ranking in the below average range.

The results of this Mathematics testing reveals “statistically significant academic underachievement in math reasoning, math calculation and fluency of math facts recall.”

Parent’s Ex. 29 at pp 4 and 19.

28. Looking to whether Student’s academic achievement is commensurate with Student’s intellectual functioning, the Independent Evaluator concluded that Student showed commensurate achievement in the areas of listening comprehension, oral expression, basic reading skills, reading comprehension and written expression. However, “statistically significant” academic underachievement was discovered in the areas of:

Reading Fluency,

Math Reasoning, and

Math Calculation.

Student should be considered Learning Disabled in these three areas. Parent’s Ex. 29 at pg 20.

29. Student was also evaluated in the areas of executive functioning by the Independent Evaluator. On testing of her ability to sustain attention, or organizing and activating for work or school, on the “affect” cluster, and on tests of Working Memory, she earned scores indicating HIGH PROBABILITY of Attention Deficit Hyperactivity Disorder. On tests of her ability to sustain energy and effort, Student was ranked as Borderline probability of having ADHD. Parent’s Ex. 29 at pp 22-23. “Clinical Assessment of Attention Deficit-Child” rating scales given to Student and her mother showed Student at risk and clinically significant, respectively, for inattention. Parent’s Ex. 29 at pg 23. The Independent Evaluator concluded that Student’s symptoms, together with her history,

classroom performance and test results, indicated that Student had ADHD/Inattentive subtype. Since this hearing request was filed, Student has received a medical diagnosis confirming her ADHD. Parent's Ex. 21, item 48.

30. In the IEE Report, the evaluator lists numerous working memory issues, all of which are manifested by Student, and which interfere with cognitively demanding tasks, and negatively impact Reading, Science and Math education. The Evaluator recommended that a memory program be delivered to Student as an Extended School year (ESY) Service. Parent's Ex. 29 at pg 24.
31. The Independent Evaluator recommends the "Word Finding Intervention Program II to address Student's difficulties with word retrieval and the need for "wait time" to collect her thoughts before speaking." While this was identified as relative weakness of the Student, her expressive language skills were not identified as an area of significant academic underachievement. Parent's Ex. 29 at pp 14 and 25.
32. Student has significant skill gaps in Mathematics reasoning and calculation which requires a specialized Math curriculum. The Independent Evaluator recommended Saxon Math as a replacement program for Student. The critical features of the program are systematic distribution of instruction, practice and assessment throughout the academic year rather than concentrating or missing the instruction, practice and assessment of related concepts into a unit or chapter. Parent's Ex. 29 at pg 26.
33. The Independent Evaluator diagnosed the following disabling conditions:
F80.0 Sound Speech Disorder;
F90.0 ADHD, predominantly inattentive presentation;

F81.0 Specific Learning Disorder with impairment in reading fluency and accuracy;

F81.2 Specific Learning Disorder with impairment in mathematics, number sense, memorization of math facts, accurate and fluent calculation and accurate math reasoning skills.”

Parent’s Ex. 29 at pg 31.

Given the breadth of testing, the in-depth analysis of the IEE report, and the significant credentials of this evaluator, I accept these findings as my own.

34. Student’s mother delivered the IEE report to the LEA on March 25, 2016, and thereafter on April 1, 2016, requested that an eligibility meeting be held. LEA Ex. 35.

██████████ (073).

35. The version of the IEE report used by the LEA at the eligibility committee meeting did not have attached the 63-pages of raw data, analysis, summaries and graphs from which the Independent Evaluator’s conclusions were drawn. The LEA’s Director of Special Education confirmed that the IEE report used at the Eligibility Committee meeting on April 6, 2016, had only the written report, and not the attached 63-page data section. Testimony of LEA Special Education Director. TR Vol II at pg 206, line 24 – pg 208, line 7. That abbreviated report is included in evidence as LEA’s Ex. 34.

36. On Tuesday, April 5, 2016, Student’s mother was notified in writing that an Eligibility Committee Meeting was to be held the following day. She signed the notification and indicated she would attend and that she waived the 8-day notification requirement. LEA Ex. 38. ██████████ (097).

37. At the meeting on April 6, 2016, with Student's mother in attendance, the Eligibility Committee found Student to meet the eligibility criteria for a specific learning disability in the areas of math calculation and math problem solving. LEA Ex. 40. The SLD Team report reflects that Student was found eligible using a "rate of learning" analysis. LEA Ex. 40 at item 3. But the LEA's Director of Special Education testified that the alternative method to determine eligibility, which is a Student showing a "pattern of strengths and weaknesses" in achievement and performance, would have been the more accurate and appropriate finding. (TR Vol II, Testimony of LEA's Special Education Director at pg 202, line 14 – pg 213, line 12.)
38. Also on April 6, 2016, the LEA sent Parent Prior Written Notice that they wished to perform an observation and obtain a teacher report from Student's Math instructor. LEA Ex. 39. [REDACTED] 096). This information was requested by the Eligibility Committee to determine if Student needs special education, the third prong of the eligibility determination. LEA Ex 41. [REDACTED] 093). Student's mother gave written permission for observation to take place and the report to be prepared. LEA Ex. 42. ([REDACTED] 092).
39. On April 11, 2016, the LEA received a letter from Student's mother expressing her concern and belief that the copies of the IEE report given to the Eligibility Committee were missing the portions relevant to the Independent Evaluator's findings of a learning disability in reading. LEA Ex. 43 [REDACTED] 072) and Parent's Ex. 17, item 36. However, that information was expressly considered by the team because it is reflected in the IEP document, at the Present levels of Academic Achievement, "General Information," at paragraph 2 (LEA Ex. 58, [REDACTED] 194).

40. On April 14, 2016, Student was administered the STAR math test, a math achievement test given to all students. TR Vol II, pg 222, line 8-16. LEA Ex. 45 [REDACTED] 101). However, it was not delivered to her at the same time it was given to other students. TR Vol I, pg 31, line 13 - 32, line 1. Since the test is given to all students, the LEA did not attempt to obtain specific parental permission. Student achieved a score at the 59th percentile. LEA Ex. 51 [REDACTED] 108). Testimony of LEA's Director of Special Education, TR Vol II at pg 222, lines 8-16 and LEA's IEP Coordinator, TR Vol I at pg 260, line 15 - pg 261, line 1.
41. Teacher reports were obtained from Student's teachers in Biology, Spanish, Health, Math (collaborative class - 2 teacher), and Foods class. LEA Ex. 46. These reports reflect that she frequently receives poor grades on tests, but sometimes improves her grades through her High School's policy of allowing the retaking of tests. LEA Ex. 46 at pp 1, 2, 4. [REDACTED] 082, 083, and 085).
42. The student's mother filed this request for a due process hearing on April 26, 2016.
43. The observation of Student in her Math class was performed on April 26, 2016, and the findings reported in memorandum form on May 2, 2016. During this observation, which took place in a collaborate classroom with one general education and one special education teacher, the student twice requested to confer with the special education instructor and had her progress reviewed by the regular education teacher. LEA Ex. 47 [REDACTED] 098-099).

44. Student was found to have an Specific Learning Disability (SLD) in math on April 6, 2016. LEA Ex. 40 [REDACTED] 094-095). That document clearly states Student meets the 3-prong eligibility test. LEA 40 [REDACTED] 095).
45. While this case was pending and after receiving Written Notice, Student's mother agreed on May 9, 2016, to attend a second Eligibility Committee Meeting for Student and waived the 8-day notice requirement. LEA Ex. 48 [REDACTED] 109). The meeting was held the same day with Student's mother in attendance, at which time it was again confirmed that Student was eligible as a student with a specific learning disability. LEA Exs. 49 and 50 [REDACTED] 103 and 102). The committee found that "either direct or indirect services in Math might be beneficial" LEA Ex. 49 [REDACTED] 103).
46. IEP meetings were held on May 26, 2016, and June 1, 2016. LEA Ex. 57 and 58. Prior notice was given. Parent's Ex. 24, pg 1. In the draft IEP document, the committee incorporated numerous findings and conclusions from the Independent Evaluator's report concerning Student's present levels of performance/strengths and weaknesses in Math. LEA Ex. 58, pg 8 OF 15 [REDACTED] 195) Services proposed included some applicable to her Math classes and several that apply to all classes. LEA Ex. 58 at pg 11 OF 15 [REDACTED] 198). Concerns for Student documented in the IEP draft document were her learning disability in Math, along with accommodations for anxiety and ADHD symptoms. LEA Ex. 58 at pg 12 of 15 [REDACTED] 199). Student's problems with reading fluency and accuracy are not directly mentioned in the IEP document. Neither are problems with a speech/sound disorder mentioned. See LEA Ex. 58, pg 14 of 15 ([REDACTED] 201).

47. The LEA proposed to provide Student with Math 180 as an ESY service. It is a Math intervention course designed for older students who are "significantly below grade level" and "have not developed the numerical understanding and fluency needed to make sense of more complex Math" (LEA Ex. 59. Parent's Tab, item 52 at pg 4) or as an alternative, to offer "Think Through Math," an on-line Math program. Parent's Tab 24, item 52 at pg 4 and LEA Ex. 52.
48. Student's ADHD inattentive type, diagnosis has been confirmed by a medical doctor affiliated with West Virginia University. It was noted that Student and her mother wish to defer medical treatment. Parent's Ex. 21, item 48.
49. The Independent Evaluation and report required 21 hours of professional time and cost the parent \$4,000.00. Parent's Ex. 21, item 49.
50. On Student's PSAT college board test taken in 2015, her 10th grade year, Student achieved a score of 390 (24th percentile) in Reading and Writing and a 310 (2nd percentile) in Math. None of her subscores met benchmark levels for college readiness. Parent's Ex. 22, item 50 at pg 2.
51. Pending this decision, Student is receiving services under the IEP document identified as Parent's Tab 24, item 52. Parent contests its appropriateness in this hearing.
52. Student is presently in the 11th grade taking two advanced placement classes (TR Vol I, pg 21, line 20 – pg 22, line 2 and pg 40, lines 15-21 and pg 41, lines 12-15) and she enjoys a high grade point average (TR Vol I, pg 49, line 8). However, she is able to accomplish these results only by studying at home for very long periods of time, 5 or 6 hours every night, and with the intense involvement of her mother and stepfather, who are both high

school educators. TR Vol I, pg 23, lines 2 – 17. She has trouble taking notes because she cannot listen and write at the same time. TR Vol I, pg 34, lines 24 – pg 35, line 10. She has difficulty taking tests in spite of her long study hours. She becomes extremely anxious and forgets what she has learned before she can finish her test. She also needs to read, and reread the questions multiple times before she understands what is being asked of her, which frequently causes her to not finish tests. TR Vol I, pg 24, lines 8 – 23. As a consequence, Student usually does poorly on her tests. This poor testing performance is not reflected in Student's grades due to the school's policy of allowing students to retake tests and even take them home to rework them. TR Vol I, pg 24, line 24 – pg 25, line 14. She has also been permitted to do extra credit work. TR Vol I, pg 32, lines 6 – 15. Thus, the grades Student is earning are not a true indicator that Student is learning at the same pace and under the same conditions as the other students. She feels the need to sit at the front of the class to help her focus and reduce distractions. TR Vol I, pg 35, line 23 – pg 36, line 5. She sometimes needs another person to read material to her, in addition to reading it herself, and also have the main points explained before she can grasp it. TR Vol I, pg 37, line 8 – pg 38, line 6.

53. Student testified that many of the accommodations mandated by the SAT plan were not provided, with the exception of some testing being done outside the classroom. TR Vol I, pg 47, line 1 – pg 48, line 17. An SAT report of August 25, 2105, reflects that SAT accommodations ordered that year were not followed. LEA Ex. 20.
54. Student felt that "Think Through Math," which was offered to her over the past summer, was not particularly helpful, because even though it is supposed to help fill in gaps in a

student's learning, it did not go back far enough. Consequently, Student found that much of the material in the curriculum assumed she had knowledge of information which she has not acquired. TR Vol I, pg 53, line 11 – pg 54, line 3, pg 56 lines 19 – pg 57, line 4. She believes the program was providing her 11th grade level Math. TR Vol I, pg 62, lines 21-23.

55. The IEP drafted for Student has only one annual goal which is:

“By June 2017, given the use of a calculator and other visual math aids, [Student] will solve math operations involving both equations and inequalities, including quadratic equations and coefficients that have complex solutions, and solve problems in mathematics and other disciplines with 80% accuracy or better on test and quizzes as recorded in teacher guidebook.” LEA Ex. 58, at [REDACTED] 197.

This goal does not appear to address, at all, the student's grade equivalency performance on the WIAT III assessment included in the IEE document. Student's achievement in Numerical Operations and Addition are only at 4th grade levels. Her subtraction, multiplication and math problem solving are at 5th grade levels. Parent's Ex. 29 at pg 4 and 19. There is no service provided in the IEP which appears to be calculated to remediate the gaps and weaknesses in Student's foundational math knowledge, other than the Summer Programs offered during Extended School Year classes, between her 4th and 5th grade performance and the 11th grade curriculum. (See LEA Ex. 58 at [REDACTED] 198.)

56. In this case, the student's mother put the LEA on notice that Student might have dyslexia, or a related type of learning disability when she wrote “Parent requesting a full battery,

including a neurological exam to evaluate for dyslexia." on September 1, 2015.

Parent's Ex. 10, item 19

57. The LEA was expressly aware that Student had problems in the subject of mathematics prior to the LEA's evaluation on October 8, 2015. In an SAT meeting held August 24, 2015, the committee notes "Problems in math in 2014 - 2015 school year ... was moved to another math class." Parent's Ex. 9 at item 13.
58. Regarding a possible disability in the area of reading fluency and accuracy, the LEA relied on the composite score of one testing instrument to make the decision that Student did not meet the criteria for that category - the Nelson Denny Reading Test which showed a total reading score of 89, in the average range (LEA Ex. 58, [REDACTED] 194, under General Information at the second paragraph). However, other relevant information should have been considered. Specifically:
 - a. The score Student received on the reading rate subtest of that evaluation tool reflected that she performed at only the 3rd percentile which demonstrates "significant weakness" (Parent's Ex. 29 at pg 19).
 - b. On the WIAT 3 - Student scored at only the 5th percentile on "oral reading accuracy" in the below average range. Parent's Ex. 29 at pg 4.
 - c. On phonological processing testing - Student performed at the second grade level on rapid digit (i.e., number) naming and rapid letter naming, which puts her score in the Very Poor Range, all of which is associated with poor reading fluency.
Parent's Ex. 29 at pg 15.

- d. On the Jordan Left Right Reversal test, she scored below the 1st percentile (i.e., more than 99% of tested children in her age category score higher). This indicates severe misperception of symbol (i.e., letters and numbers) directionality. Students with this type of problem cannot retain symbolic information [translated: letters or numbers] long term, must re-learn it over and over again and may reverse letters and not notice that they look wrong." Parent's Ex. 29 at pg 15.
- e. Both Student's mother and her stepfather, as well as Student herself, all testified that Student struggles with reading, causing her to spend long hours on homework that she must read and re-read multiple times for understanding, and that she is helped by someone else reading aloud to her. This is clear evidence that Student is struggling academically in this area. TR Vol I, pg 246, lines 5-18, pg 23, lines 11-15, pg 24, lines 16-23, pg 93, lines 13-20 and pg 94, lines 5-7. Taken together, it is clear that Student has significant challenges in the area of reading and that they negatively impact her educationally.

IV. Conclusions of Law

1. A party may amend a due process complaint when granted permission to do so by the hearing officer. When that happens, the timeliness for the hearing process, including the 30-day resolution session, and the 45 day timeline for the due process hearing begin to run again. 34 CFR § 300.508(d)(4), and Legislative rule, 126 CSR 6-3.1. West Virginia Regulations for the Education of Students with Exceptionalities, Policy 2419 (hereinafter: WV Policy 2419) Dispute Resolution, Chapter 11, §§ 4, D.2, and E. A hearing officer may also grant specific extensions of the timelines at the request of either party. 34 CFR § 300.515(c) and WV Policy 2419, Ch 11, § 4.K.
2. The methodology used to provide instruction to a student in order to satisfy the requirements of an IEP is within the discretion of the school district so long as it provides the basic floor of opportunity even if it is not the method preferred by the parent. *See E. L. By Lorsson v. Chapel Hill-Carrboro Board of Education*, 773 F.3d 509, 64 IDELR 192 (4th Cir. 2014) and generally, *Board of Education of the County of Marshall v. J. A. by Mark and Fran A.*, 56 IDELR 209 (N.D. WV March 30, 2011). “Once a Court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the States.” *Bd. of Education of Hendrick Hudson Ctrl. School Dist. v. Rowley*, 459 (US 176, ___, 102 S.Ct. 3034, ___, 73 L. Ed. 2d 690. Educators have the discretion to select the methodology used for a student so long as it is reasonably calculated to confer benefit on the student. *REB ex rel JB v. State of Hawaii, Dept. of Education*, 63 IDELR 105 (D. Haw 2014).

3. Eligibility for special education is determined by a three prong test, the requirements of which are:
- i. that the student meets the eligibility requirements for a specific exceptionality;
 - ii. that the student experiences an “adverse effect on educational performance:” ...
“An adverse effect is a harmful or unfavorable influence of the disability on the student’s performance. Educational performance includes both academic areas (reading, math, communications, etc.) and non-academic areas ... Adverse effect is not solely measured by scores on individual testing but may also be determined through consideration of other data such as classroom performance and retention history”
 - iii. and the student needs special education, defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of the student with an exceptionality. Specially designed instruction means the content, methodology, or delivery of instruction is adapted, as appropriate, to address the unique needs of the student that result from the student’s exceptionality and to ensure access of the student to the general curriculum so that the student can meet the educational standards that apply to all students.” W.V. Policy 2419, Eligibility Chapter 4, §3, “Three Prong Test of Eligibility. *See also* 34 CFR 773 § 300.8(a)(1)
4. Student was found to be eligible for special education as a student with Specific Learning Disabilities (Parents’ Ex. 45) at a SLD Team meeting held on April 6, 2016. Specific Learning Disabilities are defined at W.V. Policy 241, Ch 4, §3.L. Since neither party questioned the determination of Student’s eligibility as a student with Specific Learning

Disabilities, student's eligibility will be accepted as demonstrated, and her need for specially designed instruction presumed.

5. A parent has a right to obtain an Independent Educational Evaluation (IEE) at Public Expense if she disagrees with an evaluation conducted by the school district. *See* W.V. Policy 2419, Procedural Safeguards, Ch. 10, §7.A.1 and 34 CFR §300.502(c) and (b)(1).
6. Once the parent has requested an IEE, the school district has 10 days to either, "1) Agree in writing to pay for an IEE at reasonable and prevailing rates, and provide the District's IEE criteria and information about where an IEE may be obtained. 2) Offer WVDE mediation to try to resolve differences. This is only available if parents agree to mediate [OR] 3) Request a due process hearing to show the district's evaluation is appropriate" W.V. Policy 2419, Procedural Safeguards, Ch. 10, §7.C. *See* 34 CFR §300.502.
7. A school district cannot compel a parent to provide an explanation of why they disagree with the school district's original evaluation as a condition of providing an IEE. W.V. Policy 2419, Procedural Safeguards, Ch. 10, §7.B.
8. The School district never provided the parent with information regarding location of an evaluator for an IEE, qualifications needed for the examiner, or maximum allowable charges for the IEE as required by W.V. Policy 2419, Procedural Safeguards, Ch. 10, §§B, 1-3, and *see* 34 CFR §300.502(a)(2). Neither did the school district pursue their other options of mediation or a due process hearing. W.V. Policy 2419, Procedural Safeguards, Ch. 10, §7.C. at top, 34 CFR §300.502(b)(2)(a) (Note: the Federal Rule does not offer mediation as an option in this circumstance.)

9. Where, as here presented, a parent has already obtained an IEE prior to the due process request, the school district “must: 1) Pay for the IEE; or 2) Request WVDE mediation when parents agree to mediate; and/or 3) request a due process hearing within 10 school days of the receipt of the evaluation report to show that the evaluation obtained by the parents did not meet the criteria for a publicly funded IEE; or 4) Request a due process hearing within ten school days of billing to demonstrate that the district’s evaluation was appropriate. The district does not have to pay for an IEE if the hearing officer finds for the district.” W.V. Policy 2419, Procedural Safeguards, Ch. 10, §7.C. at bottom.
- By admission of the LEA’s counsel in their answer and at hearing, the school district did not avail itself of any of these options to comply with the mandates of the law. Since they had not taken any of the appropriate steps to avoid liability for payment of the IEE expenses, they are responsible for payment of that fee of \$4,000.00 (Parent’s Ex. 21, item 49).
10. “If a parent ... obtains an IEE and makes that evaluation available to the district, the results must be considered by the district, if the IEE meets the district’s criteria, in any decision made with respect to the provision of FAPE ...”. W.V. Policy 2419, Ch 10, §7.D and *see* 34 CFR §300.502(c)(1).
11. “The district is responsible for establishing and implementing an ongoing child find system to locate, identify, and evaluate students with disabilities residing in the district, between the ages of three and twenty-one, inclusive, regardless of the severity of the disability The child find system must include all students suspected of needing special education and related services within the district’s geographic boundaries who are ... 8) Suspected of

having a disability as defined in Chapter 4 [Defining Eligibility Categories] even though the student has not failed or been retained in a course or grade and is advancing from grade to grade.” W.V. Policy 2419, Ch. 2, §1, *and see* 34 CFRS 330.101(c). Nothing in the statute intimates that a student earning good grades and matriculating from grade level to grade level could not be an eligible handicapped student. Indeed, it is expressly stated that adequate performance and grade advancement by a student does not release a school district from its child find obligations where a student is suspected of needing special education and related services. *See, Accord:* 34 CFR §300.101(c). It is the duty of an LEA to ensure that a child is assessed in all areas related to the suspected disability. 34 CFR §300.304(c)(4).

12. Neither Federal Regulations nor West Virginia Policy 2419 provides any specific timeline for consideration of IEE results, or the making of an eligibility decision following receipt of an IEE Report. 34 CFR §300.502(c) and WV Policy 2419, Ch. 10 §7. Districts are given 80 days following receipt of written parent’s consent for an initial evaluation until they must convene an eligibility committee to determine a child’s eligibility. W.V. Policy 2419, Ch. 3 §2.A. and Ch. 4, §1. If additional evaluations are requested by the eligibility committee or IEP team, they must be completed and a new team meeting held within 60 days from the receipt of parental consent for the identified evaluations. W.V. Policy 2419 Ch. 3 §2.C. In the present case, the Independent testing was conducted on March 17, 2016 (Parent’s Ex. 29) and an eligibility committee meeting was held on April 6, 2016 (LEA Exs 38, 39, & 40) which is 20 days after testing (presumably the time from issuance of the IEE report to the Eligibility Committee meeting was even less since reports are not

generally issued immediately after testing. The parent indicated she believed she delivered the report to the LEA on March 26, 2016. This 20-day period violates no time constraints under IDEA or W.V. Policy 2419 and if the report was delivered on March 26, it was only 10 days. Student was definitively found to be an eligible student under the SLD category on May 9, 2016, and a draft IEP proposed on May 26, 2016. This would be exactly 60 days from when the parent indicated she delivered the report to drafting of the IEP (TR V I, pg 133, lines 17-20.) No mandate of a shorter timeframe is indicated by IDEA or W.V. Policy 2419.

13. Procedural Issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

- (i) impeded the child's right to a free appropriate public education;
- (ii) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (iii) caused a deprivation of educational benefits.

20 USC §1415(F)(3)(E)(ii). *See also* WV Policy 2419, Ch. 11 §4.M.

14. Where a school district fails to provide a sufficiently comprehensive evaluation, the deprivation of vital information substantially hinders a parent's right to meaningfully participate in the IEP Process. *See, Timothy O. V. Paso Robles Unified School District*, 67 IDELR 227 (9th Cir. 2016).

15. “A due process complaint must be initiated within two years of the date the parent ... knew or should have known of the disputed decision or alleged action that forms the basis for the complaint.” W.V. Policy 2419, Dispute Resolution, Ch. 11, §4,A and *see* 34 CFR §300.511(e). The complaint in this action was filed on April 26, 2016, so violations alleged before April 26, 2014 will be excluded from consideration.
16. The burden of proof in a due process hearing in West Virginia is on the party seeking relief. W.V. Policy 2419, Ch. 11 §4.A. and Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 529, 163 L. Ed. 2d 387 (2005). The party seeking relief herein is the student’s mother.
17. “Neither written notice nor consent is required for ... the administration of a test or other assessment that is administered to all students unless consent is required of the parents of all the students ... W.V. Policy 2419, Ch. 3, Evaluation/reevaluation §3.C and *see* 34 CFR §300.300(d)(1)(ii). Here, the student was tested using the STAR MATH test without parental consent, but the district’s special education director indicated that it was an assessment regularly used for all students without any special consent requirements. TR Vol II, testimony of Special Education Director at pg 222, lines 7-16. *See also* W.V. Policy 2419, Procedural Safeguards, Ch. 10, §6.B.2.
18. ...“A ‘Free Appropriate Public Education’ (FAPE) consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child “to benefit” from the instruction.” Board of Education of Hendrick Hudson v. Rowley, 458 US 175, 188-189 (1982). (emphasis added).

19. Special Education has been defined as “specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction Rowley, id., at 458 US, 188 citing 42 U.S.C. §1401(16).
20. “The ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, id., at 458 U.S. 201. The services must provide some educational benefit which is more than minimal or trivial benefit. O.S. by Michael S. And Amy S. V Fairfax County School Board, 66 IDELR 151 (4th Cir. 2015).
21. A school district is not required to provide every service and accommodation which might bring a disabled student an educational benefit, nor to maximize the student’s potential. Rowley, id. at 458 US at 199.
22. Reasonable attorneys fees may be awarded to parents of students who are the prevailing party to a due process hearing. Such awards are awarded by a court of competent jurisdiction, not by the due process hearing officer, and are subject to constraints and limitations as set forth at W.V. Policy 2419, Ch. 11, §4.0 and *see* 34 CFR §300.517(a)(i).
23. In determining whether FAPE has been provided under an IEP, it is proper to inquire whether the student has made gains in her areas of need. KE by KE & TE v Independent School District No. 15, 647 F. 3d 795, 57 IDELR 61 (8th Cir. 8/3/11). It therefore follows that an IEP should address all of a student’s identified areas of need.
24. The methodology employed by a school district must be tailored to meet the goals, benchmarks and objectives of the IEP. *See* The Board of Education of the County of

Marshall v. J.A. by Mark A and Fran A., ____ IDELR ____ (N.D. W.V. March 30, 2011), referencing Board of Education of the County of Kanawha v. Michael M., 95 F. Supp 2d 600, at 610, (S.D. W.V., 2000).

25. "... [I]f a school district is on notice that a child may have a particular disorder, it must assess that child for the disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. That notice may come in the form of expressed parental concerns about a child's symptoms ..." Timothy O. v. Paso Robles Unified School District, 67 IDELR 227 (9th Cir. 2016).
26. A child's high academic performance can mask a child's learning disability and is not determinative of the student's eligibility for special education. See Mr. And Mrs. Doe v Cape Elizabeth School District, 68 IDELR 61 (1st Cir., 2016).
27. Compensatory Education Services are an appropriate remedy when they are calculated to meet the student's needs that resulted from the educational harm. See Gibson ex rel. Gibson v. Forrest Hills School District Board of Education, 62 IDELR 261 (S.D. OH, 2014). If there is no educational harm to the student, occasioned by an LEA's denial of FAPE, then compensatory education services are not appropriate. See generally, Copeland v. District of Columbia, 65 IDELR 71 (D.D.C. 2015). The goal is to place the student where they would have been but for the denial of FAPE. See Kelsey v. District of Columbia, 65 IDELR 92, (D.D.C. 2015).

V. Discussion

Overview of the Case

The student is a female 16-year-old, high school junior (11th grade) enrolled at the respondent school district's high school. She is presently taking advanced placement classes in Psychology and English. Her other classes are regular curriculum. Student testified she had a grade point average above a 3.5. In spite of this outwardly rosy academic picture, Student and her parents indicated that she struggles academically. She studies 5 or more hours nightly, often with intense parental support and intervention. She has to read her material repeatedly, or have it read to her, to understand it. She needs someone else to analyze the material so she understands what within it is important. Even with all this study, when presented with a test, she becomes anxious and forgets what she knew the night before. She frequently fails, or does poorly on tests. She must read and reread test questions and frequently runs out of time before completion. She is able to rehabilitate her grades by taking tests over again and by taking them home after the fact to correct her answers, in line with her school's policy.

Student's mother has long believed, and asserted, that Student has a learning problem, perhaps in the nature of dyslexia. In 2012, Student was given a psycho educational evaluation which compared her intelligence to her level of achievement. Her full scale IQ of 99, at the 47th percentile, was in the average range. Her achievement was generally also in the average range, with the exception of reading fluency (18th percentile) and calculation (23rd percentile) which were characterized in the Low Average Range. Although it was noted that Student needed time to think about her answers, and consequently did not complete the reading fluency test, this did not appear to trouble the evaluator. Numerous weaknesses in her ability to do math were also

mentioned. However, the evaluators summary indicated that WVDE guidelines recommended considering scores at or below the 8th percentile from multiple data sources would meet the criteria for "significant and persistent" low academic achievement. Since Student's scores were higher than that, the evaluator concluded she "does not appear to qualify for special education services." Parent and teacher concerns about Student needing a slower paced classroom and about Student's reading ability were recognized in that report. [LEA's Ex. 11]. Student was subsequently found ineligible for special education, but was placed on a Student Assistance Team Plan. Testimony of the student and parent indicated the SAT plan was not always implemented as written, however those claims would not fall within the scope of the issues presented under IDEA and WV Policy 2419. The evidence on these points did, however, tend to indicate a somewhat hostile and/or intransigent attitude by some of Student's teachers toward Student and her need for accommodation.

In March of 2015, the student's mother was again seeking academic help for her child. She cited difficulties with Student's long hours of homework, particularly reading text. She noted Student needed to read and reread text to understand it, and that her spelling was poor. Clearly, Student's particular struggles and weaknesses were known to the school personnel and some accommodations to address them were included in another SAT plan [LEA Ex. 16].

Thereafter in August of 2015, after more parental complaints about Student's reading ability and testing difficulties, the Local Educational Authority (hereafter LEA) began the process of evaluating Student as a potentially eligible child under the IDEA. Although Student's mother requested "a full battery, including a neurological exam to evaluate for dyslexia," the school district refused this request. On October 8, 2015, an evaluation was performed by the LEA's

psychologist which administered the WISC V Intelligence test, but not all the subtests were administered. (See Finding of Fact 13). Student's full scale IQ was found to be 96, at the 39th percentile in the average range. To compare her achievement levels, the LEA evaluator administered the WIAT-III achievement test but gave only eight subtests out of the 26 included in that test's battery. Student's test results here were again in the average range with the exception of oral reading fluency, which was on the low average range, at the 16th percentile.¹ The evaluator noted that Student's score was as low as it was, in part, because she misread words, seeing one word but reading another.

The BASC III Self report was also given to Student, which is a measure of attitudes and behaviors. The evaluator's summary indicated the purpose of the evaluation was to rule out the possibility that she may have dyslexia and that Student's cognitive function and achievement levels were commensurate. She further notes that "Only one instance of a letter reversal was noted. Dyslexia does not appear to be present." Although the mother had requested that a "full battery including a neurological exam to evaluate for dyslexia" be administered, the LEA chose to give only the circumscribed evaluation described above. Based on this LEA evaluation, an eligibility committee decided on October 14, 2015, that Student was not an eligible handicapped child. Student's mother was the only dissenting vote to this conclusion.

No later than November 16, 2015, an Independent Education Evaluation (hereinafter "IEE") was requested for the student by her mother. [LEA Ex. 32]. The LEA promptly denied her request indicating they had done a "full and legally compliant" evaluation. They also indicated

¹ Percentile rankings show where a student's performance falls relative to other students taking the same test. Thus, a 16th percentile ranking would indicate that 16% of test takers did as well or worse than Student, while 84% of test takers did better.

Student was "not exhibiting academic difficulty" in spite of the parent's repeated reports of the ongoing problems with reading and homework and the SAT accommodation plans which had previously been found necessary.

The LEA took no further action with respect to the IEE request. After advising the LEA of her intentions and the identity of the evaluator, the student's mother made her own arrangements for the IEE, which was performed on March 17, 2016.

The Independent Evaluator administered 12 subtests of the WISC-V not given by the LEA and numerous subtests of the WIAT-III achievement test also not administered by the LEA. On these subtests, which the LEA chose not to administer, the student scored below the 8th percentile on Oral reading accuracy (5th percentile), Numerical Operations (7th percentile), and Math fluency-addition (5th percentile). The student also scored at only the 10th percentile in Math problem solving. All of these scores are in the same "Below Average" classification. Parent's Ex. 29.

The IEE also included numerous tests not previously administered to Student. In particular, the Nelson-Denny Reading Test revealed Student to have a reading rate at only the 3rd percentile demonstrating an area of significant weakness for her. Much other testing, unique to the IEE, is discussed at Findings of Fact numbers 18-27. The IEE report reflected four different disabling conditions including Specific learning disorders in reading fluency and accuracy, and impairments in mathematics, number sense, memorization of math facts, and accurate math reasoning skills. Student was also found to have ADHD, inattentive subtype, which includes problems with attention, motivation, and memory. Finally, she was found to have a sound/speech disorder.

The IEE was delivered to the LEA but the problems didn't stop there. At an eligibility meeting held on April 6, 2016, the copy of the IEE report was not complete. All agreed that it was missing the raw data portion, including graphs and analysis, following the written portion of the report. [See LEA Ex. 34]. Whether due to the incomplete IEE or otherwise, the Committee accepted the SLD-math calculation and problem solving designation and noted she had ADHD, in accord with the IEE, yet declined to find her SLD in reading fluency skills in spite of the IEE diagnosis [See LEA Exs. 40, 58 and Parent's Ex. 29].

Following the meeting, the LEA decided they needed further evaluations in the form of a teacher observation in Student's math class to see if she needed special education and also teacher reports from her current instructors. While this was pending, Student's mother lost patience and filed the request for this due process hearing.

A second eligibility meeting was held on May 9, 2016, where the LEA proposed to find Student eligible under a classification of Specific Learning Disability. As to the subtype of SLD found, all that was stated was "either direct or indirect services in Math might be beneficial." [LEA Ex. 49]. IEP meetings were subsequently held on May 26, 2016 and June 1, 2016. The present levels of achievement indicate Student was not found to have an SLD in reading fluency "because her overall standard score [on the Nelson Denny Reading Test] of 89 was in the average range and did not meet the Specific Learning Disability Team Report [standard] under Policy 2419 for a Learning Disability in Reading Fluency." [LEA Ex. 58, [REDACTED] 194). After the June 1, 2016 IEP meeting, the parent filed the amended complaint and revised statement of issues presented at hearing.

Issues Presented

1. **Whether LEA violated IDEA and/or Policy 2419 by failing to grant Parent's request for an Independent Educational Evaluation ("IEE") or filing request for due process to determine if the school's evaluation was appropriate.**

Parents of a child with a disability have the right to obtain an Independent Educational Evaluation of their child, at public expense, if the parent disagrees with an evaluation of the public agency. *See* 34 CFR §300.502(B)(1) and WV Policy 2419, Ch. 10 §7.A.1. This is the starting point. The law presumes that IEE's will be at public expense unless a school district takes certain actions to defend the sufficiency of its prior evaluation. Once an IEE request has been made by the parent, the school district has 10 school days under state law,² to do one of three things:

(1) "they may agree in writing to pay for an IEE at reasonable and prevailing rates, and provide the district's IEE criteria and information about where an IEE may be obtained." WV Policy 2419 Ch. 10 §7.C. This option gives an LEA the opportunity to put constraints upon their liability for the IEE, making them responsible only for "reasonable and prevailing rates" and restricting the IEE to their criteria. The LEA did not do this.

(2) The second option is "Offer WVDE mediation to try to resolve differences. This is only available if parents agree to mediate." WV Policy 2419 Ch. 10 §7(c). This option is not provided under the Federal rules and would presumably act as a waiver by the parent, of their due process rights if they participated voluntarily in the process, but the LEA did not request this option either.

² WV Policy 2419 ch. 10 §7.C. mandates a ten-school day time line. Parallel Federal law indicates it must be done "without unnecessary delay" 34 CFR §300.502(b)(2).

(3) The final option is "Request a due process hearing to show that the district's evaluation is appropriate." WV Policy 2419 Ch. 10 §7(c). Again, the LEA did not do this.

They took none of the steps offered under the law to demonstrate their evaluation was sufficient, nor to set parameters and limitations on their liability. They admit this. Rather, they now present an argument that could be summed up as "No harm, no foul." They cite the 3 prong test which must be met before a procedural fault will be found to rise to the level of a denial of FAPE:

- 1) [the violation must have] impeded the child's right to a [FAPE];
- 2) significantly impacted 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 benefits. 20 U.S.C. §1415(f)(3)(E)(ii). They would have me find these standards not met. I find they are all met.

Before the parent obtained the IEE, the LEA was asserting that their evaluation was "full," which I would understand to mean complete and comprehensive. Further, based largely on the assertedly "full" evaluation, they found Student ineligible for special education.

After the IEE was performed and the results delivered to the school, the child was found to be an eligible student in the categories of SLD - mathematics calculations and SLD mathematics problem solving. This determination was only possible because the IEE was performed, and Student was administered several testing batteries not performed by the LEA. The LEA now agrees Student is an eligible handicapped child under IDEA, a determination not possible before the IEE, and a conclusion adamantly rejected by the LEA before the IEE was performed. Hence, without the IEE, this handicapped child would not have been identified as

eligible under the IDEA. There could hardly be a greater impediment to a child's right to FAPE than to be found not eligible to come under the protections of the IDEA when they rightfully should.

Regarding a parent's opportunity to participate in the decision-making process of providing a FAPE to their child, having a proper and comprehensive evaluation is the best evidence a parent has to demonstrate and quantify the deficiencies which define their student's disabilities. Without a supportive evaluation, a parent's complaints and concerns are merely anecdotal and can be easily brushed aside or minimized. Case law has recognized that without a complete and comprehensive evaluation, a parent's right to meaningful participation in the IEP process is impaired. See Timothy O. V. Paso Robles Unified School District, 67 IDELR 227 (9th Cir. 2016). In this case, the LEA had an evaluation which they were using both to support their conclusion that Student was not suffering from a disability and to squelch further inquiry into the matter. Only by getting another more comprehensive evaluation that both demonstrated the inadequacy of the LEA's evaluation and evidenced the disabling conditions of the student, could the student's mother hope to come into the decision-making process as a full participant. I believe that with the IEE parent obtained, she has accomplished this. It is only because Student's mother took the risk of obtaining the IEE, and potentially being personally liable for the expense, that she has been able to get the LEA to the table to discuss eligibility.

As to the third possibility, i.e., a deprivation of educational benefits there is no doubt in my mind that, but for the IEE, the LEA would now still be arguing that Student is not an eligible student under IDEA, but Student's mother did get it. The IEE was given to the LEA and they did find Student eligible. They have engaged in an IEP process to create a program designed to

bestow "educational benefit" on the student. They have demonstrated by their drafting of the IEP, their belief that Student meets eligibility requirements for a specific exceptionality, experiences adverse effects on educational performance, and needs special education. (See WV Policy 2419 Ch. 4, §3). The likely and foreseeable effect of the LEA's failure to approve the IEE, or to fight it and defend their in-house evaluator would have been for the IEE never to take place. Had that occurred, the student would not now have the IEP document currently drafted. [LEA Ex. 58]. Certainly that would have caused a deprivation of educational benefit. The LEA now asserting that their IEP will convey educational benefit, should not be heard to say that the absence of that document would not be a deprivation of educational benefit. They should not be able to rely on the mother's actions in getting the IEE as a defense against the likely and foreseeable effects of their attempts to thwart her request for it.

Since the LEA failed in its procedural duties to either agree to provide the IEE at public expense, or to properly oppose it, the parent was faced with the prospect of abandoning her IEE request or assuming liability for its costs. Only by the mother's actions in getting the IEE did Student come to be found an eligible student under the IDEA. Had the parent acquiesced to the school district's rejection of her request, Student's disabilities would most likely never have been identified. Under these circumstances, both the law and fundamental concepts of equity and fairness mandate that the LEA should be responsible for the cost of the IEE. To do otherwise would be to negate the purpose of establishing the "right to an IEE at public expense" under both Federal and State provisions.

2. Whether LEA violated IDEA and/or Policy 2419 by failing to consider the entirety of the IEE by Dr. Margaret Kay ("Kay Evaluation") at the eligibility meeting and/or the IEP meeting.

Regarding this issue, Petitioner asserts that the eligibility process at the May 9, 2016, eligibility committee meeting, was subverted by the school board or one of its employees, by providing the committee members a copy of the IEE which did not contain the Nelson Denny Reading assessment results. However, the evidence does not support this conclusion. The results of that test were seen and considered by the IEP team, and the results of the Nelson-Denny test are expressly mentioned in the IEP. LEA Ex. 58 [REDACTED] 194. In the Present levels of Academic achievement and functional performance, the IEP document states "the evaluation completed by the outside agency also indicated a possible Learning Disability in Reading Fluency, but the overall standard score of 89 was within the average range and did not meet Specific Learning Disability Team Report [standards] under policy 2419 for a learning disability in reading fluency." The 89 score referred to is the student's total reading score achieved on the Nelson Denny Reading Test. Parent's Ex. 29 at pg 3. Consequently, the foundation of Petitioner's complaint (i.e., that the incomplete report prevented Student from being identified as having an SLD in reading fluency) is not born out by the evidence. The failure to identify Student as an SLD in reading fluency was a decision reached after looking at the Nelson-Denny results in the IEE in exclusion, and then interpreting those results in the light of the eligibility criteria set out in WV Policy 2419. Policy 2419 mandates that the results of an IEE provided to a school district, must be considered by the district, if the IEE meets district's criteria, in any decision made with respect to the provision of FAPE. See WV Policy 2419, Ch. 10, §7.D. and 34 CFR §300.502(c)(1). It appears that the school's personnel did see, review, and consider the IEE report of the Nelson-

Denny Test results. They did not, however, find those results sufficient alone to support a finding that Student was SLD in reading fluency.

However, the real underlying issue presented concerns not the motives of the district's people but rather whether Student's reading issues, and the entirety of the evidence supporting a finding that Student has measurable deficiencies in the area of reading skills, was fully and appropriately considered.

I do not believe that all of the relevant evidence was considered.

In addition to the low score on the reading rate subtest on the Nelson-Denny (3rd percentile - "significant weakness" found), there was also a WIAT-3 subtest on oral reading accuracy on which Student was ranked at the 5th percentile, in the below average range. On Phonological processing, Student achieved only a second grade equivalency on her ability to rapidly name (i.e., identify) letters and numbers. This puts her in the Very Poor Range, and such deficiencies are associated with poor reading fluency. Another testing instrument, the Jordan Left/Right Reversal test, demonstrated that Student has severe misperception of symbol directionality, indicating misperception of letters and numbers, and that she will struggle to retain symbolic information such as letters, words and numbers. See Parent's Ex. 29 at pp 4, 15, 19, and Findings of Fact 58. These areas of deficiency negatively impact Student educationally, making her read slowly and ineffectively. Student, her mother, and her stepfather all testified to the impact this has on her studies at home. She spends many hours every night and on weekends doing homework because she must read and reread her texts multiple times before she understands them. She frequently cannot complete tests and class assignments because of the

time it takes her to read and understand the questions. These constitute negative impacts on her education in my opinion.

Further, the negative impact that reading issues have had on Student were recognized previously as is reflected in Student's SAT plans dated March 30, 2015, August 24, 2015, and August 31, 2015. Parent's Ex. 9 at items 11, 13, and 14. Among the accommodations ordered under SAT plans were "directions given in both oral and written forms," "extra time for tests and quizzes", extra day for reading assignments" (SAT plan of March 30, 2015, Parent's Ex. 9, item 11); "tests read aloud to Student, as needed by Student," oral and written directions," and "double time on tests," (SAT Plan of August 24, 2015, Parent's Ex. 9 at item 13) and "oral and written directions (either paper or on Smart board or chalkboard) so that Student can take notes for clarification." (SAT Plan of August 31, 2015, Parent's Ex. 9 at item 14).

Having recognized previously that Student requires accommodations for her reading deficiencies, it is inappropriate for the district to now assert that Student no longer qualifies for special reading considerations under her IEP because she is not IDEA eligible under the SLD-reading fluency category. The fact is that Student is IDEA eligible. Under the Rowley mandates, eligible students must be given "education specially designed to meet the unique needs" of the individual student ... "supported by such services as are necessary to permit the child 'to benefit' from the instruction." Rowley, supra., at 458 US 188-189 (emphasis added). The present IEP does incorporate the provisions extending time for the taking of tests and quizzes as well as oral and written directions and test questions. It does NOT incorporate provisions or accommodations to help her understanding of long or difficult reading assignments. Accordingly, her IEP should be amended to include the provision of audio books, when available, and audio or

oral presentation of reading texts when reading long passages in class assignments or tests.

Notably, the LEA agreed in their post-hearing briefs to provide audio books to Student, an accommodation/service not mentioned by the Independent Evaluator.

3. **Whether LEA violated IDEA and/or Policy 2419 by failing to identify Student as a disabled child eligible for special education services for at least two years prior to the filing of the original due process request.**

Petitioner's counsel argues in her post-hearing "Brief of Petitioner" that the child find provisions of IDEA at 20 U.S.C 1412(a)(3)³ and 34 CFR §300.111,⁴ requires states to "find and evaluate all children with disabilities residing in the state regardless of the severity of their disabilities." Petitioner's Brief at pg 10. Parallel responsibilities fall to the local school districts of

³20 U.S.C. 14129(a)

(3) Child Find

(A) In general. All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities **attending private schools**, regardless of the severity of their disabilities, **and who are in need of special education and related services, are identified, located, and evaluated** and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction. Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized Education Program. An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, **is developed, reviewed, and revised for each child with a disability** in accordance with section 1414(d) of this title.

⁴34 CFR §300.11 Child find.

(a) General.

(1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services

West Virginia pursuant to WV Policy 2419, Ch. 2, §1. Petitioner says little else on this point, continuing her argument with the degree of liability she believes applies to the LEA.

As stated, the petitioner is seeking redress for purported violations of IDEA and/or Policy 2419 for the two years prior to the filing of the original due process complaint. The original complaint was filed on April 26, 2016, therefore the period of time at issue would extend back to April 26, 2014. The reason for this time period is the effect of the relevant statute of limitations in West Virginia. "A due process complaint must be initiated within two years of the date the parent/adult student or district knew or should have known of the disputed decision or alleged action that forms the basis for the complaint ..." WV Policy 2419 Ch. 11, §4. Due Process Complaints, A.⁵

The petitioner's argument seems to infer that because Student was not recognized over the past two years as an eligible student under IDEA, and was later recognized as an eligible student due to the testing conducted in the IEE, that the school district must have failed in its child find obligations, but this is not the inevitable consequence of applicable law.

A. Time Period of April 26, 2014 to March 26, 2015

The district's obligations under child find are to "locate, identify, and evaluate." This the district did. Responding to the parent's complaints, Student was evaluated to determine if she was an eligible child in 2012. (LEA Ex. 11). Notably, that evaluation tested her in the areas of reading fluency, mathematics calculation, working memory (which includes attention, concentration and higher order thinking skills), processing speed, verbal comprehension,

⁵ Exceptions to the 2-year limitation exist where a school district misrepresents or withholds information from a parent and thereby prevents the parent from filing for due process, but no such claim was made here.

perceptual reasoning, processing speed, letter word identification, passage comprehension, broad reading, and spelling. In short, she was then tested in essentially all the areas in which she has now been identified by the IEE as being disabilities or weaknesses. The parent did not challenge the results of this 2012 evaluation in the subsequent 2-year period either by requesting a due process hearing or by requesting an IEE. The applicable 2-year statute of limitations prevents her from directly challenging that evaluation now. Thus, she attempts to do indirectly what cannot be done head on, suggesting that the district's reliance on the 2012 evaluation and subsequent finding of ineligibility under 2419 constitute a violation of child find obligations. I find that the district's obligations under child find were discharged for the period between that evaluation and the parent's subsequent request for evaluation in 2015 when they conducted the evaluation and eligibility inquiry in 2012. The evaluation has the superficial indicia of having tested the very areas of concern now identified by Parent's IEE as areas of disability, and/or relative weaknesses (LEA Ex. 11). Further, Student's potential eligibility was considered but rejected (LEA Ex. 15). By these actions, the district discharged its "locate, identify and evaluate" duties under child-find provisions. After the 2012 evaluation, the record is silent regarding problems Student was having with her education until March 26, 2015. Those complaints concerned issues Student was manifesting, primarily at home, with excessive time being required for homework and the reading of text, and her need to read text multiple times for understanding. Further, testing anxiety is something that takes place in the student's mind and cannot necessarily be seen. There is no way the district would have been aware of what problems Student was having at home, or in her internal emotional state unless Student or a parent told them. If they were told earlier than March 26, 2015, it is not reflected in the evidence. Consequently, I find that Student was not deprived of

a FAPE for the period prior to March 26, 2015, due to any failure of the district to pursue its child find obligations.

B. Time Period of March 26, 2015 to April 26, 2016

Beginning with an SAT meeting on March 30, 2016, (for which notice was sent to Parent on March 26, 2015), the district was on express notice that Student's mother wanted Student to be evaluated to determine if she had dyslexia. Problems identified then included the large amounts of time needed for homework, especially when reading text, her need to read multiple times for understanding, her excessively neat organizational style, her poor spelling, and problems with "timed reading/writing causes anxiety/poor performance" Parent's Ex. 9, item 11.

Rather than test her immediately for an IDEA eligibility, SAT meetings were held on March 30, 2015 (during Student's 2014-2015 freshman year), on August 24, 2015, on August 31, 2015, and on October 5, 2015 (during Student's 2015-2016 sophomore year) with SAT interventions being ordered each time in the form of accommodations and modifications. Parent's Ex. 9, items 11-17.

Following the SAT meeting on August 24, 2015, the district proposed to conduct a "psycho educational evaluation because Student was "struggling with reading and all timed tests" Parent's Ex. 10, item 18. The district's notice of evaluation dated August 28, 2015, indicated they would test "Achievement" and "Intellectual ability as well as teacher reports, parent info, observations, and self-rating scales. The parent gave permission to evaluate on September 1, 2015, and further made a request that Student be given a "full battery, including a psychological exam to evaluate for dyslexia." The district declined to do the extra testing requested by the parent and gave her until September 19, 2015, to withdraw her permission to test. Parent's Ex.

10, items 18-21. Student was finally tested by the district's psychologist on October 8, 2015, but the achievement testing was comprised of an incomplete WIAT-3 that included no math subtests or oral language and left out some reading skills and written expression subtests. Parent's Ex. 11, item 22. The testing results were in the normal, low normal range.

On October 14, 2015, now over a year ago, an eligibility committee looked at the results of the evaluation and concluded Student was ineligible under any category of exceptionality. Student's mother disagreed with the school's evaluation and believed it to be incomplete. Still wanting the full battery to screen for dyslexia, the mother sought the district's assistance in procuring an IEE. On or before November 16, 2015, she stated "My request is based on the school evaluation that was not comprehensive and appropriate." Parent's Ex. 16, item 34. She indicated the Independent Evaluator she wanted to do the evaluation and provided contact information, and requested the IEE be provided at public expense. Four days later, the district shot back written notice of their refusal. They indicated that

"The full and legally complaint evaluation process has been completed for the student on two separate occasions. The parent has provided no information regarding what if any additional information may be gleaned from a neuropsychological evaluation relative to the eligibility criteria for any of the disability categories that was present in the multiple existing evaluations."

As discussed more fully at the Discussion of Issue I above, the district took no further action with respect to this IEE request. The parent was not able to get the student in for the IEE until March 17, 2016, making arrangements on her own, and chancing that she would ultimately

be personally liable for the cost. After the IEE report was complete, Student's mother hand delivered it on or about March 26, 2016.

An eligibility committee meeting was held on April 6, 2016, and Student was found to be eligible under the criteria of SLD-math calculation and SLD-math problem solving. They now confirmed that there was an adverse effect on Student's educational performance, even though in November of that same school year they emphatically stated "the student is not exhibiting academic difficulty." (Compare Parent's Ex. 16, item 35 to LEA Ex 40). Additional time was then interposed when they requested additional data from their own employees in the form of teacher reports and a math class observation to determine if special education is needed in math class." LEA Ex. 41. It was not until May 26, 2016, that an IEP document was finally drafted, 30 days after Student's mother filed a due process request. It appears that the delays from August 2015 to May 26, 2016, were occasioned because the district stubbornly refused to administer a "full battery, including a neurological exam to evaluate for dyslexia." Parent's Ex. 10, items 20 and 21. Had they agreed, a full evaluation could have been performed and eligibility determined in October 2015, and the committee would have had the information they needed to find Student eligible as a child with a specific learning disability, as has now been done. (See, Parent's Ex's. 12, items 23 and 24, and LEA Ex. 58.) Instead, the district performed the half-hearted and incomplete evaluation found at Parent's Ex. 11.

The district also had a second chance to redeem itself by granting Parent an IEE at public expense. Had they done so, they could have placed constraints on the cost, the testing criteria, and the required qualifications of potential evaluators. WV Policy 2419, Ch. 10, §7(B)(1-3). It is also possible that they could have helped the parent find an evaluator who could have completed

the testing and report earlier than March 26, 2016. However, their unjustified confidence in the infallibility of their position dictated their responses and the consequence was a delay of seven months from Parent's initial request for the neuropsychological exam to the filing of the complaint, and 13 months to the present time. During this delay, Student has lost out on a precious year when she could have been receiving services, accommodations, and special education. Remedial programs could have been implemented and delivered by now. As a consequence of these delays, compensatory education is appropriate.

4. Whether LEA violated IDEA and/or Policy 2419 by failing to identify Student as a disabled child eligible for special education services within a reasonable time after the parent provided the school with the [REDACTED] evaluation.

Petitioner argues that having already found Student ineligible for special education in October 2015, that when the IEE report was provided to them, the district should have had all the evidence necessary to make a determination on the issue of eligibility.

The evidence indicates the IEE was completed and delivered to the district on or about March 25, 2016. (LEA Ex. 35). Student was found to meet the first two criteria as a child with specific learning disability on April 6, 2016, which is 12 days later. The SLD Team Report of April 6, 2016, indicates that "the student DOES meet the eligibility criteria for a specific learning disability that adversely impacts his/her education and is eligible for special education and related services." (LEA Ex. 40 at second pg, [REDACTED] 095). However, in the eligibility committee report, also dated April 6, 2016, it states that only the first two prongs for eligibility (i.e., student "meets the eligibility requirements for one of the specific exceptionalities and experiences an adverse effect on educational performance (LEA Ex. 41). The third prong, which is "needs special education," has a note handwritten next to it which states E[ligibility] C[ommittee] to

reconvene after observation/teacher report complete." Further down the page it is written "An observation is needed in math class plus a teacher report to help determine if [Student] needs special education'." It is clear to me that what occurred is that in October 2015, Student was found not to meet the eligibility requirement for one of the specific exceptionalities. This is the first prong of the three prong eligibility test all of which must be met in order to come under the protection of the IDEA and WV Policy 2419. See, WV Policy 2419, Ch. 4, §3 (quoted at Conclusion of Law 3, *supra.*) and 34 CFR §300.8(a)(). Once that first of the three inquiries was decided in the negative, the other two prongs of the test would not have been addressed since they are dependent on that initial finding.

When a different conclusion concerning the existence of a condition satisfying the first prong of eligibility was reached in April 2016, and Student was found to have a specific learning disability in math calculation and math problem solving, the inquiry had to go further. Prong number two was then reviewed and the adverse effect on educational performance was unanimously found to be present (LEA Ex. 40, [REDACTED] 094, and LEA Ex. 41, [REDACTED] 093). It is at the consideration of the third prong of the eligibility inquiry, regarding the need for special education, that the eligibility committee felt it required more information to make the final determination. Consequently, they requested that a math class observation be conducted and teacher reports be completed by Student's instructors. The math class observation was completed and a report issued on May 2, 2016. (LEA Ex. 47). The eligibility committee reconvened on May 9, 2016, and looked at all the information before them, including the new math class observation, and teacher reports, and concluded that a Section 504 Accommodation Plan would not suffice for Student's needs because "either direct or indirect services in math might be

beneficial." (LEA Ex. 49, [REDACTED] 103). This suggests that the late-obtained information assisted the committee in determining not only that special education was needed, but also the types of services (both direct and indirect) that might be beneficial to her.

Under the circumstances, it was not unreasonable for the Eligibility Committee to seek additional information on April 6, 2016, in order to make decisions concerning Student's need for special education, the final prong of the 3 prong eligibility test. The delay, from April 6, 2016, to May 9, 2016, is 34 days. I can locate no statutorily imposed timeline violated by this time delay, nor does Petitioner identify any.

Accordingly, I do not find Student's rights to a FAPE were specifically violated by this action.

5. Whether LEA violated IDEA and/or Policy 2419 by testing Student with STAR math as part of eligibility determination without obtaining permission from Parent.

Petitioner would have me decide that Student was deprived of a FAPE because she was given the STAR MATH test, after the eligibility committee met on April 6, 2016, and without parental permission. The evidence was clear that the STAR MATH test is a math achievement test routinely administered to all students (TR Vol II, p 222 lines 8-16.) Student was given the test individually rather than in a group setting. (TR Vol I, pg 31, line 13-pg 32, line 1), and the test was administered on April 14, 2016, after the April 6, 2016, initial eligibility committee meeting. (LEA Ex. 45 and 41).

The relevant rule provision states:

"Parental consent is not required before ... (ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent

is required of parents of all children." 34 CFR §300.300(d)(1)(ii). (See also WV Policy 2419, Ch 3, §3(c) which indicates "Neither written notice nor consent is required..." for such testing.)

The fact that Student was tested at a separate time and place than her classmates does not change the application of these rule provisions. Neither does the fact that it was administered while eligibility questions were pending. The district violated no rule, principle or policy under IDEA or WV Policy 2419 by their administration of the STAR MATH test to Student on April 14, 2016.

6. Whether LEA violated IDEA and/or Policy 2419 by having Parent sign waiver of time period for notification of eligibility meeting by telling her it was for a "SAT" meeting.

Parent signed a document dated April 4, 2016, titled "Notice of Eligibility Committee and/or Individualized Education Program Team Meeting." It states the time (1:30 pm, Wednesday, April 6, 2016) and place for an "Eligibility Committee Meeting." Parent's signature appears at the bottom which she has dated April 5, 2016. Above Parent's signature are areas for "Parent's Response." She checked "I will attend the meeting as scheduled" and also checked "I agree to waive the 8-day notification period." (LEA Ex. 38). Parent claims she was deliberately misinformed that the meeting was to be an SAT meeting, and that this "failure to notify her of the true nature of the meeting deprived her of her right to fully participate in the meeting by having the benefit of counsel to advise her as to her rights."

However, testimony of the district's IEP Coordinator directly contradicted this. This district employee testified she gave Parent the notice of the Eligibility Committee meeting and that it had been specifically scheduled so as to accommodate parental requests for such a meeting as soon as possible. In the IEP, Coordinator's own words, "But I believe I asked her to waive the

eight day notice for the eligibility because [the parent] wanted to have the meeting as soon as possible. And I could've given her eight days. I did that for her benefit." (TR Vol I, pg 310, lines 3-6.) This testimony aligns with the content of the notification document.

Even if the school district employee said "SAT meeting" when they meant "Eligibility Committee (EC) Meeting," the parent had the chance to look at the written document which was very clear. Further, if the parent was misled, she could have continued the E.C. meeting to a time when her attorney would be available. Consequently, I do not find any violation of IDEA or WV Policy 2419 occasioned by the notice given to the parent prior to the April 6, 2016, eligibility committee meeting.

7. **Whether the LEA's proposed Individualized Education Plan ("IEP") is reasonably calculated to provide Student with a Free Appropriate Public Education ("FAPE") where it fails to provide accommodations and/or services for Student's documented disability in reading fluency, attention deficit hyperactivity disorder/inattentive subtype, speech sound disorder, weakness in long-term memory for facts and details and short-term auditory/visual working memory, automatic/accurate number facts recall, inability to transfer written information, and inability to separate relevant from irrelevant detail.**

In the landmark case of In re Board of Education of Hendrick Hudson Central School v. Rowley, 458 US 176, 102 S.Ct. 3034, 73 L. Ed 2d 690 (198), the U.S. Supreme Court laid the basic rules for the determination of whether the requirements of FAPE have been provided in a child's educational program. The Court there indicated that a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* At 458 US 188-189. But the district is not required to provide every service or accommodation which might bring a disabled student an educational benefit. *Id.* At 458 US at 199. The services to be

provided under the IEP must provide some educational benefit which is more than minimal or trivial. *See O.S. by Michael S. and Amy S. v. Fairfax County School Board*, 66 IDELR 151 (4th Cir 2015). In determining whether FAPE has been provided under an IEP, it is proper to inquire if a student has made gains in her areas of need. (*K.E. by K.E. and T.E. v. Independent School District*, No. 15, 647 F.3d 795, ___, 57 IDELR 61 (8th Cir. 2011)). It would follow from these cases that a comprehensive IEP should include special education and related services reasonably calculated to allow her to make gains in all her identified areas of need.

The school district argues that its IEP (LEA Ex. 58) is adequate to the mandates of IDEA and relevant case law. As to the areas of weaknesses, which have been identified in the IEE, District's counsel states "'Weaknesses' do not constitute disabilities requiring accommodation under IDEA of Policy 2419. Moreover, before services would be required, such conditions must be shown to adversely affect the student's education" [Respondent] Board of Education's Brief on Due Process Issues at p 17.

The district has already incorporated into the IEP of May 26, 2016, the following services and accommodations:

For Math:

1. Break multiple step math problems into smaller steps to solve;
2. Calculator for all math-related concepts;
3. Grade math problems in steps;
4. Guide problems or formula sheet for all math related concepts; and
5. Study guides for tests and quizzes

For all classes:

1. Extended time on tests quizzes;
2. Extended time for assignments/one extra day;
3. Copy of class notes and PowerPoints at the beginning of class;
4. Wait time for processing information;
5. Oral and written directions; and
6. Separate setting for tests and quizzes.
7. Oral, written, and rephrased directions and test questions

(LEA Ex. 58 [REDACTED] 198)

The school district has also gone on record offering Math 180 as a way to redress gaps in Student's math knowledge, (See LEA Ex. 59), and they offered think through Math as an Extended School Year (ESY) Service over the past summer. (LEA Ex. 52 and TR Vol II, pg 235, line 7-19.

Several of these provisions are included in the parent's wish list included in the post-hearing brief, and the petitioner does not complain that any of the above listed provisions are inappropriate except for the specific math curriculum, so I will conclude at this point that the provisions (other than the math curriculum) are appropriate.

Items Petitioner seeks which are not in the IEP include:

For her ADHD symptoms:

1. preferred seating;
2. short specific directions (school offered "oral written, rephrased directions and test questions);

3. prompts when off task; and
4. break down tasks into smaller sections (this is included in the IEP for math but no other subjects).

For her SLD and processing issues:

1. Never use Scantron Sheets - but allow Student to mark her answers in the book;
2. Never use Word Searches or Word Scrambles;
3. Review of wrong answers on tests with the student to see if she knows the material; and
4. Don't impose point deductions for detail errors, spelling and sign reversal (IEP provides for grading of math problems in steps).

As related services for skills gaps:

1. Audio presentation of text for long reading passages and assignments to compensate for skills issues with reading fluency;
2. Test Preparation Program for the ACT and SAT College entrance exams;
3. Cog Med memory program for her memory issues relative to all subject areas including math; and
4. Saxon Math - for math skills gaps.

The standard which the school district needs to meet in order to constitute FAPE is "educational instruction specially designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit" from the instruction.

Rowley, *supra*. At 458 US 188-189.

The multiple services, modifications and accommodations contained in the existing IEP (LEA Ex. 58 at [REDACTED] 198) appear to track many of the recommendations of the independent evaluator and others appear to be slightly modified versions of her suggestions. These provisions appear to address many of the specific problems and identified weaknesses that Petitioner identifies in her issue number 7. These provisions will help Student in the classroom and should also remove some of the time pressure Student faces in her homework assignments and in the testing environments. However, one thing all of these provisions have in common is that they address the acquisition of the regular education curriculum going forward. None of these provisions address the existing skills gaps which were identified by the Independent Evaluator.

The identification of Student as SLD in math calculation and math problem solving was reached because Student's test results in the IEE showed "statistically significant academic under achievement in math reasoning, math calculation, and fluency in math facts recall." She tested at the 3rd percentile level on reading rate which indicates a "significant weakness." (See Parent's Ex. 29 at pg 19 and generally see also LEA Ex. 29). While the single subtest on reading rate was not enough to qualify Student as an eligible student with SLD reading fluency, it is a recognized area of severe under achievement. As more fully discussed in Issue 2 previous, there was also significant other testing data from the IEE, as well as a history of SAT accommodations, to support a finding that weaknesses in Student's reading abilities negatively impact her educationally.

Further, the recognition that Student has significant issues regarding her ability to utilize working memory (See LEA Ex. 29 at pg 22) makes it appear more unlikely that Student will be

able to benefit from programs designed to close skills gaps unless she receives help in this areas as well.

If Student is to receive benefit from her education, she needs to close existing skills gaps. Consequently, her present IEP dated May 26, 2016, does not provide FAPE without some provision to address these issues. The specific programs to be provided present a question of methodology. "Once a court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the state." Rowley supra. At 459 US 176, __.

The methodology used to satisfy the requirements of an IEP is within the discretion of the school district if it provides the basic floor of opportunity required under the law, even if it is not the method preferred by the parent. See E.E. by Lorsson v. Chapel Hill-Carrboro Board of Education, 773 F.3d 509, 64 IDELR 192 (4th Cir. 2014); and generally Board of Education of the County of Marshall v. J.A. by Mark and Fran A., 56 IDELR 209 (N.D. W.V. March 30, 2011). This case law would appear to prevent the mandating of specific programs where the methodology conflicted with the preferences of a school district. Accordingly, I will limit my order to the services which must be added. Since the petitioner has demonstrated through the evidence that Student has unmet needs for remediation of skills gaps in math calculation, math problem solving, and in reading fluency, and since attempts at remediation will be negatively impacted if she is not helped to remember the programming, the IEP should be amended to provide related services in these areas.

The IEP should be amended to include related services of:

1. Audio presentation of reading texts when long reading passages are contained in assignments or tests;

2. A test preparation program to assist Student get ready to take the ACT and SAT college admission tests;
 3. A plan or program designed to assist Student with her working memory issues; and
 4. A remedial mathematics program which will address the specific skills gaps identified in the IEE report (see discussion in Issue 8 below for more on the provision of a remedial math program.
8. **Whether Math 180 as contained in the LEA's proposed Individualized Education Plan ("IEP") is reasonably calculated to provide Student with an educational benefit by adequately closing the gap between Student's current achievement level in math and her current grade level and math requirements.**

The school district has agreed that Student has gaps in her math facts knowledge that require remediation. The revised IEP bearing date of May 26, 2016 (Parent's Ex. 24, item 52 a pg 2 of 15) reflects that "Math 180 Basic Skills" was offered to Student as an ESY service, 12 hours per week for the period of June 21, 2016 through the month of July to address these issues. That document also reflects that Student was offered "Think Through Math." For reasons that are too convoluted to discuss and ultimately irrelevant to this discussion, Student did not receive either of these programs over the Summer. The Independent Evaluator has recommended that Student receive a replacement math program that will supplant the common core type math curriculum offered by the school district.

Both "Math 180" and "Think Through Math" are programs specifically designed to assist students who are significantly below grade level work their way up. (LEA Ex. 59 and 52). Both programs contain material that starts at a 3rd grade equivalency and goes up from there. "Think

through Math" is an online course with built in supports of "intelligent software, precise customized corrective feedback and real time tutoring." (LEA Ex. 52). "Math 180" is offered in two courses, the first taking the Student from 3rd through some 5th and 6th grade level instruction and a second course that incorporates the remainder of 5th and 6th grade curriculum up through 8th grade, focusing on algebra and higher mathematics. (LEA Ex. 59). Both of these programs offered by the district are common core programs, which integrates concepts (TR Vol II, pg 232, line 13 - pg 233, line 10, Testimony of LEA's special education director).

Both of these programs appear, at first, to be just the sort of math presentations Student needs, providing instruction to fill gaps at a very early grade level equivalency. However, the independent evaluator explained in some detail that a common core style of presentation would create significant difficulties for a child with Specific Learning Disabilities. As the Independent Evaluator explained it:

"I guess the way I would explain it would be in a traditional kind of curriculum are contemplative developmental sequence. For example, addition, subtraction, multiplication, division. You work on one thing and you practice it a lot until you really have the skill sets down and then you go on to the next level. In the ... common core curriculum there's within one lesson a lot of mixing of concepts, algebra, geometry, fractions, decimals, percents, basic math facts, probability estimation, and a student like [Student's name] often times will do poorly in a common core math program even with tutorial support because they're confused by the mix of concepts that are addressed in the lesson My understanding is that [Student's name] had a couple of tutorial interventions in mathematics because

of her continuing difficulties in ... in this area and that she hasn't really benefitted from that. ... But my opinion, her math program should be replaced with a more traditional step wise procedural type of mastery approach.

TR Vol II, pg 29 line 24 - pg 31, line 7.

As a general principle, it is within the discretion of a school district to choose the methodology used to provide education to students, so long as the IEP provides the basic floor of opportunity. *See, E.L. by Lorsson v. Chapel Hill-Carrboro Board of Education*, 64 IDELR 192 (4th Cir. 2014). The methodology remains within the discretion of the district so long as it is reasonably calculated to confer benefit on the student. *REB ex rel J.B. v. State of Hawaii, Dept. of Ed.*, 63 IDELR 105 (D. Haw. 2014).

Here we have a student who has previously been presented with common core curricular programs and has come away with significant skill gaps. The Independent Evaluator who has many years of experience working with learning disabled students makes a strong case that Student needs a program for math that is step by step, one concept area at a time, rather than the common core, integrated math type program. The IEP which the district endorses takes notice of Student's needs for a simple step by step approach to her math instruction. At Part IX: Services, it is noted that instructors should "break multiple step math problems into smaller steps to solve," and also that they should "Grade math problems in steps." LEA Ex. 58 at [REDACTED] 198. I recognize that these services do not mandate any particular curriculum style, but they do serve to illustrate the recognized need of Student to address just one thing, one idea or one concept at a time. For these reasons, I find that math curricula presented in an integrated common core manner are not reasonably calculated to confer educational benefit on this student, and therefore

she must be given access to a more traditional, step by step, one concept at a time program to remediate her existing underachievement in math calculation and math problem solving and also to advance her knowledge of mathematics as she approaches the standardized testing for college entrance, and graduation.

9. **Whether the IEP contains compensatory education services sufficient to make up for failure to identify and provide special education services and accommodations when first sought by the parent.**

The issue here presented, is decided within the discussions of Issues 2, 3, and 7 above.

VII. Directives for Implementation

1. The LEA shall pay to the Independent evaluator the sum of \$4,000.00, the cost of the Independent Education evaluation.
2. The LEA shall provide to the student, as part of her IEP services, a remedial mathematics instruction curriculum to overcome the skills gaps in math calculation and math problem solving. The current grade level of some of her math knowledge and functioning are at only the 4th and 5th grade level. This remediation should be calculated to fill the achievement gaps between that grade level and her current 11th grade status. Further, this remedial program should take into account her need for step by step, one math concept/skill at a time, non-integrated instruction, due to her specific learning disabilities as per the recommendations of the independent evaluator.
3. The LEA shall provide to the student IEP accommodations/services to address her identified weaknesses in reading fluency, including the provision of audio books whenever available, (this service was offered by the LEA in its post-hearing brief) and audio or oral presentation of reading texts when long reading passages are contained in assignments or tests.
4. Student shall be provided, at LEA expense, a program or plan to assist her with her working memory issues so that she can benefit from her remedial mathematics instructions. A program such as COG MED or its functional equivalent would satisfy this directive, however the methodology chosen is for the school district to decide.
5. As compensatory relief, and with the intent of placing the student where she would have been had she not been delayed in receiving her IEP services for a period of over a year,

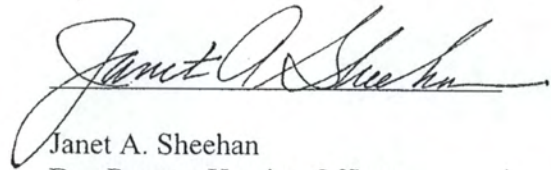
and to close her skills gap, Student shall be given access to a college entrance examination preparation program, at LEA expense, including preparation for both mathematics and reading test portions.

6. Additionally, the LEA should include in the IEP, services/accommodations offered to Student by the LEA's post-hearing brief. Specifically:
 - a. preferential seating for Student at the front of the class; and
 - b. provision, and permission for Student to use, a Life Scribe Pen in her classes.
7. Within 20 days following this decision's issuance, the LEA shall reconvene an IEP meeting to amend Student's IEP in accordance with the above directives and implement them forthwith.

VIII. Appeal Rights

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process complaint notice in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the issuance of the hearing officers written decision.
WV Policy 2419, CSR § 126- 16-3, Chapter 11, §4 N.

SO ORDERED

A handwritten signature in cursive script, reading "Janet A. Sheehan", written over a horizontal line.

Janet A. Sheehan
Due Process Hearing Officer

Entered this 28th day of October, 2016