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RE: [REDACTED], THE STUDENT, AND [REDACTED] AND [REDACTED], THE PARENTS V. CLARKSVILLE-MONTGOMERY COUNTY SCHOOL SYSTEM, APD Case No. 07.03-231611J

Enclosed is a *Final Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF
SPECIAL EDUCATION**

IN THE MATTER OF:

**████ and █████, THE PARENTS, and
████, THE STUDENT,
*Petitioners,***

v.

**CLARKSVILLE-MONTGOMERY
COUNTY SCHOOL SYSTEM,
*Respondent.***

APD Case No. 07.03-231611J

FINAL ORDER

This contested case arises from claims made under the Individuals with Disabilities Education Act (IDEA)¹ and was heard before Chief Administrative Judge Phillip R. Hilliard on June 28-30, 2023. The Petitioners, █████ and █████, the parents, and █████ (████), the student, are represented by attorneys Justin Gilbert and Jessica Salonus. The Respondent, Clarksville-Montgomery County School System (CMCSS), is represented by attorneys John Kitch and Rebecca Demaree.

Pursuant to an ORDER SETTING HEARING entered on April 10, 2023, the transcript has been provided, and the parties filed proposed findings of fact and conclusions of law, in lieu of closing arguments, on July 14, 2023.

The issue in this case is whether █████ was denied a free and appropriate public education (FAPE) and, if so, the appropriate remedy. Based on review of the entire record, it is **DETERMINED** that the Respondent did not provide █████ with a FAPE because the Respondent violated its obligation to provide █████ with an appropriate individualized education

¹ The Petitioners also include claims under Section 504 (29 U.S.C. § 794(a)), the Americans with Disabilities Act (42 U.S.C. § 12132), and 42 U.S.C. § 1983.

program (IEP), depriving [REDACTED] of an educational benefit in the areas of reading, writing, and transition. Therefore, the Petitioners are the prevailing party on those claims, and [REDACTED] is awarded 888 hours of compensatory education in the form of 5 sessions per week, at 1 hour per session, of Dyslexia tutoring from a reading interventionist trained to provide Dyslexia tutoring through the Wilson Reading and Language System.² [REDACTED] is also awarded compensatory education in the way of CMCSS assessing [REDACTED], through the use of an interest inventory, a career exploration assessment, and a vocational skills assessment.

Witnesses who testified at the due process hearing, in the order they appeared, were: (1) Ms. Taylia Griffith,³ Director of Special Populations for CMCSS (Respondent's expert as a special education teacher and administrator, and in the discipline of instructionally appropriate Individualized Education Programs (IEPs)); (2) Ms. Kathryn Metcalf (Petitioner's expert as a special education teacher and administrator, and in the discipline of instructionally appropriate Individualized Education Programs (IEPs)); (3) Dr. Sara McAfee (Respondent's Dyslexia expert); (4) [REDACTED], the parent; (5) Sergeant Major Aaron Keener, Junior Reserve Officers' Training Corps (JROTC) instructor at [REDACTED]; (6) Dr. Ryann King, School Psychologist for CMCSS (Respondent's Psychology expert, and for the limited purpose of opining as to Dr. Metcalf's expert report); (7) Dr. Mandy Frost, Assistant Principal at [REDACTED]; (7) Ms. Bethanie Hargett-Slack, [REDACTED]'s [REDACTED] grade English Teacher at [REDACTED]; (8) Ms. Lisa Elliot, [REDACTED]'s [REDACTED] grade Algebra II Teacher at [REDACTED]; (9) Ms. Chelsie Jensen, [REDACTED]'s [REDACTED] grade English Teacher at [REDACTED]

² For the reasons explained herein, CMCSS may provide these services through its employees.

³ Ms. Griffith testified on day one of the proceedings, as well on day three.

█████; and (10) Staff Sergeant Brian Peters, Jr., a U.S. Army recruiter in Clarksville, Tennessee.

FINDINGS OF FACT⁴

1. █████'s family relocated to Clarksville, Tennessee for █████'s 5th grade year in 2016-2017. CMCSS' Individual Education Program (IEP) identified █████ as eligible for special education for "Specific Learning Disability" and "Language Impairments."

2. CMCSS utilizes various reading screeners to assess the abilities of its students receiving special education. These include a student's abilities, or lack thereof, in fundamental, basic reading skills.

2016-2017 IEP

3. For the 2016-2017 IEP, █████'s █████ grade year, CMCSS used a phonics screener on █████ that included screening for "decoding," finding that █████ was "Far Below Expectation." This IEP created 12 goals, including two for "Academics-Basic Reading Skills" in order to address sounding out vowels and consonants ("decoding" words).

4. For the 2016-2017 IEP, CMCSS used a reading screener that showed █████ to be in the eighth percentile for reading comprehension. The IEP noted this score as a "deficit" but stated █████ "oral reading fluency deficits must first be addressed."

5. The same reading screener showed █████ to be in the second percentile for oral reading fluency.

6. In addition to the area of oral reading fluency, the 2016-2017 IEP also labeled █████ as "exceptional"⁵ in the areas of written expression, language, and speech.

⁴ References to the Due Process Hearing Transcript are noted as Hrg. Tr., Vol. ____, [page number]:[line numbers]. References to Exhibits are noted as Hrg. Ex. ____ at [page number].

7. According to a “Curriculum Based Assessment,” at the time of the formulation of the IEP, █████ could write 40 words, spelling 28 correctly, in a three-minute period. The IEP further states that █████ “displayed multiple spelling errors which were not phonetically readable.”

2017-2018 IEP

8. For the 2017-2018 IEP, █████’s █████ grade year, CMCSS used a reading screener that showed █████ in the first percentile for reading fluency. The number of goals in this IEP reduced from the 12 in the previous IEP to six, and removed altogether both present levels of performance and goals for basic reading skills.

9. No subsequent IEPs contain present levels of performance or goals for basic reading skills.

10. █████’s goal for reading fluency, in █████ 2017-2018 IEP, was to “use decoding strategies to read at a rate of 90 words per minute”

11. In addition to oral reading fluency, █████ also remained labeled as “exceptional” for written expression, language, and speech.

12. According to a “Curriculum Based Assessment,” at the time of the formulation of the IEP, █████ could write 53 words, spelling 41 correctly, in a three-minute period. According to the Kaufman Test of Educational Achievement-Third Edition, █████ scored in the tenth percentile in written expression.

13. No dyslexia-specific interventions were provided in the 2017-2018 IEP.

⁵ While the record is unclear on the exact meaning of “exceptional,” the other categories in which █████ also was labeled as exceptional are those in which █████ scored near the bottom percentiles. Thus, the tribunal concludes that █████ exhibited severe deficits in these areas.

2018-2019 IEP

14. For the 2018-2019 IEP, ■■■■■'s ■■■ grade year, a reading screener again showed ■■■■■ in the first percentile in reading fluency. ■■■■■'s reading fluency goal was identical to that on ■■■ 2017-2018 IEP. ■■■■■ was expected to “use decoding strategies to read at a rate of 90 words per minute.” ■■■■■ written expression goal was to write 85 words in three minutes.

15. In addition to oral reading fluency and written expression, ■■■■■ also remained labeled as “exceptional” for language. The area of speech does not appear in the 2018-2019 IEP.

16. The area of speech does not appear in any subsequent IEPs.

17. According to a “Curriculum Based Assessment,” at the time of the formulation of the IEP, ■■■■■ could write 85 words, spelling 75 correctly, in a three-minute period.

18. No dyslexia-specific interventions were provided in the 2018-2019 IEP.

2019-2020 IEP

19. For the 2019-2020 IEP, ■■■■■'s ■■■ grade year, CMCSS used a reading screener, “Fastbridge,” that showed ■■■■■ to be in the ninth percentile for reading fluency. ■■■■■ IEP contained a slightly raised reading fluency goal, which assumed ■■■■■ would “use decoding strategies to read at a rate of 100 words per minute” ■■■■■ written expression goal was also slightly increased to writing 100 words in three minutes.

20. In addition to oral reading fluency and written expression, ■■■■■ also remained labeled as “exceptional” for language.

21. According to a “Curriculum Based Assessment,” at the time of the formulation of the IEP, ■■■■■ could write 85 words, spelling 87 correctly, in a three-minute period. The 80% score on the IEP suggests that the “87” words spelled correctly is a typographical error and should instead be 77.

22. No dyslexia-specific interventions were provided in the 2019-2020 IEP.

23. During the period covered by the 2019-2020 IEP, [REDACTED] turned [REDACTED] years of age, triggering the requirement for certain transition items to be included in the IEP.

24. Transition services are designed to prepare a student to have an understanding of what careers, educational opportunities, and training are available after they graduate high school, and they include things such as instruction in the classroom, hands-on experience in the school setting, hands-on experience outside of the school setting, and the performance of particular jobs.

25. It can be difficult for teachers to gather information from students at 14 years of age about their post-secondary plans.

26. However, there are tools available to assist in that process, including a student survey, student portfolio, vocational assessment,⁶ interest inventory, career exploration assessment, and a skills assessment.

27. The 2019-2020 IEP indicates a “Student interview” was done, with a box checked under the category of “how were the student’s preferences and interests considered.” Each subsequent IEP also includes this checkmark. Otherwise, aside from a “Student Transition Questionnaire” attached to Mr. Wooten’s reevaluation report (discussed below), which is not referenced in any of [REDACTED]’s IEPs, none of these assessment tools were ever used for [REDACTED]

28. In the “Measurable Post Secondary Goals” section, the 2019-2020 IEP states, under both the “Employment” and “Post-secondary Education/Training” goals, that “[REDACTED] has the ability to do anything [REDACTED] sets [REDACTED] mind to after high school.” Similarly, for

⁶ A vocational assessment helps to determine what skill sets a student possesses, where the student’s strengths lie, and what vocational areas would be beneficial for the student to explore.

“Independent/Supported Living,” the IEP says “[redacted] has the ability to live independently after high school,” and for “Community Involvement” that “[redacted] has the ability to get around the community on [redacted] own after high school.” No actual goals were stated.

2019 Eligibility Report

29. In December of 2019, [redacted]’s 8th grade year, CMCSS completed an Eligibility Report, including a Reevaluation Summary, to determine whether [redacted] remained eligible to receive special education services.

30. The report summarized “Previous Assessments” showing [redacted] ranked in the first and second percentiles in reading fluency, pseudoword decoding,⁷ and word reading. The assessments were done in 2016. The report also showed [redacted]’s full-scale IQ to be a 99 (from an IQ test taken in 2013), which equates to an average intelligence level.

31. The Eligibility Report determined that [redacted] remained eligible for special education services because [redacted] met Tennessee’s state standards for the category of Specific Learning Disability, with deficit areas of reading fluency and written expression, but not basic reading skills.

Wooten Reevaluation

32. On January 13, 2020, CMCSS school psychologist Brad Wooten performed a reevaluation to determine whether additional assessments were needed to further inform whether [redacted] still had a disability under Tennessee’s state standards.

33. Mr. Wooten found that Fastbridge reading fluency probes showed [redacted] had a negative rate of improvement (-1.21) and that “[redacted] [was] regressing in the number of words [redacted] reads correctly per minute.”

⁷ Pseudoword decoding is the ability to write down words based on their letters and the sounds the letters make.

34. Mr. Wooten administered testing to obtain an estimate of [REDACTED]'s reading abilities and found that "[REDACTED] experiences great difficulty with foundational reading skills needed to become a fluent reader." Subtest scores showed [REDACTED]'s basic reading skills (as well as broad reading, letter-word identification, and sentence reading fluency) ranking [REDACTED] in less than the first percentile.

35. A "Student Transition Questionnaire" was attached to Mr. Wooten's report, which identified [REDACTED]'s post-secondary career choices as the Army (First Choice) and "working at lego" (Second Choice), checking a box to say that [REDACTED] wanted to work part time. [REDACTED] listed NASA as a job or career [REDACTED] wanted to know more about. [REDACTED] listed teaching as a career that [REDACTED] would not like. [REDACTED] answered other questions about the mode of transportation to get to work (which was somewhat internally inconsistent – [REDACTED] marked driving [REDACTED] own car, the family car, and that a parent would drive [REDACTED]); reiterated what [REDACTED] wanted to do after high school (saying [REDACTED] wanted to work full-time, contradicting [REDACTED] earlier indication to work part-time); noted certain items that [REDACTED] already had (social security card, birth certificate, and a checking account); and advised that [REDACTED] wanted to live on [REDACTED] own in an apartment or house.

36. Under the deficit areas for Specific Learning Disability, Mr. Wooten checked "No" for basic reading skills and "Yes" for reading fluency and written expression.

2020-2021 IEP

37. On January 29, 2020, [REDACTED]'s IEP for 2020-2021, [REDACTED] [REDACTED] grade year, again documented the Fastbridge⁸ reading screener for fluency, showing [REDACTED] was reading an average of 59 words per minute, noting the average [REDACTED] grader reads 151 words per minute. The IEP contained two goals – one for reading fluency and another for written expression.

⁸ The documentation in evidence sometimes refers to this screener as "Fastbridge" and in other instances as "Fast Bridge."

38. In the 2020-2021 IEP, CMCSS restated the prior year's reading fluency goal from middle school that [REDACTED] will "use decoding strategies to read at a rate of 100 words per minute" [REDACTED] written expression goal was also substantially similar to the prior year's IEP.

39. The area of language does not appear in the 2020-2021 IEP and does not reappear in any subsequent IEP.

40. According to a "Writing Prompt," at the time of the formulation of the IEP, [REDACTED] could write a total of 53 words in a three-minute period. There is no indication of how many words were spelled correctly.

41. No dyslexia-specific interventions were provided in the 2020-2021 IEP.

42. In the 2020-2021 IEP's transition services planning section, [REDACTED]'s employment and post-secondary education/training goals respectively stated, "[REDACTED] will enter the army" and "[REDACTED] will attend a 2 year college." The IEP does not include any transition services or goals, such as preparing for the Armed Services Vocational Aptitude Battery (ASVAB),⁹ to help [REDACTED] reach [REDACTED] aspiration to enter the Army.

43. None of the subsequent IEPs include any services or goals relative to the ASVAB.

44. For [REDACTED]'s "Independent/Supported Living," the IEP states that "[REDACTED] will live on [REDACTED] own apartment or house," and for "Community Involvement" that "[u]pon high school graduation, [REDACTED] will obtain a driver's license."

45. On the same day the 2020-2021 IEP was created (January 29, 2020), [REDACTED]'s special education teacher, Dr. Candice Leaverton,¹⁰ emailed a different school psychologist than

⁹ The ASVAB is the standardized test that is given to all individuals who are interested in joining any branch of the United State Military. Minimum scores are required to enlist.

¹⁰ Ms. Leaverton is now an assistant principal for CMCSS.

Mr. Wooten – Megan Christensen. Dr. Leaverton asked Ms. Christensen to “[p]lease take a look at [REDACTED]. I am very concerned.” When Ms. Christensen asked why Dr. Leaverton was concerned, Dr. Leaverton responded, “I will have to talk to you later. This kid can’t read.”

46. During the 2020-2021 IEP, Ms. Chelsie Jensen taught [REDACTED] [REDACTED] grade English in a “co-taught” classroom consisting of Ms. Jensen (the regular education teacher) and Dr. Leaverton, the special education teacher who had sounded the reading concern to Ms. Christensen.

47. In addition to the regular education classroom, Dr. Leaverton also taught [REDACTED] in a separate special education class, Literary Transitions, made up solely of special education students. With two exceptions, one “0” and one “97.5,” [REDACTED] made all “100s” during this special education class. [REDACTED]’s grades from Literary Transitions were factored into [REDACTED] overall grade point average.

48. In Ms. Jensen’s [REDACTED] grade regular education English class, two major projects included *The Odyssey* and *Romeo and Juliet*. In the first semester of [REDACTED] grade, [REDACTED] received a 38.5, an “F,” on a *Romeo and Juliet* checkpoint assessment. On the unit assessment for *Romeo and Juliet*, [REDACTED] received a score of 73.8, a “C.”

49. On the six other assessments taken during the first semester, [REDACTED] received the following scores: 25 (F), 56 (F), 100 (A), 20 (F), 73 (C), 100 (A), and 36 (F). [REDACTED] average assessment score was 65. The scores [REDACTED] received for classwork, homework, and “other” graded items were much better, with [REDACTED] routinely receiving scores of 100, and averaging a score of 96.

50. In the second semester of [REDACTED] grade, [REDACTED] received a score of 25, an “F,” on an *Odyssey* quiz (noted as one of three graded assessments for the semester). On the two major

assessments for that semester, taken February 5, 2021, and February 25, 2021, [REDACTED] received scores of 43.5 and 55, both “F’s.” The scores [REDACTED] received for classwork, homework, projects, and “other” graded items were again much better, with [REDACTED] routinely receiving scores of 100 and averaging a score of 95.5.

51. In Ms. Jensen’s [REDACTED] grade regular education English class, [REDACTED] was permitted to redo at least some of [REDACTED] class assignments if [REDACTED] so chose, with an unlimited number of retakes. Then, Ms. Jensen would adjust [REDACTED]’s grades after [REDACTED] redid the assignment, helping [REDACTED] pull up [REDACTED] class average.

2021-2022 IEP

52. For [REDACTED]’s 2021-2022 IEP, [REDACTED] [REDACTED] grade year, CMCSS documented a reading screener, “aReading,” with [REDACTED] returning to the first percentile for reading fluency, which is the same percentile as the screener used for the 2017-2018 IEP. On another reading screener, “Autoreading,” [REDACTED] scored in the sixth percentile rank.

53. The 2021-2022 IEP listed [REDACTED] as exceptional for reading fluency and written expression but not basic reading skills. The reading fluency goal remained the same for a third consecutive year, as did the written expression goal.

54. In addition to oral reading fluency and written expression, [REDACTED] was labeled as “exceptional” for “Transition,” for the first time.

55. According to a “Writing Prompt,” at the time of the formulation of the IEP, [REDACTED] could write a total of 53 words in a three-minute period. There is no indication of how many words were spelled correctly. However, a narrative included shows that [REDACTED] was using accommodations (predictive text, snap and read, and voice to text) when completing the writing prompt.

56. No dyslexia-specific interventions were provided in the 2021-2022 IEP.

57. ██████ would turn ██████ during the 2021-2022 IEP, triggering the need for the additional category of transition services to be listed on ██████ IEP. For the age ██████ “Transition Services,” the IEP stated “[██████] will take the classes necessary to successfully meet the Tennessee graduation requirements.” The IEP also noted that ██████ was taking or would take Criminal Justice and JROTC as elective classes. Lastly, the IEP contained an annual goal that “when given grade level assignments, [██████] will ask questions to ensure ██████ understands what the expectations are, complete the assignments and turn them in 90% of the time as measured by weekly grade checks and teacher observation for the duration of this IEP.”

2022-2023 IEP

58. During the first semester of ██████’s ██████ grade school year, in November of 2022, ██████ grade teacher, Ms. Bethanie Hargett-Slack, stated to ██████’s mother that “[██████] had a reading problem, that ██████ [cannot] read.” This statement of concern was identical to that raised by Dr. Candice Leaverton nearly three years earlier, on January 29, 2020, except this time the concern was shared directly with ██████’s mother.

59. Ms. Hargett-Slack and ██████’s mother also discussed dyslexia screening. According to ██████’s mother, Ms. Hargett-Slack also stated that she had “done all she [could] do as a teacher.”

60. On November 3, 2022, per a request from ██████’s mother, ██████, for “outside resources,” Ms. Jensen, ██████’s ██████ grade English teacher, gave ██████ the website for contacting Dr. Sara McAfee, the director of the Clarksville Center for Dyslexia.

61. ██████’s 2022-2023 IEP continued to state that ██████’s deficits remained reading fluency and written expression.

62. Using the “Fastbridge CBM aReading screener,” [REDACTED]’s present levels of performance in reading fluency showed [REDACTED] in the “high-risk” category, in the first percentile nationally. [REDACTED] reading fluency goal retained the assumption that [REDACTED] will “use decoding strategies to read at a rate of . . .” Further, it increased the words per minute from 100 to 130.

63. [REDACTED] twice misspelled [REDACTED] own last name on the 2022-2023 IEP documentation.

64. The written expression goal remained the same for a fourth year in a row – writing 100 words in three minutes with one minute to think about the writing prompt.

65. According to a “Writing Prompt,” at the time of the formulation of the IEP, [REDACTED] could write a total, on average, of 53 words in a three-minute period. There is no indication of how many words were spelled correctly. However, a narrative included shows that [REDACTED] was using accommodations (predictive text, snap and read and voice to text) when completing the writing prompt.

66. No dyslexia-specific interventions were provided in the 2022-2023 IEP.

67. Basic reading skills or fundamental reading skills (such as writing out phonemes¹¹) are not typically part of an [REDACTED] grade regular education curriculum.

68. [REDACTED]’s final exam score for [REDACTED] first semester of [REDACTED] grade English-III was an F, and [REDACTED] final exam score for the second semester, even when assisted by a human reader, was a C.

69. Over the course of 13 English class assessments during the school year, [REDACTED] made five F’s, three D’s, one C, one B, and three A’s., with an average score of 59. Despite these results on objective testing measures in the classroom, [REDACTED] received a final letter grade of “C.” This included scores given for take-home assignments.

¹¹ A phoneme is a unit of sound. For example, the “cat” has three phonemes – “kuh,” “aeh,” and “tuh.”

70. When doing schoolwork at home, [REDACTED] uses “assistive technology” and “artificial intelligence bots” to complete assignments. This simultaneously illustrates [REDACTED]’s drive to do well, [REDACTED] work ethic, and [REDACTED] inability to read and write.

71. As an example, [REDACTED] can speak the words of a topic such as “George Washington” into a Word document by using speech to text software. [REDACTED] can then paste that written word, “George Washington,” into an artificial intelligence bot, such as “Chat GPT.”

72. The artificial intelligence bot can create a paper about the subject matter, here George Washington, that [REDACTED] can highlight and paste back into a Word document. [REDACTED] can then run the Word document through another software program, “Grammarly,” which will create a demeanor or style (e.g., business, informal paper, graduate level, undergraduate level, or essay). Where words appear as underlined for being contextually inappropriate, [REDACTED] would click and change them per the software’s suggestion, although [REDACTED] would not understand the changes being made by the software, or whether they were actually grammatically appropriate. [REDACTED] will next use read-aloud software to read [REDACTED] the newly fashioned Word document, and [REDACTED] then would change items that [REDACTED] was not satisfied with or that “didn’t sound right.” At that point, if Word notes grammatical errors, [REDACTED] can again click to make automatic changes that would be inserted by the software. Once the product is finished, [REDACTED] cannot read it [REDACTED]—[REDACTED] again would listen to the read-aloud software.

73. Math is a relative strength for [REDACTED], and [REDACTED] generally performs well in [REDACTED] math classes, with accommodations.

74. The “Measurable Post Secondary Goals” on the 2022-2023 IEP remained the same as in prior IEPs – “[REDACTED] will enter the Army” and “[REDACTED] will attend a 2 year college.” And for the age [REDACTED] transition services, the IEP again stated “[REDACTED] will take the classes

necessary to successfully meet the Tennessee graduation requirements.” A transition annual goal was added, stating that “[g]iven research and career websites, [REDACTED] will research career opportunities of interest and their educational requirements, meet with the counselors to discuss options and develop alternate career paths.”

75. In the 2022-2023 IEP, CMCSS wrote, as a transition present level of performance, that “[REDACTED] has stated several times about enlisting in the Army after graduation. However, [REDACTED] currently has no back up plan in the event [REDACTED] cannot enlist.” This present level was based upon a teacher observation.

76. To enter the armed services, a student must score a minimum of 31 on the ASVAB. When [REDACTED] took the test in 2022, [REDACTED] scored a “7.”¹² Regardless, a student with a diagnosis of ADHD, autism, or dyslexia is not eligible to enlist in the military. Additionally, no accommodations are allowed when taking the ASVAB for purposes of qualifying to enlist.

77. According to [REDACTED]’s JROTC instructor of the past three years, Sergeant Major Aaron Keener, [REDACTED]’s interests involved owning a landscaping business, and the military was [REDACTED] backup plan.

78. However, save a transition goal in [REDACTED]’s 2022-2023 IEP that states “[g]iven research and career websites, [REDACTED] will research career opportunities of interest and their educational requirements, meet with counselors to discuss options and develop alternate career paths,” there is no indication in [REDACTED]’s transition present levels, [REDACTED] transition goals, or [REDACTED] transition services for employment that [REDACTED] was being equipped to become a business owner for landscaping (or any business).

¹² The record is not clear on whether [REDACTED] was provided any accommodations during the test.

Independent Education Evaluation

79. On November 13, 2022, prior to the next annual IEP meeting for the 2023-2024 school year, [REDACTED]'s mother requested an independent educational evaluation (IEE).

80. On January 9, 2023, an IEE was performed by Rebecca Townsend, a school psychologist. In that IEE report, which was completed on January 26, 2023, Ms. Townsend identified that [REDACTED] had serious issues with working memory, and she diagnosed [REDACTED] with dyslexia, dysgraphia, attention deficit hyperactivity disorder, and autism. An additional evaluation was performed by Dr. Ryann King, a CMCSS school psychologist, but Dr. King only focused on autism and attention deficit hyperactivity disorder,¹³ finding that [REDACTED] met criteria for those as well.

81. Ms. Townsend's testing showed an IQ score for [REDACTED] of 82, low average.

82. Among others, Ms. Townsend used the Woodcock Johnson IV, the same test that Mr. Wooten had used two years prior, to assess [REDACTED]. Her results showed the same as Mr. Wooten's had – [REDACTED] scored less than the first percentile for basic reading skills.

83. Ms. Townsend's report also showed a "Sentence Writing Fluency" score of 0.2 percentile.¹⁴

84. Ms. Townsend concluded that "[REDACTED]'s] results on the WJ-IV Achievement demonstrates significantly below grade level skills in all areas assessed. These scores are indicators that [REDACTED] has had academic difficulties for a significant amount of time without adequate remediation."

¹³ ADHD falls under the disability designation of "Other Health Impairment" (OHI).

¹⁴ The tribunal presumes the Woodcock Johnson test was taken without any accommodations.

85. Ms. Townsend included a number of different “Recommendations to Build Reading Skills.”

86. The 2023-2024 IEP does not reflect Ms. Townsend’s dyslexia diagnosis. Nor does it speak to any of the phonological recommendations that Ms. Townsend made or any specifics about basic sight-word recognition or decoding.

87. “Dyslexia” is not a special education eligibility category on its own; it falls under the special education category of “Specific Learning Disability.”

88. Under the primary disability category of Specific Learning Disability, there are several possible deficit areas, including basic reading skills, reading fluency, and written expression.

89. Decoding skills fall under the deficit area of basic reading skills. Decoding words is part of the foundation for reading.

90. Dyslexia also falls under basic reading skills; if a student is dyslexic, then the IEP may simply identify the deficit area as “basic reading skills.”

91. If there is a deficit in basic reading skills, including decoding, that is not addressed, then a student will not have the adequate foundation to then develop fluency or written expression skills.

92. [REDACTED] has known that [REDACTED] has had reading difficulties since the 1st grade.

93. [REDACTED] first learned about the lack of dyslexia interventions for [REDACTED] after she had Dr. McAfee review [REDACTED]’s IEPs in November 2022. [REDACTED] did not learn exactly how far behind [REDACTED] was until she received the Townsend report. (*Id.* at pp. 396-97; 415-16).

94. Until Ms. Hargett-Slack’s conversation prompted further evaluations from Ms. Townsend and Dr. McAfee, █████ thought █████ was struggling to read, but she did not know █████ was functionally illiterate.

2023-2024 IEP

95. The next and final IEP for █████, 2023-2024, for █████ █████ grade year, showed the “Fastbridge aReading Screener” score placing █████ in the “High Risk” category, third percentile. Despite having recently been given a dyslexia diagnosis, which was made known to CMCSS at least as early as January of 2023, the IEP proposed by CMCSS for 2023-2024 listed goals of reading fluency and written expression, but not basic reading skills.

96. On January 25, 2023, █████ wrote a total of 55 words in a three-minute period. Nine of these words are misspelled or make no sense phonetically. The majority are simple words. Roughly 13 are articles or prepositions (e.g., the, at, a, to, etc.). The writing is very rudimentary in nature.

97. According to a “Writing Prompt” completed on February 3, 2023, █████ could write a total, on average, of 69 words in a three-minute period. There is no indication of how many words were spelled correctly.

98. In June of 2023, Ms. Katheryn Metcalf had █████ perform exercises to determine █████ written expression capabilities. █████ wrote 31 words in three minutes, spelling 16 of 31 incorrectly. Most or all of the words █████ correctly spelled were “sight words,” which are words that students memorize over the years, starting at a very young age.

99. The 2023-2024 IEP does not include any dyslexia-specific interventions.

100. The reading fluency goal was reduced from 130 words per minute back to 115 words per minute, and included the assumption that [REDACTED] “will use decoding strategies to read at a rate of 115 words per minute”

101. Despite having the same written expression goal for four straight years of writing 100 words in three minutes, [REDACTED] was only able to write 69 words in three minutes.

102. For [REDACTED] transitional present level in the 2023-2024 IEP, CMCSS again stated [REDACTED]’s interest in “enlisting in the Army after graduation,” “[h]owever, [REDACTED] currently has no back up plan in the event [REDACTED] cannot enlist.”

103. For present levels of performance, CMCSS again relied solely on “teacher observation.”

104. For [REDACTED] transition goal, [REDACTED] was to research “career opportunities of interest and their educational requirements and meet with counselors to discuss options and develop alternate career paths.”

105. [REDACTED]’s transition services planning measurable post-secondary goal under “full time employment,” was to “attend a college or trade school before perusing [sic] a career field of [REDACTED] choice,” but did not identify a particular type of career field.

106. The IEP again lists the classes [REDACTED] will take throughout [REDACTED] high school tenure, which can benefit one to transition to full-time employment or the military, including classes in criminal justice and JROTC.

107. For instance, [REDACTED] has grown and shown leadership qualities through [REDACTED] JROTC class.

108. In the JROTC class, students can work on a portfolio throughout their high school years to help document the student's goals and what they would like to achieve after graduation. However, no such portfolio was made part of the record in this case.

109. In JROTC, [REDACTED] has identified [REDACTED] post-secondary goal as having his own lawn care business in which [REDACTED] would employ others.

110. [REDACTED] has also been involved in the CMCSS Criminal Justice Academy, which is intended to give students an opportunity to further develop an interest in the criminal justice field. However, while the documents in the record show that [REDACTED] has an interest in the military, there is nothing to show that [REDACTED] has a specific interest in pursuing a career in criminal justice.

111. Aside from the classes that [REDACTED] has or will take in high school, the IEP does not specify any additional training [REDACTED] would need to obtain in order to achieve any goals. Instead, the "transition services" simply states that "[REDACTED] will take the classes necessary to successfully meet the Tennessee graduation requirements."

112. Despite Townsend's identification of dyslexia, the trigger for use of the deficit of basic reading skills, the Prior Written Notice issued on February 21, 2023, by CMCSS to accompany the 2023-2024 IEP, again identified [REDACTED]'s deficit areas as reading fluency and written expression, but not basic reading skills.

113. Both CMCSS and [REDACTED]'s parents signed that they attended the IEP meeting, for the 2023-2024 IEP, and gave consent to the services listed. However, the parents also wrote "we do not agree the IEP provides FAPE."

114. While CMCSS created an "IEP at a glance" following its 2023-2024 IEP development for all of [REDACTED]'s teachers in [REDACTED] and [REDACTED] grades, the IEP at a glance does not reflect [REDACTED] having dyslexia.

115. Regarding transition, when a student has no backup plan to a single choice of post-secondary goals, other tools can be employed to assist in the development of a meaningful, more developed set of goals and services. These other tools could include an interest inventory, a career exploration assessment, a skills assessment, or a vocational assessment.

116. These assessments are sometimes needed to align a student's preferences and interests with their actual strengths and skill sets. This is especially true when a student's preferences or interests are not likely to be fulfilled, such as "being rock stars" or becoming a professional sports player. Taking the actual skills and strengths into account in transition planning is important to determine realistic and attainable goals.

117. Accommodations should be provided to special education students, but they should not completely replace intervention and instruction.

118. ██████'s individual IEPs listed the following accommodations:

2016-2017 & 2017-2018 IEPs

- Planned/preferential seating
- Additional time to take tests or complete assignments
- Having test or test items being read aloud

2018-2019, 2019-2020 & 2020-2021 IEPs

- Allowing assignments to be typed or recorded
- Directions provided in small, distinct steps
- Planned/preferential seating
- Oral testing for directions or test items
- Extended time for tests and assignments¹⁵

¹⁵ The 2020-2021 IEP specified an additional two days for the completion of assignments.

2021-2022 IEP

- Using Snap and Read¹⁶ (for Math)
- Providing a quiet place for test taking (Math)
- Being provided photocopies of pages/items vs. student copying from text/board
- Oral testing
- Time and a half on testing
- Repeating directions verbatim for tests
- 24 additional hours for the completion of assignments

2022-2023 IEP

- Directions provided in small, distinct steps
- Time and a half on testing
- 24 additional hours for the completion of assignments
- Printed copies of notes if not in Google classroom
- Snap and Read on any assignment or text

2023-2024 IEP

- Directions provided in small, distinct steps
- Planned/preferential seating
- Repeating directions verbatim for tests
- 24 additional hours for the completion of assignments
- Snap and Read on all assignments/assessments
- Provision of notes if not posted in Google classroom or other online platforms

¹⁶ Snap and Read is an electronic application that takes a picture of text and then reads it aloud to the user.

- Retake tests if the score is under 60% after providing additional supports (tutoring or reteaching)
- Chunking large assignments into smaller more manageable parts
- Speech to Text on assignments

119. Dr. Sara McAfee, a former special education teacher and dyslexia specialist, has tutored █████ one-on-one approximately 35 times since the beginning of 2023, using the Wilson Reading and Language System program.

120. Dr. McAfee’s experience with █████ is the same as the experiences of all █████ teachers that testified at the hearing – █████ is an exceptionally hard-working and eager student.

121. Through various tests administered by Dr. McAfee in November of 2022, █████’s normed reading ability showed as remaining below the first percentile (<1%), with an “extremely poor” ability to decode, poor ability to encode, lack of good sound-symbol knowledge, and an inability to fluently read anything for comprehension.

122. Because of █████’s lack of basic reading skills, in order to learn to read on █████ own, █████ must go back to the very basic introduction of the alphabet and alphabetic sequencing, and then learn letters and sounds in order to put them together to make words and pull them apart.

123. Dr. McAfee attended the February 2023 annual IEP meeting at the request of █████’s parents. There she recommended one-on-one tutoring to meet █████ basic reading needs, along with counseling for possible depression.

124. Dr. McAfee’s recommendation for one-on-one tutoring to meet █████’s basic reading needs was not provided for in the 2023-2024 IEP (nor was the “refusal” noted in the Prior Written Notice of February 13, 2023).

125. Dr. McAfee disagreed with the proposed IEP for 2023-2024 and advised the parents not to approve it.

126. [REDACTED] has the ability to become a functional reader, defined as one who can read prescription bottles, learn a trade or a job, or attend school.

127. Only 2% of the population are considered “alexia,” meaning they cannot read at all, and [REDACTED] has already demonstrated that [REDACTED] is not alexic by virtue of the progress that [REDACTED] has made during tutoring sessions with Dr. McAfee.

128. The Wilson Reading and Language System program is a 12-step program that can be used to teach reading to a dyslexic student.

129. Using the Wilson Reading and Language System program, for [REDACTED] to become a functional reader, it will require approximately three to four years, with one-hour sessions five (5) days per week. This breaks down to 222 hours per year, or 888 hours over 4 years.

130. Dr. McAfee has already begun to employ the Wilson Reading and Language System program with [REDACTED], and is on step two of that program, with [REDACTED] learning pre-K to 1st grade reading skills.

131. [REDACTED]’s currently stated Grade Point Average (GPA) is a 3.4 out of a 4.0 system. [REDACTED] is scheduled to receive a regular education diploma at the end of the 2023-2024 school year.

132. One or both of [REDACTED]’s parents signed each of [REDACTED] IEPs, indicating that they had attended and participated in the IEP meetings.

133. [REDACTED]’s parents are both military veterans, with [REDACTED] mother, [REDACTED], serving 20 years with deployments overseas in 2006-2007, 2010, 2012, and 2019. When not deployed, [REDACTED] attended most or all of [REDACTED]’s IEP meetings.

134. The process of IEP meetings can be difficult for parents to fully grasp, including the special education lexicon that is familiar to a special education teacher.

135. There is a section on each IEP to “[d]escribe the concerns of the parents regarding their student’s education.” Throughout most of the IEPs, ██████’s parents periodically expressed concerns about ██████ being able to follow directions, reading, self-confidence, processing, and ██████’s transition to high school. The exceptions are the 2021-2022 and 2022-2023 IEPs, which note that “[a]t the moment, parents have no concerns. They are very pleased with how well ██████ is doing.” The 2023-2024 IEP states that ██████’s parents “are concerned about [██████] receiving all of the supports ██████ needs to be successful.”

ANALYSIS

When enacting the IDEA, Congress clearly conferred jurisdiction of a student’s IDEA claims upon hearing officers, also known as administrative law judges. 20 U.S.C. § 1415(f)(3)(A). Therefore, administrative judges are to determine whether a student received an appropriate education under the IDEA. 20 U.S.C. § 1415(f)(3)(E). In Tennessee, the Office of the Secretary of State, Division of Administrative Procedures, has jurisdiction over the subject matter and the parties of this proceeding and the undersigned administrative law judge (the tribunal) has the authority to issue final orders. *See* TENN. COMP. R. & REGS. 0520-01-09-.18; *see also* TENN. CODE ANN. § 49-10-101.

The U.S. Supreme Court held in *Schaffer v. West* that the burden of proof is on the party “seeking relief.” 546 U.S. 49, 51 (2005). Thus, when a parent files a request for a due process hearing, the parent bears the burden of proof. *Id.* at 56; *see also, Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990). The parents also bear the burden of proof for their ADA, Section 504, and § 1983 claims. *Doe v. Sumner Cnty. Bd. of Educ.*, No. 3:19-CV-01172, 2020 WL

5797980, at *2 (M.D. Tenn. Sept. 29, 2020) (citing *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 452-53 (6th Cir. 2008)).

Therefore, the Petitioners in this case have the burden to introduce evidence that would, by a preponderance of the evidence, prove the issues alleged in the due process complaint should be resolved in their favor.

A. FAPE (Reading and Writing)

The IDEA requires that a free and appropriate public education (FAPE) be made available to all children between the ages of 3 and 21. 34 C.F.R. § 300.101. The IDEA ensures that “all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

The IEP need not be ideal but must “aim to enable the child to make progress” both academically and functionally. *Andrew F.*, 580 U.S. at 399-400. The instruction offered must be “‘specially designed’” to meet a child’s ‘unique needs’ through an “[i]ndividualized education program.” *Id.* at 400 (citing §§1401(29), (14)). The IEP “is [to be] constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. §§1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). Having considered the disability, achievements to date, and potential for growth, the IEP should aspire to be an “appropriately ambitious” educational program. *Andrew F.*, 580 U.S. at 402.

While filed under the IDEA, this case is not just about what the IDEA, itself, means and how to abide by its dictates. If there are state special education laws that are more extensive than the IDEA, a violation of such a law may amount to a violation of the IDEA. *Doe ex rel. Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 457 (6th Cir. 1993). One such Tennessee law – that is at the center of this case – is TENN. CODE ANN. § 49-1-229, which sets forth requirements for schools to identify children with *characteristics* of dyslexia, notify parents when a child exhibits such *characteristics* (through tests/screeners¹⁷), provide such parents with dyslexia information and resource materials, provide the student with the appropriate *dyslexia-specific* interventions, and monitoring the progress and effectiveness of interventions. TENN. CODE ANN. § 49-1-229(a)(3) and (c)(1-2, 4) (emphasis added). Additionally, schools are to put a plan together as to how to implement “appropriate instruction and evidence-based interventions for all students, including those who exhibit the characteristics of dyslexia.” TENN. CODE ANN. § 49-1-229(b).

TENN. CODE ANN. § 49-1-229 defines “dyslexia-specific intervention” as follows:

“Dyslexia-specific intervention” means evidence-based, specialized reading, writing, and spelling instruction that is multisensory in nature, equipping students to simultaneously use multiple senses, such as vision, hearing, touch, and movement. Dyslexia-specific intervention employs direct instruction of systematic and cumulative content, with the sequence beginning with the easiest and most basic elements and progress methodically to more difficult material. Each step must also be based on those already learned. Components of dyslexia-specific intervention include instruction targeting phonological awareness, sound symbol association, syllable structure, morphology, syntax, and semantics.

TENN. CODE ANN. § 49-1-229(f)(1).

¹⁷ “The dyslexia screening procedures shall include phonological and phonemic awareness, sound symbol recognition, alphabet knowledge, decoding skills, rapid naming, and encoding skills.” Tenn. Code Ann. § 49-1-229(a)(2).

1. Dyslexia and Fundamental or Basic Reading Skills

Ms. Kathryn Metcalf is a recently retired special education administrator who has roughly 34 years of experience in the field of special education, including the formulation of instructionally appropriate IEPs for students with dyslexia. Throughout her tenure, Ms. Metcalf has also been trained in reading programs for dyslexic students, including the Wilson Reading and Learning System program and, in turn, been responsible for providing that training to the teachers in her schools. Ms. Metcalf testified as an expert witness for the Petitioner regarding how children learn to read and the balance between providing accommodations versus teaching children to learn to read. Ms. Metcalf also testified about how reading and writing work together. Ms. Metcalf ultimately opined that based on the information available to CMCSS, ■■■ showed characteristics of dyslexia that should have led to ■■■ being provided with dyslexic-specific interventions instead of only providing ■■■ accommodations, or “work-arounds,” and that ■■■ was not making progress due to a lack of basic, fundamental reading skills.

Ms. Metcalf first testified about how a student learns to read. She discussed that basic, or fundamental, reading skills are foundational, and that without a foundation a student should not be expected to perform well at the next levels of reading, including reading fluency and comprehension. She likened it to attempting to build a house without a foundation. Similarly, without the foundational, basic reading skills, a student should not be expected to perform well in the area of written expression because without the ability to decode words, students do not learn how to write words other than those they have memorized (sight words).

All three experts who testified regarding basic reading skills (Ms. Metcalf and Dr. McAfee for the Petitioners, and Mr. Griffith for the Respondent) addressed some of the different

parts that make up basic reading skills. These include decoding and encoding. Decoding refers to the ability to understand the way that certain letters make sounds – this is sometimes also referred to as phonological awareness. Encoding is a next step – the ability to hear sounds in a word and write the word on paper. Breaking it down further, Dr. McAfee testified that systematic decoding involves the basic introduction of the alphabet, alphabet sequencing, and learning letter and sounds in order to put them together to form words. Similarly, Ms. Griffith noted the use of phonemes, or basic units of sound, as a part of phonemic awareness, using the example of the word “cat” having three phonemes (“kuh,” “aeh,” and “tuh”). These different parts of basic reading skills are some of what the dyslexia screeners are looking at to determine if a student has characteristics of dyslexia.

Ms. Metcalf also testified about the dangers of providing accommodations versus continually teaching a student how to read, beginning with basic reading skills. In her opinion, both students and teachers can become overdependent on accommodations because they can result in higher test scores or because they represent what simply becomes the status quo due to such accommodations having been previously provided. She further opined that when test scores are the driver, accommodations can ultimately remove a student’s desire to want to read. Ms. Metcalf’s testimony was almost entirely unrebutted by CMCSS, and it is credited given her education, expertise, and years of experience in the field of special education.

2. ██████’s Characteristics of Dyslexia

The record contains a number of screeners, tests, and assessments that identified characteristics of dyslexia in ██████ TENN. CODE ANN. § 49-1-229 requires that students be screened for “phonological and phonemic awareness, sound symbol recognition, alphabet knowledge, decoding skills, rapid naming, and encoding skills.” TENN. CODE ANN. § 49-1-

229(a)(2). As early as 2016, assessments of █████ showed █████ in the second percentile for *pseudoword decoding*.¹⁸ Also in 2016, CMCSS performed a screener that showed █████ was “Far Below Expectation” in “*decoding*.” The assessments and the screener led to goals in the 2016-2017 IEP to address these “*Basic Reading Skills*” deficits. But this would be the last time █████’s IEPs would note basic reading skills as a deficit and therefore create goals to help █████ build a foundation to read. No testimony was elicited at the hearing to explain this turn of events other than Ms. Griffith testifying that when students move to the secondary level, “they become more focused on fluency” and “outside of that, I cannot tell you why it’s not stated, other than that’s not the eligibility category that they agreed upon as a[n] [IEP] team.”

On January 13, 2020, a reevaluation of █████ was performed by CMCSS school psychologist Mr. Brad Wooten for the purpose of determining whether additional assessments were needed to further inform whether █████ still had a disability under Tennessee’s state standards. Mr. Wooten found that █████ “experiences great difficulty *with foundational reading skills needed to become a fluent reader*.” An assessment performed by Mr. Wooten showed █████ in the less than first percentile for *basic reading skills and letter-word identification*.¹⁹ But Mr. Wooten²⁰ checked “No” for basic reading skills as a deficit.²¹ Sixteen days later, on January 29, 2020, █████’s special education teacher, Dr. Candice Leaverton, emailed a different school psychologist than Mr. Wooten – Megan Christensen. Dr. Leaverton asked Ms. Christensen to

¹⁸ This assessment, the Wechsler Individual Achievement Test-Third Edition, placed █████ in the first or second percentile for all other reading areas as well (basic reading composite score of 2%, oral reading fluency score of 1%, and word reading score of 2%).

¹⁹ That same assessment, the Woodcock Johnson IV, also showed █████ to score in the less than first percentile for broad reading and sentence reading fluency.

²⁰ Mr. Wooten was not called to testify as a witness.

²¹ Mr. Wooten checked “Yes” for reading fluency and written expression.

“[p]lease take a look at [REDACTED]. I am very concerned.” When Ms. Christensen asked why Dr. Leaverton was concerned, Dr. Leaverton responded, “I will have to talk to you later. *This kid can’t read.*” In November of 2022, almost three years later, [REDACTED]’s English teacher, Ms. Bethanie Hargett-Slack, stated to [REDACTED]’s mother that “[REDACTED] had a reading problem, that [REDACTED] *[cannot] read.*”

At that point, [REDACTED] asked for an independent education evaluation, which was performed by school psychologist Rebecca Townsend on January 9, 2023.²² Ms. Townsend diagnosed [REDACTED] with dyslexia.²³ Ms. Townsend employed a number of tests on January 9, 2023, including the Woodcock Johnson IV, which is the same test that Mr. Wooten used for [REDACTED] January 2020 reevaluation. [REDACTED] achieved the same percentile rank on the *basic reading skills* subtest as when Mr. Wooten administered the test three years prior – less than the first percentile. Ms. Townsend concluded that “[REDACTED]’s] results on the WJ-IV Achievement demonstrates significantly below grade level skills in all areas assessed. These scores are indicators that [REDACTED] has had academic difficulties for a significant amount of time without adequate remediation.”

In her “Recommendations to Build Reading Skills,” Ms. Townsend stated as follows:

[REDACTED] demonstrates weaknesses in *phonological processing* that appear to interfere with [REDACTED] reading and writing skills. In addition to using an evidence-based intervention to build [REDACTED]’s] *phonological processing skills*, it may be also helpful to practice playing word games that require rhyming, blending sounds together to form a word, removing a sound from a word to form another word, and saying a one word syllable or one sound at a time. In some cases, incorporating letters (orthography) is helpful for supporting and building *phonological processing*. For example,

²² Ms. Townsend was a school psychologist for CMCSS from 2000-2010, but she no longer works for CMCSS, which allowed her to perform the evaluation as an independent evaluator.

²³ Ms. Townsend also diagnosed [REDACTED] with dysgraphia (a disability in the area of writing), ADHD, and Autism.

use letter cards to build a word and then change one or more letters or letter combinations to form a different word.

Reading teachers are encouraged to focus on developing [REDACTED]'s reading fluency and de-emphasize individual word analysis. Teachers can combine fluency techniques such as in imitative reading, repeated reading, radio reading, phrase reading, paired reading, and echo reading, *basic site-word recognition*, *decoding*, vocabulary development, and comprehension lessons.

Due to [REDACTED]'s reading difficulties, it is recommended that [REDACTED] receive additional time to complete tests, quizzes, and assignments requiring this skill.

Hrg. Ex. 17, at Bates No. 0347 (emphasis added).

From 2016 through November of 2022, multiple indicators of basic skills reading difficulties that squarely fit within the dyslexia markers noted at TENN. CODE ANN. § 49-1-229(a)(2) should have compelled CMCSS to notify [REDACTED]'s parents that [REDACTED] showed characteristics of dyslexia and provide them with the appropriate resource material, put a plan together to provide dyslexia-specific interventions to [REDACTED], and monitor [REDACTED]'s progress using tools to measure the effectiveness of the interventions. Other than in 2016-2017, when [REDACTED]'s IEP at least identified basic reading skills as a deficit and provided two goals to address the deficit, CMCSS failed to do so.

If there could have been any doubt about [REDACTED] possessing the characteristics of dyslexia, Ms. Townsend's evaluation report from January of 2023 removed it. Inexplicably, CMCSS failed to comply with TENN. CODE ANN. § 49-1-229 even thereafter. There is nothing in the record to show that CMCSS, to date, has provided [REDACTED]'s parents with appropriate resource material (aside from Ms. Jensen having provided [REDACTED] the website for the private dyslexia business owned by Dr. McAfee), put a plan together to provide dyslexia-specific interventions to [REDACTED], or monitored [REDACTED]'s progress using tools to measure the effectiveness of the intervention.

Indeed, CMCSS' response to an interrogatory propounded by the Petitioners asking what dyslexia-specific interventions have been provided to [REDACTED] was: "*dyslexia specific interventions were not specifically provided.*" Additionally, the IEP for 2023-2024 year, which was written on March 20, 2023, almost two months after the completion of the Townsend evaluation, on January 26, 2023,²⁴ still does not identify basic reading skills as a deficit area. Moreover, Ms. Townsend specifically recommended both "evidence-based intervention to build [REDACTED]'s] phonological processing skills" and a number of practical exercises she opined would be helpful in that regard, as well as "basic site word recognition and decoding techniques." There is no mention of any of this language in the 2023-2024 IEP, nor any testimony to show that it has been provided by CMCSS.

3. CMCSS' Defense

CMCSS' defense is based on [REDACTED] currently having a GPA of 3.4 and [REDACTED] being on track to graduate with a high school diploma. This defense is unpersuasive. First, similar oversimplified defenses have been rejected. *Andrew*, 580 U.S. at 402, n. 2 ("We decline to hold in *Rowley*, and do not hold today, that "every handicapped child who is advancing from grade to grade... is automatically receiving a [FAPE].") And while on its face CMCSS' argument appears stronger given that [REDACTED]'s GPA is more than "passing" in some instances, the record contains a substantial amount of evidence suggesting that [REDACTED]'s grade point average may not reflect of [REDACTED] actual capabilities in [REDACTED] English classes, specifically in the areas of reading and writing.

²⁴ The record does not establish exactly when the Townsend evaluation was made available to CMCSS. However, Ms. [REDACTED] testified that she provided it to the school as soon as it became available to her, about which testimony there was no dispute. The tribunal presumes, therefore, that it was provided to CMCSS between January 26, 2023, and March 20, 2023.

For instance, though concluding with semester-ending grades of a “B” and an “A,” respectively, in █ grade English, █ received scores of 25 (F), 56 (F), 100 (A), 20 (F), 73 (D), 100 (A), 36 (F), 38.5(F), and 73.8 (D), an average score of 58, on assessments (tests) taken during the first semester. In the second semester, records show there were three graded assessments (tests). On these assessments, █ received scores of 55, 43.5, and 25, all “F’s.”

The explanation for █ final semester grades are two-fold, according to the proof adduced at the hearing. One, █ fared much better on classwork, homework, and “other” graded items, routinely scoring 100, with an average of 96 in the first semester and 95.5 in the second. And two, in █ 9th grade English class, █ was permitted to redo at least some of █ class assignments if █ so chose, with an unlimited number of retakes. █’s grades would then be adjusted, helping █ pull up █ class average.²⁵ Similar issues are seen in █’s █ grade English class grades. █ average score on assessments was 59. █ other work, including some that was “take-home,” brought █ final first semester grade up to a 70, a “C.”²⁶

The second problem with CMCSS’ defense is that what constitutes appropriate educational progress for █ must be factored into █ IEPs, *L.H. v. Hamilton County Department of Education*, 900 F.3d 779, 793 (6th Cir. 2018); *see also D.C. Klein Indep. Sch. District.*, 860 Fed. Appx. 894, 905 (5th Cir. 2021) (holding that the development of a child with disabilities “should be measured . . . with respect to the individual student”), as should the objective data from assessments and screeners. Of course, this harkens back to *Andrew F.’s*

²⁵ The testimony suggests that all students were provided the opportunity to redo certain assignments. It was not part of █’s accommodations in the IEP in effect at that time, the 2020-2021 IEP.

²⁶ Relatedly, the testimony showed that █’s scores from █ Literary Transition class – a type of English class comprised of special education students, only – was factored into █ overall GPA. The proof shows that █ made one “B” in this class and the rest “A’s.” During the 2020-2021 school year, out of 43 graded assignments, all but two were scores of 100.

requirements regarding an appropriately ambitious IEP considering the student’s unique needs based on █ disability and potential for growth. *Endrew F.*, 580 U.S. at 400-402.

As illustrated by some of the conflicts in █’s grades, using those grades, alone, would be problematic to show progress. The objective data on which the IEPs *were written* show relative stagnation. Further, this says little about what the objective data has continually shown for what *should have been written* in the IEPs regarding basic reading skills.

4. Objective Assessments

█ has had two consistent deficit areas in █ IEPs – reading fluency and written expression. To examine █ progress in these two areas, █ present levels of performance (the level at which █ was performing at the time of the drafting of █ IEPs) are important to consider. The tribunal concludes that █’s reading fluency over time, though there are a few increases, has not changed, or perhaps has even regressed from where █ started in 2016.

READING FLUENCY		
<u>Date of Assessment</u>	<u>Percentile</u>	<u>Citation</u>
August 24, 2016	2 nd percentile	HRG EX. 1, BATES NO. 0040
October 17, 2016	1 st percentile	HRG EX. 5, BATES NO. 00211
March 15, 2018	1 st percentile	HRG EX. 3, BATES NO. 00154
March 4, 2019	9 th percentile	HRG EX. 4, BATES NO. 00176
January 13, 2020	Less than the 1 st percentile	HRG EX. 5, BATES NO. 00233
November 30, 2020	1 st percentile or 6 th percentile ²⁷	HRG EX. 11, BATES NO. 00267

²⁷ These two scores apparently come from two different screeners, aReading and Autoreading, respectively.

January 12, 2022	1 st percentile	HRG EX. 13, BATES NO. 00267
August 26, 2022	2 nd percentile	HRG EX. 19, BATES NO. 04689
January 9, 2023	less than .1 percentile	HRG EX. 5, BATES NO. 0341
January 11, 2023	3 rd percentile	HRG EX. 19, BATES NO. 04689

As for written expression, though ██████’s IEPs show that ██████ has been able to write more words at certain times over the years, this does not conclusively show progress for several reasons. One, the language of the IEPs is not consistent in providing the number of words that are spelled correctly – no IEPs after the 2019-2020 IEP provided the number of misspelled words, which is obviously important for all students, but even more for someone with dyslexia, given their phonetic challenges. Relatedly, until the 2023-2024 IEP, none of the IEP’s contained goals for written expression regarding punctuation.

Two, the IEPs are unclear on whether accommodations were provided to ██████ when conducting the writings, or whether those accommodations were helpful. The 2020-2021 and 2021-2022 IEPs state that ██████ wrote 53 words in three minutes. No accommodations were noted to have been provided on the IEPs for the writing prompt. Accommodations were stated on the IEP as having been provided for the writing prompt given in 2022-2023, but ██████ made no progress – ██████ number of words written were exactly the same, 53.

And third, the trends in the scores of ██████’s performance in written expression do not compel a finding of progress, especially given that the last writing example in evidence from January 23, 2023, presuming the use of accommodations, suggests that the total number of words on the page don’t tell the whole story. ██████ started with a baseline of 40 words in three minutes,

according to the 2016-2017 IEP. For the 2017-2018 IEP, ■ was able to write 53 words in three minutes. The next two successive IEPs (2018-2019 and 2020-2021) saw what seems to be a precipitous increase to 85 words in three minutes, but then the scores for the next three years regressed back to 53 words in three minutes. On January 25, 2023, on another writing sample, ■ wrote 55 words in three minutes. According to the 2023-2024 IEP notes, eight days later, on February 3, 2023, ■ could write an average of 69 words in three minutes. One score of 69 words in three minutes amongst the 53's in three minutes from the three successive years prior, and the 55 words in three minutes a few days prior does not show progress over time. This is especially true since there is no indication whether the words written on February 3, 2023, were spelled accurately or that the writing contained the correct punctuation.²⁸

The tribunal concludes that the January 25, 2023, writing is a better depiction of ■'s capabilities. In that writing, eight of the words are misspelled or make no sense phonetically. The majority are simple words. Roughly 13 are articles or prepositions (e.g., the, at, a, to, etc.). There is a total of 4 punctuation marks, all periods. Two of them are misplaced or not correct. The writing does not convey complete or cogent thoughts. For these reasons, the tribunal determines ■ has not progressed in the area of written expression.

Because these scores did not improve over time, it explains in part why the goals for reading fluency changed very little for ■ over the years. The rest of the explanation, more importantly, is that these scores and the resulting similarities in the goals year to year bear out Ms. Metcalf's opinion that CMCSS was attempting to help ■ build a reading house without a foundation.

²⁸ In the last IEP, for 2023-2024, spelling and punctuation are elements of written expression goals.

5. ■■■■■'s Potential for Growth

As noted above, one important factor under *Andrew F.* is the student's potential growth. 580 U.S. at 400-402. After all, even “[l]imited academic progress does not ipso facto signal a violation of the IDEA” *A.W. v. Loudon County School District*, No. 3:20-cv-76, 2022 WL 4545609, at * 12 (September 28, 2022) (quoting *J.B. ex rel. Belt v. District of Columbia*, 325 F.Supp.3d 1, 9 (D.D.C. 2018)). The ultimate question is whether the educational program that CMCSS formulated for ■■■■■ allowed ■■■■■ to make progress appropriate in light of ■■■■■ circumstances. *Andrew F.*, 580 U.S. at 399.

The inquiry that follows is two-fold: can ■■■■■ learn to read, and if so, whether that potential required more than what CMCSS offered ■■■■■. The answer to both questions is a resounding yes. Dr. Sara McAfee credibly testified that ■■■■■ can learn to read if ■■■■■ receives dyslexia-specific instruction. CMCSS did not attempt to impugn Dr. McAfee's testimony on this point, and it called no witnesses to rebut Dr. McAfee's opinion. Nor is there any dispute that ■■■■■ has an IQ of 82, low average,²⁹ or that the services provided have not been effective in reading fluency or basic reading skills. While one could quibble about progress in written expression, as discussed above, the tribunal has concluded that no sustainable progress has been shown in that area.

In the analogous case of *Nein v. Greater Clark Co. Sch. Corp.*, 95 F.Supp.2d 961 (S.D. Ind. 2000), wherein a student who was of average intelligence yet functionally illiterate after three years of education in ■■■■■ school, the court noted that *Rowley* had explained “the requirements of the IDEA in terms of providing ‘access’ to an education.” *Nein*, 95 F.Supp.2d at 977. To that end, the court noted that “the ability to read is truly the key that opens the door to

²⁹ In 2013, ■■■■■'s IQ score was 99.

all other aspects of an education,” and that if the school was providing “a Chevrolet without a transmission – even if the engine might run, no power reached the wheels.” *Id.* The tribunal finds these metaphors to be applicable to the instant case.³⁰

In another similar case, *C.B. v. Special Sch. Dist. No. 1, Minneapolis Minn.*, 636 F.3d 981 (8th Cir. 2011), the court reversed the federal district court below and agreed with the hearing officer that the school had not fashioned an appropriate IEP for the student, finding that “[y]ear after year, the School District set trifling goals for the Student and failed to help ■■■ achieve even those insignificant goals.” *C.B.*, 636 F.3d at 989. The tribunal would not cast CMCSS’ goals as being trifling or insignificant, but they were wrong. This conclusion is reached from the unrebutted testimony of Ms. Metcalf that CMCSS’ repeatedly asking ■■■ to use decoding skills in ■■■ reading fluency goals was like trying to build other parts of a house without a foundation because, as borne out by the assessments and tests provided to ■■■ along the way, ■■■ *had little to no decoding skills*. This finding is also supported by the unrebutted testimony of Dr. McAfee, who opined, based on her assessment of ■■■, that ■■■ has an extremely poor ability to decode.

The *C.B.* court also rejected another argument made by the school therein that CMCSS makes in the instant case – that the student’s reading progress was evidenced by satisfactory performance in other subjects. *C.B.*, 636 F.3d at 990. The *C.B.* court found the argument unconvincing because the gap in the student’s reading fluency was increasing every year when compared to C.B.’s peers. *Id.* The same is true of ■■■. In conclusion, as in *C.B.*, the tribunal finds that CMCSS staff genuinely wanted to help ■■■, but that they failed to satisfy the

³⁰ While technology has certainly changed since 2000, it is noteworthy that the student in *Nein* was provided the accommodation of having materials read to ■■■ or recorded, which is substantially similar, though in a different form, than the reading accommodations provided to ■■■ *Nein*, 95 F.Supp.2d at 967.

substantive requirements of the IDEA as well as the requirements of TENN. CODE ANN. § 49-1-229.

6. Statute of Limitations

The IDEA imposes a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); *see also id.* at § 1415(b)(6)(B). “A parent or agency shall request an impartial due process hearing within 2 years of the date the parents or agency knew or should have known about the alleged action that forms the basis of the complaint.” *Id.* § 1415(f)(3)(C); *A.W. v. Loudon County School District*, No. 3:20-cv-76, 2022 WL 4545609, at * 9 (E.D. Tenn. September 28, 2022). Both parties acknowledge that [REDACTED] has long had a reading problem; [REDACTED] has known of [REDACTED]’s struggles in reading since as early as the 1st grade. And [REDACTED] has noted concerns about [REDACTED]’s reading problems along the way in IEP meetings. Therefore, it is reasonable to wonder about the depth of what [REDACTED] knew of [REDACTED]’s reading deficiencies and whether more should have been required of [REDACTED] to determine why [REDACTED]’s struggles continued. But not all reading problems are necessarily a result of dyslexia.

TENN. CODE ANN. § 49-1-229 identifies “phonological and phonemic awareness, sound symbol recognition, alphabet knowledge, decoding skills, rapid naming, and encoding skills” as characteristics of dyslexia that must be screened for. TENN. CODE ANN. § 49-1-229(a)(2). There is no proof in the record to suggest that [REDACTED] or [REDACTED] knew or should have known that [REDACTED] struggled with these specific characteristics, versus other deficit areas such as reading fluency or written expression,³¹ until [REDACTED] was diagnosed with dyslexia. According to the testimony of [REDACTED], her first realization of the depth of [REDACTED]’s reading problems came from her conversation

³¹ Reading fluency and written expression were known issues to [REDACTED] and [REDACTED] because they were included in each of [REDACTED]’s IEPs. Again, [REDACTED]’s first IEP with CMCSS (2016-2017) contained the deficit of “basic reading skills,” but there is no proof in the record as to why this was removed the following year or why it never returned.

with Ms. Hargett-Slack in November of 2022, in which Ms. Hargett-Slack told █████ that █████ “cannot read.” And the meeting with Ms. Hargett-Slack and contemporaneous conversations with Dr. Sara McAfee are what prompted her to ask for an independent education evaluation, which resulted in the dyslexia diagnosis in Ms. Townsend’s report of January 26, 2023.³² CMCSS did not offer any proof to undercut █████’s account of these events. In the absence of countervailing evidence, the testimony of █████ is given significant weight and is credited.

It is undisputed that █████ was not diagnosed with dyslexia until Ms. Townsend’s January 26, 2023, report, even though CMCSS certainly should have done more on that front, at a minimum because of the requirements of TENN. CODE ANN. § 49-1-229. Also, given CMCSS’ position that █████ is doing well and is on-track to graduate with a regular education diploma, █████ had less reason to think there was something more she should do given that CMCSS has substantially more expertise in disabilities, including dyslexia.

Therefore, █████ knew or should have known that █████’s IEP failed to provide support for █████ reading and writing deficits, in November of 2022 at the earliest. *See C.B. v. Pittsford Cent. Sch. Dist.*, No. 08-CV-6462 CJS (P), 2010 WL 1533392 at *18 (W.D.N.Y. April 15, 2010) (claim accrued when parents first became aware that son’s IEP failed to provide support for █████ “deficits in executive functioning”). Because the Petitioners’ due process complaint was filed on March 23, 2023, the statute of limitations does not operate to bar their FAPE claims regarding reading and writing.

³² The record does evidence a clear date on which █████ was made aware of the results of Ms. Townsend’s independent education evaluation report.

B. FAPE (Transition)

Transition services are designed to prepare a student to have an understanding of what career or educational opportunities are available after they graduate high school, and they include things such as instruction in the classroom, hands-on experience in the school setting, hands-on experience outside of the school setting, and the performance of particular jobs. During the year when a student reaches the age of 16, the IEP must use the student's transition-related preferences to devise a transition plan. *Gibson*, 655 Fed. Appx. at 438. In Tennessee, "the IEP of a child with a disability must include [a]ge-appropriate transition assessments to include, at a minimum, education, training, and employment for students age fourteen (14) and older." TENN. COMP. R. & REGS. 0520-01-09-.12(2)(b). Under the IDEA, starting during the year in which a student turns 16, the transition plan is to include transition goals, which must be based on "age appropriate transition assessments" of the child's current and future capabilities. *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 Fed. Appx. 423, 438 (6th Cir. 2016) (quoting 34 C.F.R. § 300.320(b)(1)). And to ensure that these goals are realized, the IDEA, starting during the year in which a student turns 16, also requires the IEP Team to list the services, on the IEP, that the school district will provide to help the child accomplish them. *Id.* 34 C.F.R. §300.320(b)(2).

34 C.F.R. § 300.43 defines transition services as follows:

(a) Transition services means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and includes:

- (i) Instruction;
- (ii) Related services;
- (iii) Community experiences;
- (iv) The development of employment and other post-school adult living objectives; and
- (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

34 C.F.R. § 300.43(a)(1-2)(i-v).

The courts have uniformly expressed the importance of following the IDEA’s procedural mandates including transition services, but ““a procedural violation will constitute a denial of a FAPE only if it causes substantive harm to the child or ■ parents; such as seriously infringing on the parents’ opportunity to participate in the IEP process, depriving an eligible student of an IEP, *or* causing the loss of educational opportunity.”” *A.W. v. Loudon County School District*, No. 3:20-cv-76, 2022 WL 4545609, at * 11 (E.D. Tenn. September 28, 2022) (internal citations omitted).

1. Statute of Limitations

While the statute of limitations determination favors the Petitioners for their reading and writing FAPE claims, the outcome is different for their transition claims. The Tennessee rule regarding transition, TENN. COMP. R. & REGS. 0520-01-09-.12(2)(b)), says “the IEP of a child with a disability must include [a]ge-appropriate transition assessments to include, at a minimum, education, training, and employment for students age fourteen (14) and older.” As noted above, at age 16, under the IDEA, the responsibility for assessments continues, but two additional pieces then must be added to the IEPs, going forward – goals and services. The tribunal determines that the Petitioners knew or should have known whether CMCSS’ failure to conduct

satisfactory assessments for the 2019-2020 and 2020-2021 IEPs gave rise to a claim for the denial of FAPE at the time of the formulation of those IEPs, and therefore their transition claims regarding those IEPs are barred by the IDEA's statute of limitations.

It is not uncommon for a substantial amount of expertise to be required for a parent or student to know or have reason to know whether a FAPE violation has been committed. Indeed, as set forth above, such is the case regarding the Petitioners' FAPE claims for reading and writing. However, there are also circumstances in which the bar for a layperson-parent must be higher, otherwise the statute of limitations becomes meaningless.

For example, in *D.C. v. Klein Ind. School Dist.*, 711 F.Supp.2d 739 (S.D. Texas 2010), the parents' administrative complaint was based in part on the allegation that the appropriate people were not present at an IEP meeting. The court determined that the parents knew of this deficiency on the date of that IEP meeting and therefore found their claim to be barred by the applicable statute of limitations.³³ *D.C.*, 711 F.Supp.2d at 745-746. The *D.C.* opinion has been cited with approval by the United States District Court for the District of Columbia, particularly noting the *D.C.* court's language that "the inquiry should depend upon the particular deficiency asserted, and the parent's ability to recognize it." *Damarcus S. v. Dist. Of Columbia*, 190 F.Supp.3d 35, 45 (D.D.C. 2016)

By the time of the first IEP that contained transition items (2019-2020), [REDACTED] had been receiving special education with CMCSS for just shy of three years, and [REDACTED]'s parents had participated in IEP meetings up to that point.³⁴ Therefore, though they were not experts in the

³³ The statute of limitations for IDEA claims brought in Texas was one year at the time of the issuance of the *D.C.* opinion. Beginning September 1, 2022, the statute of limitations was changed to two years.

³⁴ The independent education evaluation suggests that [REDACTED] had been receiving special education services throughout [REDACTED] education, beginning in pre-kindergarten. Thus, it is likely that [REDACTED]'s parents had attended IEP meetings for many years prior to 2016-2017.

field of special education, they should have been reasonably accustomed to the IEP processes by that time, including the opportunity to ask questions about the forms, if necessary, and have input during IEP meetings. The IEP form is certainly not as straightforward as it could be, including where information regarding assessments is located. However, there are five boxes in the IEP form that serve to identify how the “student’s preferences and interests were considered;” a sixth, including one for “Other.” These boxes note what assessments have been done.

As opposed to making a medical diagnosis such as dyslexia, the need for adequate transition assessments is not something that is beyond a layperson. To the extent that a student interview (the box that was checked for the 2019-2020 and 2020-2021 IEPs) of ██████ in and of itself would have been insufficient due to ██████ not being able to meaningfully assist, this is certainly something that ██████’s parents would or should have known. Additionally, one of these boxes is for a “Vocational Assessment,” which is, in part, what the Petitioners’ complain about as a FAPE violation, and is also a part of the relief the Petitioner’s seek as compensation to redress the transition claims. For these reasons, it is determined that the Petitioners knew or should have known that CMCSS’ failure to conduct satisfactory assessments for the 2019-2020 and 2020-2021 IEPs gave rise to a claim for the denial of FAPE at the time of the formulation of those IEPs. Therefore, transition claims regarding those IEPs are barred by the IDEA’s statute of limitations. The Petitioners’ transition claims based on the later IEPs remain viable.

2. Non-Barred Transition FAPE Claims

In the three areas of substance for “Transition” – assessments, goals, and services – CMCSS fell short. For every IEP in which transition was addressed, the only assessment tool

noted in the IEPs as having been used was a “Student interview.”³⁵ There was one assessment tool completed as part of the reevaluation performed by Mr. Wooten on January 13, 2020, a “Student Transition Questionnaire,” but it was not noted in any of the IEPs.³⁶ Obviously, in order to have goals or services, first an assessment must be conducted.

Though no goals are mandated to be in the IEP until the student turns 16 years of age, the insufficiency of whatever assessment was done for the actionable IEPs (2021-2022, 2022-2023, and 2023-2024) is first illustrated by the 2019-2020 IEP. As CMCSS’ witness Ms. Griffith testified, this IEP contains no goals, but instead only compliments such as “[REDACTED] has the ability to do anything that [REDACTED] sets [REDACTED] mind to.” *See Gibson*, 655 Fed. Appx. at 438-39 (finding the lack of goals or services as apparent proof that assessments were insufficient). While the IEP lists “full-time employment,” “living independently,” and “being independently mobile in the community and able to access services” as goals,³⁷ these are too vague to be of significant value. *Dracut School Cmt. v. Bureau of Special Educ. Appeals of the Mass. Dept. of Elementary and Secondary Educ.*, 737 F.Supp.2d 35, 51 (D. Mass. 2010) (Stated goals were inadequate because they “impermissibly conflate[d] enabling [the student’s] broad vision statement (i.e., the long term goal of attending college and working with computers) with its statutory obligation to provide appropriate, measurable goals developed according to timely transition assessments.”).

³⁵ Given that no such Student interview materials were provided at the hearing, it is presumed that these interviews were audibly conducted with no notes taken, other than perhaps what is noted in the IEPs themselves.

³⁶ The other checkboxes on the IEP forms are for “Student survey,” “Student portfolio,” “Vocational assessment”, and “Interest inventory.” None of these boxes were ever checked on any of [REDACTED]’s IEPs.

³⁷ The four areas for goals in IEP form are “Employment,” “Post-Secondary Education/Training,” “Independent/Supported Living,” and “Community Involvement.”

The 2020-2021 IEP, while not actionable due to any claims thereunder being barred by the statute of limitations, is very similar to the 2019-2020 IEP and informs the findings regarding the later IEPs. It adds an employment goal that [REDACTED] will enter the Army and a post-secondary education/training goal to attend a 2-year college. For [REDACTED]'s living situation, it notes that [REDACTED] will live on [REDACTED] own in an apartment or house, and for community involvement that [REDACTED] will obtain [REDACTED] driver's license. One may argue that the goal of enlisting in the Army is a more specific transition goal. However, as brought out at the hearing through testimony from Staff Sergeant Brian Peters, Jr., because [REDACTED] is dyslexic [REDACTED] cannot enlist in the Army. If CMCSS had tended to its responsibilities under TENN. CODE ANN. § 49-1-229, in all likelihood [REDACTED]'s dyslexia diagnosis would have been made at the time of the formulation of this IEP, which would have rendered [REDACTED] unable to enlist in the Army. Therefore, the addition of the employment goal that [REDACTED] would enter the Army was of little to no value. *Jefferson County Bd. of Educ. v. Lolita S.*, 581 Fed. Appx. 760, 765 (11th Cir. 2014) (stock transition goals that are unobtainable based upon child's circumstances are insufficient and deny the student FAPE).

There are three changes reflected in the 2021-2022 and 2022-2023 IEPs, during the first of which [REDACTED] turned [REDACTED] triggering the added requirements of goals and services. First, the statement that "[REDACTED] will take the classes necessary to successfully meet the Tennessee graduation requirements" was added under "Activities/Strategies (Transition Services)." Second, the IEP notes the elective classes of Criminal Justice and JROTC. And third, there are annual transition goals in these IEPs. In the 2021-2022, an annual goal was added to help [REDACTED] understand what the expectations were relative to [REDACTED] work assignments in class and when they were due. In 2022-2023, the annual goal was added to "research career opportunities of interest

and their educational requirements and meet with counselors to discuss options and develop alternate career paths.”

While these IEPs contain more, they still ultimately fail to constitute a plan tailored to address the skills necessary for ██████ to reach attainable post-secondary goals, as required by 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). As testified to by Ms. Griffith, the elective classes could be helpful. Ms. Metcalf similarly testified. However, they are still problematic to the extent they could be considered services for the unattainable goal of ██████ enlisting in the Army,³⁸ which is noted on the IEP as the only employment goal. Moreover, in the 2022-2023 IEP, it is noted in the present levels of performance that ██████ “has no backup plan in the event ██████ cannot enlist [in the Army],” which again shows a failure to meaningfully assess ██████. Even assuming the military was a viable option, the IEPs fail to contain actual services, such as preparing for the Armed Services Vocational Aptitude Battery (ASVAB), that would have helped ██████ accomplish this goal, but for the benefit he received from JROTC. Furthermore, the annual goal regarding researching career opportunities and their educational requirements and then meeting with counselors to discuss career paths is an example of something that should have been in the IEPs beginning at age 14; it looks much more like an assessment tool than a goal.

In the last IEP at issue (2023-2024) the goal under “full time employment” states ██████ is to “attend a college or trade school before perusing [sic] a career field of ██████ choice,” but no particular type of career field is noted. Otherwise, this IEP is substantially similar to the previous year.

³⁸ Save the brief testimony from Dr. Mandy Frost that she “thought [█████] would really like the work-based learning class with the Montgomery County Sheriff’s Department” there is no indication that ██████ has expressed any interest in a career in law enforcement. When asked if Dr. Frost was aware whether ██████ had indicated that ██████ enjoyed the Criminal Justice classes, Dr. Frost responded that “I thought ██████ passion was more with JROTC.”

CMCSS' failures in transition substantively harmed [REDACTED], resulting in the loss of educational opportunity. [REDACTED] has a strong work ethic, mows lawns for pay, and has the IQ to benefit from transition services beyond what [REDACTED] was provided. *See Gibson*, 655 Fed. Appx. at 440 (substantive harm exists from lack of transition assessments and services even for a student who was "unable to perform competitive work.") At a minimum, [REDACTED] has the capability to be gainfully employed and perhaps even run [REDACTED] own lawn service. [REDACTED] simply was not provided the services to reach attainable goals.

C. Compensatory Education

When FAPE has been denied, compensatory education is one type of relief that may be awarded. The aim of compensatory education is to place the student in the position that they would have occupied but for the school's violations of the IDEA. *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 317 (6th Cir. 2007) (citing *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)). It is "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Id.* at 316 (quoting *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994)). The Sixth Circuit has adopted the approach taken by the D.C. Circuit in *Reid*, which is a flexible approach (qualitative) rather than a rote hour-by-hour (quantitative) compensation award. *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007).

1. Reading and Writing

Dr. McAfee testified about what compensatory education she believed to be due to [REDACTED] to compensate [REDACTED] for the alleged violations of FAPE for reading and writing. She testified that she had completed 35 sessions of tutoring with [REDACTED], using the Wilson Reading and Language System program, and that [REDACTED] would need 3-4 years, one hour per day, 5 days per week, for a total

of 222 hours per year, or up to 888 hours in total in order to be compensated for the loss incurred. Dr. McAfee was stipulated as an expert in the field of dyslexia. Her testimony regarding the amount of compensatory education was neither impugned nor rebutted by CMCSS. The tribunal credits Dr. McAfee's testimony, finding that it comports with the standard espoused in *Reid*.

The Petitioners, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, have asserted that whatever compensatory education is awarded should be provided in the form of a fund from which the parent draws, citing *Somberg v. Utica Cmty Schs.*, 908 F.3d 162, 167 (6th Cir. 2018), as well as other cases in which courts have also used such a fund. However, the justification for such a fund, according to the court in *Somberg* was the "contentious, hostile" relationship between the parties, including counterclaims by the school against the student's attorney and the student's mother. *Somberg*, 908 F.3d at 176-177. Several of the other cases cited by the Petitioners contain little to no rationale for why a fund is necessary. As to the cases that do express such a rationale, including *Somberg*, no proof was provided to show how or why that rationale should be applied in this case.³⁹ Additionally, Dr. McAfee testified that when she recommended CMCSS provide services to meet [REDACTED]'s basic reading skills needs that it could be done "[t]hrough someone in the building." Indeed, Dr. Mandy Frost testified that teachers from [REDACTED]'s high school are trained in the Wilson Reading and Language System program.

The Petitioners have not shown that CMCSS is unable to provide the compensatory education, only that they have so far been unwilling. Therefore, the tribunal declines to award

³⁹ Several cases were cited from a database (IDELR) that at least one federal district court, in an unreported opinion, has determined not to be an authoritative source. *Parrish v. Bentonville School*, No. 5:15-CV-05083, 2017 WL 1086198 at n. 11 (W.D. Ark. June 2, 1995). The tribunal does not currently have access to the IDELR database. For that reason, the cases cited from the IDELR database were not considered. For future reference, should the Petitioners' counsel want to make use of cases from the IDELR database, they may include electronic copies of any such cases with their pleadings.

compensatory education in the form of a fund. Instead, the Petitioners are awarded 888 hours of compensatory education in the form of 5 sessions per week, at 1 hour per session, of dyslexia tutoring from a reading interventionist trained to provide dyslexia tutoring through the Wilson Reading and Language System. If the parties agree, the total hours can be provided more frequently than 1 hour per day.

2. Transition

At the outset of the hearing during preliminary discussions on the record, the tribunal advised the Petitioners that they must provide evidence of what compensatory education should be awarded if they were to prevail on the claims regarding the denial of FAPE. Specifically, the tribunal advised that testimony from a qualified witness would have to be provided to show what compensatory education would be due to ██████ if violations of FAPE were committed. Petitioners' counsel did not respond with any questions or concerns. On the second day of hearing, the testimony was taken of the Petitioners' first expert, Ms. Kathryn Metcalf. Ms. Metcalf spoke generally about what type of things constituted transitions services and then testified about why, in her opinion, CMCSS fell short in the area of transition for ██████. At the end of her direct examination, the following exchange took place between the Petitioners' counsel and Ms. Metcalf –

Q. And in terms of transitions, if ██████ hasn't been identified with options other than going into the army and the transition services, as you say is not correctly completed, what needs to be done to fix that?

A. Well, ██████ needs to have a -- I think -- I believe that in my opinion it would be beneficial for ██████ to have a functional vocational evaluation completed to help look at what skills ██████ has, how those can be applied, what types of services and assistance ██████ might need, you know, as an adult going forward, also digging deeper into that career exploration of doing an interest inventory, learning styles inventory, and just personal preference assessment.

MR. GILBERT: All right. I pass the witness.

HRG. TR., VOL. II, p. 314: Lines 8-22.

This exchange was followed by another, this time between the tribunal and Petitioner's counsel –

ADMINISTRATIVE LAW JUDGE: Mr. Kitch, before you begin [with cross examination] -- Mr. Gilbert, this will go back to something that I mentioned at the beginning of the proceedings. Let me try it this way. Do you intend to call additional witnesses after Ms. Metcalf?

MR GILBERT: Yes.

ADMINISTRATIVE LAW JUDGE: Do you intend for any of those witnesses to give any more color to what a compensatory education ask/need ought to be?

MR. GILBERT: Yes.

HRG. TR., VOL. II, pp. 314-315.

The Petitioners' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW requests that CMCSS be ordered to fund an interest inventory, a career exploration assessment, and a vocational skills assessment for ██████, "and commensurate with those results, create Transition services to enable ██████ to become a functioning member of a post-secondary society." Such an award is far too speculative in light of the proof presented.

The case law in the Sixth Circuit does not reveal an answer on which party should bear the burden of proof as to the amount of an award of compensatory education. The case law appears to be scant, in general, on this issue. However, at least one case from a federal district court in the D.C. Circuit (the same circuit that rendered the *Reid* opinion) does appear to address the question. In *Phillips ex rel. T.P. v. District of Columbia*, the court held that the "plaintiff has the burden of 'proposing a well-articulated plan that reflects [the student's] current education

abilities and needs and is supported by the record.” 736 F.Supp.2d 240, 248 (D.D.C. 2010) (quoting *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbit*, 583 F.Supp.2d 169, 172 (D.D.C. 2008)). In *Phillips*, the court found that the Petitioners’ expert did not provide testimony regarding *how* the hours of compensatory education he recommended would “provide the educational benefits that likely would have accrued’ had the services been ‘supplied in the first place,’” but instead was nothing more than a presumptive hour-for-hour “cookie-cutter approach” that *Reid* rejected. *Id.* at 249 (citing *Reid*, 401 F.3d at 524). The case was remanded to the hearing officer for an opportunity to supplement the record with evidence necessary to support a compensatory award consistent with *Reid*, noting, at footnote 4, that if the Petitioners were unable to provide such evidence, then the hearing officer may conclude no compensatory award should issue. *Id.* at 250.⁴⁰

The Petitioners have met their burden of proof to show that CMCSS should assess ██████ to compensate ██████ for the transition violations found herein,⁴¹ but they have not met the burden to show what more should be provided. Therefore, CMCSS is ordered to assess ██████, through the use of an interest inventory, a career exploration assessment, and a vocational skills assessment.

D. § 504, ADA, and § 1983 Claims

In addition to their IDEA claims, the Petitioners also brought claims under Section 504 (29 U.S.C. § 794(a)), the Americans with Disabilities Act (42 U.S.C. § 12132), and 42 U.S.C. §

⁴⁰ Ultimately, two-and-one-half years later, the case made its way back to the district court. By that time, the hearing officer had taken more proof on remand, denied any compensatory education, and the Petitioner had again appealed to the district court. Cross-motions on summary judgment were filed and the court granted the motion of the school district. *Phillips ex rel. T.P. v. District of Columbia*, 932 F.Supp.2d 42 (D.D.C. 2013).

⁴¹ Again, no proof was provided to support the award of a monetary fund versus CMCSS administering or providing the assessments.

1983. While the Petitioners believe *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236, 240 (6th Cir. 2021), though it was reversed by the United States Supreme Court in *Perez v. Sturgis Pub. Sch.*, 143 S.Ct. 859 (2023), “relieve[s] parties and hearing officers from deciding 504/ADA claims,” they nevertheless ask the tribunal to do just that. For its part, CMCSS has argued, in its PREHEARING BRIEF OF THE CLARKSVILLE/MONTGOMERY COUNTY SCHOOL SYSTEM, that this tribunal does not have jurisdiction over the Section 504 or ADA claims, citing TENN. CODE ANN. § 49-10-606. However, CMCSS’ argument was rejected in *P.G. through A.G. v. Genesis Learning Centers*, 2019 WL 3231363, No. 3:19-cv-00288, 2019 WL 3231363 (M.D. Tenn. July 18, 2019) and therefore must be rejected here, also.

Courts typically analyze Section 504 and ADA claims together due to the similarity of the statutes, finding that apart from Section 504’s limitation to denial of benefits “solely” by reason of disability and its reach of only federally funded – as opposed to “public” – entities, the reach and requirements of the statutes are precisely the same. *S.S. v. Eastern Kentucky University*, 532 F. 3d 445 (6th Cir. 2008). In order to prevail, the Petitioners must show that ■■■ is (1) a “handicapped person” under the Act, (2) otherwise qualified for participation in the program, (3) being excluded from participation in, or being denied the benefits of, or being subjected to discrimination under the program solely by reason of ■■■ handicap, and (4) that CMCSS is receiving federal financial assistance. *G.C. v. Owensboro Public Schools*, 711 F. 3d 623, 635 (6th Cir. 2013). The third prong – the reasonable accommodation requirement – requires a showing that the school “failed to supply [the student] with a community-financed education which was sufficiently ‘appropriate’ to his or her personal learning requisites to enable his or her reasonable access to an education similar, relative to his or her individual academic

potential and cognitive abilities, to that available to the average fellow student.” *Campbell v. Bd. of Educ. Of Centerline Sch. Dist.*, 58 Fed. Appx. 162, 166 (6th Cir. 2003).

█’s dyslexia, a learning disability, obviously substantially limits █ in the major life activity of reading. 28 C.F.R. § 35.108(b)(1)(ii) and (c)(1)(i). Therefore, █ is a handicapped person under the Act, satisfying the first prong of the test set forth in *G.C.* █ is a student at CMCSS, a local education agency, and therefore meets the second prong. (29 U.S.C. § 794 (b)(2)(B). As discussed throughout this Order, CMCSS could (and was required to) have accommodated █’s dyslexia, the needed accommodations were not unreasonable, and what CMCSS provided was not reasonable. Therefore, █ meets the third prong. *Knox Co. v. M.Q.*, 62 F. 4th 978, 1000 (6th Cir. 2023). It is axiomatic that CMCSS receives federal financial assistance, satisfying the fourth prong. Accordingly, the tribunal finds that CMCSS violated Section 504 and the ADA.

To prevail under a § 1983 claim, the Petitioners must, among other things, show that “an officially executed policy, or the toleration of a custom within the school district leads to, causes, or results in the deprivation of a constitutionally protected right.” *Parker v. West Carroll Special School District*, No. 21-5700, 2022 WL 2913982, at * 3 (6th Cir. March 14, 2022). The Petitioners have not made such a showing and therefore have not proven a § 1983 violation.

CONCLUSIONS OF LAW

1. The Petitioners have met their burden of proof to show that CMCSS did not provide █ with FAPE because CMCSS violated its obligation to provide █ with an appropriate individualized education program (IEP) reasonably calculated to enable █ to make progress appropriate in light of █ circumstances, which deprived █ of an educational

benefit in the areas of reading and writing, from the time of the 2017-2018 IEP through the filing of the due process complaint.

2. The Petitioners transition claims for the IEP years 2016-2017 through 2020-2021 are barred by the IDEA's statute of limitations.

3. The Petitioners have met their burden of proof to show that CMCSS did not provide [REDACTED] with FAPE because the Respondent violated its obligation to provide [REDACTED] with an appropriate individualized education program (IEP), depriving [REDACTED] of an educational benefit in the area of Transition, from the time of the 2021-2022 IEP through the filing of the due process complaint.

4. The Petitioners have met their burden of proof to show that [REDACTED] is entitled to compensatory education.

5. The Petitioners are the prevailing party on all claims for which they have met their burden of proof, as noted above.

REMEDY

[REDACTED] is awarded 888 hours of compensatory education in the form of 5 sessions per week, at 1 hour per session, of Dyslexia tutoring from a reading interventionist trained to provide Dyslexia tutoring through the Wilson Reading and Language System. [REDACTED] is also awarded compensatory education in the way of CMCSS assessing [REDACTED], for purposes of transition, through the use of an interest inventory, a career exploration assessment, and a vocational skills assessment.

POLICY STATEMENT

The policy reason for this decision is to uphold the federal and state laws pertaining to the education of children with disabilities.

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **28th day of July, 2023**.

A handwritten signature in blue ink, reading "Phillip R. Hilliard", written over a horizontal line.

PHILLIP R. HILLIARD
CHIEF ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the
28th day of July, 2023.