

**STATE OF OHIO  
DEPARTMENT OF EDUCATION  
OFFICE FOR EXCEPTIONAL CHILDREN**

IN THE MATTER OF : State Level Review Officer

THE APPEAL OF : Theresa L. Hagen, Esq.

THE DUE PROCESS HEARING DECISION :

OF :

██████████ (“Student”), By And Through  
His Parent, ██████████ :  
Petitioner/Appellant  
and : Case No. SE 3617-2018

SYLVANIA SCHOOLS :  
Respondents/Appellee

**SLRO DECISION**

Parent, ██████████, on behalf of her son, ██████████ (“██████” or “Student”), timely brought this appeal to challenge the Decision of the Independent Hearing Officer (“IHO Decision”) issued on February 14, 2019. Petitioner’s Notice of Appeal, May 22, 2019 (“Parent Appeal”). In his Decision, the IHO denied the relief sought by Parent in the Due Process Complaint in its entirety. The IHO concluded that Sylvania Schools (“Sylvania”) had properly provided Student with IEPs, in the second through fifth grades, that were appropriate to enable him to make progress in light of his circumstances, and, as such, Sylvania was not required to reimburse the Parent’s Lindamood-Bell (“LMB”) reading program that was privately provided for Student during the summers (ESY 2016,

ESY 2017, ESY 2018) and during the school day in the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> grades.<sup>1</sup> Thus, the IHO concluded that the Student was not denied a FAPE. IHO Decision at 24-25.

In addition, the IHO found that the School's Notices of Absences, issued as the result of recording daily absences for Student's private LMB tutoring as "unexcused," were proper and not in retaliation for filing a due process complaint. *Id.* On review, it is found that the IHO *erred* in determining that Sylvania provided Student with a FAPE, in determining that the Parent was not entitled to reimbursement for LMB private tutoring, and in finding that Sylvania's unexcused absence notices were proper. As such, the Parent is entitled to reimbursement for the privately-paid services provided to Student.

#### I. SUMMARY OF SLRO DECISION

Upon a *de novo* review of the IHO Decision, and in consideration of the Parent's Appeal notice and relevant law, it is concluded, based on the relevant testimony and documentary evidence in the entirety of the Record, that the IHO ERRED in finding that Sylvania Schools ("Sylvania") properly considered the Student's (████) evaluations and assessments in identifying his reading deficits and providing appropriate accommodations to support █████'s educational deficits and provide a FAPE. Further, the IHO ERRED in concluding that the Student did not require additional private intervention services, specifically the Lindamood-Bell ("LMB") reading program, both out of school and in-school, in order to provide Student a FAPE, prevent further regression, and remediate an on-going 2-grade level reading deficit in the second-fifth grades. Indeed, it is concluded that any reading progress made by █████ at Sylvania was

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<sup>1</sup> 2<sup>nd</sup> grade (4 hrs/day; 4 weeks during school in May 2016; 8 weeks in summer); 3<sup>rd</sup> grade (1 hr/day; 4 hrs. Sats); 5<sup>th</sup> grade (2hrs/day, 2-3 days/week).

wholly as a result of the extensive private LMB tutoring provided by [REDACTED] Parent throughout [REDACTED] education at Sylvania between the second and fifth grades. That is, but for the Parent's provision of private reading tutoring, the record supports the conclusion that [REDACTED] would not have had any meaningful grade level progress or been able to access or participate in any grade level curriculum, and, in fact, would have further regressed with only Sylvania's in-school sub-standard reading interventions.

At the crux of the issue in this matter was whether [REDACTED], a student of normal intelligence with Dyslexia, would have successfully progressed from grade to grade with the Sylvania Schools 100min/week, small group Wilson reading program had the Parent *not* independently paid for and provided three (3) summers of ESY<sup>2</sup> and additional private LMB tutoring during the school years in the second, third, and 5<sup>th</sup> grades, as well as private in-school reading tutors in 2<sup>nd</sup> and 4<sup>th</sup> grade. It is concluded that [REDACTED] would not have progressed in reading skills with only the School District's provided WRS; in fact, [REDACTED] had experienced significant reading regressions when provided with only the School's Wilson reading program without the additional private LMB tutoring.

Most significantly, Sylvania did not provide their Wilson Reading interventions with even the minimum required fidelity of two sixty to ninety-minute Wilson reading lessons per week and [REDACTED] remained on Level 1 of the Wilson Reading program's 12 levels until the 5<sup>th</sup> grade, contrary to the 2-3 year average to complete the full 12-step Wilson Reading Program when provided with fidelity and the Reading research that supports the critical need for early reading skill acquisition in children.

[www.wilsonreadingsystems.com](http://www.wilsonreadingsystems.com).

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<sup>2</sup> ESY summers 2016, 2017, 2018. In addition, the Parent may have paid for a 4<sup>th</sup> ESY summer (2019) during the pendency of this litigation.

Thus, contrary to Sylvania's assertion that ■■■ experienced adequate and appropriate reading progress, the School's own data correlates with ■■■ experiencing widening reading gaps when provided with *only* the School District's 20-minute daily Wilson tutoring in the second-fifth grades and not any additional Parent-provided reading interventions. Specifically, and most persuasively, ■■■ regression was emphasized in the 4<sup>th</sup> grade when the Parent discontinued the private LMB programming and ■■■ was provided with only the Sylvania School's Wilson 20-minute daily, small group reading program in the fourth grade, directly resulting in the substantial regression in reading skills with ■■■ dropping from a 3.5 grade level equivalent (34%) at the beginning of fourth grade to a 1.8 grade equivalent (5 %) in March. Likewise, in second grade, ■■■ started at Sylvania reading at grade level with the School providing only the Wilson 20-minute daily reading program; by the middle of the year, ■■■ showed substantial regression. Significantly, Sylvania chose to downgrade ■■■ reading from 30 minutes daily in the 1<sup>st</sup> grade to only 20 minutes daily in the second grade, short of the minimum fidelity.

Therefore, the School District's Wilson reading intervention program alone, provided below the required Wilson program fidelity, was continually insufficient and inadequate to support and remediate ■■■ reading deficits in the 2<sup>nd</sup>-5<sup>th</sup> grades. Further, ■■■ remained on the Wilson Reading Level 1 of 12 Levels for three (3) years before progressing to Level 2 in the 5<sup>th</sup> grade, contrary to the WRS recommendation that 12 levels could be completed in 3-4 years. Therefore, it is concluded that because the Parent-provided ongoing private LMB tutoring starting after ■■■ reading evaluation in

Spring of the second grade (2016) and throughout the summers (2016, 2017, 2018), and because the Parent continued to provide remediation and responsive intervention support for ■■■ regularly documented reading regressions at Sylvania through the current the 5th grade year, ■■■ reading success and educational progress cannot be determined to have been *solely* as a result of Sylvania's Wilson reading program provided to ■■■ as suggested by the School District. Specifically, the fact that ■■■ reading skills quickly and substantially dropped two grade levels in 6 months in the 4<sup>th</sup> after receiving *only* the 20-minutes daily of the School District's Wilson reading program, along with the fact that the School District failed to provide the Wilson reading program with fidelity, fully supports the conclusion that the School District's 20-minute Wilson instruction was not reasonably calculated to enable ■■■ to make grade level reading progress in light of his normal average intelligence.

To the contrary, without the Parent's private tutoring interventions, the evidence fully supports finding that had ■■■ received only the School District's minimal 20-minute group reading supports, ■■■ would not have experienced any reading success and his grade level reading gap would have continually widened. This is particularly significant in the critical early grade years and in compliance with Ohio's Third Grade reading requirement. J.Exh. 29. Thus, the IHO ERRED in concluding that the Sylvania Schools provided ■■■ with a FAPE by providing the insufficient Wilson reading interventions and support for ■■■ without consideration of the fact that the School District failed to provide the Wilson program with fidelity and failed to remediate ■■■ on-going 2-year reading gap. Further, the IHO ERRED by not concluding that any of ■■■ reading remediation successes were directly as a result of the Parent providing ■■■

with on-going, private in-school reading tutoring and intensive summer reading programming.

Further, [REDACTED] quick and significant regressions when provided only the 20 minutes of Wilson small group reading underscores the substantial importance of the Parent-provided LMB tutoring and summer programming to support [REDACTED] critical reading skills advancement. As such, the IHO's conclusion that the School District's Wilson reading program provided [REDACTED] with "an IEP reasonably calculated to enable a child to make meaningful progress appropriate in light of the child's circumstances" is in error. IHO Decision at 24. Thus, the IHO conclusion that [REDACTED] 2017-2018 IEP provided [REDACTED] with a FAPE must be reversed. IHO Decision at 25.

Finally, the School District issuance of Notices of Absences based upon [REDACTED] attendance at tutoring programs in the 4<sup>th</sup> grade are punitive when compared to the School District's response to [REDACTED] absences for attending the same reading programs in the 2<sup>nd</sup> grade. The School District intentionally recorded [REDACTED] 4<sup>th</sup> grade absences as "unexcused" unlike the 2<sup>nd</sup> grade absences that were "excused" for attending the same LMB reading program outside of school. Significantly, the only difference between the two years is that the Parent signed a contract for the second grade tutoring agreeing to privately pay for the program and not seek reimbursement from the school for the LMB tutoring in exchange for the School District's agreement to not record [REDACTED] as absent.<sup>3</sup> Thus, although the School District had previously acknowledged that [REDACTED] could be

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<sup>3</sup> See, Parent Exhibit 9, "Agreement" 5/5/2016 "Based on assurances that [REDACTED] regularly will attend the Program, . . . the District will consider [REDACTED] absences during the Period to be excused." Para 2. Further, the Parent "waiv[ed] any and all claims . . . with respect to the provision of a free appropriate public education." Para 4. In addition, the Parent contractually agreed that the LMB program and transportation would be "at their expense." Para 1.

excused for the same Lindamood-Bell extra-curricular educational tutoring in the 2<sup>nd</sup> grade, in [REDACTED] fourth grade year, the School District changed the same type of absence for LMB tutoring to “unexcused.”

To not have recorded [REDACTED] absences as unexcused for the same LMB reading tutoring in the 4<sup>th</sup> grade that was recorded as excused in the 2<sup>nd</sup> grade is inconsistent. Further, the School has a legal obligation to provide a *free* and *appropriate* education and cannot condition their obligation to provide needed educational programming, particularly critical reading remediation and specialized instruction, on the Parent’s waiver of the School District’s responsibility to provide FAPE for the assurance that the student is not recorded unexcused; indeed, Parent cannot waive the School District’s legal obligations, including providing additional critical remedial reading instruction. Regardless of the motives, should the Parent need to seek private services to remediate substantive special education services that the School neglected to appropriately provide to the Student, pursuant to IDEA, the School District must be responsible for the payment for the services they failed to provide to the Student. There is no tenable legal foundation that would support a contractual provision for the Parent’s promise of paying for the private tutoring and not seeking reimbursement from the school, as well as waiving the School’s “provision of a free appropriate public education” in exchange for the School District to excuse a Student’s absence from school for a privately-paid remedial reading program that the School should have provided in the first place.

Here, the motive for recording the 4<sup>th</sup> grade absences as unexcused, however, seems more to avoid any acknowledgement of [REDACTED] ongoing, unmet educational

support needs for additional, more-intensive reading tutoring<sup>4</sup> than for retaliation, particularly in light of [REDACTED] significant regression when having access to only the School's insufficient 20-minute daily Wilson reading program. Nevertheless, to require a contractual promise to give up due process rights to seek reimbursement from the School District and provide the School with a release to provide FAPE in order to assure that a student is excused from school for remedial tutoring is unconscionable and could, indeed, be considered retaliatory. In fact, pursuant to ORC, a superintendent may approve of a student's absence "for a future limited period of time" pursuant to a written request by the Parent. Because the Student had, in fact, been previously excused from School for the same LMB tutoring program, there is no foundation upon which to consider the absences for the same private reading tutoring "unexcused."<sup>5</sup>

Accordingly, it is concluded that the School District's 20-minute daily Wilson programming was not provided with required fidelity and was insufficient and wholly inadequate for [REDACTED] to make appropriate educational progress, consistent with his abilities and academic potential. As such, *but for* the Parent's private LMB programing and tutoring, [REDACTED] would not have made any meaningful reading progress and would have experienced further reading skill regressions and grade-level deficiencies. Thus, the IHO erred in determining that the School District's 20-minute Wilson Reading program was "appropriately ambitious" to provide [REDACTED] with an "adequate" program to make meaningful progress. Therefore, the IHO conclusion dismissing Parent's complaint that Sylvania provided [REDACTED] with a FAPE must be REVERSED.

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<sup>4</sup> See, para 5: "This agreement shall . . . not serve as an admission that Student requires placement outside of the District."

<sup>5</sup> Notwithstanding the fact that the District also included a provision that the "Agreement is not precedent setting and shall have no bearing on Student's current and future educational programming and placement."



Further, as a result of failing to provide [REDACTED] with a FAPE, including failing to provide [REDACTED] with any substantive reading instruction during [REDACTED] attendance at [REDACTED] Elementary School, Sylvania Schools must fully REIMBURSE the Parent for the Lindamood-Bell reading programming provided to [REDACTED] in grades 2-5, including during the school year and summers, that did, in fact, provide [REDACTED] with appropriate remedial reading instruction that the School should have provided to [REDACTED]. And, in addition, Sylvania School must provide prospective services and payment for any continued private reading programming required during the pendency of this litigation. Finally, in light of [REDACTED] academic potential as a student with normal intelligence, and the School's failure to provide him with critical interventions and support services, Sylvania Schools must also prospectively provide appropriate intensive reading programming to fully remediate [REDACTED] ongoing two-year grade level reading deficit to [REDACTED] current grade level reading to allow [REDACTED] to access his grade level educational curriculum. Thus, [REDACTED] prospective remediation must also include tutoring as needed for substantive educational content [REDACTED] missed as a result of his un-remediated reading deficiencies, including intensive Math supports in light of his normal, average intelligence.

Further, because Sylvania has not shown that they could provide the necessary and appropriate services for [REDACTED] in the School setting, and that the school-provided Wilson programming was provided far below the required fidelity for several years, Sylvania's reading interventions are found to have been wholly inadequate to remediate [REDACTED] and provide him with the appropriate supports and services to make progress in his educational programming to advance from grade level to grade level. Therefore, because

■■■■ has be able to make appropriate grade level progress consistent with his normal intelligence abilities with the privately provided, intensive Lindamood-Bell programming, Sylvania must continue PROSPECTIVE READING SERVICES to provide ■■■■ with the LMB programming until such time that LMB testing supports a recommendation that ■■■■ no longer requires the intensive remedial reading interventions. Finally, the School must provide COMPENSATORY EDUCATION, as necessary, for ■■■■ to catch up with any academic content deficiencies as a result of the School's failure to appropriately and adequately remediate ■■■■ reading deficits that caused ■■■■ to fail to access grade level academics.

The reimbursement and prospective awards are correlated with the fundamental legal responsibility that the School District is required to provide ■■■■ with a FAPE, including appropriate and effective reading remediation and supports, to allow ■■■■ to fully participate in his educational opportunities in light of his intellectual potential as a student with a normal, average intelligence. That is, had Sylvania provided ■■■■ with the appropriate and necessary interventions in the first place to support him with acquiring the proper reading skills needed to access grade level curriculum to allow his *successful* academic advancement from grade level to grade level, the School District would not be in the position of providing reimbursement expenses.

Therefore, the IHO Decision denying the Parent reimbursement for private LMB tutoring is REVERSED. In addition, the IHO Decision that the Notices of Absences issued as unexcused absences for ■■■■ LMB private tutoring were not sent in retaliation for the Parent's due process complaint is also REVERSED.

Further, the IHO determination that [REDACTED] Notices of “unexcused” Absences were properly provided, as required, pursuant to the Ohio Revised Code, and not retaliatory is in error and, as such, is also REVERSED. Although the IHO’s conclusion was limited only the Notices, the School District must correct the recording error in the Student’s educational record to reflect that any absences for LMB private reading tutoring in 4<sup>th</sup> grade, or any grade, must be “excused,” consistent with the absences for the Student’s LMB private reading tutoring in the 2<sup>nd</sup> grade.

On SLRO Review, it is concluded the Parent is entitled to full REIMBURSEMENT for the privately provided in-school reading tutoring for [REDACTED] including, but not limited to, the private reading tutors in [REDACTED] second and fourth grade years, for the privately provided Lindamood-Bell private tutors and programing costs, including transportation expenses, during the 2016-2017 and 2018-2019 (3<sup>nd</sup> and 5<sup>th</sup> grades) school years, and for the privately provided Lindamood-Bell summer session program costs, including transportation, in the summers of 2016, 2017, 2018. In addition, Parent is entitled to REIMBURSEMENT for the private programming and tutoring expenses during the pendency of this litigation, including ESY 2019 LMB summer programming and transportation costs, and any private tutoring expenses, during the 2018-2019 school year.

## II. BACKGROUND

### A. STUDENT

The Student ([REDACTED]) in this matter is an 11-year-old Student with diagnoses of dyslexia, autism, and attention deficit disorder (“ADD”) and a history of early intervention services and programs. Parent Br. at 1; Tr. Vol.I, p. 45. [REDACTED] is a student of

average, normal intelligence and enrolled in Sylvania Schools at the beginning of Second Grade. Exhs.12,13 (Dr. [REDACTED] Currently, [REDACTED] a Fifth grader at [REDACTED] Elementary School (“[REDACTED]”), Sylvania City School District (“Sylvania”/”District”)<sup>6</sup>. Parent Br. at 2; Tr. Vol.I, p.47.

At an early age, [REDACTED] missed several developmental milestones, particularly those related to the development of speech, and, as such, was diagnosed with PDD-NOS, a neurodevelopmental disorder, in a subcategory of autism spectrum disorders, that is particularly related to the development of speech, including social skills, verbal, or nonverbal communication impairments. Tr. Vol. I, p.45, Pet Br at 2. By age two, [REDACTED] was enrolled in a variety of programs for children with speech and developmental delays and receiving 30-40 hours per week interventions, including CHIPS program at [REDACTED] Hospital, the [REDACTED] Autism Program, and Capable Kids. Id. Subsequently, [REDACTED] started Kindergarten at Capable Kids, in the [REDACTED], in 2013. Tr. Vol. I, p. 45; Pet Br. p. 1; See, October, 2013 Evaluation Team Report (“2013 ETR”).

[REDACTED] Kindergarten Reading Readiness Assessment at Capable Kids showed that while he demonstrated average abilities on the matching letters and number concepts, [REDACTED] demonstrated “very low abilities on phonological processing scale such as rhyming, blending, deletion, and phonemic identification and segmentation.” J.Exh 1, p.6. On the WIAT III Early Reading Skills subtest, [REDACTED] performed well below average. Specifically, [REDACTED] demonstrated 73% accuracy with naming letters, 40% accuracy with letter-sound correspondence, 8% accuracy with phonological awareness, and 40% accuracy on reading comprehension. J.Exh 2 p. 6. Tr. 6-7, 9. Further, although [REDACTED] demonstrated strong comprehension skills, he was unable to recognize the alphabet, either capital or

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<sup>6</sup> At the time of filing the due process Complaint on May 22, 2018, [REDACTED] was in the 4<sup>th</sup> grade.

small case letters, and struggled with matching letter and sounds, rhyming words, and recognizing beginning and ending word sounds, consistent with phonological awareness deficits. Tr. 6-7, 9. As such, by the end of kindergarten, [REDACTED] was reading at less than a pre-K level. Tr. 7. Subsequently, [REDACTED] parents consulted with Dr. [REDACTED], a developmental pediatrician, who identified [REDACTED] as having significant reading deficits, and advised that [REDACTED] would require intensive phonics-based reading interventions. Tr. 10, Pet.Br.p 2.

In first grade, 2014-2015, [REDACTED] was enrolled in [REDACTED] (“Hope Academy”), a [REDACTED] Public charter school specializing in addressing the needs of children with neurodevelopmental and autism spectrum disorder, particularly speech, language, and social skills deficits and sensory processing, in small group classes. Tr. Vol. 1, p.46. In December 2015, [REDACTED] conducted an ETR (“2015 ETR”) with the [REDACTED] finding that [REDACTED] had significant reading deficits from dyslexia; and, that he lacked phonetic awareness and experienced underdeveloped reading abilities, struggling with phonic skills and sight word recognitions, consistent with dyslexia, and Dr. [REDACTED] impressions and recommendation. Given [REDACTED] significant reading deficits, Hope Academy prepared an IEP for [REDACTED] that included English Language Arts and a Foundational Skills/Spelling goals for which he was provided 30 minutes daily of individual or small group reading interventions, five days per week, including direct and specially designed instruction. Pet. Br. p.2; J. Exh. 2.

Additionally, Parent had retained the service of a private certified reading specialist, [REDACTED] (“[REDACTED]”), who provided Orton-Gillingham (“OG”) reading interventions several hours per week over the summer and, subsequently, every

morning before school Id. By February, [REDACTED] had made little progress with the OG interventions, struggling with letter and sound recognition, but he continued to work on the pre-primer (pre-kindergarten) sight wordlists. Tr. Vol. II; J.Exh. 2.

In Second grade, 2015-2016, Parent enrolled [REDACTED] in [REDACTED] Elementary School, in the Sylvania Public School District (“District”), because Parent sought a more social and inclusive environment for [REDACTED] after he had made substantial progress in his autism-related social and sensory issues in first grade at [REDACTED]. Tr. Vol. I, p. 47. However, [REDACTED] reading assessments, performed by [REDACTED], showed that he continued to work more than two grade levels behind (pre-K) and have significant language-based deficits, in particular, phonological awareness (3<sup>rd</sup> percentile), letter identification skills (0.3 percentile) and word attack skills (less than 0.5 percentile), with word recognition skills below the 1st percentile, consistent with dyslexia. J. Exh. 2; Tr. Vol. I, p.47-48. Throughout 2<sup>nd</sup> grade, [REDACTED], provided interventions and reading assessments for [REDACTED]. pursuant to the [REDACTED] 1<sup>st</sup> grade IEP reading goal that [REDACTED] will “know and apply grade level phonics and word analysis skills.” J.Exh. 2.

In preparing [REDACTED] IEP for second grade, Sylvania Schools adopted and reviewed [REDACTED] first grade ETR (2013) and IEP (2014-2015) from [REDACTED], including the private reading assessments that identified [REDACTED] dyslexia and a two-grade level reading deficit that was especially profound in phonics and decoding, the critical building blocks for reading, as well as [REDACTED] demonstrated memory delays and deficits as a result of his autism spectrum disorder (“PDD-NOS”), slowing down [REDACTED] progress J. Exh.3, p.7; J. Exh.3, p.8. Although Sylvania “reviewed [REDACTED] assessments” showing profound dyslexia, the IEP team rejected the results as “not norm-based because too

narrow” despite results from WIAT-III and DAS-II. See, ETR (10/18/2013). Thus, in rejecting the Hope Academy assessments, Sylvania did not consider [REDACTED] dyslexia and two-grade level reading deficit that was “profound in phonics and decoding” in developing [REDACTED] 2<sup>nd</sup> grade IEP. See, also J-Exh.10, Comprehensive Psychoeducational Examination, 2/9/2016.

Conversely, however, the record shows that [REDACTED] reading assessments, find [REDACTED] with a “documented deficits in language,” especially a phonological processing deficit (8%) (“very low range”), which included Below Average decoding and phoneme identification and segmentation deficits, lacking phonemic awareness and letter sound identification, and struggles with phonics and sight word recognition, and Below Average Early Reading Skills. See, ETR (10/18/13); Progress Report (10/23/15). Further, contrary to Sylvania’s assertion that the data was not “norm based,” the results were reported from norm-based assessments, including WIAT-III and DAS-II, as reported by [REDACTED], Sylvania School Psychologist; ETR (10/18/2013). Likewise, Sylvania had the data from [REDACTED] School Readiness assessments, reporting that [REDACTED] had “very low abilities in phonological processing such as rhyming, blending, and dialectic and phonemic identification and segmentation.” J-Exh. 3, 2015-2016 IEP.

On December 17, 2015, Sylvania Schools formalized [REDACTED] 2<sup>nd</sup> grade 2016-2016 IEP, identifying [REDACTED]’s autism as his qualifying disability, but including reading support, with a *downward* modification of [REDACTED] small group reading decoding intervention from 30 minutes a day to 20 minutes a day, five days per week, with the school’s intervention specialist using the OG-based Wilson Reading Program.<sup>7</sup> J-Exh 7.

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<sup>7</sup> 20-minute daily reading intervention (100 mins/week) is below the Wilson Reading System fidelity requirements. See, [www.wilsonreadingsystems-fidelity.com](http://www.wilsonreadingsystems-fidelity.com).

Thus, despite [REDACTED] lack of progress with an OG reading program in 1<sup>st</sup> grade, the District determined that the OG-based Wilson Reading Program, at 30% less than [REDACTED] was provided in the 1<sup>st</sup> grade, was appropriate to provide [REDACTED] with effective reading support. Further, in developing the 2<sup>nd</sup> grade IEP, Sylvania again disregarded the private reading assessments that identified [REDACTED] dyslexia and a two-grade level reading deficit. J-Exh.3, p.7. That is, despite including [REDACTED] dyslexia data identification from [REDACTED] pre-schools and first grade in his 2<sup>nd</sup> grade IEP, Sylvania instead chose to qualify [REDACTED] in the autism category, although [REDACTED] was on the far mild end of the autism spectrum with “PDD-NOS” (“pervasive developmental disability, no origin specified), yet on the more urgent need end of the dyslexia spectrum, with a two-year reading deficit at less than K-level, and particularly in light of his age and the critical reading skill window of opportunity closing in the third grade. See, J-Exh.2, at 1-2, Capable Kids, [REDACTED] [REDACTED]. Instead, Sylvania included reading under the “additional needs” section of [REDACTED] 2<sup>nd</sup> grade, 2015-2016 IEP, focusing instead on [REDACTED] low spectrum autism sensory and communication needs.

Specifically, the Sylvania evaluation team found needs in several additional areas, besides dyslexia, including “executive functioning, social communication, and academics (particularly reading) [with [REDACTED] qualifying for special education under the category of autism and additional needs in areas of Executive functioning, reading, writing, communication, and social interactions.” J-Exh. 3. In addition, the IEP included Intervention Specialist support for ELA, communication, and foundational skills with a multi-sensory approach, including vision, touch, speech, and hearing to apply to learning reading skills. Id. For additional support, the Parent privately hired two Sylvania teachers



from [REDACTED] Elementary School, an intervention specialist and a certified reading specialist, to supplement [REDACTED] specialized instruction during and after the school day, two to four hours per week. Pet. Br. at 4, Tr. Vol. 1 at 49.

With [REDACTED] 20-minute Wilson daily reading supports, Sylvania's December 2015 testing results showed that [REDACTED] reading remained at a pre-Kindergarten level with decoding skills below the 1<sup>st</sup> percentile, and reading levels regressing to more than two years behind grade level. Tr. Vol. I, p. 50-55; J-Exh. 8. Further, in light of [REDACTED] profound reading deficits, with [REDACTED] IEP and progress reports showed his ongoing, more than 2-grade level un-remediated reading deficit. Nevertheless, Sylvania's reading goals for [REDACTED] include apply *grade-level* (second grade) phonics and word analysis skills in decoding words with 80% accuracy; with unreachable goals, [REDACTED] first quarter progress was recorded only as "receiving additional movement and heavy work opportunities to help him focus and attend in the classroom setting." J-Exh. 32, IEP Progress Report, 10/23/2015, at 1. In October 2015, [REDACTED] continued reading at the pre-primer reading level, with an accuracy of 11/40 (36%) *pre-primer* Dolch sight word list, improving from the month before at 3/12 (25%), but still retaining an un-remediated reading deficit of over two (2) years, with a DRA 3 reading level (with 16-18 average for 2<sup>nd</sup> grade). Id, at 1. Indeed, Sylvania had disregarded [REDACTED] assessments, identifying [REDACTED] dyslexia and two grade levels reading deficit.

Subsequently, in February 2016, on the advice of [REDACTED] developmental pediatrician, Dr. [REDACTED], Parent consulted with Dr. [REDACTED] a pediatric educational neuropsychologist, who confirmed [REDACTED] diagnoses of autism, dyslexia, and ADHD. J-Exh. 10 at 8 ("Dr. [REDACTED] Comprehensive Test Results, February 2, 2016, "Dr. [REDACTED]

Report 2016”). Specifically, the results showed [REDACTED] Basic Reading Composite (2<sup>nd</sup> percentile), Word Reading (1<sup>st</sup> percentile; <1.0 GE), and Decoding ability (3<sup>rd</sup> percentile; <1.0 GE) were extremely low; his KTEA Reading Score was also extremely low at 0.1 percentile, <1.0 GE) resulting in Dr. [REDACTED] adding the “additional diagnosis (beyond Autism Spectrum Disorder) of Specific Learning Disability, with Impairment in Reading: 315.00 (F81.0) also known as Dylsexia.” Id. at 9. In fact, Dr. [REDACTED] notes that “despite having all the data and features of dyslexia historically, [REDACTED] had not been formally diagnosed with dyslexia.” Id. Further, Dr. [REDACTED] outlined specific educational needs in light of [REDACTED] processing speed and working memory deficits, emphasizing auditory instruction, additional time and repetition to process information, and extra time to complete tasks that may take him longer than his class peers. Id. at 19-20. Dr. [REDACTED] recommended the Lindamood-Bell Visualize and Verbalize approach along with an Orton-Gillingham or Seeing Stars program to help [REDACTED] “build phonemic awareness, word reading, and reading comprehension.” Id. at 9, 11. Dr. [REDACTED] recommended that [REDACTED] be evaluated for Lindamood-Bell reading intervention for daily in-school interventions as well as summer intervention “to close the current reading gap.” Id. at 12. The School District declined to adopt any of Dr. [REDACTED] recommendations.

In March 2016, pursuant to Dr. [REDACTED] recommendation, [REDACTED] was evaluated by the Lindamood-Bell program showing that [REDACTED] overall reading abilities, especially decoding and phonemic awareness, had remained at below a Kindergarten level, in excess of a 2-year reading deficit, at the 1<sup>st</sup> percentile; on the other hand, [REDACTED] WISC-IV aptitude tests to showed [REDACTED] to have average, normal intellectual abilities. Tr. Vol.I, p.55-57. The Lindamood-Bell recommendation for [REDACTED] reading remediation was

intensive reading intervention four (4) hours per day, five (5) days per week, with a focus on phonics and decoding. Pet. Exh.9.

On May 2, 2016, [REDACTED] began a 12-week, four hours a day, five days per week, intensive Lindamood-Bell program focused on decoding and phonemic awareness. See, Pet. Exh. 9. Because the program started before the end of the school year, Sylvania and the Parent entered into a written agreement that the Parent would pay for the Lindamood-Bell private program and not seek reimbursement, and that Sylvania would excuse [REDACTED] from school in the mornings for the four weeks he was still enrolled in school while he was attending the LMB program if the Parent agreed to waive her right to file a due process complaint. Pet. Exh. 9 (“Agreement”). Thus, the Agreement was prepared to assure that the Parent would fully pay for the private Lindamood-Bell program, to assure that [REDACTED] was not recorded as unexcused from school and subject to truancy during May while participating in the Lindamood-Bell reading program, and to waive any claims against the School with respect to FAPE during the May 2016 participation in the LMB program. Id. ¶2. Also, the contract provided that the Parent’s LMB placement could not be considered as an agreement that [REDACTED] required an out-of-district placement nor have any bearing on future educational placement or programming.

After the school year ended, [REDACTED] continued the LMB program throughout the summer, completing a 12-week intervention program. In August, 2016, at the conclusion of the 12-week program, exit testing showed that [REDACTED] decoding skills had advanced two full years, to second grade level, and his reading fluency skills to the mid-first grade level. Pet. Exh. 39 (“Lindamood-Bell Summary Chart” see, 8/15/2016).

In 3<sup>rd</sup> grade, [REDACTED] returned to [REDACTED] Elementary School with the same Sylvania School's Wilson reading intervention program of 20 minutes daily provided in a small group by an intervention specialist. Resp. Exh.10 at p.14. In addition, as recommended at the conclusion of the 2016 LMB summer program, the Parent continued to provide [REDACTED] with private LMB intervention for 1 hour daily before school, four hours on Saturdays, and four hours daily during school breaks to avoid regression. Tr. Vol.I pp.60-61.<sup>8</sup> The School District testing at the beginning of the 3<sup>rd</sup> grade confirmed that [REDACTED] was reading third and fourth grade material and that his decoding skills had exceeded his grade level; further, the LMB testing results showed that the summer programming had remediated [REDACTED] phonetic reading and decoding from pre-K level at the end of 2<sup>nd</sup> grade, to the second grade level at the beginning of 3<sup>rd</sup> grade. J.Exh.10; Parent Exhs.26; 39. In February 2017, as [REDACTED] continued to receive both the School's 20-minute daily Wilson Reading tutoring and the daily 1-hour LMB tutoring before school, [REDACTED] reading and decoding skills had further progressed to a 4.5 grade equivalency. Pet. Exh. 39. In addition, [REDACTED] achieved an Accelerated on the Ohio Third Grade reading test. J-Exh.14, at 3.

At the end of third grade, [REDACTED] returned to a second summer of full-time LMB tutoring, four hours a day, five days per week during the summer. CITE. . Following the 2017 summer program, prior to 4<sup>th</sup> grade, [REDACTED] LMB testing showed some slight declines in decoding and phonics due to some additional summer focus on improving fluency and comprehension. Nevertheless, [REDACTED] started the 4<sup>th</sup> grade with a 3.5 grade level reading. Pet. Exh. 39.

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<sup>8</sup> The Parent pointed out in Brief that her privately provided LMB tutoring amounted to "eight times the amount of intervention provided by the School District." Parent Br. at 7. This is especially significant given [REDACTED] reading success in the 3<sup>rd</sup> grade.

Prior to entering 4<sup>th</sup> grade, [REDACTED] was again evaluated by Dr. [REDACTED] who continued to recommend both Orton Gillingham and Lindamood-Bell programs to address [REDACTED] significant reading deficiencies, particularly in decoding and phonemic awareness. J.Exh.12 (Comprehensive Psychoeducational Evaluation, Dr. [REDACTED] 8/10/18), p.10; J. Exh. 13, p. 6. Dr. [REDACTED] emphasized that [REDACTED] continued to require a “strong dose” of “intensive and ongoing reading intervention during the school day (120-180 mins/day, 4-5 days per week).” Id. He also recommended frequent RTI assessments, at least every 4-6 weeks to assess ongoing intervention needs. Id. Ultimately, Dr. [REDACTED] again recommended [REDACTED] continue with the Lindamood-Bell program due to the program’s extensive neurological research, in light of [REDACTED] autism, and their success in intensive interventions in dyslexia that were individualized and data driven, and, also finding that OG interventions alone with [REDACTED] had been ineffective for [REDACTED] J. Exh.13, p. 6.

In 4<sup>th</sup> grade, Sylvania continued to provide the 20-minutes daily Wilson group reading intervention to focus on phonemic awareness and decoding retention. Parent Br. at 8. As a result of [REDACTED] success with the 3<sup>rd</sup> grade school-year privately-provided LMB tutoring<sup>9</sup> and the 2016 and 2017 LMB summer reading programs, resulting in near to and above grade-level phonics and decoding skills, the Parent discontinued providing in-school, privately-paid LMB intervention programming during the 4<sup>th</sup> grade school year and, instead, provided private in-home afterschool reading support. As such, at school [REDACTED] received only the School District 20-minute daily Wilson reading program starting at the beginning of 4<sup>th</sup> grade. Tr. Vol I, 65; Resp. Exh. G.

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<sup>9</sup> [REDACTED] received LMB tutoring one hour before school and four hours on weekends

In February, 2018, however, in response to [REDACTED] declining reading skills, the Parent hired a licensed teacher (Ms. [REDACTED]) to provide additional reading intervention after school, 2.5 hours per day, three days a week, offering 3-4 times more phonic and decoding interventions than the School District. Nevertheless, at the March 2018 IEP conference, Parent discovered that [REDACTED] had already experienced significant declines, with [REDACTED] decoding skills regressing from the 58<sup>th</sup> percentile at the beginning of the year to the 5<sup>th</sup> percentile, from a near-fourth grade (3.5) reading equivalent to a first grade (1.8) reading equivalence. As such, Parent reinstated the privately provided LMB programing before school. Parent Br. at 10; Pet Exh. 39 Summary Chart. Further, [REDACTED] reading level on the Star Reading (AIR) test had fallen from Accelerated, the previous year (3<sup>rd</sup> grade) Pet.Exh. 27, to Limited (4<sup>th</sup> grade). Pet. Exh. 29.

Further, between the 3<sup>rd</sup> and 4<sup>th</sup> grades, [REDACTED] had not exceeded a 2.5 grade equivalency for phonemic reading and decoding on the School's Slosson and Gray Oral Reading Tests. Pet. Exh. 39. Thus, correlating to the withdrawal of the Parent-provided in-school LMB reading supports, [REDACTED] was unable to progress, indeed regressed, when provided with only the School District 20-minute daily Wilson program between the beginning of 4<sup>th</sup> grade, 2017 and March, 2018. Nevertheless, the IEP team rejected Parent's request for 2018 ESY, finding that [REDACTED] did not qualify. For the third summer, Parent privately placed [REDACTED] in the LMB summer program for remediation of [REDACTED] 4<sup>th</sup> grade regression.

In 5<sup>th</sup> grade, [REDACTED] started school with a remediated 3.9 grade equivalency in phonemic reading and decoding following the 4<sup>th</sup> grade spring and 2017 summer LMB reading programs. Despite the correlating improvement data with LMB tutoring,

Sylvania continued to provide [REDACTED] with the 20-minute daily Wilson reading program, without fidelity. Starting at the beginning of the school year, the Parent returned [REDACTED] to the privately provided LMB tutoring for two hours every morning (8:30-10:30am), five (5) days a week. By mid-January, [REDACTED] word decoding and reading fluency had increased, successfully attaining fifth-sixth grade reading skills.

On May 22, 2018 Parent filed a due process complaint. On September 10, 2018, the Parent amended her due process complaint to include the Summer 2018 LMB reading program reimbursement. Parent Br. at 5. The IHO Decision agreed with the SCHOOL DISTRICT that Parent was not entitled to reimbursement for LMB because the School “provided [REDACTED] an IEP that afforded him a FAPE” and, as such, the private LMB tutoring was a “gold standard” program that the Parent preferred but was not required for [REDACTED] to make appropriate progress in light of his circumstances. IHO Decision at 53.

Accordingly, it is found that the Parent necessarily and unilaterally provided the essential intervention tutoring required for [REDACTED] to participate in his education and make meaningful progress from grade to grade. That the specific program chosen by the Parent was the Lindamood-Bell program is not the essential issue; rather, the issue is that School District provided an inadequate Wilson Reading program, 20 minutes daily, in a small group, without the required program fidelity and with the knowledge that [REDACTED] had not been successful in making any measurable reading progress with Orton-Gillingham-based instruction in the first grade, even when provided 1:1 and in excess of the minimum fidelity requirements, receiving 30 minutes daily in-school, and additional private OG tutoring after school. That is, when [REDACTED] enrolled in the Sylvania Schools in the second grade, the School District intentionally downwardly adjusted [REDACTED] reading

intervention to a small group and less time than required by the Wilson Reading Program minimum fidelity requirements.

Further, and more concerning, is that the School District intentionally disregarded [REDACTED] dyslexia identification and extensive reading data that showed [REDACTED] experiencing an on-going, un-remediated 2-year reading deficit. Instead, the School District summarily dismissed the dyslexia identification and the reading deficit data as “not norm-based” and intentionally chose, instead, to identify [REDACTED] qualifying IDEA disability *solely* as “high-functioning” autism (PDD-NOS). See, 2015 ETR; 2015-2016 IEP. In fact, [REDACTED] autism diagnosis was on the far, mild end of the autism spectrum, as a pervasive developmental disability, a sub-category of neurodevelopmental disorders. See, *DSM-V* (Table 5; see, autism interactive autism network: “does not fully meet the criteria for autistic disorder or Asperger’s syndrome” (April, 2007). While [REDACTED] autism also requires consideration of supports and services consistent with [REDACTED] social and emotional challenges, [REDACTED] most significant challenges are language-based, specifically dyslexia, learning to read. That is, the record supports that the School District intentionally dismissed the extensive, historical evidence of [REDACTED] dyslexia and substantial reading deficits and, ultimately, merely passed him from grade to grade with an inadequate reading program.

Thus, the Parent was put in the position of providing critical early reading interventions for [REDACTED] that the Sylvania failed to make available to [REDACTED]. In addition, not only did the School District ultimately provide such an insufficient program in light of [REDACTED] serious reading deficiencies and concomitant autism and ADHD such that [REDACTED] experienced negligible reading progress, on-going reading regressions, and compromised



access to academic content in the 2<sup>nd</sup> and 4<sup>th</sup> grades, but the School District also continued to insist that the reading *successes* ■■■ experienced were solely as result of their daily 20 minute group Wilson reading program, insufficiently provided without the required fidelity, thereby fully discounting the extensive nearly year-round parentally provided private tutoring, including the intensive LMB summer program in 2016, 2017, and 2018, and before school, and the last month of 2<sup>nd</sup> grade and throughout the 3<sup>rd</sup> school year. That is, the School District took credit for all of ■■■ reading progress, but provided inadequate, substandard programming. Indeed, remarkably, when LMB supports were not provided in the 2<sup>nd</sup> grade and the first 5 months of 4<sup>th</sup> grade, ■■■ fully regressed back to the two grade-level deficit. Thus, all of ■■■ grade-level reading success were fully correlated only to the ■■■ extensive parentally-provided LMB reading programming in the 2<sup>nd</sup>-5<sup>th</sup> grades at Sylvania.

Specifically, in the fourth grade, for the several months when the Student was provided *only* the School District's daily 20 minute group Wilson program, without the Parent's additional private reading interventions, ■■■ showed extensive regression from beginning the school year at 3.5 grade level to as low as 1% (1.8 grade level equivalent) Exh. 39. Likewise, in the second grade, ■■■ was unable to progress beyond his 2-year reading deficiency, remaining in the pre-primer reading levels, and testing in the 1<sup>st</sup> percentile throughout the year with only the School District downwardly adjusted 20-minute, daily small group Wilson reading programming. Thus, the record fully supports the conclusion that ■■■ would have shown further extensive regression without the LMB private interventions as highlighted/reported by the assessment data when Student received only the 20-minute Wilson program in 4<sup>th</sup> grade.

That is, had the Student been provided *only* the Parent's programming, the Student would have experienced grade level successes and the ability to access grade level academics and successfully progress from grade level to grade level. OR had the Student received *only* the School District Wilson reading program, the Student would have shown little progress and experienced a widening reading deficit over the 4 years he attended Sylvania Schools. Thus, the evidence fully supports that the SCHOOL DISTRICT's reading programs provided by Sylvania were wholly inadequate and failed to provide ■■■ with a FAPE, and that ■■■ reading successes were fully correlated with the provision of the Parent's private program interventions.

Finally, in addition to the School District's failure to properly provide ■■■ with an appropriate reading program to support ■■■ needed reading interventions, the SCHOOL DISTRICT failed to provide additional reading support services to remediate ■■■ on-going 2-year reading gap. As such, ■■■ only reading progress that provided him access to his educational curriculum was the Parent's privately provided LMB programming. In addition, in the extensive independent educational psychological testing results and evaluations, ■■■ did not demonstrate an intellectual disability; to the contrary, ■■■ tested in the normal intellectual abilities range. As such, with proper reading services, ■■■ should have been participating in grade-level curriculum and making grade-level progress. Thus, Sylvania failed in offering appropriate remediation to close ■■■ ongoing 2-year reading gap contrary to their legal responsibilities. That is, the evidence supports finding that the Parent's LMB reading programming was wholly responsible for providing ■■■ with the needed reading and educational supports and services in order to provide him a meaningful and appropriate education in light of his

normal, average intelligence capable of progressing from grade level to grade level in the second through fifth grades. Therefore, School District failed to provide [REDACTED] with a FAPE.

Accordingly, the Parent is entitled for REIMBURSEMENT for the provision of private reading services that supported [REDACTED] participation in the Sylvania school grade level curriculum that Sylvania wholly failed to provide. Reimbursement is appropriate for the private programs that were provided in the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grade school years and in the 2016, 2017, and 2018 summers, as well as during the pendency of this litigation, that prevented and remediated the serious reading regressions that [REDACTED] was experiencing and would have continued to experience cumulatively as demonstrated by the 2<sup>nd</sup> and 4<sup>th</sup> grade assessments when [REDACTED] received only the Sylvania reading program, and by [REDACTED] success in the 3<sup>rd</sup> and 5<sup>th</sup> grades, when with Parent provided private LMB tutoring throughout the school year. In fact, the Parent provided the critical remedial services for [REDACTED] that were required as a result of the School District's failure to provide an appropriate education. Further, the School must provide PROSPECTIVE Relief, including academic remediation, as is necessary to fully remediate [REDACTED] 2-year reading gap to allow [REDACTED] to catch up to grade level reading competencies and to close the educational content gap that resulted from the ongoing two-year reading gap and inadequately provided Wilson Reading program that prevented [REDACTED] from making appropriate progress and accessing critically grade level educational content.

Finally, the Respondent School District refers to LMB programing as the "gold standard" and argues that under the IDEA, Student is not entitled to education pursuant to a parentally preferred program placement. Further, the IHO agreed with the School

District that the LMB program was simply an unnecessary “gold standard,” parent-preferred program.

The School District’s obligation to the Student is to provide appropriate instruction and support to confer sufficient educational benefits to provide a free appropriate public education in the least restrictive environment. Thus, because the burden is on the School District to provide the Student an appropriate education, the School District is responsible for selecting the methodology and instruction for the individual Student. Br at 23-24. Indeed, Sylvania is correct that they bore the burden of providing █████ with appropriate education and had Sylvania selected appropriate instruction to remediate █████ to grade level reading competencies, there would be no grounds upon which to reimburse the Parent for additional programming. However, here, Sylvania chose to provide █████ with a wholly insufficient and inadequate Wilson reading program (“WRS”) 20-minute daily reading group instruction that was delivered without the required fidelity. The results of providing only the 20-minute WRS school-chosen program are emphasized in both the 2<sup>nd</sup> and the 4<sup>th</sup> grade reading assessments when the Parent did not supplement █████ reading with private programs and █████ only reading program was the School District 20-minute WRS. While the evidence suggests that the School District was considering delivering the Wilson reading program with the required fidelity of a minimum of two (2) full reading blocks each week (at least 120 minutes with two full 60 minute lessons; 30-minute lesson blocks), the proposed improvement was simply too late for █████ School District Br. at 26; proposed 2018-2019 IEP (30 minutes, WRS reading; 15 minutes writing; improving the program delivery to minimum fidelity).

Accordingly, Parent is entitled to Reimbursement for the provision of reading services that supported [REDACTED] learning to read and allowed [REDACTED] to progress from grade to grade and access grade level content in the Sylvania Schools.

B. PROCEDURAL HISTORY

This due process complaint was originally filed on May 22, 2018, by the Parents on behalf of their minor child, and was subsequently amended on September 10, 2018. See, Due Process Complaint and Request for a Due Process Hearing, September 10, 2018 (“Complaint”). Following a Due Process Hearing on December 10, 2018, on February 14, 2019, IHO Matthew Rohrbacker issued the IHO Opinion, concluding that Sylvania School’s Wilson Reading program had provided [REDACTED] with a FAPE and provided [REDACTED] with appropriate reading instruction in grades 2-5 at Sylvania School District. IHO Opinion at 24.

Further, the IHO found that the District provided [REDACTED] with an IEP that enabled him to make progress in light of his circumstances, in consideration of *Endrew F.* and, as such, was provide a free, appropriate public education (“FAPE”). IHO Opinion at 24. Thus, the IHO concluded that Parent was not entitled to reimbursement for the privately provided reading tutoring for [REDACTED] including private reading tutors in [REDACTED] second and fourth grade years, the Lindamood-Bell private tutors during the 2016-2017 (3<sup>rd</sup> grade), and 2018-2019 (5<sup>th</sup> grade) school years, and the Lindamood-Bell summer session programs in the summers of 2016, 2017, and 2018. IHO Opinion at 22, 23, 25. Further, the IHO determined that the Notices of Absences were properly provided pursuant to the Ohio Revised Code and not in retaliation for [REDACTED] absences for private tutoring or for

filing a Due Process Complaint. IHO Opinion at 24-25. The Parent filed an appeal of the IHO Decision on March 22, 2019.

### III. APPEAL ISSUES

#### 1. The Parent's Appeal

Parent identified six (6) “Issues to be Considered on Appeal” in the Notice of Appeal; specifically, “[w]hether the IHO erred: 1) in deciding that special education services provided by Sylvania failed to provide FAPE; 2) in deciding that private LMB reading intervention services provide by Parent were not appropriate or necessary for [REDACTED] to receive FAPE by: §§ 2(a-q); 3) in failing to [] properly apply precedents of the 6<sup>th</sup> Circuit and S.Ct. requiring that the District determine and provide such educational services as will confer meaningful educational benefit gauged [in] relation to [REDACTED] potential; 4) by concluding that the District did not retaliate against Parent and [REDACTED] by treating [REDACTED] participation in LMB intervention services during the first two hours of school as unexcused tardy; 5) by concluding that Parent’s request for reimbursement for costs of independently providing reading intervention services to [REDACTED] through LMB should be denied; and 6) by concluding that there was insufficient evidence to require retroactive reimbursement or prospective assumption of the cost of reading interventions through LMB.” Petitioner’s Notice of Appeal<sup>10</sup>, Exh. B.

Further, in their Appeal Brief, the Parent argues (7) assignments of error: that the IHO 1) Misapplied Supreme Court and Sixth Circuit Precedents;<sup>11</sup> 2) Erred by

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<sup>10</sup> The Parent’s Notice of Appeal issues will be combined with the issues listed and addressed in the Parent’s Appeal Brief, as organized in the Parent’s Appeal Brief. Petitioner’s Notice of Appeal, Exh. B.

<sup>11</sup> The Parent’s first Appeal issue addressed in the Appeal Brief is a section of supporting legal authority titled “Applicable Precedents of the Supreme Court and Sixth Circuit Require That a School District Provide Such Educational Services As will confer Meaningful Benefit Gauged in Relation to a Child’s

Concluding that Lindamood-Bell Testing Not Properly Administered; 3) Erred By Concluding That Lindamood-Bell Interventions Were Inappropriate Because The Program Repeatedly “Started Over”; 4) Erred by Concluding The Lindamood-Bell Reading Interventions Were Not Individualized; 5) Erred In The Lindamood-Bell Intervention Provided To ██████ During the Fifth Grade Year Was Not The Least Restrictive Alternative; 6) Erred By Concluding That ██████ Did Not Qualify For Summer Intervention Services (“ESY”); and 7) The District’s Adverse Treatment of ██████ Involvement In Lindamood-Bell Interventions During the 2018-2019 School Year. Parent’s Appeal Br. 16-28, §§IIA ((a)-g); B.

## 2. The School District Appeal

On appeal, the School District asserts (5) assignments of error: 1) Petitioner’s claim for reimbursement for summer 2016 ESY tutoring is time-barred; 2) ██████ was not eligible for ESY for the summers of 2017, 2018; 3) Petitioner is not entitled to reimbursement for LMB tutoring because ██████ IEPs and proposed IEP provide him with a FAPE; and, further, Petitioner is not entitled to a “gold standard” program 4) Petitioner did not establish progress was attributable only to outside tutoring; 5) Petitioner failed to establish that the District retaliated against her. Sch. Dist. Br. 19-29.

## 3. Joint Appeal Issues

Specifically, the Joint Issues to be resolved as identified in the Appeal Notices and Briefs will be considered as such:

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Potential.” §II.A(a) at 12. As the case law in §II.A(a) is not specifically applied to any certain facts or arguments on appeal, it is not included as a specific Issue on Appeal; however, the Petitioner’s authority is relevant and is considered throughout the Decision. Likewise, in Parent’s Notice of Appeal (§3), the Parent asserted that the IHO “fail[ed] to [] properly apply precedents of the 6<sup>th</sup> Circuit and S.Ct. requiring that the District determine and provide such educational services as will confer meaningful educational benefit gauged [in] relation to ██████ potential.” Notice of Appeal, §3.

- A. Whether Sylvania provided [REDACTED] with a **FAPE** in the 2<sup>nd</sup>-5<sup>th</sup> grades; (Parent Notice of Appeal ##1,2; School District Appeal Br.#3).
- B. Whether the Parent's **Lindamood-Bell (LMB)** private reading services were essential to [REDACTED] reading remediation and progress; Parent Notice of Appeal ##1,2(a-q); Parent Appeal Br. ##2-5; School District Appeal Br. ##3-4).
- C. Whether [REDACTED] required **ESY** services to prevent reading skills regression and recoupment over the summer;
- D. Whether [REDACTED] unexcused absences were recorded in **Retaliation** for [REDACTED] participation in LMB private reading services during the school day, (Parent Notice of Appeal #4; Parent Appeal Br. #7; School District Appeal Br. # 5) and
- E. Whether [REDACTED] Parent is entitled to **Reimbursement** for providing [REDACTED] with LMB private reading services during the school year and summers (Parent Notice of Appeal ##5,6; School District Appeal Br. ## 1,3)

#### IV. STANDARD OF REVIEW and JURISCHOOL DISTRICTICTION

In Ohio, at the conclusion of an IHO hearing and issuance of a Final Decision a party “may appeal the findings and decision” in writing to the Ohio Department of Education. O.A.C. §3301-51-05(K)(14)(b)(i), further referenced in Ohio Operating Standards for the Education of Children with Disabilities, OH. Op. Stds. §3301-51-05(K)(14)(b)(i) (effective July 1, 2014). To perfect and vest SLRO jurisdiction, the appealing party must identify specific errors in a decision so as to properly notify the opposing party of the specific issues that are asserted on appeal so that they can be



afforded adequate and appropriate appeal preparation. Thus, the appeal notice “shall set forth the order appealed and the grounds of the party’s appeal” and “shall notify the other party of the filing of the appeal.” O.A.C. § 3301-51-05(K)(14)(b)(i)(a)(b); Ohio Op. Stds. §3301-51-05(K)(14)(b)(i)(a)(b).

Here, the Parent’s Appeal properly identified the specific grounds of their appeal. Accordingly, this SLRO review considered the entire record and the IHO Decision *in toto* to determine *de novo* whether the evidence fully supported the IHO’s factual findings and legal conclusions, specifically the Parent Issues §§1(a-g)-II in the Parent’s Appeal Brief and §§1-6 in the Parent’s Reply Brief. Thus, this SLRO is vested with the jurisdiction to consider the Parent’s appeal arguments and to conduct an independent review to assure relevance and documentary credibility of the Record facts relied upon by the IHO, and to consider assertions and arguments supporting specific alleged errors as raised by the parties.

Upon reviewing an IHO Decision, the state level review officer (“SLRO”) gives deference to the IHO for credibility judgments and evidentiary resolutions but must employ a *de novo* review of the IHO’s statutory interpretation and legal rulings. See, 34 C.F.R. §300.510(b); *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 621 (6<sup>th</sup> Cir. 1990); See, also, *N.W. ex rel. J.W. v. Boone County Bd. of Educ.*, 763 F.3d 611, 614 (6<sup>th</sup> Cir., 2014), *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6<sup>th</sup> Cir. 2001). Specifically, the SLRO jurisdiction vests to examine the entire record and conduct an independent review in determining whether the IHO’s Decision was properly supported in the IHO Record. O.A.C. §31-51-05 (k)(14)(b)(iii)(a)(e).

Thus, while testimonial credibility conclusions reached by the IHO may be

considered on review under an abuse of discretion standard, the SLRO must also consider the relevance and documentary credibility of the entire Record facts relied upon by the IHO. The party challenging the IHO Decision has the burden of proving the errors asserted on appeal to the SLRO. *Renner v. Ann Arbor Bd. Of Educ.*, 185 F.3d 635, 642 (6<sup>th</sup> Cir. 1999).

Accordingly, in reviewing the IHO Decision, and in light of the independent review, the SLRO must consider the IHO's credibility judgments and evidentiary resolutions in reviewing the IHO's substantive conclusions of the issues in the IHO Decision. In addition, the IHO's application of legal authority in reaching his Final Decision is a legal determination that must be reviewed *de novo* on SLRO review. Thus, on SLRO review, it must be determined *de novo* whether the IHO applied proper jurisprudence in determining that the record supported his legal conclusions. Accordingly, this SLRO review considered the entire record and the IHO Decision *in toto* to determine *de novo* whether the evidence fully supported the IHO's factual findings and legal conclusions, specifically the Parent issues §§1-6, and §§1A-Q as argued in the Parents' Appeal.

## **V. DISCUSSION**

### **A. Whether Sylvania provided [REDACTED] with a FAPE in the 2<sup>nd</sup>-5<sup>th</sup> grades. (Parent Notice of Appeal No. 1; School District Appeal Br.##3, 4).**

The Parent's first Appeal issue is whether the IHO erred in deciding that Sylvania's special education services provided [REDACTED] with a FAPE. Parent Notice of Appeal at (1); IHO Decision at 24-25. In addition, the Parent argues that the IHO erred

“in determining that private reading intervention services provided by Parent were not appropriate or necessary for [REDACTED] to receive FAPE.” Parent Notice at (2). On the other hand, the School District asserts the IHO properly concluded that 1) [REDACTED] 2017-2018 IEP (4<sup>th</sup> grade) and proposed 2018-2019 (5<sup>th</sup> grade) IEP provided him with a FAPE, and that the 2) Petitioner “did not establish [REDACTED] progress was attributable only to outside tutoring.” School District Br. at 10, 23, 28 (##3, 4); (at 6, 8 (2<sup>nd</sup> and 3<sup>rd</sup> grades)).

Pursuant to IDEA, the School District must provide a student individualized programming that “consists of educational instruction specifically 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 v. Rowley*, 458 U.S. 176, 188-89 (1982); 20 U.S.C. §1412(a)(1)(A)(i)(IV); 34 C.F.R. §300.39(a)(1). Thus, the special education services must meet the student’s unique needs through *specially designed instruction*, based on peer-reviewed research. 20 U.S.C. §1414 (d)(1)(A)(i)(IV). Further, the IEP must include the academic instruction appropriate to address the student’s learning disabilities, interventions, and necessary related services supports including speech and language therapy. 20 U.S.C. §1414(d)(1)(A).

However, because *Rowley* did not articulate a standard to evaluate the “adequacy of education,” the recent *Endrew* Court “found little significance in the *Rowley* Court’s language concerning the requirement that states provide instruction calculated to ‘confer some educational benefit,’” as in *Rowley* the child’s IEP was already “designed to deliver more than adequate educational benefits.” *Endrew F. v. Douglas Cnty. Sch. Dist.*, RE-1, 137 S.Ct. 988, 1000 (2017; citing *Rowley*, 458 U.S. at 200, 209-210. Thus, the *Endrew* Court found that “the essential function of an IEP is to set out a plan for pursuing

academic and functional *advancement*” in consideration that IDEA is “an ambitious piece of legislation” and that a “substantive standard not focused on student *progress* would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.” *Endrew F.* at 995 (emphasis added), citing, 20 U.S.C. §1414(d)(1)(A)(I)-(V)

The *Endrew F.* Court concluded that the “IEP must aim to enable the child to *make progress*” and the progress contemplated by the IEP “must be appropriate in light of the child’s circumstances” [with] “specially designed instruction” to meet a child’s unique needs” through an “[i]ndividualized education program” *Id.* at 999-1000 (emphasis added); see also, 20 U.S.C. §1401(29)(14); 20 U.S.C. §1414(d)(1)(A)(i)(I)-(V). That is, “[p]rogress through the system is what our society mean by an education and access to an education is what the IDEA promised.” *Id.* at 999. Thus, for a child fully integrated in the regular classroom, an IEP must be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 1000. Therefore, pursuant to IDEA, *Endrew* concluded that the School District must provide the student with an educational program that is not only “reasonably calculated” but also “appropriately ambitious *in light of the consideration of the student’s individual circumstances*” including present levels of educational achievement and characteristics of the disability, and must “aim to enable the child to make progress.” *Id.* at 1001.

Specifically, the special education services must meet the student’s unique needs through *specially designed instruction*, based upon peer-reviewed research, as needed to permit the child to pursue academic and functional advancement and benefit from the instruction. *Id.* at 1000; 20 U.S.C. §1414 (d)(1)(A)(i)(I)-(IV); 34 C.F.R. §300.39(a)(1). The IEP must include the academic instruction appropriate to address the student’s

learning disabilities, interventions, and necessary related services supports including speech and language therapy. *Id.* at 999-1000; 20 U.S.C. §1414(d)(1)(A). While “IDEA does not require the best education possible or to maximize a handicapped child’s potential, neither did ‘Congress intend that a school system could discharge its duty under IDEA by providing a program that produces some minimal academic advancement.’” *Henrico County v. Z.P., by and through his Parents*, 399 F. Supp. 298, 304 (4<sup>th</sup> Cir. 2005) (“the IEP must aim to enable the child to make progress . . . that sets out a plan for pursuing academic and functional advancement.”); 20 U.S.C. §1414(d)(1)(A)(i)(I)-(V).

In addition, dyslexia is recognized as a specific learning disability under IDEA that is defined as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, or spell.” 20 U.S.C. § 1401(30)(B); 34 C.F.R. §300.8(c)(10). Dyslexia refers to specific learning difficulties related to word recognition, decoding, and spelling, not due to intellectual disabilities. For reading disorders, there is a specification of which abilities related to reading are partially or totally compromised, i.e., word reading accuracy, reading rate, and/or reading comprehension. See, National Reading Panel, five components of reading: phonemic awareness, phonics, fluency, vocabulary, and comprehension. *J Child Psychology & Psychiatry* 45: 2-4 (2014); Specific reading disability: dyslexia (phonemic awareness, phonics, fluency, “*in particular*”).

For students with dyslexia, *all* reading components are compromised, thus they must be supported and accommodated. Thus, to accommodate a child’s educational deficiencies and to measure meaningful progress or continued regressions, the relevant

specific reading component disorders must each be identified and properly supported. *Id.* Further, “[i]n determining the child’s disability under the IDEA, including a specific learning disability, the public agency *must* conduct a comprehensive evaluation, which requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child.” Letter to Unnerstall, 68 IDELR 22 (OSEP April 25, 2016).

Both the District and the IHO ignored the Supreme Court’s most recent guidance in *Endrew F.* that “all children with disabilities are entitled to an ‘appropriately ambitious’ and ‘challenging’ educational program. . . that shields children from low expectations.” *Endrew F.*, 137 S.Ct. at 1001. Specifically, the Court warned that “[g]eneral assumptions about a category of disability have no place in the analysis; IDEA’s expectation of *grade-level advancement* and a child’s *individual circumstances* are paramount [so that] every child has the chance to meet challenging objectives.” *Id.* (*emphasis added*). Thus, “the IEP must aim to enable the child to make progress. . . that sets out a plan for pursuing academic and functional advancement. . . that is “*appropriately ambitious in light of the child’s circumstances.*” *Id.* (*emphasis added*); 20 U.S.C. §1414(d)(1)(A)(i)(I)-(IV).

Here, although the IHO acknowledged and included an *Endrew F.* citation in his discussion, he instead relied solely on *Rowley* and a California district court case, *K.K., et al v. Alta Loma School District*, 2013 WL 393034 (C.D. Cal. 2013) (“*Alta Loma*”); *Rowley*, 458 U.S. at 200, 209-210. The IHO found that the expert in the *Alta Loma* case, like Dr. [REDACTED] in the present case, recommended the LMB program to a student with dyslexia and ADHD because it was a “multi-sensory approach.” IHO Opinion at 21; *Alta*

*Loma* at 4. The IHO also found similarities to the *Alta Loma* case where the Student was “missing” for 3 hours before school every day for private LMB tutoring, like [REDACTED] who was “missing” for 2 hours every morning in the 2018-2019 school year. IHO Decision at 22. The IHO noted that in *Alta Loma*, in addition to the School District not following the expert’s LMB recommendation,<sup>12</sup> the “hearing officer and the district court found that the IEP was proper. . . individualized for the student’s needs and reasonably calculated to confer a meaningful educational benefit on the student and, as such, the IEPs were substantively reasonable.” *Id.* citing *Alta Loma* at 6. Thus, the IHO, in reliance upon the *Alta Loma* similar facts where the Parent unsuccessfully sought LMB programming, concluded that the Sylvania School District provided [REDACTED] with a FAPE.

The IHO’s application of *Alta Loma* to the present case, however, is rather misplaced. On review, the court found that the Student had made “substantial progress in reading decoding” that was, in fact, meaningful, and “on track to meet her 3<sup>rd</sup> grade goals.” As such, the court concluded that the District provided the Student with a FAPE despite not following the recommendation for the LMB program. *Alta Loma* at 17-18. Indeed, then, because the Student was achieving grade level progress in the School’s programming, the district court dismissed the argument that the Student “would never catch up to her peers,” and finding that the “meaningful benefit standard” did not require “disabled students to perform at the same level as the rest of the class.” *Alta Loma* at 7; 9 citing *Deal v. Hamilton Co. Bd. of Educ.*, 392 F.3d 840, 862 (6<sup>th</sup> Cir 2004).

In contrast to the instant case, however, the *Alta Loma* court also found that

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<sup>12</sup> Although the Student’s absences in *Alta Loma* were noted in the court’s decision, the court did not reach any conclusions about the LMB programming and limited the decision to the school’s programming decisions for the Student. Also, the absences had not been recorded as “unexcused” for the LMB tutoring.

the student did not demonstrate substantial annual regressions or lack of progress, and, in fact, made progress, albeit “more slowly than her peers,” and was able to write multiple paragraph compositions and to grasp grade level math concepts. *Alta Loma*, at 11. That is, the Student was successfully progressing at or near grade level, met 3<sup>rd</sup> grade standards, and made reading progress, with only a slight decrease in the KTEA score between 2<sup>nd</sup> and 4<sup>th</sup> grades. Further, unlike Sylvania, *Alta Loma* fully considered the Student’s independent psychoeducational evaluations. *Id.* at 7,14. Accordingly, and most significantly, despite the Parent’s dissatisfaction with the *Alta Loma*’s rejection of payment for LMB programming, *Alta Loma* appropriately responded to the Student’s needs by increasing in-school supports, up to 90 minutes daily for both reading and math, while the Student was on track to make grade level goals. *Id.*, at 5-6.

Thus, the flaw in the School District’s argument and the IHO’s sole reliance on this *Alta Loma* case is that, factually, the Student did not have a long history of a 2-year reading gap or significant regressions correlated to the School District’s inadequate reading programs; in fact, the *Alta Loma* court found that the Student “did not demonstrate the lack of any progress” and the School continued to offer additional supports, including increasing reading and math instruction up to 90 minutes/day in consideration of the Parent’s independent educational evaluations. That is, factually, the *Alta Loma* case does not support the School District arguments that Sylvania provided [REDACTED] an appropriate education and that [REDACTED] did not require additional private reading tutoring beyond the 20-minute daily, small group Wilson Reading program, provided without fidelity, in school. In addition, had the Student in *Alta Loma* demonstrated the same substantial reading regressions and grade level gaps as [REDACTED] the 9<sup>th</sup> Circuit’s



“meaningful benefits” standard would not have been satisfied. Further, even though the court applied the higher “meaningful benefits” standard, which was more similar to *Endrew F.*’s “appropriately ambitious” standard, the case was decided several years prior to *Endrew F.*, and thus, relied on the *Rowley* standard.

As such, the IHO erred by not relying upon the recent, relevant Supreme Court jurisprudence and its progeny, and instead relying heavily on a single California district court case, decided prior to the *Endrew F.*, that seemed somewhat factually favorable for Sylvania in that *Alta Loma* rejected an IEE LMB programming recommendation. In fact, *Alta Loma* was quite factually distinctive from the instant case, with the *Alta Loma* School considering the Student’s IEE results and recommendations, and responding to the Student’s needs by offering substantially more reading support for the Student, with the Student experiencing near grade-level progress without significant regressions. Further, while the Parent in *Alta Loma* also privately provided the LMB tutoring program, *Alta Loma* did not record the Student as “unexcused” for tutoring absences. Thus, the IHO’s conclusions based on *Alta Loma* are not persuasive.

In determining whether the School District provided a student with a FAPE, the student’s education program must be appropriately ambitious in light of the consideration of the student’s individual circumstances, including present levels of educational achievement and characteristics of the disability. See, *Endrew F.* at 1000-1001. Further, the “[*Endrew*] standard requires consideration of whether the program aims for grade-level advancement in the general education curriculum, and if not. . . it must be “nevertheless challenging given the child’s unique potential for growth.” *K.D. v. Downingtown Area Sch. Dist.*, WL 2682741 (3<sup>rd</sup> Cir. 2018) 31, citing, *Endrew* at 999-

1000. (“markedly more demanding than ‘merely more than *de minimus*’” [as]. . . “merely more than *de minimus* progress from year to year can hardly be said to have offered an education at all.”). Indeed, “[s]trict adherence to *Endrew F.*[and] strict compliance with IDEA’s ban on low expectations—is critical to securing educational opportunity for children with learning disabilities.” *Id* at 29, *citing Endrew F.* at 1001.

Moreover, merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE.” *Lisa M. v. Leander Indep. Sch. Dist.*, No. 18-501, 2019 WL 2120166, ---F.3d--- (5<sup>th</sup> Circ. May 15, 2019), citing, 34 C.F.R. §300.101(c)(1). In applying the *Endrew* standard, the 5<sup>th</sup> Circuit noted that even students who demonstrate academic successes could still require special education support; that is, the “Fed. Regs. specifically provide that IDEA eligibility must be granted to a disabled student ‘who needs special education and related services, even though the child has not filed or been retained in a course or grade, and is advancing from grade to grade.’” 34 C.F.R. §300.101(c)(1). Indeed, [REDACTED] reading skills remained at two (2) grade levels behind while continuing to receive the School’s limited Wilson reading program without fidelity. Thus, the mere fact that [REDACTED] received passing marks and was promoted from grade to grade is not dispositive in determining whether he received FAPE, and, in fact, supports a contrary conclusion.

In addition, pursuant to IDEA, a district must consider parent-initiated evaluations in “any decision made with respect to the provision of FAPE to the child.” 34 CFR §300.502(c)(1). When the district does not consider the Parent’s private evaluation, it results in a procedural violation that significantly impacts a parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the

Student. 34 C.F.R. §300.513(2)(ii). Further, if a child has other disabilities in addition to dyslexia, any reading intervention must also be individualized to the child's specific needs, strengths, and deficiencies, including accommodating the additional disabilities. 20 U.S.C. §1414. That is, just because a specific reading program is specially tailored for students with dyslexia, a student with dyslexia *along with* additional learning challenges may require additional, specific tailored instruction and accommodations.

The IHO, however, disregarded the School District's error in failing to consider the Parent's private psychoeducational evaluations, in violation of IDEA. Instead, the IHO fully discounted Dr. [REDACTED] and the two comprehensive psychoeducational evaluations, finding fault with Dr. [REDACTED] for not contacting the School District to "speak directly with [] educators," having "limited understanding of such things as when school started in the morning" and "never observing [REDACTED] in any of the LMB sessions or [] anywhere outside of his office." See, IHO Decision at 21. To the contrary, it is neither proper nor a requirement that Dr. [REDACTED] contact the School District regarding a private evaluation.

Further, the IHO found that Dr. [REDACTED] evaluation information was "unknown, as those [Parent] binders ('which contained information regarding [REDACTED] with Dr. [REDACTED]) were not put into evidence," implying that the Parent failed to admit Dr. [REDACTED] comprehensive neuropsychological evaluations of [REDACTED] along with binders of the privately collected information about [REDACTED] provided to Dr. [REDACTED], or implying that Parent failed to admit additional personal information regarding [REDACTED] that was known by Dr. [REDACTED] but not disclosed. IHO Decision at 15-16. Neither argument is persuasive.

To the contrary, to the extent that the binders contained information relevant to [REDACTED] educational data and testing, Dr. [REDACTED] two extensive psychoeducational

evaluations were included in the Parent's Exhibits admitted into Evidence by IHO Rohrbacher. See, Entry, certified January 4, 2019, admitting Parent's Exhs. 1-15; Parent Exhs. 10, 12, Psychoeducational Evaluations<sup>13</sup> (2/9/2016; 7/31/2018); see also. J.Exhs. 10, 12. That the Parent may have had additional information or an additional binder she kept for [REDACTED] personal educational and medical information and records is protected as private; thus, the IHO conclusion about "Parent's binders" is misplaced and unsupported. Further, nothing in the IHO's Decision supports finding that the IHO reviewed or considered Dr. [REDACTED] Psychoeducational Evaluations, included in the Record evidence, in determining whether Sylvania provided [REDACTED] with a FAPE despite having both the 2016 and the 2018 Evaluations admitted into evidence at the hearing. Psychoeducational Evaluations of [REDACTED] February 2, 2016, March 2, 2018; J-Exhs. 10, 12.

Thus, the IHO erred in concluding that the Parent did not provide Dr. [REDACTED] "information regarding [REDACTED]" and, in not finding that the School District failed to consider the private independent educational evaluations, and further, in not considering the two critical psychoeducational evaluations evidence in his Decision.<sup>14</sup> Further, and unfortunately, despite their review obligations, the School District did not take into consideration any of the recommendations of Dr. [REDACTED] and instead, insisted that the

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<sup>13</sup> Both Psychoeducational Evaluations were comprehensive, including [REDACTED] history and background, assessments administration and data, professional impressions and conclusions, and intervention and remediation recommendations. See, Parent Exhs. 10, 12. Presumably, Parent provided [REDACTED] relevant data to Dr. [REDACTED], and the data could have been included in a binder of the Parent that was not admitted into evidence. However, to the extent that Dr. [REDACTED] relied upon Parent's data about [REDACTED], it would have been included in Dr. [REDACTED] reports. Additional data, however, not used in Dr. [REDACTED] examinations and reports, remain as the Parent's private documents.

<sup>14</sup> In fact, the IHO only noted Dr. [REDACTED] recommendation that [REDACTED] "have a medical doctor prescribe an extended release stimulant medication to promote [REDACTED] attention profile." IHO Decision at 15, citing Pet Ex. 10, at 11. While it could be concluded that the IHO may have looked at Dr. [REDACTED] comprehensive independent evaluations in order to find the medication recommendation, there are no further findings or conclusions that the IHO considered any of the comprehensive testing results and extensive analyses regarding [REDACTED] reading and educational challenges.

Parent “expects the District to fix [REDACTED]” School District Br, at 45. In fact, the IHO agreed with the District that the Parent was seeking a preferred “gold standard” program. IHO Decision at 24. While the District asserted that “[T]he [Parent] expects the District to fix [REDACTED]” there is no evidence throughout the record to support any suggestions that the Parent was seeking unreasonable “fixes” for their son.

Indeed, contrary to the School District’s arguments, “Students with [dyslexia](#) can, with early identification, proper assessment and intensive instruction tailored to their unique needs, *overcome their disability*.” See, J. Sch Psychol 40:3-6 (*emphasis added*); see also, IDA, Yale Center, WWC, Best Evidence (“Best Evidence”: Johns Hopkins University).

School District argues that there is no obligation for the School District “to bring students to the same level as their peers.” School District Br. at 45 *citing*, *Endrew F.*, 137 S.Ct. at 991. Indeed, while particular grade level remediation is not required pursuant to IDEA, educational services provided pursuant to an IEP must be individualized in consideration of the specific child’s needs and abilities, and, pursuant to *Endrew F.*, their *potential*. *Id.* Thus, the School District’s obligation is to provide educational services consistent with the Student’s capabilities and in light of their circumstances, which may include closing grade level gaps. *Id.* Here, [REDACTED] is a child of normal intelligence with a language-based learning disability and the capability to achieve grade level reading skills. To categorically dismiss [REDACTED] potential for learning to read and closing the on-going 2-year reading gap is wholly inconsistent with the scholarship and jurisprudence of IDEA.

Indeed, when the Supreme Court had the opportunity to revisit the IDEA educational benefit obligations of Schools, the Court rejected the “merely more than *de*

*minimus*” standard, underscoring the individualized standard, requiring “an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” *Endrew F.* 137 S.Ct at 998. In addition, the Court emphasized that the *Endrew* standard is a “markedly more demanding” than the “merely more than de minimis” standard, which “would barely provide ‘an education for all’ children with disabilities,” and in fact, “receiving an instruction that aims so low would be tantamount to ‘sitting idly. . .awaiting the time when they were old enough to ‘drop out’.” See, *Endrew F.* 137 S.Ct. at 1000. [REDACTED] like *Endrew F.*, was simply receiving more of the same insufficient reading programming each year, and experienced substantial regressions and the failure to close his on-going 2-year reading gap. Likewise, [REDACTED] Parent sought appropriate private education to provide [REDACTED] the educational opportunities to learn critical reading skills and remediate his 2-year reading deficit to close the gap between his reading level and academic grade level so that he could appropriate participate in grade level academics in light of his intellectual potential.

Where student has additional co-morbidities, e.g., additional language-based learning disabilities such as ADHD or autism, the dyslexia remediation is more complex, requiring consideration of the additional learning disabilities in designing an appropriate, individualized reading program. Thus, the minimum Wilson reading program delivery may not be sufficient to meet the Student’s unique needs. The student may need “a more intensive, structured, multisensory, phonetic, research-based program which will give [the Student] the appropriate instruction opportunity for extensive repetition and enforcement he needs.” *Forest Grove Sch. Dist. v. T.A.*, 577 U.S. 230, 247 (2009). Indeed, “providing a deficient IEP is the same as not providing an IEP.” *Id.* at 248.

Thus, the School District failed to consider all of the relevant factors contributing to [REDACTED] reading deficiencies to tailor an individualized reading program for [REDACTED] including more intense 1:1 remedial instruction.

Indeed, “[t]o ensure reading success, it is important to understand which interventions has been proven effective for struggling readers. . . implementing the program to fidelity is vital to overall success.” See, Stamm, Amy, College of William and Mary, School of Education; *A Program Evaluation: Fidelity of Implementation of the Wilson Reading System* (2017). One-to-one tutoring is highly effective in improving the performance of struggling early students. To provide the Wilson Reading System with fidelity in small group settings requires 45-90 minutes daily Wilson Language Training Corp. (2016a); however, 45 minutes daily is considered *minimally acceptable* fidelity for small groups. (*emphasis added*). Each WRS lesson is 90 minutes, comprising of three (3) thirty (30) minute blocks. Stamm, *Fidelity of Implementation of WRS*, at 80-81; [www.wilsonreadingsystems.com](http://www.wilsonreadingsystems.com); further, 30 minutes daily/5 days per week, while not an endorsed fidelity, is bare minimum programming, requiring more years to experience successful remediation.

Additionally, the instruction must continue for sufficient duration because “[a] child who is reading accurately but not fluently at grade level still requires intensive reading instruction.” *Id.* That is, “consistent repetition for the brain to adequately and appropriately store and recall essential reading components is required before progressing to a next level.” *Id.* Students with dyslexia can be taught to succeed in the classroom, but it requires that a specialized program unique to the students need be delivered by trained individuals with great intensity four to five times per week with fidelity: strict

adherence to the requirements of the program. Thus, for a student with an existing 2-year deficit, the minimum programming would be insufficient to remediate the substantial deficiency; instead more intensive delivery of the program is essential “to ensure that every student can read at grade level or above . . . [by] the end of grade 3.” See, No Child Left Behind Act. Thus, in addition to providing [REDACTED] with insufficient reading programming that failed to remediate [REDACTED] reading deficiencies, the Sylvania’s Wilson program was provided without fidelity. Simply administering some part of a program does not necessarily satisfy the obligation to provide [REDACTED] with specialized instruction.

At the heart of the matter, and most significantly, is the fact that the School District first, failed to provide the Wilson Reading program with fidelity and second, failed to consider [REDACTED] relevant data in decoding, phonics, and fluency to determine his critical needs for intensive reading remediate in choosing appropriate reading remediation programming. Sylvania provided only 20 minutes daily of small group reading instruction for [REDACTED].<sup>15</sup> Further, Ms. [REDACTED] who provided the Wilson program services to [REDACTED] small group, is a Level 1 Wilson Dyslexia practitioner who is only certified to provide 1:1 services. J-Exh. 7, p. 15. That is, Ms. [REDACTED] did not have the required Level II certification to provide the Wilson program in a group setting like [REDACTED] small instruction group-lessons. Resp. Exh. R, Sylvania Schools Staff Trained in Specialized Reading Programs (Ms. [REDACTED]; See, [www.wilsonlanguage.com/programs/fidelity/](http://www.wilsonlanguage.com/programs/fidelity/) see, [www.wilsonlanguage.com/professional-learning/individual-teacher-support/wrs-level-ii-certification](http://www.wilsonlanguage.com/professional-learning/individual-teacher-support/wrs-level-ii-certification). Level I, II certifications (last visited Sept. 26, 2019).

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<sup>15</sup> The School District asserts that the IEP offers [REDACTED]. 35 minutes of “specialized instruction in reading decoding and writing.” However, it still offers only 20 minutes of Wilson Reading programming, with 15 minutes of writing instruction. Likewise, the School District proposed “45 minutes of specialized instruction in reading decoding and writing.” The 45 minutes, then, would include 30 minutes of the Wilson Reading programming, fidelity.



Therefore, Sylvania failed to provide even the minimum program requirements or the appropriately trained Wilson Level II practitioner to teach the Wilson Reading program in small groups. In fact, the Wilson program specifically states that “without fidelity, we cannot guarantee that the instruction will be effective, and the student’s learning may suffer.” [www.wilsonlanguage.com/professional-learning/accruited-partners/authentic-professional-professional-learning](http://www.wilsonlanguage.com/professional-learning/accruited-partners/authentic-professional-professional-learning) (last visited Sept. 29, 2019). Therefore, Sylvania failed to deliver the Wilson Language Training program with fidelity, both in the amount of instruction time and proper teacher certification. Accordingly, Sylvania failed to provide [REDACTED] with a FAPE by not providing the WRS with fidelity and not individualizing the program to [REDACTED] identified specific needs.

In addition, in declining to consider [REDACTED] potential in determining whether the School District had provided FAPE, the IHO misapplied the “entirely unworkable” language from *Endrew F.*, IHO Decision at 16, 19, citing *Endrew F.*, 137 S.Ct. at 1000 (2017). See, also School District Brief at \_\_\_\_\_. In fact, the “entirely unworkable” phrase from *Endrew F.* referred to the *Rowley* Court in rejecting the “equal opportunity” standard, where students are offered an opportunity substantially equal to that given her non-handicapped classmates, finding that “[t]he requirement that States provide ‘equal’ education opportunities would . . . seem to present an *entirely unworkable standard* requiring impossible measurements and comparisons.” *Endrew F.* 137 S.Ct. at 1000, citing, *Board of Education v. Rowley*, 458 U.S. 176, 198-99 (1982) (*emphasis added*). *Endrew F.* emphasized that nothing had changed in the IDEA statute to reconsider the “equal opportunity” standard and, as such, as in *Rowley*, declined to interpret the FAPE provision to include “opportunities substantially equal to that [of] non-handicapped

classmates.” *Id.* Thus, the IHO’s conclusion suggesting that *Endrew F.* rejected “an argument over potential of the student [that] could result in a discussion of an ‘entirely unworkable standard’” is a misstatement regarding the *Endrew F.* decision. IHO Decision at 16. Rather, *Endrew F.* clarified that the standard is that an IEP must be reasonably calculated “to make progress appropriate in light of the child’s circumstances.” *Endrew F.* 137 S.Ct at 999. That is, a student’s potential is a factor to consider. Thus, the IHO erred in failing to consider [REDACTED] potential in light of his intellectual abilities, and in finding that the School’s WRS was not appropriately ambitious to support [REDACTED] opportunities to acquire grade level reading skills.

Finally, the IHO failed to consider that [REDACTED] lack of progress was not as the result of his un-remediated disability, but rather, the result of deficiencies in the School District’s programs and supports provided to [REDACTED]. Indeed, several courts have recognized that sub-standard and deficient special education programs can deny students with specific learning disabilities, particularly dyslexia, a FAPE and the opportunity to advance from grade level to grade level. See, e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 518 F. 3d 1275, 1289-90 (11<sup>th</sup> Cir.) (upholding compensatory education award for denying FAPE to Student with dyslexia); *Evans v. Bd. of Educ.*, 930 F. Supp 83, 102 (S.D.N.Y. 1996) (Student with dyslexia denied FAPE); *see also J.M. v. Morris Sch. Dist. Bd. of Educ.*, (No. 20-cv-06660-W) 2011 U.S. Dist LEXIS 148670, 32-34 (D.N.J., 2011) (school program was inappropriate and ineffective for Student with dyslexia). Indeed, the *Endrew* court warned that without ambitious goals in light of a child’s potential, “[f]or children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly, awaiting the time when they were old enough to drop out.’”

*Endrew F.* 137 S.Ct. at 999. The instruction offered must be “specially designed” to meet the child’s “unique needs.” *Id.* at 994. Thus, [REDACTED] reading programming at Sylvania must be “appropriately ambitious in light of the circumstances” with opportunities for [REDACTED] to experience “grade-level advancement in the general education curriculum.” *Id.* at 999-1000.

Nothing about [REDACTED] Wilson reading program is specially designed for [REDACTED] unique needs. In fact, besides providing the Wilson program without fidelity, including less than minimum instruction time, and the failure to administer the program with the appropriately trained WRS level II group practitioner, there are no additional reading services or specially designed supports offered to address [REDACTED] specific reading remediation needs or to respond on-going or emerging regressions. Significantly, too, the School District failed to provide sufficiently ambitious reading programming to remediate [REDACTED] ongoing 2-year reading deficiency. Such a sub-standard delivery of an inadequate reading program falls far short of the “ambitious” instruction [REDACTED] required in light of his normal intelligence to close his reading gap and read at grade level.

Accordingly, Sylvania failed to provide [REDACTED] with a FAPE by both delivering the Wilson Reading program below the minimum fidelity requirements and by failing to provide an appropriately designed reading program to remediate [REDACTED] 2-year reading deficits, specifically in decoding and phonemic awareness, consistent with his dyslexia.<sup>16</sup>. The data fully supports finding that the School District’s Wilson programming alone provided no measurable reading progress, and was only

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<sup>16</sup> [REDACTED] relative strengths in reading comprehension, as delivered by oral read-aloud accommodations is consistent with his WISC intelligence testing, showing that he has average, normal cognitive intelligence.

correlated to reading regressions, specifically in the second and fourth grades when [REDACTED] experienced 2-year reading deficits. Indeed, the School District relies on bootstrapping [REDACTED] LMB programming data results to attempt to prove that Sylvania, rather than Parent, provided [REDACTED] with the needed supports and services to make reading progress consistent with his intelligence.

Thus, Sylvania did not provide [REDACTED] with a reading program that was appropriately ambitious in light of [REDACTED] intelligence and did not provide [REDACTED] with opportunities to experience grade-level access and advancement in the general education curriculum. Even under the *Rowley* standard, the School District reading interventions, provided without the minimum fidelity requirements, were not “reasonably calculated” to enable [REDACTED] “to receive educational benefits.” More importantly, the Court in *Endrew F.* specifically rejected the exact weak programming that was not tailored in consideration of [REDACTED] intellectual abilities and potential. That is, the School District provided [REDACTED] with an inadequate reading instruction, delivered without fidelity, in the 2<sup>nd</sup>–5<sup>th</sup> grades, resulting in a failure to remediate his dyslexia challenges and resulting in a continuing 2-year reading gap that further resulted in [REDACTED] inability to access grade level academic content and make progress in light of his normal intellectual academic abilities. Accordingly, the IHO erred in finding that School District provided [REDACTED] with a FAPE.

**B. Whether the Parent’s Lindamood Bell (LMB) private reading services were essential to [REDACTED] reading remediation and progress.**

*(Parent Notice of Appeal nos. 1, 2(a-q); Parent Appeal Br. ## 2-5; School District Appeal Br. ## 3-4).*

The Parent argues that the IHO erred “in determining that private reading intervention services provided by Parent were not appropriate or necessary for [REDACTED] to

receive FAPE.” Parent Notice at (2). Further, the Parent asserts that the Lindamood Bell Reading Program (“LMB”) was essential for [REDACTED] given his ongoing 2-year reading deficit that Sylvania failed to remediate and was, in fact, widening. Pet. Br. at 6-7,10. On the other hand, despite the reading assessment data showing periodic and significant reading regressions, Sylvania disagrees with the Parent that [REDACTED] was not making progress while in school at [REDACTED] Elementary; as such, the School considers that the Parent’s unilateral placement of [REDACTED] into intensive LMB programming over the summers and during the school years was excessive and unwarranted. Resp. Br. at 23.

Specifically, the School District argues and the IHO agreed that schools are not required to “close the gap” or “bring a student to grade level.” Resp. Br. at 25-26; IHO Decision at 23. Thus, the School District and the IHO conclude that the LMB program was an unnecessary, “Parent-preferred” “gold standard” program; and, the School District was not required to provide an education “designed according to the Parent’s desires.” Resp. Br. at 27; IHO Decision at 21. The IHO concluded, “there is not sufficient evidence to support that LMB was necessary for [REDACTED] to make progress.” IHO Dec. at 21.

When the School District fails to provide FAPE, the Parent may seek a private placement that is appropriate to the Student’s academic needs. *Forest Grove School District v. T.A.*, 557 U.S. 230, 241 (2009). Consistent with *Endrew F.*, courts have consistently applied the most recent FAPE standard by requiring an “appropriately ambitious” IEP that gives a Student “the chance to meet challenging objectives under his particular circumstances.” See e.g., *K.D. v. Downingtown Area School District*, 167 A3d 294, 296 (3<sup>rd</sup> Circ. 2018); *citing Endrew F.*, 137 S.Ct. at 999. In addition, the court in *Downingtown* found that despite the Student’s severe learning disabilities, the Student is

still entitled to receive “challenging objectives” to “bridge the gap” to obtain grade-level performance; and, further finding, that “[w]ithout special education services, the gap will only widen.” *Downingtown*, 167 A3d at 298, citing OSEP Letter (Nov. 26, 2016).

Further, when “it is known that a different educational method has enabled a child protected by the IDEA to make real educational progress, the School may not dismiss that method and, must be gauged against reasonably accurate evaluations of a child’s potential.” *J.H. v. Henrico C. Sch. Bd.* 326 F.3d 560, 569 (4<sup>th</sup> Cir. 2003) (citing 20 U.S.C. 1400(c)(4); (“the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research of proven methods of teaching and learning for children with disabilities”); School District failed to apply replicable research and use proven methods of teaching and learning in education of children with disabilities; applying “window of opportunity” analysis of dyslexia students in the 2<sup>nd</sup>-5<sup>th</sup> grades, reading skills required substantial repetitions to learn language.

Indeed, OSEP guidance emphasizes that “[r]esearch has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction services and supports are provided.” U.S. Dept’t of Educ., Dear Colleague Ltr., at 1 (Nov. 16, 2015). Further, OSEP instructs that for children who are integrated into regular classroom, “the annual goals . . . should be ‘sufficiently ambitious to help *close the gap*’ between the child’s current and *grade-level achievements*.” *Id.* (*emphasis added*). That is, the “IDEA contemplates educational programs tailored to ‘how the child’s disability affects the child’s involvement and progress in the general education curriculum.’” *Id.* 20 U.S.C. §1414(d)(4)(A) (aa)(ii)(I); 20 U.S.C. §1414(d)(1)(A).

The School District obligations are well-established. FAPE “must be tailored to unique needs of the child through the IEP.” *Furhmann ex rel Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031 (3d Cir. 1993); 20 U.S.C. § 1401 (9)(2006). That is, instruction must be specially designed to meet the child’s unique needs to provide appropriate educational opportunities and supports for the child to learn. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369 (1985). Further, the No Child Left Behind Act includes requirements about research-based instruction, screening and diagnostic reading assessments, and highly-qualified teachers “to ensure that every student can read at grade level or above . . . [by] the end of grade 3.”

Specifically, dyslexia remediation requires a different standard based upon the science that supports finding that early remediation is critical to learning to read; while there are different reading methodologies, the selected program needs to assure that the IEP is reasonably calculated to enable the child to receive educational benefits to “likely to produce *progress, not regression*”. *M.S. v. Bd. of Educ.*, 231 F.3d at 103. Further, the progress must be meaningful, i.e., more than mere trivial advancement. *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). Nevertheless, the student must be able to read at grade level by the end of 3<sup>rd</sup> grade. Thus, the progress must meaningfully close the gap between the [REDACTED] deficiencies and grade level achievement by the end of 3<sup>rd</sup> grade.

For example, in *Downingtown*, in sharp contrast to Sylvania School District and [REDACTED] the Downingtown School District was found to set appropriately challenging goals, were “willing and able to review K.D.’s IEPs throughout her education” and promptly scheduled additional meetings, sought more assessments, offered a one-on-one aide,

revised and developed additional IEPs, and adopted neuropsychologists recommendations, “including adopting a new reading program.” *Downingtown Area School District*, No. 17-3065 (3<sup>rd</sup> Cir., Sept 18, 2018). Further, Downingtown School District provided K.D. with 3 summers of ESY, occupational therapy, a multi-sensory reading and writing program for two and a half hours and a supplemental Wilson reading program, considered the private neuropsychology evaluation and additional evaluations, adding a one-on-one aide, and increasing IEP goals including reading fluency, math, reading comprehension, adding an hour of direct math instruction, forty-five minutes of direct writing instruction, and fifty-five minutes of “multisensory reading instruction” per day, all in “evidence-based” programs.” *Id.* Finally, the School District accepted the psychologist’s recommendation to replace the Wilson Reading program with “SRA/corrective Reading and FastForward” (an LMB program), and two other “research-based programs that provide phonics and reading comprehension instruction.” *Id.*<sup>17</sup>

Unlike K.D., ██████ experienced significant regressions during the school year in second grade (August 2015-May 1, 2016) and fourth grade (August 2017-March 27, 2019) with the Sylvania’s small group Wilson reading program and *without any LMB tutoring*. ██████ *regression* reading data fully correlates with the two school years ██████ receiving *only* the School District’s 20-minute Wilson reading program without fidelity. Specifically, in the second grade, ██████ regressed to the 1<sup>st</sup> percentile reading (word attack), pre-K grade equivalent (testing date 3/9/16). Exh. 39. In the fourth grade, ██████

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<sup>17</sup> The Parents still rejected the School District program, unilaterally placing KD in a Private school, arguing that *Endrew* had elevated the FAPE standard to require more than the School District offered. The 3<sup>rd</sup> circuit, however, found that FAPE was provided because the 3<sup>rd</sup> Cir. applied the meaningful benefit standard, like *Endrew*, rather than the merely more than *de minimis* standard applied by the 10<sup>th</sup> circuit, overturned by *Endrew*.



started the year at a 34<sup>th</sup> percentile reading, 3.5 grade equivalent, after a summer of LMB tutoring (testing date: 8/14/17); by March, 2018, *without LMB* and with only the School District 20 minute Wilson reading program, [REDACTED]. regressed to a 5<sup>th</sup> percentile, and 1.8 grade equivalent. Id. (testing date: 3/27/18). In both years, the Parent responded by enrolling [REDACTED] in private 1:1 LMB programming to remediate his regressions.

On the other hand, the Record fully supports the Parent's claim that [REDACTED] experience reading *progress* in the 2<sup>nd</sup>-5<sup>th</sup> grades at [REDACTED] Elementary when provided with the Parent's privately-paid, extensive LMB programming and tutoring. [REDACTED] LMB tutoring fully correlates with [REDACTED] reading data showing reading progress, contrary to [REDACTED] reading regression when provided with only the School District 20-minute daily Wilson Reading program. Specifically, the Parent provided ESY LMB programming for [REDACTED] during the summers of 2016, 2017, and 2018, as well as before school in end of the 2<sup>nd</sup> grade (May, 2016: 4 hours, M-F, in-school); during the school year in 3<sup>rd</sup> grade (Aug, 2016-June, 2017: 2 hours, M-F, before/during school); at the end of the school year in 4<sup>th</sup> grade (April, 2018-June, 2018: 2 hours, M-F, before/during school) and during the school year in the 5<sup>th</sup> grade (1 hour, M-F, before school). See, Exhs 17, 39. Also, in 2<sup>nd</sup> grade, after [REDACTED] had LMB tutoring for 4 weeks in May, plus ESY, [REDACTED] reading had progressed to grade level (2.0 grade equiv.) before the start of 3<sup>rd</sup> grade; in 4<sup>th</sup> grade, [REDACTED] had LMB tutoring in the spring, April-May, 2018, after regressing with just the School District's WRS to 1.8 in March. After LMB tutoring from April to August 2018, [REDACTED] reading had progressed back to grade level (3.9 grade equiv.). Exh. 39.

When [REDACTED] began to struggle with making progress in reading in the second grade, the Parent was referred by Dr. [REDACTED], [REDACTED] developmental pediatrician, to Dr.

██████, pediatric educational psychologist to conduct a comprehensive educational and neuropsychological examination. Parent Exh 10, Psychoeducational Evaluation (“██████ Report I”), Dr. ██████, February, 2016. Dr. ██████ identified ██████ dyslexia, ADHD, and autism and recommended intensive reading interventions, specifically Lindamood Bell programming, to “build phonemic awareness, word reading, and reading comprehension” to remediate deficiencies. ██████ Report I at 11 (“Summary”). Specifically, Dr. ██████ suggested that, depending on the LMB evaluation results and recommendations, ██████. “could participate in daily intervention during the school day as well as summer intervention to close the current reading gap.” ██████ Report I at 12.

Accordingly, as ██████. continued to experience an un-remediated 2-year reading gap, along with struggling with grade level academics as a result of insufficient programming that was not individualized or even properly administered with, Parent unilaterally enrolled ██████ in the Lindamood Bell Reading Program, as recommended by Dr. ██████. J.Exh. 10(██████ Report I). Specifically, ██████ reading deficiencies were critically low when participating in *only* the School District’s WRS in August-May 2016 (2<sup>nd</sup> grade; regressed to less than K-grade equivalency, testing 3/19/16), and August-March 2018 (4<sup>th</sup> grade; regressed to 1.8 grade equivalency, testing 3/27/18). After the precipitous regression in 4<sup>th</sup> grade, in April, 2018, ██████ returned to daily LMB private tutoring, two (2) hours every day before school the last two months of school, followed by 4 hours daily LMB ESY summer 2018, fully remediating and progressing beyond ██████

beginning of school grade equivalent<sup>18</sup> to a 3.9 grade equivalency (testing 8/14/18).

In fact, as pointed out by the Parent, the School District selected assessment data that was collected and presented at the hearing was subsequent to [REDACTED]. completing intensive LMB programming and not the data that correlated to the dates [REDACTED] received only the School District 20-minute daily group Wilson reading program to present at hearing. Thus, Parent is correct that the School District misrepresented the Reading data presented at the Hearing by not correctly correlating [REDACTED] reading data with specific interventions; that is the School District takes credit for [REDACTED] positive reading progress when, actually, the reading *progress* correlates *only* when [REDACTED] received additional, intensive parent-provided LMB tutoring programming. See, Parent Exh. 39.

In addition, the Parent argues that the LMB testing results were reliably administered by LMB practitioners, contrary to the IHO's conclusion that the LMB testing results were unreliable because the tests were "administered by individuals who do not have the proper certifications" Parent Br. at 18-19; IHO Opinion at 15. Parent asserts that the LMB Center Manager verified that the LMB staff received the required "training related to test administration" as well as in the program content. Parent Br. at 18. Significantly, the LMB program is intensive 1:1 instruction; thus, the success of the student on one lesson, progresses the student to the next lesson, unlike group reading lessons. Further, Parent points out that the Sylvania School District psychologist agreed that the "norm-based" standardized testing training is the primary requirement need[ed] in order to administer [the] necessary program effectiveness. Parent Br. at 19, citing *Brown* testimony at Tr. Vol. II, 159-164. Indeed, the LMB data is also supported

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<sup>18</sup> [REDACTED] grade equivalency after the summer ESY LMB program following the 3<sup>rd</sup> grade was 3.5 (testing 8/14/2017, beginning of the 4<sup>th</sup> grade)

██████ Report I (2d grade); and, by the Psychoeducational Evaluation II (██████ Report II) (4<sup>th</sup> grade); Feb 2018. Exh. 10, 12.

A School District must consider all recommendations from a student's doctors and other professional evaluators, including speech and educational professionals in order to identify all services that must be provided to meet the child's unique needs. Even if a School District doesn't have a particular program or services that would be required for the child to meet his FAPE needs or do not have adequate or appropriate staffing, School District retains their legal obligation to obtain and provide the required program or services to deliver FAPE. While only the IEP team can made the decisions regarding a child's educational placement and services, the IEP team must include the Parent and *fairly consider all professional recommendations*, nor can the IEP decisions be based upon financial considerations.

The IHO discredited Dr. ██████ comprehensive neuropsychological report, finding that Dr. ██████ "did not speak directly with any of the District educators, did not provide counseling for ██████ [] had limited understanding of such things as when school started in the morning, and was surprise to find the extent for [LMB] instruction as to how to administer the program." IHO Decision at 16. Further, the IHO found that Dr. ██████ testing showed that ██████ "ADHD has a greater impact on ██████ learning than does his autism spectrum disorder." IHO Decision at 15, citing "Vol II, p 18-19"). The IHO mischaracterized Dr. ██████ report, as well as his independent evaluator role to provide an Independent Educational Evaluation pursuant to the Parent's request.

Again, the School conflates the success of ██████ in the parentally-provided private LMB tutoring with the lack of success of the School's Wilson Reading program,

provided without fidelity, and claims that the School District is responsible for [REDACTED] successful remediation, and thus, provided a FAPE. To the contrary, but for the Parent's LMB program interventions, the record fully supports that [REDACTED]. would have continued to experience significant reading deficiencies and loss of academic content access, and that his on-going 2 year reading gap would have continued to widen. That is, the LMB private tutoring fully correlates with increases in [REDACTED]'s reading data. Likewise, the School District's 20-minute daily Wilson reading programming fully correlates with [REDACTED] reading data regressions when provided as the [REDACTED] only reading intervention. Exh 29.

In fact, for example, [REDACTED] DIBEL school data testing results show that [REDACTED] started 4<sup>th</sup> grade, in August 2017, at 40 words/correct/min. Subsequent testing in Nov. 2017-Jan 2018 showed [REDACTED] with a 31 words/correct/min, showing a *slight regression* in reading accuracy. After Parent hired private tutors in the Spring for additional LMB reading support, [REDACTED] DIBEL testing rose to 71 words/correct/min in May 2018. Further, at the end of the year, in addition, [REDACTED] May, 2018 testing finally showed progress, with [REDACTED] advancing from level 12, to level 18. Thus, again, [REDACTED] only showed reading progress as a result of Parent-provided private LMB tutoring.

The mainstreaming preference to educate in the least restrictive environment must be secondary to the educational benefits of learning to read and write. That is, "when a School District fails to comply with IDEA [i.e., fail to provide FAPE], unilateral private placement becomes the only option available to Parents." *Carter v. Florence County School District Four*, 950 F. 2d 156, 158 (4<sup>th</sup> Cir. 1991). Indeed, [REDACTED] was "mainstreaming" with the School District's 20 min daily Wilson Reading programming

only in the second grade (until May, 2016) and in the 4<sup>th</sup> grade (until March, 2018) when sharp reading declines and skill regressions were discovered. Significantly, upon discovering the substantial reading skill declines, the School District did not change [REDACTED] reading interventions or programming in response to his reading level regressions. Because Sylvania failed to comply with the IDEA requirements of literacy and closing the gap between ability and achievement, Parent's unilateral private program placement was the only option available to assure that [REDACTED] received appropriate, timely, and meaningful educational supports to assure that critical literacy benchmarks were achieved and that he could progress from grade to grade without additional regression beyond his ongoing 2-year gap.

The LMB program was not selected carelessly or arbitrarily by Parent. To the contrary, the Parent was advised by [REDACTED] educational/developmental pediatrician, Dr. [REDACTED] who recommended an assessment by the LMB program based on [REDACTED] dyslexia and severe reading gap and in further consideration of his co-morbidities of ADHD and autism. See, J. Exhs 10, 12. Psychoeducational evaluations, 2016, 2018. As such, [REDACTED] needed a specially designed instructional intervention that would be appropriate given [REDACTED] specific circumstances. The LMB program is a "highly effective program," recommended for students, particularly for intense remediation for children with severe reading disabilities, in Kindergarten through High School. Further, the LMB program is delivered with 1:1 tutoring with trained teachers, and, as well has "substantially positive effects for paraprofessional tutors"; thus, paraprofessionals and/or volunteers may be useful "when resources are limited [and] may reach more struggling readers." [www.bestevidence.org](http://www.bestevidence.org) at 55-56. In addition, in comparison between the LMB

and the WRS reading programs, the research shows that WRS has +0.17 ave and LMB +0.93 ave. comparative improvement effects on word attack results over the same time period. [www.bestevidence.org](http://www.bestevidence.org) at 173.

Thus, consistent with Dr. [REDACTED] recommendations that [REDACTED] needed “a strong dose of reading,” the LMB program was best tailored for [REDACTED] to achieve appropriate interventions to support reading recovery and progress to his normal-range academic abilities. Thus, the LMB programming was essential for [REDACTED] to aggressively remediate his severe reading deficits that were critically further regressing with just the insufficient School District Wilson program, provided without intensive reading interventions with fidelity. See, Exh 12.

Therefore, the IHO erred in concluding that [REDACTED] was making progress during the year [and] . . . there is no evidence that following time off from school that he was having trouble reacquiring those skills learned during the school year.” That is, the IHO agreed with the District’s argument that [REDACTED] made progress in reading as a result of the District’s Wilson Reading program and that [REDACTED] did not require the LMB summer program. The IHO erred in this conclusion. In fact, the science of dyslexia precisely emphasizes that children with dyslexia have poor reading retention and, as such, need intense remediation to allow children to ultimately retain language skills.

Further, contrary to the IHO’s conclusion that no evidence supported finding that [REDACTED] had “trouble reacquiring [reading] skills learned during the school year following time off from school,” the evidence fully supports finding that [REDACTED] significantly regressed when receiving only the District’s WRS program. The Reading assessment data fully correlates with [REDACTED]’s progress subsequent to participating in the LMB

programming and [REDACTED] regressions subsequent to participating in the District's WRS programing. Thus, the IHO erred in not considering the Reading assessment evidence that was provided, including the correlation of the assessment data with [REDACTED] progress subsequent to private LMB tutoring, and with [REDACTED] regressions subsequent to only the District's WRS tutoring. Indeed, the 4<sup>th</sup> grade regression between the beginning of the school year and the spring, from a 3.5 grade level reading to a critically low 1.8 reading level in March, 2018 is wholly contradicts the IHO's conclusion that [REDACTED] "was making progress during the year." IHO Decision at 52. Thus, the IHO conclusion that [REDACTED] made reading progress as a result of the School District's Wilson reading programming is in error and contrary to the evidence. Therefore, the IHO Decision that the District's WRS provided [REDACTED] a FAPE, such that the LMB services were unnecessary, must be REVERSED.

Further, any reading progress that the School is reporting beyond a 1<sup>st</sup> grade level, is attributable only to the Parent's intensive LMB 1:1 reading tutoring program. That the School asserts that the progress is the result of their insufficient Wilson Reading Program interventions is untrue and misleading. Because [REDACTED] has not been presented any Wilson Reading interventions beyond the initial K-level Step 1 of the program, any reading progress [REDACTED] has experienced is completely correlated with the Parent-provided intensive LMB 1:1 reading tutoring programming in the 3<sup>rd</sup>-5<sup>th</sup> grades and the summers of 2016, 2017, and 2018.

Nothing in the Record supports finding that the School District considered Dr. [REDACTED] LMB recommendations to address [REDACTED] specific reading decoding and phonemic awareness deficiencies. In addition, the School District did not respond with



additional interventions or conduct further evaluations when [REDACTED] reading data was showing that he was experiencing significantly regressing reading skills, particularly in critical early reading decoding and phonemic awareness skills. Lindamood Bell (“LMB”) is individualized to the student based upon results from a battery of several assessments, including the student’s state or district assessments, and psychoeducational evaluations. Lessons are developed and designed to address the student’s specific needs, but all are multisensory, structured reading interventions that are structured and sequential. Indeed, 1:1 tutoring highly effective, while small groups not as effective as 1:1 [www.bestevidence.org](http://www.bestevidence.org) at 114. When resources are limited, LMB’s use of paraprofessionals and volunteers may reach more struggling readers, finding that studies support “substantial positive effects for [LMB] paraprofessional tutors.” Id. at 55-56. LMB is designed to remediate children with severe reading disabilities Id. at 173.

While [REDACTED] reading success was wholly as a result of intensive LMB daily reading tutoring, the School District’s assessments simply showed [REDACTED] progress. Nevertheless, during the two time periods in the 2<sup>nd</sup> and 4<sup>th</sup> grade, when [REDACTED] was not participating in the LMB daily private reading tutoring, his reading assessments showed dramatic regressions when provided with only the School District’s WRS. Thus, the reading programming responsible for providing appropriate and effective reading progress for [REDACTED] is, without question, correlated solely with the LMB private, intensive tutoring. [REDACTED] is a Student of normal, average intelligence who, as such, is capable of successfully participating in grade level academics, given that the appropriate supplemental aids and services are provided to allow him to successfully access grade level academic content. To fail to support and remediate [REDACTED] reading needs

is to deny ■■■ his required access to a free and appropriate education in the academic curriculum. Further, the LMB program provided ■■■ with all the services and the “intense reading dose” that the Dr. ■■■ independent comprehensive evaluation recommended. The Woodcock reading tests (“word attack” results) showed that ■■■ academic progress correlated with the Parent’s privately provided LMB programming. Thus, the Parent’s private LMB programming provided ■■■ with a successful reading interventions, allowing ■■■ to remediate reading deficits and prevent further reading skill declines.

On the other hand, the Parent is responsible for providing ■■■ with the essential and critical early reading remediation and progress by enrolling him in intensive LMB programming in the 2<sup>nd</sup>-5<sup>th</sup> grades, including ESY in 2016, 2017, and 2018, and all school year tutoring in the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grades. Thus, the evidence fully supports the conclusion that the private LMB program was the appropriate placement for ■■■ and resulted in ■■■ reading remediation success. IHO Decision at 22-23. Accordingly, the IHO Decision was in ERROR and must be REVERSED.

**C. Whether ■■■ required Extended School Year (ESY) services to prevent reading skills regression over the summers, 2016, 2017, 2018.**

*(Parent Appeal 6; School District Appeal 1, 2)*

The Parent argues that the IHO erred in finding that ■■■ did not qualify for extended school year (“ESY”) summer intervention services. See, Parent Appeal Br. at 27-28, §A(g). Specifically, the Parent takes issue with the IHO’s conclusion that “■■■ was making progress during the year [and] . . . there is no evidence that following time off from school that he was having trouble reacquiring those skills learned during the

school year.” IHO Opinion at 23 citing “discussion of regression in *Cordrey v. Euckert*, 197 F.2d 1460 (6<sup>th</sup> Cir. 1990).” Specifically, the *Cordrey* court concluded that ESY is appropriate if it “prevents significant regression . . . so as to seriously affect his progress.” *Cordrey*, 197 F.2d at 1470. The Parent argues that the School District’s WRS was, in fact, inadequate and failed to provide FAPE; and, and as a result, the Parent was put in a position of providing private ESY services for [REDACTED] to both remediate and prevent significant regression of essential reading skills. Indeed, Parent emphasizes that [REDACTED] needed “intensive intervention in the summer because the window is closing on his ability to learn to read” Pet. Br. at 27; Pet. Reply Br. at 1-3, 8.

On the other hand, the School District argues that [REDACTED] was not eligible for ESY tutoring in the summers of 2017 and 2018, and that reimbursement for the 2016 summer services is time-barred. School District Appeal Br. at 19-20. The IHO agreed with the School District, finding that [REDACTED] was not eligible for ESY in the summers of 2017 and 2018 because ESY must be provided only if the IEP team determines “that the services are necessary for the provision of FAPE to the child” and that [REDACTED] IEP team “did not see any evidence that [REDACTED] would lose skills or knowledge without ESY or that his progress would be jeopardized without ESY [] or, to prevent significant regress of skills. . .so as to seriously impeded the child’s progress toward the child’s educational goals”; or, “to avoid something more than adequately recoupable regression” upon his return to school. IHO Decision at 21, citing O.A.C. § 3301-51-02 (G)(1)(b).

Also, the School District argues that the Petitioner is not entitled to reimbursement for the ESY LMB tutoring because [REDACTED] “past IEPs and the proposed 2019-2020 IEP provide him with a FAPE.” *Id.* That is, the School District asserts that

because the School's Wilson reading program was appropriately designed for [REDACTED] and fully resulted in [REDACTED] reading progress, the Petitioner did not establish progress was attributable only to outside tutoring or that further summer reading services were required. Sch. Dist. Br. at 28-29; See, Notice of Appeal (##3,4). In addition, the School District pointed out that the Parent did not object to the IEP team determination to decline ESY services for [REDACTED] and initialed the 2018 IEP ESY amendment. Id. Thus, the School District argues that [REDACTED] was not eligible for ESY in the 2018 Summer because the Parent had initialed the 2018 ESY IEP amendment, and that [REDACTED] had "made progress and demonstrated growth on the 4<sup>th</sup> grade assessments," and, further, that Parent simply "did not want to hear any positive data or information." Id. at 22.

In addition, the School District rejected the Parent's assertion that [REDACTED] needed "intensive intervention in the summer because the window is closing on his ability to learn to read" since the Parent "provided no evidence to justify this conclusion." School District Br. at 22; Pet. Reply Br. at 8. The School District argues that contrary to Parent's arguments, "[REDACTED] has made progress toward his educational goals every year" and, as such would not require ESY services. School District Br. at 21. Likewise, the School District argues that the Parent's claims of any regression were not supported in the IEP team's review of [REDACTED] reading data. Id. at 21-22 (no data cited); see, J-Exh 39; reading testing, 3/27/18 (Woodcock: 1.8 grade equiv.; GORT: 1.9 grade equiv.).

Further, the District disagrees with the Parent that it is "necessary to catch [REDACTED] up to his grade level peers in reading," asserting that the District is not required "to bring students to the same level as their peers" nor is the "failure to do so . . . a denial of FAPE." School District Br 25; Id. at 22, *citing Endrew* at 991. Finally, the School

District argues that “even if [REDACTED] hundreds of hours of tutoring improved his reading skills [], that does not demonstrate that [REDACTED] needed the outside tutoring to make progress on his IEP goals” or that he would not have recouped them without summer tutoring. *Id.* at 23. The District’s points are not well-taken.

ESY decisions are fact and case specific, and a showing of actual regression is not required to find a child eligible for ESY. That is, lack of progress is not the only criteria for finding a child eligible for ESY. *J.H. ex rel. J.D. v. Henrico County School Board*, 326 F.3d 560, 567-69 (4th Cir. 2003). Further, the *Henrico* court found that the “district court and the hearing officer applied an incorrect legal standard in determining whether extended school year services were necessary to provide a free appropriate education;” that is, “the mere fact of likely regression is not a sufficient basis” to evaluate whether a student would require an educational program during the summer. *Id.* at 569-70.

Instead, the relevant inquiry requires “window of opportunity” evidence to determine “whether the level of services provided in the summer programming are adequate to prevent the gains from the school year from being significantly jeopardized without ESY services.” *Id.* Additional factors to consider must include “likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals.” See, Letter to Given (OSEP, 2003), subsequent to *MM v. Greenville County*, 303 F.3d 523, 537-538 (4<sup>th</sup> Cir., 2002). In addition to regression and lengthy recoupment, emerging skills and breakthrough opportunities such as critical learning to read (“on the brink of learning to read”) must be considered and incorporated into the ESY eligibility analysis. 34 CFR 300.309 (1977) (ESY services must be considered annually for every child with a disability); *Henrico Cnty Sch. Bd.*, 326 F.3d at 567 (critical “window of

opportunity” evidence: whether ESY services adequate to prevent academic gains from the school year from being “significantly jeopardized.”)

Where “it is known that a different educational method has enabled a child protected by the IDEA to make real educational progress, the School Board may not dismiss that method with merely conclusory remarks in an IEP.” *Henrico Cnty Sch. Bd.*, 326 F.3d at 567. In *Henrico*, when a different educational method enabled a child protected by the IDEA to make real educational progress it “must be gauged against reasonable, accurate evaluations of a child’s potential.” *Id.* at 569. citing *Rowley*, 458 U.S. at 202 (“[T]he Court finds that the School District’s conduct in this matter reflects the inertia to which Congress was referring when it wrote in the IDEA the ‘the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.’”); 20 U.S.C. § 1400 (c)(4).

Here, in applying the “window of opportunity” evidence to [REDACTED] educational programming, the IEP team inaccurately determined that any educational reading gains [REDACTED] experienced during the school year would not be significantly jeopardized if he was not provided with ESY services, in particular, the private LMB summer tutoring. Like the Student in *Henrico*, [REDACTED] made “rapid and significant progress” in the private setting, with a more effective, comprehensive reading education method than the School’s Wilson Reading programming. Significantly, in consideration [REDACTED] window of opportunity evidence to avoid significantly jeopardizing [REDACTED] emerging reading skills, of the five cognitive ability areas of verbal comprehension, visual spatial, fluid reasoning, working memory, and processing speed, [REDACTED] personal weaknesses are particularly

working memory and processing speed. See, Psych. Evals; J. Exhs. 10 (2/9/16: 2d grade), 12 (3/16/18: 4<sup>th</sup> grade). Specifically, then, [REDACTED] is significantly weaker when recalling visual images and information than when recalling verbal presentations. [REDACTED] deficiencies in visual processing speed and working memory result in challenges in learning new material or applying logic. Id. That is, while [REDACTED] may easily understand information presented visually at the time, he has difficulty recalling it later, fully supporting his need for ESY support services to retain language gains made throughout the school year.

Thus, while [REDACTED] strengths in verbal comprehension and fluid reasoning skill were average to his peers, his significant weaknesses in working memory and processing skills have a profound effect on [REDACTED] reading and decoding new words (weak memory and recall) and reading fluency (slow processing speed) consistent with dyslexia. See, J. Exhs. 10, 12 (Dr. [REDACTED]). As a result, [REDACTED] memory functioning was average when recalling verbal information in context, but he experienced low average *retention* when recalling visual word lists, especially when presented without context, consistent with dyslexia. Id

Therefore, even had the School District provided [REDACTED] with an appropriate reading program that supported his reading needs during the school year, [REDACTED] would need ESY summer programming in his critical early reading instruction to avoid significantly jeopardizing his ability to *retain* and commit to memory the essential reading building blocks for future reading fluency, particularly in light of his dyslexia and normal intelligence abilities. That is, contrary to the School District's argument, [REDACTED] reading assessment data demonstrates a history of reading regressions and slow recoupment that

would jeopardize his school year gains in reading. Thus, [REDACTED] had a significant need for ESY and year-round reading instruction to support his emerging reading skills throughout the year, and to avoid losing critical school year gains in reading. Thus, in stark contrast to the School District arguments, [REDACTED] experienced significant reading skill regressions when provided with the School District 20-minute Wilson small group reading programming.

Unfortunately, however, instead of retention goals for supporting and reinforcing new reading skill acquisition, [REDACTED] required substantial ESY summer programming to *remediate* and provide intensive reading instruction that had not been adequately or appropriately provided to him during the School year by the School District. Thus, rather than providing ESY regression and recoupment support for [REDACTED] school year reading instruction, ESY was required to remediate [REDACTED] reading skill deficits from inadequate reading programming during the school year.

The District had the opportunity to support their argument that [REDACTED] responded successfully to the School District WRS and could make adequate and appropriate grade level reading advancement without outside tutoring when [REDACTED] was provided solely the School's reading programming when [REDACTED] was in the second and 4<sup>th</sup> grades. To the contrary, the data does not support the District's assertion that [REDACTED] made reading progress with the District's WRS reading instruction, and instead correlates negatively to [REDACTED] reading progress when *only* the District's Wilson programming was provided in the 2<sup>nd</sup> and 4<sup>th</sup> grades. In the second grade, after 7 months of the 20-minute daily Wilson program, [REDACTED] March 2016 assessments (Woodcock Reading Mastery, Word Attack) show that [REDACTED] was reading at the 1<sup>st</sup> percentile (pre-K), far below any measurable 1<sup>st</sup>



grade reading equivalent; in the 4<sup>th</sup> grade, the March 2018 assessments show that [REDACTED] had regressed from the 34 percentile and 3.5 grade equivalent at the beginning of the year to 5<sup>th</sup> percentile and 1.8 grade reading equivalent. Parent Exh. 39. (see, also, Wide Range Achievement Test-4: 0.4<sup>th</sup> percentile; <K grade level). Pet. Exh. 39. Thus, when [REDACTED] was supported with solely the School District WRS, his reading skills regress to more than a two-year grade level deficiency gap.

Therefore, the Record reading data is completely contrary to the School District assertion that [REDACTED] has made “adequate and appropriate” progress and “appropriate grade level reading advancement” every year *without* outside tutoring and that regressions were not supported [REDACTED] reading data. In fact, [REDACTED] reading progress and advancement are wholly correlated to his enrollment in the LMB reading program. Pet. J.Exh. 39. Thus, the School District assertion that there was not evidence that [REDACTED] would “lose skills, jeopardize progress, or prevent regression” without ESY is clearly unsupported. Further, in consideration of the “window of opportunity” evidence, the School District fully failed to provide the level of services needed to prevent the gains or progress [REDACTED] had made during the school year from being significantly jeopardized without extended summer educational programming. Accordingly, ESY services were critical to prevent [REDACTED] school year reading gains from being significantly jeopardized.

Further, and significantly, at the heart of this issue is the actual evidence presented by the School District to the IHO to support the argument that [REDACTED] was making appropriate grade level progress with the School District Wilson Reading Program, and, thus, was not eligible for ESY. Specifically, though, the School District presented all [REDACTED] reading data, without correlating the reading program with the data results, and as

such, included the LMB reading remediation tutoring, as well as the [REDACTED] school comprehension data. That is, the School District did not distinguish the critical decoding and phonetic awareness data between the time periods when [REDACTED] was participating in LMB private tutoring and when [REDACTED] was participating in only the School District 20-minute daily WRS which resulted in a broad and *skewed* overview showing more progress (end of 2<sup>nd</sup> grade, 3<sup>rd</sup> grade, beginning of 4<sup>th</sup> grade, 5<sup>th</sup> grade) than regression (2<sup>nd</sup> grade, 4<sup>th</sup> grade).

What the School District doesn't clarify is the time periods of intensive privately-paid LMB programming: (end of 2<sup>nd</sup> grade, 3<sup>rd</sup> grade, end of 4<sup>th</sup> grade, 5<sup>th</sup> grade, and the summers between 2<sup>nd</sup>-3<sup>rd</sup> grade; 3<sup>rd</sup>-4<sup>th</sup> grade; 4<sup>th</sup>-5<sup>th</sup> grade). Thus, the School District conflates the successful (progress) LMB data with the unsuccessful (regression) data to support their argument that the *overall* the School District provided [REDACTED] with appropriate reading programming, and, as such, did not require additional Parent-provided reading interventions. Indeed, when the data inquiry looks at the time periods when *only* the School District WRS was provided to [REDACTED] (2<sup>nd</sup> and 4<sup>th</sup> grade) the correlation presents *only* regression data.

Accordingly, in determining whether the School District provided an appropriate reading program for [REDACTED] that resulted in [REDACTED] critical reading remediation and progress towards reading competency given his intellectual abilities, the conclusion is negative, finding that the School District programming alone is wholly inadequate and further, provided without the critical fidelity. Thus, the School District's minimal reading instruction provided [REDACTED] with no measurable gains in reading skills. On the other hand, the Parent's LMB programming provided [REDACTED] with consistent reading

programming that successfully remediated his 2-year reading gaps in the 2<sup>nd</sup>-5<sup>th</sup> grades, allowing him to access critical academics in light of his intellectual abilities. [REDACTED] has made progress toward his educational goals every year *subsequent* to [REDACTED] summer LMB Reading Program, thus, [REDACTED] reading data fully supports the conclusion that [REDACTED] reading successes were as the result of the Parent's privately provided intensive LMB reading programming during the summers, before school daily in the 3<sup>rd</sup> grade, and to remediate [REDACTED] deficits at the end of the 2<sup>nd</sup> and 4<sup>th</sup> grades after the SCHOOL DISTRICT Wilson reading program resulted in [REDACTED] experiencing significant reading regressions.

Thus, the School District essentially ignored the assessment red flags and professional recommendations that fully underscored [REDACTED] significant ongoing reading deficits in the critical areas of phonemic awareness and decoding. See, Dr. [REDACTED] comprehensive psychoeducational evaluations, 2016, 2018. Exhs 10, 12. In addition, the Record includes comprehensive data showing [REDACTED] emerging significant language deficits beginning in pre-school-1<sup>st</sup> grade; indeed, Sylvania had [REDACTED] full reading records and adopted the ETR from [REDACTED] 1<sup>st</sup> grade at Hope Academy to develop [REDACTED] second grade IEP at [REDACTED] Elementary when [REDACTED] transferred to Sylvania Schools in the second grade. See, J-Exh.2, IEP2014-2015, Hope Learning Academy; J-Exh.1, ETR, 10/18/2013. It is especially unfortunate that the School District dismisses [REDACTED] reading data from his Kindergarten and first grade schooling given the substantial importance of identifying and supporting early developing readers in essential reading skills, and even more critical in students with dyslexia.

Contrary to the S.D. assertion that [REDACTED] had made progress, however, [REDACTED]

experienced a nearly two grade-level regression during the 4<sup>th</sup> grade (SY 2017-2018). ■ started his 4<sup>th</sup> grade year in August 2017, after a full summer of LMB private tutoring, successfully remediated to almost grade level reading skills, at a 3.5 grade equivalent, but, over the school year, falling to a 1.8 grade equivalent by the end of March, 2018. Significantly, like in 2<sup>nd</sup> grade, ■ only reading instruction during the 4<sup>th</sup> grade was the District's 20-minute Wilson Reading program. See, J-Exh.39; Pet. Br. at 25; J.-Exh 2017-2018 IEP (Reading Decoding: 100 mins/week (20 min/day); written expression: 75 min/week (15 mins/day). Further, while the SCHOOL DISTRICT suggests that they offered ■ increased reading programming to 35 mins/day of reading in the 4<sup>th</sup> grade, that includes the 15 mins/day of written expression in addition to the 20-minute WRS reading programming (100 mins/week). See, Exh.\_\_(IEP 2021-20180. Thus, the critical decoding reading instruction needed for ■ to learn to read and remediate his 2-year reading gap, remained at 20 minutes daily, well below the required Wilson fidelity.

Further, the School District ignored ■ comprehensive reading data that fully supports his need for *year-round* support in reading skills, especially when correlated with ■ receiving only the School District's WRS 20 min daily group program. In 4<sup>th</sup> grade, specifically, ■ began the year, after a full summer of intensive LMB programing, reading at a 3.5 grade equivalency, 34<sup>th</sup> percentile on the Woodcock Reading Mastery, Word Attack. Exh. 39. However, by the end of March, after 3 academic quarters of the School District's 20-minute Wilson reading small group interventions, ■ had significantly regressed to reading at a 1.8 grade equivalency, an almost 2-grade level deficit, in the 5<sup>th</sup> percentile, on the Woodcock Word Attack assessment. Also, in

March 2018, at the end of [REDACTED] 4th grade, his scores [REDACTED] was a grade level behind and in the 11<sup>th</sup> percentile on the Slosson Oral Reading Test; and on the Gray Oral Reading Test (“GORT”), [REDACTED] was at the 1<sup>st</sup> percentile in both accuracy and fluency, over 2 grade levels behind. Exh. 39. Furthermore, Dr. [REDACTED] confirmed that [REDACTED] reading on grade level was an appropriate and necessary goal given his normal academic abilities, as remediation is *critical in early years* so as not to lose significant and critical literary skills that could lead to adult illiteracy if unremediated. Exhs. 10, 12.

The School District arguments focus largely on discrediting Parent’s advocacy for their son, dismissing and mischaracterizing the Parent’s arguments, suggesting that the Parent is seeking an unnecessary “gold standard” program and looking for “fixes” by enrolling [REDACTED] in the LMB remediation programming after finding that the School District’s Wilson Reading program was not providing effective remediation for [REDACTED] dyslexia. In support, the School District argues that “Dyslexia is a lifelong condition and intervention is a marathon, not a sprint.” School Brief, citing TR II 10. This statement is especially dismissive regarding a justification for reducing programming or minimizing essential intervention needs for a student with an ongoing reading regressions and a continuing 2-year reading deficit, especially, when written by a School District with a legal obligation to provide appropriate, individualized education for students, including critical summer interventions for young emerging readers; and, additionally, in light of national third grade reading requirements. In fact, this sentence was quoted directly from the Yale Center for Dyslexia (“Yale Center”) and used somewhat out of context. Indeed, the quote is lifted from an article “Taking Time for Summer Fun” and the marathon/sprint analogy refers to parents “pacing themselves financially” and balancing

fun activities “with academic remediation” during the summer, suggesting that parents consider long-term financial strategies and balance summer dyslexia programming with needed “play, rest, and exploration.” Dyslexia.yale.edu, *Taking Time for Summer Fun*, Kyle Redford, Education Editor, quoting Dr. Sally Shaywitz.

In fact, contrary to the School District arguments, the article also emphasizes that young dyslexic children can lose reading skills over the summer since “written words are often still transient, temporary,” and, as such, “*a total reprieve is not in their child’s best interest.*” (emphasis added). Thus, the misuse of the suggestion to balance summer programming with financial considerations overgeneralizes the fact that dyslexia varies individually, and, further, is both dismissive of the particular struggles of the individual and inaccurate of the summer remediation potential and process of a student’s dyslexia reading challenges. To imply that the Parent in this matter is seeking summer programming that is optional because dyslexia requires “lifelong” or “marathon” interventions is, in fact, in direct conflict with Dr. Shaywitz’s advocacy and research for intensive, critical early intervention and summer programming for struggling young readers. In fact, the article undercuts the School District’s arguments, emphasizing summer programming is an important consideration as “[s]cientific data clearly show that many children, especially dyslexic girls and boys, lose reading skills over the summer.”

Indeed, to suggest that early dyslexia reading interventions are not essential or are a “gold standard” because dyslexia is a long lifetime marathon ignores the science that supports effective early, intensive remediation of the dyslexia learning disability and ultimate educational and career successes. Thus, contrary to the School District argument, and consistent with the research supporting dyslexia summer programming for

children to maintain the gains in reading skills from their academic year and the window of opportunity evidence, the Parent-provided ESY program was critical to [REDACTED] continued reading skill remediation and progress, and to avoid additional reading skill regressions. Therefore, in concluding that ESY services were unnecessary for [REDACTED] the IHO erred in rejecting the Parent's arguments and the significant "window of opportunity" jurisprudence. Further, The IHO erred in affirming the School District inaccurate testimony that ESY was unnecessary because of the "failure to show regression or [related] recoupment." IHO Decision, citing Tr. 18. Thus, despite a lifetime dyslexia disorder, in fact, early remediation assures individuals life long reading skills.

**D. Whether [REDACTED] unexcused absences were recorded in retaliation for [REDACTED] participation in LMB private reading services during the school day.**  
*(Parent Appeal #7; School District Appeal #5)*

The Parent asserts that the IHO erred in concluding that the School District did not treat [REDACTED] or Parent adversely as a result of [REDACTED] involvement in LMB interventions during the 2018-2019 school year. Parent Notice of Appeal, Exh.B §§3,4; Parent's Appeal Br. 28-29. Specifically, the Parent takes issue with the fact that the SCHOOL DISTRICT recorded [REDACTED] absences during his LMB reading interventions in the 4<sup>th</sup> and 5<sup>th</sup> grades, beginning in March, 2018, as "unexcused." Id. On the other hand, in response, the School District alleges simply that the Parent "failed to establish that the School District retaliated against" the Parent or her son. School Appeal #5, School District Br. at 29-30.

The Parent correctly points out, however, that, in his Decision, the IHO did not consider the issue that [REDACTED] absences were recorded as "unexcused" while he was

attending LMB private tutoring and during the pendency of the due process proceedings. Pet. Appeal at 3, §§B 3,4 In fact, the IHO focused only on the mechanics of recording the absences, determining that the School District *notices* of excessive absences, that could lead to truancy, were not retaliatory because no action was taken other than sending the required notifications for Student's absences, based just upon the attendance recorded in the "school's record management system." IHO Decision at 24; School District Br. 30.

If the School District had intended "no action" to be taken for an accumulation of "unexcused" absences, then it's difficult to understand why the School District would record them as unexcused, or why they would send a notice of "excessive absences."<sup>19</sup> Further, the fact that "no action" was to be taken for the unexcused absences logically implies that the absences were ultimately to be excused by the School District. As such, the exercise of recording the absences as "unexcused" only to later say in a hearing that there was no intention to take action, certainly fits the description of an action taken only to retaliate for the Parent taking █████ out of school for private reading tutoring. Further, by concluding that there was "no evidence that [] the District was retaliating against █████ or the Petitioner by *providing the notice* required under the statute" the IHO simply ignored the issue of *recording* unexcused absences in the first place. IHO Decision at 24; emphasis added. That is, the IHO avoided the issue of whether or not recording █████ absences as "unexcused" during his LMB tutoring was a retaliatory action. IHO Decision at 24-25.

Indeed, the School District Notices of Absences reflect an inconsistency with their recording of █████ absences for private tutoring. In █████ second grade, the School

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<sup>19</sup> Principal █████ sent notices of 65 hours of absence on March 21, 2018 and November 19, 2018 (4<sup>th</sup> and 5<sup>th</sup> grades). Exh 9. The hours correlated only with █████ LMB tutoring.



District acknowledged that [REDACTED] morning absences would be excused for the Lindamood-Bell extra-curricular educational tutoring.<sup>20</sup> See, Parent Exhibit 9, (“Agreement”). Again, in the third grade, [REDACTED] was absent every morning for the Parent-provided LMB programming. Yet, in [REDACTED] fourth grade year, the School District changed the type of absence for attending the very same LMB Program to “unexcused.” All of the absences were for identical reasons, consistent with [REDACTED] attendance at the LMB program, and did not exceed the tutoring and transportation time. In fact, [REDACTED] excused private LMB tutoring time in the 2<sup>nd</sup> grade was four (4) hours each morning, but the 4<sup>th</sup> grade private LMB tutoring time was only two (2) hours each morning. Further, in both 2<sup>nd</sup> and 4<sup>th</sup> grades, the Parent intervened to add LMB reading tutoring when [REDACTED] reading regressions were significantly critical.

Thus, the only difference between the second grade absences (2016) with the third (2016-2017) and fourth grade absences (2018-2019) is that the Parent signed a contract for the second grade LMB tutoring agreeing to not seek reimbursement from the school for the second grade private tutoring, to agree that FAPE would not be challenged, and that the agreement would have no future educational implications; and the School District agreed, accordingly, to not record [REDACTED] as absent. See, Parent Exh. 9 (“Agreement”). But, by the fourth grade, the Parent decided to request reimbursement for [REDACTED] ongoing private tutoring needs to remediate his grade level gaps.

Further, while the Agreement for the 2<sup>nd</sup> grade tutoring included a provision that the agreement was to have “no bearing on Student’s current and future educational

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<sup>20</sup>¶ 2 “When Student is absent without a valid excuse, the student is deemed truant, which triggers the District’s obligations to pursue truancy charges against the student/parent. Based on the parent’s assurances that [REDACTED] regularly will attend the [LMB Program] and absent any indication that [REDACTED] is no longer attending, the District will consider [REDACTED] absences during the Period to be excused absences.”

program and placements,” the agreement cannot be read to suggest that excusing a student from school for private reading tutoring could only be limited to a contractual obligation with a *quid pro quo* provision that the Parent gives up her rights to seek any future relief and would release the School District from their obligation to provide [REDACTED] with FAPE, specifically the 2015-2016 IEP reading and writing goals. Pet. Exh. 9 at ¶4, ¶3. Any suggestion that a student would be recorded as “unexcused” and subject to truancy if the Parent did not agree to and sign the contract, would be considered duress and, as such, an unconscionable contract.<sup>21</sup> Further, the Parent is not in a position to indemnify the School District for violations of legal obligations pursuant to IDEA by signing contract. Pet. Exh. 9 at ¶4.

The Parent provided ample notice of the Student’s critical private tutoring as a result of the School’s inability to provide appropriate reading supports. More significantly, the School District has both their own reading assessment data and the Parent’s LMB assessment data to see the correlation between the progress with LMB tutoring and the regression with the WRS. The assessments are accurate and consistent with one another. Thus, the School District was fully aware of [REDACTED] reading struggles and remediation needs, as well as the success of the LMB tutoring to close [REDACTED] the reading gap and prevent reading regressions.

Significantly, the School District’s focus in their Brief, like the IHO’s Opinion, is on the issuance of the *Notice* of Absences. School District Br. 18, 30; IHO Opinion at 32.

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<sup>21</sup> In fact, even without the duress of requiring the contract execution in exchange for the absences recorded as excused, the contract is unconscionably one-sided. That is, for the benefit of not recording the absences as “unexcused,” the Parent agreed that the one month of LMB tutoring was not the LRE, not the appropriate placement, not FAPE, and that the SCHOOL DISTRICT was not required to provide any special education services, and that the Parent waived right to seek reimbursement and waived all other rights against the SCHOOL DISTRICT.

That is, neither the School District nor the IHO addressed the issue regarding the recording of [REDACTED] absences for his reading tutoring as “unexcused.”<sup>22</sup> Thus, the School District did not present any argument or evidence supporting the recording of [REDACTED] 4<sup>th</sup> grade daily morning absences as “unexcused” when [REDACTED] daily morning absences in the 2<sup>nd</sup> grade for the same intensive remedial reading programming were recorded as “excused.”

Indeed, there is no legal foundation that supports a contractual requirement to excuse a Student’s absence from school for private tutoring in exchange for the Parent’s promise of paying for the private tutoring, even if the School District believes that the tutoring is unwarranted. See, Parent Exh. 9 at ¶5 (“This agreement . . . shall not serve as an admission that Student required placement outside of the District.”) In fact, pursuant to ORC§3301-69-02(B)(1)(2)(j), subject to a Parent’s written *explanation for an absence* from school to the approving authority, the superintendent of schools may approve an absence that “constitutes a good and sufficient cause for absence from the school.” It strains credulity to imagine that private tutoring requests would be summarily denied; however, presumably, any regularly scheduled tutoring request could be considered “unwarranted” as the very nature of the private tutoring is to supplement the School District’s instruction. Nevertheless, for a student with a 2-year reading deficiency, private reading tutoring would seem especially supported by the School District.

Here, the motive for requiring a contract for the tutoring absences as well as recording the 4<sup>th</sup> grade absences as unexcused, however, seems largely to avoid any acknowledgement of [REDACTED] reading skills regression and ongoing support needs for

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<sup>22</sup> It is noted that the IHO Opinion and the SD Brief language are quite similar, with the IHO concluding that the SD did not retaliate against the Parent in recording [REDACTED] private reading tutoring as unexcused, resulting in a notice of truancy.

additional, more-intensive reading tutoring, rather than denying a Student's opportunity for private tutoring. Indeed, in both the Spring of 2016 (2<sup>nd</sup> grade) and Spring of 2018 (4<sup>th</sup> grade) [REDACTED] reading assessments showed deficiencies of over two (2) grade levels, such that tutoring would be reasonable and justified. See, Pet. Exh. 39, reading testing results (3/9/16). To instead require [REDACTED] to add additional program hours to his day to supplement the School District's inadequate reading supports would only further burden an already struggling student due to the School District's inability to remediate his reading deficiencies.

Significantly, the second grade agreement also emphasized that the Parent had to agree that the "District shall not be responsible for the efficacy of the educational program provided to Student by the Lindamood-Bell Learning Processes and that they shall have no right to *seek compensatory education or other relief from the District* as a result of any real or perceived failures by the Lindamood-Bell Learning Processes or services not provided pursuant to Paragraph 3 ("Special Education Services") Exh 9 at ¶4 ("Waiver and Release") (emphasis added). Although the intent of this provision was for the School District to avoid compensatory education and reimbursement for the LMB services, the waiver and release applies only to the "failures" or "services not provided" by the LMB program. That is, the Agreement does not address the failures or services not provided by the School District.

Finally, the School District argues that the LMB tutoring is not the LRE, nor an appropriate placement, and as such, the Parent waived the right to seek reimbursement and waived all rights against the School District. While the LRE should be in the general education class to the "maximum extent possible," removal to a special service provider

certainly becomes part of the LRE when the School District can't provide the student with appropriate supported education or a specific service program in the general education class. Thus, that [REDACTED] was spending most of his day in his general education class, with additional special supports and reading tutoring services provided outside the general education classroom is consistent with IDEA's LRE requirements. That is, whether [REDACTED] appropriate reading instruction was in the classroom, or inside the school building down the hall, or in another building down the street from the School, [REDACTED] appropriate placement in the LRE is not defeated because the LRE is the educational program, not the location. As such, when the 20-minute Wilson reading programming was resulting in [REDACTED] reading regressions, the LMB reading programming, wherever it was located, provided the essential LRE for [REDACTED] to make meaningful progress in his IEP reading goals.

Therefore, to have recorded [REDACTED] absences as "unexcused" in the 4<sup>th</sup> grade for the same LMB private reading tutoring program that was recorded as "excused" in the 2<sup>nd</sup> grade [and 3<sup>rd</sup>? or did he get to school in time??) is wholly inconsistent and could certainly be considered punitive and retaliatory for Parent seeking reimbursement for [REDACTED] remedial LMB reading program in the 4<sup>th</sup> grade. That is, but for the different school year, if a student's absence for a reading tutoring program is considered an "excused" absence, the determination should remain consistent from year to year. Indeed, the difference is that the School District required the Parent to execute a contract agreeing to not seek reimbursement for the private reading tutoring program in exchange for not recording [REDACTED] absent from school for a cumulative amount of time that could ultimately reach a truancy threshold. Thus, the *quid pro quo* of the contract was that the

School District would not record [REDACTED] as absent in exchange for the Parent releasing them from all future claims, including educational responsibilities.

Here, the School District insists that because the WRS provided [REDACTED] a FAPE, the Parent-provided LMB services were unnecessary. It, however, is somewhat disingenuous and confusing that the School District would choose to consider [REDACTED] absences unexcused for privately paid reading tutoring, when the School District later relied upon the positive reading data from the LMB tutoring to argue that [REDACTED] was making reading progress while at Sylvania Schools. The logic is especially defeated when the results of the private LMB tutoring consistently support [REDACTED] successful remediation to near grade level reading when participating in LMB tutoring.

In fact, Parents can remove their child from school by providing a written excuse to the school for private tutoring. While private tutoring isn't one of the state statutory reasons for permitting the excused absence, the superintendent may approve any Parent's written requested absences. Certainly, private tutoring is excusable, particularly with a Student with substantial disabilities, including reading, autism, and ADHD, as identified under IDEA, and recognized by both federal and state law, and by the Sylvania School District in compliance with IDEA. Nevertheless, the Parent did not receive a notice of denial of absences for private tutoring; only the notices that [REDACTED] had accumulated excessive unexcused absences.

Accordingly, it is concluded in a *de novo* review of the record and relevant law, that the recording of [REDACTED] absences in the 4<sup>th</sup> grade for his out-of-school private LMB tutoring is considered retaliatory. In this matter, the administrative remedy is limited to reversing the inaccurate recording of absences and requiring the School District to correct

the record to reflect the 4<sup>th</sup> grade absences for LMB consistent with the 2<sup>nd</sup> grade LMB tutoring absences.

**E. Whether [REDACTED] Parent is entitled to Reimbursement for providing [REDACTED] with LMB private reading services during the school year and summers (Parent Appeal Notice ##5,6; School District Appeal ##1,3).**

It is well-settled that parents “may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state.” *Gagliardo v. Arlington*, 489 F.3d 105, 111 (2d Cir. 2007) citing *Burlington*, 471 U.S. at 365. Tuition reimbursement is authorized under IDEA when a School has “not made a free appropriate public education available to the child in a timely manner prior to the [private placement] enrollment.” *Forest Grove Sch. Dist. v T.A.*, 129 S.Ct. 2484, at 2496 (2009), citing, 20 U.S.C. §1412(a)(10)(C)(ii). IDEA requires that “the instruction must be specially designed to meet the child’s unique needs to provide appropriate educational opportunities and supports for the child to learn, [] failing that, if the child learns in another environment, the parents are entitled to be reimbursed for securing and paying for the other school environment that was able to teach the child to read and write” despite the fact that Student was no longer enrolled in public school. *Id.*

Further, a student has the right to relief, including compensatory education, because of the IDEA’s “stringent procedural safeguards to permit disabled children and their parents to seek redress from an LEA that is currently or has in the past, failed to fulfill its statutory responsibilities [and] District courts have broad power to grant equitable relief, including compensatory relief, to remedy past failures by an LEA.” *L.R.L. v. District of Columbia*, 896 F. Supp. 2d 69, 76 (D.C. 2012). That is, compensatory education “aims to bring the student up to the level where the student

would be but for the denial of FAPE.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *see also, G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir.2015)(endorsing “same position” method, quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the School District’s violations of the IDEA.”). In addition, parents may seek compensatory education as an “equitable remedy. . .designed to required School District to belatedly provide services that should have been delivered to the student,” in school and now need to assure that the student has the benefit of the missing services and supports. *Reid*, 401 F.3d at 518. Thus, there is broad discretion in awarding appropriate relief when a School District is found to fail to provide a student a FAPE.

In finding that IDEA authorizes a reimbursement remedy, the Court noted, in *Burlington*, that this remedy “merely requires the Town to belatedly pay expenses it should have paid all along and would have borne in the first instance had it developed a proper IEP.” *Id.* at 370-71, 20 U.S.C §1415(i)(2)(C)(iii). Thus, such reimbursement covers “expenses that [the School District] should have paid all along.” *T.P. ex rel S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009) (per curiam) (quoting *Burlington*, 471 U.S. at 370-71). In considering compensatory education or a reimbursement request for the cost of private special education services, the factors are (1) whether “the School District [has] fail[ed] to provide a FAPE”; (2) whether “the private school placement is appropriate”; and (3) whether the “equities” warrant a reimbursement or compensatory services award in full or in part. *Forest Grove Sch. Dist.*, 129 S.Ct. at 2496. Parents bear the burden of persuasion as to each element of a claim for reimbursement. *Schaffer v. Weast*, 546 U.S. 49 (2005). Thus, a Parent is entitled to



reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a FAPE and the private school's program is appropriate. *Burlington*, 471 U.S. at 370. That is, *Burlington* imposes only two prerequisites for reimbursement, that is, that the public placement failed in providing appropriate educational services, and that private educational services have success in providing appropriate educational benefits. *Id.*

To determine whether a School District's reading programming was appropriate, there must be "special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the Student so that the Student receives an educational benefit as identified on the Student's IEP." 20 U.S.C. §1401(9); *Endrew F.*, 137 S.Ct. at 998; *see also*, *Rowley*, 458 U.S. at 189-200. That is, the Student's IEP must be reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. *Id.* Although the IEP need not maximize the Student's potential, the School District is required to provide "an educational program [that] must be appropriately ambitious in light of the child's circumstances... [and] every child should have the chance to meet challenging objectives." *Endrew F.*, 137 S. Ct. at 999, (*citing Rowley* at 206-09). Thus, "the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993), *Frank G.*, 459 F.3d at 364. In short, "the issue turns on whether a placement – public or private – is 'reasonably calculated to enable the child to receive educational benefits.'" *Id.* (quoting *Rowley*, 458 U.S. 176, 207 (1982)).

In the present matter, the School District's 20-minute daily Wilson programming was not delivered with required program fidelity requirements, including insufficient instruction time and a Wilson reading practitioner who was not qualified to provide group WRS instruction pursuant to the WRS fidelity requirements, was insufficient and wholly inadequate for ■■■ to make appropriate educational progress, consistent with his abilities. Indeed, the School District defaulted on their obligation to provide appropriate reading programming and the supports and accommodations ■■■ critically needed to catch up to and access grade level educational curriculum in light of his normal, average intelligence. In fact, the School District's ongoing failures to provide appropriate reading interventions drove the need for ■■■. to require private, more ambitious and intensive 1:1 reading interventions to remediate his educational deficiencies. In addition, the School District had adequate opportunities to provide the extensive and critical reading interventions and supports for ■■■, in particular in both the 2<sup>nd</sup> and 4<sup>th</sup> grades when ■■■ was only participating in the School District's 20-minute daily reading program. Rather than identify and support ■■■ alarming reading regressions, however, the District remained firm that their 20-minute daily group lesson, provided without the minimum fidelity. Indeed, the School District conflates the positive reading assessment data from the Parent's private LMB tutoring to further support their position that the inadequate Wilson reading program provided ■■■ an appropriate reading program.

Courts have recognized that the mainstreaming preference of IDEA is secondary to educational benefit, i.e., learning how to read and write, in determining whether a Parent is entitled to reimbursement when the public school defaults on their responsibility to provide a Student with a free appropriate public education; that is, the Court focuses on

tuition reimbursement for parents when the public school defaults, regardless of whether the parent's placement is public or private. *See, e.g., Florence Cnty Sch. Dist.*, 950 F. 2d at 158; *Burlington*, 471 U.S. at 367. Likewise, for reimbursement purposes, when the School District defaults on providing FAPE, the private placement need not meet all the State requirements so long as the private placement meets the Student's individual needs and, thus, is appropriate. *Florence Cnty. Sch. Dist.*, 510 U.S. at 13-15. However, the Parent seeking reimbursement for private services must present evidence that the private placement was "likely to produce progress not regression." Here, the LMB program is focused on [REDACTED] much needed phonemic awareness instruction that combines academic content with reading remediation. The LMB program provides 1:1 instruction in one-hour units, up to six hours per day. In contrast to Sylvania's 20 minute daily, group Wilson Reading program, the LMB program was provided to [REDACTED] with the required fidelity, four (4) hours a day, five (5) days a week with an LMB certified practitioner. In addition, the comprehensive periodic testing results fully correlate [REDACTED] reading successes, particularly decoding and phonology, while enrolled in the LMB program, as well as demonstrating [REDACTED] reading regressions when having only the School's Wilson Reading program 20-minute daily small group instruction.

Because the Sylvania School District failed to comply with the requirements of the IDEA to provide [REDACTED] with a beneficial educational program that supported his reading and writing needs, the unilateral private program placement was the only option available to the Petitioners. IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a

proposed IEP, is proper under the Act.” *Burlington*, 471 U.S. at 369. Further, “because such a result would be contrary to IDEA’s guarantee of a ‘free appropriate public education,’ we held that ‘Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case, [as well as] prospective compensatory education.” *Florence*, 510 U.S. 7(1993); *Id.* Further, a Parent is entitled to seek reimbursement for a unilateral placement during the pendency of legal challenges. *Burlington*, 471 U.S. at 370. In addition, the *Burlington* Court acknowledged that while the Parent may have continued to pay for private services during the pendency of the due process litigation, the Parent does not forfeit the rights of the student under IDEA during litigation. *Id.*

Indeed, as pointed out by the Parent, the School has a legal obligation to provide a free and appropriate education. Should Parent need to seek private services to remediate substantive special education services that the School neglected to appropriately provide to the Student, the School District must be ultimately responsible for the payment for the services they failed to provide to the Student. In fact, the Parent acknowledges that pursuant to *Burlington*, the Parent’s choices when disagreeing with the School’s educational decisions are to “go along with the [School] to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement.” Parent Br. at 29, citing *Burlington* at 370. Thus, that is exactly the action the Parent has taken during [REDACTED] enrollment at Sylvania School District beginning in [REDACTED] second grade. The Parent has consistently disagreed with the School District’s reading interventions as inadequate, supported by the multiple reading assessment results with critical regression results correlated to the School District insufficient reading

programming, and, as such, paid for appropriate placements for [REDACTED] to learn to read during his critical early reading years rather than close the door on those essential learning opportunities.

On the other hand, the IHO agreed with the School District that the Parent was seeking more for [REDACTED] than the School District was obligated to provide. However, because the comprehensive Reading assessment data from both the School District and the private LMB programs fully supports the conclusions that the School District program was inadequate and correlated with substantial reading regression, and that the Parent LMB program provided intense, appropriate, successful reading remediation that resulted with [REDACTED] reading successes. Thus, consistent with the *Burlington* factors and *Forest Grove*, the IHO's conclusion that Sylvania provided [REDACTED] with a FAPE, and, dismissal of Parent's complaint, are in ERROR and must be REVERSED.

Accordingly, Sylvania Schools must reimburse Parent for the Lindamood-Bell ESY reading programming provided [REDACTED] in the summers of 2016, 2017, and 2018. In addition, the Parent is entitled to reimbursement for 2019 ESY reading programming required during the pendency of this litigation, including the 2019-2020 school year. Further, Sylvania Schools must reimburse Parent for the Lindamood-Bell reading programming provided to [REDACTED] in grades 2-5, including during the school years in 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grades. In addition, the Parent is entitled to reimbursement for additional private tutoring, hired to assist [REDACTED] during the school days.<sup>23</sup>

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<sup>23</sup> To the extent that his award does not include private at-home or additional in-school or after-school reading tutoring, it is acknowledged that the need for the additional, private remedial reading tutoring for a student of average, normal intelligence was also as a result of [REDACTED] receiving inadequate, substandard reading instruction at Sylvania Schools. Sylvania Schools must also reimburse the Parent for these additional, private reading services.

In addition, in light of [REDACTED] academic potential as a student with normal intelligence, Sylvania Schools must also prospectively provide compensatory education including appropriate and *intensive* reading programming to fully remediate [REDACTED] ongoing two-year grade level reading deficit to bring [REDACTED] up to his current grade level reading to allow [REDACTED] to access his grade level educational curriculum. This prospective programming must also include any needed substantive tutoring to remediate the educational content lost to [REDACTED] due to his reading deficiencies in the 2<sup>nd</sup>-5<sup>th</sup> grades and catch him up to grade-level curriculum, including, but not limited to reading, math and writing. Thus, this reimbursement is supported by the fundamental legal responsibility of the School District to provide [REDACTED] with the appropriate and effective reading remediation and supports that should have been provided by the School District all along.

## CONCLUSION

Because the School District failed to comply with the requirements of the IDEA to provide [REDACTED] with a beneficial educational program that supported his reading and writing needs, the unilateral private program placement was the only option available to the Petitioners. That is, because the Parent had to privately pay for [REDACTED] appropriate reading intervention programming to provide him with an essential educational program to remediate his severe reading deficiencies and close ongoing grade-level gaps to allow [REDACTED] to access and make progress in his grade-level curriculum in light of his normal, average intelligence and potential to make appropriate grade-level progress, the School District must reimburse the Parent for expenses paid for [REDACTED] for costs of programming that the District should have paid all along had it provided [REDACTED] with the proper services and supports to learn to read.

In addition, consistent with the *Burlington* factors, the Parent provided [REDACTED] with an effective private reading placement, that delivered an “intense reading program” as specifically recommended in both of [REDACTED] neuropsychological comprehensive assessments in the second and fourth grade, recommended specific methodologies and “intense remediation” to address [REDACTED] specific critical reading deficits, largely as the result of the School District’s inadequate and insufficient reading programming. Indeed, the private LMB reading assessments fully support that [REDACTED] made substantial progress while enrolled in LMB tutoring, in contrast to the assessment data showing regression while [REDACTED] receiving only the School’s Wilson program. Thus, the Parents provided substantial evidence to demonstrate that the private LMB tutoring provided progress and not regression, in contrast to the School’s Wilson reading program, provided without the required minimum fidelity, and as such, the LMB program was a necessary and appropriate placement for [REDACTED]. As such, the School District must reimburse the Parent for the privately-paid tuition expenses for [REDACTED] participation in the essential LMB reading programming between second and fifth grades.

Thus, the *Burlington* factors, that require the *public* placement to have failed to provide appropriate educational services, and the *private* educational services to have succeeded to provide [REDACTED] with appropriate reading education benefits, are met. *Burlington*, 471 U.S. 359, 365 (1985). Indeed, the School District’s programming woefully failed to be specially designed to meet [REDACTED] unique needs. Fortunately for [REDACTED], with the Parent-provided LMB private reading programs and reading tutoring, [REDACTED] made progress in a private environment that provided appropriately ambitious reading education needs and goals in light of his normal average intellectual abilities.

Accordingly, the Parent is entitled to reimbursement for the payment of the LMB programs that were successful in teaching critical decoding and fluency reading skills to [REDACTED] before the window of opportunity closed for [REDACTED]. Because the Record fully supports the conclusion that Sylvania wholly failed to provide [REDACTED] with the appropriate reading interventions, resulting in [REDACTED] further reading regressions and his continued un-remediated 2-year reading gap, the Parent must be awarded full REIMBURSEMENT for the privately provided reading accommodations that the School District failed to provide for [REDACTED].

Upon SLRO Review of the IHO Decision and the complete record, it is found that the IHO ERRED in finding that the Student “made progress in light of his circumstances” and was provided a FAPE by the School District. To the contrary, it is concluded that the School District provided a wholly insufficient Wilson reading program, administered without fidelity, and as evidenced by the Student’s continuing reading deficits and regressions when only receiving the School District WRS, particularly in light of his normal intellectual abilities. Further, the IHO ERRED in agreeing with the School District and finding that the Parents “chose Lindamood-Bell as what they believed to be the gold standard” and not concluding that Student’s reading progress data, as supported by the School District’s and private reading assessments, was fully correlated to and as a result of the Parent’s privately paid LMB reading program interventions to remediate [REDACTED] during Student’s attendance at Sylvania Schools in the second to fifth grades. That is, the LMB tutoring was a critical and essential remediation program that provided [REDACTED] with the crucial reading tutoring, vital to remediating the ongoing 2-year grade level deficiency and to provide the “intense reading program” as recommended by [REDACTED].



neuropsychologist in his comprehensive assessments and reports in both 2016 and 2018.

In addition, contrary to *Endrew F.*, the IHO ERRED in not considering the School's failure to provide [REDACTED] with "appropriately ambitious" goals that would allow him to catch up to his peers and to continue to make grade-level progression, especially *in light of* [REDACTED] academic potential with an average, normal intelligence. Indeed, the Parent's privately provided programming underscored the conclusion that [REDACTED] is fully capable of meeting grade-level expectations. Thus, [REDACTED] academic goals and services should have been sufficiently ambitious to prevent [REDACTED] significant reading regressions.

Further, under any educational legal standard and the published Wilson reading program fidelity protocol, Sylvania's 20-minute daily Wilson reading program was wholly inadequate by failing to be delivered with the required fidelity or with the appropriately trained Level II small group Wilson practitioner. By repeatedly providing [REDACTED] with the same insufficient and inappropriate Wilson reading program in second through fifth grade, that was neither individualized or tailored to [REDACTED] academic needs, nor in light of [REDACTED] intellectual circumstances, the School District failed to provide [REDACTED] with opportunities to meet appropriate reading goals that would enable him to advance in the grade-level curriculum, acquiring grade level academic content, and to close the two-year reading gap, thus failing to provide [REDACTED].

Specifically, then, it is found, in a *de novo* consideration of the Parent's Appeal arguments and issues, and review of the entire record, that the IHO ERRED in determining that the Sylvania School District provided [REDACTED] with the necessary supports and services to make any meaningful progress in an appropriate educational setting pursuant to IDEA requirements. To the contrary, it is found that the Parent-provided

private reading programs, specifically the Lindamood-Bell tutoring, along with additional private individual tutors, were essential in remediating [REDACTED] substantial reading deficits in his critical early reading grades, 2<sup>nd</sup>-4<sup>th</sup> grades.

Further, the record fully supports the conclusion that absent the Parent's unilaterally paid private programming, [REDACTED] would have continued to experience additional and substantial reading regressions between the beginning of second grade and the end of fourth grade resulting in further failures to learn grade level content and fading opportunities to remediate a widening reading gap. That is, the Parent cannot be faulted for responding promptly to [REDACTED] reading struggles and profound grade level regression at the end of the second grade and enrolling him in the LMB summer intensive program, as recommended by the comprehensive psychoeducational evaluation. The District's choice of programming is a sub-standard version of the Wilson Reading System that resulted in [REDACTED] reading skill regressions. In addition, regardless of the School District disagreement with [REDACTED] need for additional reading interventions, recording [REDACTED] absences as unexcused in the 4<sup>th</sup> grade is both inconsistent with their recording of the same absence for private reading tutoring in 2<sup>nd</sup> grade and retaliatory in the 4<sup>th</sup> grade.

Thus, it is found that the School District's 20-minute daily Wilson programming, that was not delivered with required program fidelity requirements, was insufficient and wholly inadequate for [REDACTED] to make appropriate educational progress, consistent with his abilities. Indeed, the School District defaulted on their obligation to provide appropriate reading programming and the supports and accommodations [REDACTED] critically needed to catch up to and access grade level educational curriculum in light of his normal, average intelligence. In fact, the School District's ongoing failures to provide appropriate reading

interventions drove the need for [REDACTED] to require private, more ambitious and intensive 1:1 reading interventions to remediate his educational deficiencies. In addition, the School District had more than adequate opportunities to provide the extensive and critical reading interventions and supports for [REDACTED] in particular in both the 2<sup>nd</sup> and 4<sup>th</sup> grades when [REDACTED]. was only participating in the School District 20-minute daily reading program. Rather than identify and support [REDACTED] alarming reading regressions, however, the District remained firm that their 20-minute daily group lesson, provided without the minimum fidelity was adequate, and instead, focused on criticizing Parent's strident advocacy. Therefore, the IHO conclusion that Sylvania provided [REDACTED] with a FAPE, dismissing Parent's complaint, must be REVERSED.

Accordingly, the IHO Decision is REVERSED in its entirety. Sylvania School District's 20-minute daily Wilson reading program provided to [REDACTED], pursuant to his IEP, was wholly inadequate, failing to be delivered with even minimum fidelity requirements. As such, Sylvania failed to provide any meaningful or appropriate public education services to support [REDACTED]'s IEP reading decoding and fluency goals, especially in light of [REDACTED] normal intelligence.

Thus, the Parent is entitled to REIMBURSEMENT for all private reading services, including full payment for the 2016, 2017, and 2018 ESY Lindamood-Bell reading programs (\$58,586; P. Ex. 34) that prevented additional summer regressions and intensively remediated [REDACTED] grade level reading skills deficits pursuant to [REDACTED] IEP goals, as well as any 2019 summer reading programs provided during the pendency of this litigation.

In addition, the Parent is entitled to REIMBURSEMENT for all privately paid Lindamood-Bell reading tutoring during the school years 2015-2016 (2<sup>nd</sup> grade: 4 hours per day/5 days per week, 4 weeks); 2016-2017 (3<sup>rd</sup> grade: 9 hours per week (90 minutes/5 day per week)), 2017-2018 (4<sup>th</sup> grade: 8 weeks ), and 2018-2019 (5<sup>th</sup> grade: 10 hours per week (2 hours/5 days per week), and including privately-paid reading tutoring provided during the 2<sup>nd</sup> grade (2 reading tutors, 2-4 hours per week) and the 4<sup>th</sup> grade (a Reading Specialist, and an Intervention Specialist, 2.5 hours, 3 times per week)<sup>24</sup> The Parent is also entitled to REIMBURSEMENT for any additional privately paid tutoring provided during the pendency of this litigation.

Further, consistent with the mandate in *Endrew F.*, the Parent is entitled to PROSPECTIVE RELIEF, including LMB tutoring, to fully and expeditiously remediate [REDACTED] ongoing two-year reading deficit to close the gap and enable him to appropriately participate in grade level education. Finally, [REDACTED] is entitled to COMPENSATORY EDUCATION, as needed, to remediate any academic deficiencies as a result of the School District's default on their obligation to provide the appropriate reading programming, supports, and accommodations [REDACTED] critically needed to catch up to and access grade level educational curriculum in light of his normal, average intelligence.

IT IS SO ORDERED.

October 17, 2019  
DATE

***Theresa L. Hagen, Esq.***  
THERESA L. HAGEN, ESQ.  
STATE LEVEL REVIEW OFFICER

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<sup>24</sup> Parent must provide School District with invoices, receipts, or other form of payment acknowledgement to assure accurate and full reimbursement.

**NOTICE OF OPPORTUNITY TO BRING CIVIL ACTION TO APPEAL  
DECISION OF STATE LEVEL REVIEW OFFICER**

If you are not satisfied with the findings and decision of the State Level Review Officer, you have the right to bring a civil action to appeal the decision, in writing, under Revised Code Section 3323.05(H) and Rule 3301-51-05(K)(17). You may file your civil action:

1. In the court of common pleas of the county in which the child's School District of resident is located within **45 days** of notification of the order of the state level review officer, under Chapter 119, of the Ohio Revised Code, as specified in Revised Code Section 3323.05(H), **or**
2. In a district court of the United States within **90 days** from the date of the decision of the state level review officer regardless of the amount in controversy, as specified in 20 U.S.C. 1415(i)(2) and 34 C.F.R. 300.516.

***Filing in Common Pleas Court***

If you bring your civil action in Ohio common pleas court, within **45 days** of notification of the order of the state level review officer, you must file:

1. A Notice of Appeal setting forth the order being appealed from and stating that the SLRO's order is not supported by reliable, probative, and substantial evidence. If you wish, you may provide detail regarding the grounds for your appeal.
2. The Notice of Appeal must be filed with **both** the clerk of the court of common pleas and the Ohio Department of Education **within the 45 day timeline**. The address for the Ohio Department of Education is:

Ohio Department of Education  
Office for Exceptional Children  
Procedural Safeguards Section  
25 South Front Street, Mail Stop #202  
Columbus, Ohio 43215-4183

3. You must mail a copy of the notice of appeal to the other party to the due process hearing.

***Filing in Federal Court***

If you choose to bring a civil action in the United States district court, **within 90 days from the date of the decision of the SLRO**, you must file your civil action in accordance with the court's requirements. You should call the clerk for the United States district court to determine that court's filing requirements.

October 17, 2019  
DATE

***Theresa L. Hagen, Esq***  
THERESA L. HAGEN, ESQ.  
STATE LEVEL REVIEW OFFICER

## CERTIFICATION OF DECISION AND ORDER

I, Theresa L. Hagen, am a State Level Review officer (SLRO), for the Ohio Department of Education (ODE). I have served as the SLRO in the matter of Sylvania School District and ■■■ Student and Parent of Student, Case No. 3617-2018.

I hereby certify that the attached document is a true, accurate, and complete copy of the final decision and entry, which I issued on or about October 17, 2019, in the matter of the Appeal of the Decision on Amended Due Process Complaint regarding Student and the Sylvania School District.

**Theresa L. Hagen, Esq.**  
Theresa L. Hagen, Esq.  
State Level Review Officer (SLRO)

October 17, 2019  
Date

## CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of this SLRO Decision has been served Paul Belzais, Esq., Malone, Ault & Farell, 7654 W. Bancroft Street, Toledo, Ohio 43617, attorney for the Parent, and to Shawn Nelson, Esq., Marshall & Melhorn, LLC, 4 Seagate, 8<sup>th</sup> Floor, Toledo, Ohio 43064, attorney for Sylvania Schools on this 17th day of August, 2019.

*Theresa L. Hagen, Esq.*

THERESA L. HAGEN, ESQ.  
STATE LEVEL REVIEW OFFICER