UTAH STATE BOARD OF EDUCATION
BEFORE THE DUE PROCESS HEARING OFFICER

[REDACTED] and **[REDACTED]** on behalf of their minor child **[REDACTED]**, Petitioners, vs. Thomas Edison Charter School North, Respondent.	**DECISION AND ORDER** Case No. DP-2122-07 (Hearing Officer Doug Larson)

A due-process hearing was held in the above-referenced matter on May 4, 5, and 17, 2022 ("Hearing"). Petitioners **[REDACTED]** were present during the Hearing representing their minor child **[REDACTED]** ("**[REDACTED]**"). The **[REDACTED]** were represented by counsel, Aaron Bergmann. Principal **[REDACTED]** was present on behalf of Respondent Thomas Edison Charter School North ("TEC"), which was represented by counsel Erin Preston. This matter was assigned to the undersigned Hearing Officer, Douglas R. Larson ("Hearing Officer"). The Hearing was held in accordance with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA") 20 USC §1415 et seq., and 34 CFR §§300.507-515, and the Utah State Board of the Education ("USBE") Special Education Rules ("State Rules") IV.I-P, August 2020.

I. INTRODUCTION

On January 25, 2022, Petitioners filed a Request for Due Process Hearing ("Complaint") with the Utah State Board of Education stating that **[REDACTED]**'s placement was inappropriate, and he was not receiving a free appropriate public education ("FAPE") in violation of the IDEA. The Complaint requested an expedited due process hearing schedule in this matter, and the Hearing

Officer spoke to the parties about this request via telephone conference on February 1, 2022. The Hearing Officer denied the request for an expedited schedule because the Complaint did not proffer facts related to discipline or challenge of placement. The parties entered into the early resolution process, but no resolution was found.

Respondent filed a Request for Dismissal on February 9, 2022, based on insufficiency of the Complaint. The Hearing Office determined the Complaint satisfied statutory requirements, and the Request for Dismissal was denied. The parties participated in a pre-hearing conference via Zoom on Monday, March 7, 2022. The parties agreed to hearing dates on April 13, 14, and 15, 2022. Respondent filed a request for mediation on March 10, 2022. It is not clear to the Hearing Officer what became of that mediation request, but the parties informed the Hearing Officer that no resolution was possible. Petitioner filed a motion to move the Hearing to May 4 and 5, 2022, and Respondent stipulated to the motion. That motion was granted. The Hearing commenced at the offices of Cache County School District, 84 East 2400 North, North Logan, Utah 84341. Questioning of witnesses took longer than planned, and the parties requested a specific extension of the Hearing on May 17, 2022. The Hearing Officer granted the extension.

The parties called several witnesses. For efficiency, the Hearing Officer granted the parties latitude in questioning, so witnesses would not need to be recalled a second time. Witnesses called in the order of appearance:

[REDACTED], OD (Optometrist)

[REDACTED] (**[REDACTED]**'s Mother)

[REDACTED] (Neuropsychologist)

[REDACTED] (Speech Language Pathologist)

[REDACTED] (**[REDACTED]** Grade Teacher)

[REDACTED] (Optometrist)

[REDACTED] (School Psychologist)

[REDACTED] (**[REDACTED]**'s Father)

[REDACTED] (**[REDACTED]**'s Mother)

[REDACTED] (**[REDACTED]** Grade Teacher)

[REDACTED] (Program Director, Utah School for the Deaf and Blind)

[REDACTED] (Teacher, Utah School for the Deaf and Blind)

[REDACTED] (Principal)

The following exhibits were entered during the hearing:

Exhibit 102 - Letter - Response to Due Process Complaint

Exhibit 103 - Speech Report

Exhibit 104 - My Years at TEC Charter

Exhibit 105 - **[REDACTED]** Assessment Report

Exhibit 107 - Email string, top email dated August 19, 2020 9:28 a.m.

Exhibit 108 – Unsigned Written Prior Notice and Consent for Evaluation/Re-Evaluation

Exhibit 109 - Email dated February 18, 2021 3:23p.m.

Exhibit 110 - Email string, top email dated May 4, 2021 5:00 p.m.

Exhibit 111 - Letter dated October 7, 2021

Exhibit 112 - Email string, top email dated May 5, 2021 11:42 a.m.

Exhibit 113 - Accommodations that were requested at **[REDACTED]**'s first IEP meeting

Exhibit 115 - Letter dated August 23, 2021

Exhibit 116 - Email chain, top email dated August 26, 2021 1:34 p.m.

Exhibit 117 - Recording of **[REDACTED]** 's IEP Meeting

Exhibit 120 - Email chain, top email dated October 11, 2021 1:55 p.m.

Exhibit 121 - Referral for Evaluation for Special Education Services

Exhibit 126 - Email dated January 19, 2022 4:26 p.m.

Exhibit 127 - Neuropsychological Assessment

Exhibit 128 - December 8, 2021 audio recording

Exhibit 130 - Vision Therapy Program Estimate

Exhibit 204-B - Personal Notes about **[REDACTED]**

Exhibit 204-C - Email chain, top email dated May 6, 2021 8:42 a.m.

Exhibit 205 -· Psychoeducational Assessment Report

Exhibit 206 - IEP dated 5/4/21

Exhibit 210 - Amendment to IEP

Exhibit 211 - September 14, 2021 audio recording

Exhibit 213 - Notes of **[REDACTED]**

Exhibit 214 - Personal notes of **[REDACTED]**

Exhibit 216 - Email dated September 20, 2021

Exhibit 218 - Prior Written Notice dated October 21, 2021

Exhibit 221 - Various emails

Exhibit 223 - Email dated August 11, 2021 11:31 p.m.

Exhibit 224 - Email chain, top email dated October 14, 2021 5:10 p.m.

Exhibit 225 - Referral for Evaluation for Special Education Services

Exhibit 226 - Emails with attachments

Exhibit 227 - Patient Encounter Details

Exhibit 228 - Assessment made by **[REDACTED]**, OD

Exhibit 229 - Utah Schools for the Deaf and Blind vision therapy services guidelines for **[REDACTED]**s who are blind or visually impaired

Exhibit 231 - Notes and Communication with **[REDACTED]** Family

Exhibit 232 – USDB Parent Interview

Exhibit 233 - Letter dated July 12, 2021

Exhibit 235 - Email dated October 12, 2021 11:51 a.m.

Exhibit 236 - Attempts to Service **[REDACTED]** via emails from **[REDACTED]**

Exhibit 237 - Vision Screenings

Exhibit 240 - Functional Vision Assessment

Exhibit 241 - Email dated April 18, 2022

Exhibit 242 - Letter dated September 20, 2021

Exhibit 243 - Email dated October 11, 2021

Exhibit 248 - Neuropsychological Assessment

In the pre- and post-Hearing briefs and during the Hearing, Petitioners argued that **[REDACTED]** has had massive deficits in his learning due, in principle, to TEC's failure to identify, locate, and evaluate **[REDACTED]** in violation of the IDEA child find obligations, which deprived **[REDACTED]** of FAPE. Central to its argument is that TEC failed to properly evaluate

and provide appropriate accommodations for **[REDACTED]** and failed to implement the accommodations or provide appropriate special education and related services as required under the Individualized Education Plan ("IEP"). Petitioners claimed that TEC failed to treat **[REDACTED]** as members of the IEP team, which effectively precluded them from advocating for **[REDACTED]**, and consequently, deprived **[REDACTED]** of a FAPE. Petitioners claimed that TEC's failures are systematic. Based on the foregoing, Petitioners should be entitled to reasonable attorney fees and costs.[1]

Petitioners requested relief in the form of an order for TEC to revise policies, procedures, and trainings related to the IDEA; an order granting one year of compensatory education as a result of excluding **[REDACTED]** from school from August to September 2021 and from October 2021 to the present; an order requiring TEC to implement all accommodations recommended by Dr. **[REDACTED]** and reimburse the **[REDACTED]** for the treatment **[REDACTED]** received from Dr. **[REDACTED]**; an order for TEC to consider the recommendations made by Dr. **[REDACTED]** in the neuropsychological evaluation; and finally, an order for TEC to pay the **[REDACTED]**' costs and attorney's fees.

Respondent argued in briefing and throughout the Hearing that **[REDACTED]** has been well-liked by his peers and academically successful up through the **[REDACTED]** grade. In the younger grades, TEC admitted it deduced that **[REDACTED]** was having some difficulties in reading and writing, and the school monitored **[REDACTED]** work and provided supports through the school's Multi-Tiered Systems of Supports ("MTSS") program. **[REDACTED]** was subjected to school closure along with the rest of the school in the spring 2022. During the spring of **[REDACTED]** **[REDACTED]** year, in February 2021, TEC admitted that the **[REDACTED]** requested an evaluation for **[REDACTED]** for Special Education. In response, TEC conducted a full battery of testing, which demonstrated that **[REDACTED]** qualified for special education services under the category of Specific Learning Disability ("SLD"). The IEP team, including parents, established reading, writing, and speech goals for **[REDACTED]** and memorialized them in a May 4, 2021 IEP.

[1] The Complaint also listed a failure to disclose AT's education file, but that issue was not raised at the Hearing or in subsequent briefing and will not be addressed further.

TEC argued that it implemented accommodations for **[REDACTED]** that parents requested based on a diagnosis from Dr. **[REDACTED]** related to convergence insufficiency, which is a binocular vision disorder. TEC pointed out that **[REDACTED]** parents did not disclose much information about **[REDACTED]** eye problems or his vision therapy sessions throughout the summer 2021. On September 14, 2021, after parents had provided further information, the IEP team suspended the existing IEP based on the parents' requests, waived the required hours of specialized instruction, and implemented much or all of Dr. **[REDACTED]** recommended accommodations to reduce stress on **[REDACTED]** and allow the team to observe his academic performance. Respondent argued that **[REDACTED]** unilaterally decided to bring **[REDACTED]** to school for a limited number of hours each day, but they excluded **[REDACTED]** from school altogether starting on October 8, 2021. Between September 12 and October 8, Respondent claimed that it implemented accommodations in a reasonable manner.

Respondent took an additional step and enlisted the Utah School for the Deaf and Blind ("USBD") to conduct a functional vision assessment to better understand the impact of **[REDACTED]** disability on his education. The parties failed to meet again in January 2022 as planned, and instead, Petitioner filed a request for due process.

II. BURDEN OF PROOF

Petitioner, as the party requesting a due process determination, is the party carrying the burden of proof by a preponderance of the evidence in this matter. *Schaffer v. Weast,* 546 US 49 (2005) ("The burden of proof in an administrative hearing challenging [in the IDEA context] is properly placed upon the party seeking relief."). The Hearing Officer informed Petitioners at the pre-Hearing conference that Petitioners would have the burden of proof.

III. FINDINGS FROM THE RECORD

The Hearing Officer makes the following findings from the record:

1. **[REDACTED]** attended TEC from **[REDACTED]** to **[REDACTED]** grade.

2. Petitioners filed a Complaint in this matter on January 25, 2022. The Complaint alleged, among other things, that TEC failed to identify and evaluate **[REDACTED]** despite possessing information that **[REDACTED]** has one or more disabilities. Ex. 101.

3. Ms. **[REDACTED]** testified that she spoke to **[REDACTED]** teachers as early

as **[REDACTED] [REDACTED]** year stating concerns that **[REDACTED]** may suffer from dyslexia, although she only described those conversations as "informal" when she would "catch them in the hall." Trans. at 76:6-23; 99:19-100:14; 974:19-975:2.

4. The record indicates that TEC was on notice of Ms. **[REDACTED]** concerns about dyslexia as early as the 2019-2020 school year, **[REDACTED] [REDACTED]** grade year. Ex. 107.

5. TEC assessed **[REDACTED]** academics regularly in class, along with his peers each year, and assessed him on state exams. **[REDACTED]** scores in the **[REDACTED]** and **[REDACTED]** grade reflected a young student performing at or above class averages in all areas except for spelling and reading words per minute. Indeed, **[REDACTED]** math scores and his DIBELS composite reading score in **[REDACTED]** grade were well above the class average. In **[REDACTED]** grade, **[REDACTED]** showed he continued to struggle in spelling and in reading words per minute. Ex. 105

6. The school performed eye screenings every year. These screenings are basic and would not likely detect dyslexia, and **[REDACTED]** passed every screening from **[REDACTED]** to **[REDACTED]** grade. No test was administered in **[REDACTED] [REDACTED]** grade year. **[REDACTED]** was absent for the test in his **[REDACTED]** grade year. Ex. 237.

7. The record suggests that TEC sought to obtain consent for evaluation for **[REDACTED]** in the spring 2020, to test for speech. **[REDACTED]** testified that she discovered a Written Prior Notice and Consent for Evaluation form in **[REDACTED]** backpack in March 2020 ("Consent"), after the school had dismissed for COVID. **[REDACTED]** testified that she disregarded the form found in **[REDACTED]** backpack because Principal **[REDACTED]** had asked her to sign a similar form "not too long before." 92:24-94:17.[2] No corroborating evidence was offered supporting that claim, and TEC has no record of a prior form. The Consent form found in **[REDACTED]** backpack is dated February 13, 2020. Exhibit 108.

[2] Petitioner spoke about another consent form for a study that was conducted at Utah State University using students from TEC in which AT participated. The record is not clear as to the relevance of that study in connection with the Consent and the IEP as that study was conducted independently from TEC and had no relevance to evaluating AT for special education. *See* Transcript at 94:13-97:7.

8. When **[REDACTED]** was in **[REDACTED]** grade, **[REDACTED]** testified that she and other family members spent 10-12 hours per week tutoring **[REDACTED]** on homework to "keep him caught up with his class. Trans. at 184:13-25; 846:18-21.

9. In March 2020, TEC closed pursuant to Utah State COVID 19 orders for the remainder of the school year.

10. Prior to the 2020-2021 school year, the **[REDACTED]** sought spoke to some staff members and sought more information and assistance from neighbors and others regarding support for **[REDACTED]**, but at no time did the **[REDACTED]** specifically request testing or seek support from the school.

11. In the fall 2020, **[REDACTED]** started in Ms. **[REDACTED]** **[REDACTED]** grade. The Consent from the previous year had not been signed by the **[REDACTED]**, but TEC did not follow up with **[REDACTED]** to obtain parental consent for assessment in August 2021.

12. **[REDACTED]** visited Ms. **[REDACTED]** on August 18, 2020, introduced herself, and told Ms. **[REDACTED]** that she suspected her son had dyslexia. Ms. **[REDACTED]** indicated that Ms. **[REDACTED]** stated she did not believe **[REDACTED]** needed "services at the school at this time." Ex 204b.

13. However, in an email dated August 19, 2020, Ms. **[REDACTED]** informed Ms. **[REDACTED]** that she had a note from the previous year indicating **[REDACTED]** mother "suspect[ed] dyslexia and was thinking about a parent referral." Ms. **[REDACTED]** Directed Ms. **[REDACTED]** to start tiered support and told her to let the special education teacher know if she needed to make a referral. Exhibit 107.

14. Ms. **[REDACTED]** indicated she provided little or no additional support to **[REDACTED]** as he was in the average range for most subjects, excluding spelling and reading, and she never requested a referral for testing. Trans at 1025:6-1027:17. She indicated in an email dated August 19, 2020, she would "keep an eye on **[REDACTED]** and let [Ms. **[REDACTED]** know if [she saw] a problem with his reading." A handwritten note on that email stated, "**[REDACTED]** wasn't worried about his reading, his SRI scores were okay." Ex. 107.

15. **[REDACTED]**, TEC MTSS Coordinator, recalled that Ms. **[REDACTED]** initially asked to have **[REDACTED]** tested for an IEP at the beginning of the year, but Ms.

[REDACTED] recalled that Ms. **[REDACTED]** "changed her mind." Ms. **[REDACTED]** stated, "I wish I would have understood to pull him right away. We got busy with three other students from [Ms. **[REDACTED]**] class, and [**[REDACTED]**] name was never put on the monthly minutes list. Ex 112.

16. TEC did not seek permission to assess **[REDACTED]** until February 2021. Ms. **[REDACTED]** wrote an email to Ms. **[REDACTED]** on February 18, 2021 and discussed **[REDACTED]** "who struggles greatly with spelling and reading" but had "never been referred despite a lot of concerns from his mom." Ms. **[REDACTED]** made a handwritten note on the email that stated, "I talked with [Ms. **[REDACTED]**] in-person on 2-18-21 and gave her information and access to the Utah Dyslexia Handbook. I
helped her make a formal referral." Ex 109. Ms. **[REDACTED]** saw to it that Ms. **[REDACTED]** made a referral and signed consent for evaluation. Trans. at 632:2-633-3.

17. Ms. **[REDACTED]** provided information to Ms. **[REDACTED]** about the school's role in evaluating and providing special educational services to students with dyslexia. She explained to Ms. **[REDACTED]** that schools do not make diagnoses, but schools make educational classifications. Trans. at 633:22-634:13.

18. In February 2021, Ms. **[REDACTED]** made an allegation that **[REDACTED]** was being bullied at school on the playground and had sustained injuries from being kicked. She also made allegations that **[REDACTED]** was receiving threats from other studentss. Principal **[REDACTED]** investigated the allegations. Principal **[REDACTED]** brought Mr. **[REDACTED]** in to review video surveillance with him. There were no incidents on the dates and times offered by Mr. **[REDACTED]**. Principal **[REDACTED]** investigated further and searched every recess for a two-week period surrounding the dates the bullying was reported. There was no supporting evidence for the allegations of bullying. Trans. at 1014:2-1017:25 and 1213:18-1217:2.

19. Despite being unable to substantiate the allegations of bullying, the **[REDACTED]** unilaterally moved **[REDACTED]** to online learning. Trans. at 904:25-906:11. From February to the end of the year **[REDACTED]** was an online learner, which meant that he streamed class through Google Meet attending remotely from home. His assignments were prepared a week in an advance and sent home with parents. There was only one glitch in the

technology during that time, which resulted in **[REDACTED]** being unable to access the class for about 5 to 10 minutes. Trans. at 1018:2-1020:1.

20. In March 2021, TEC initiated a comprehensive psychoeducational assessment for **[REDACTED]** compiling data from school records, prior testing, and observations and issuing several other assessments including Wechsler Intelligence Scale for Children, Woodcock Johnson, Comprehensive Test of Phonological Processing, and Behavior Assessment System for Children. The comprehensive psychoeducational assessment was completed and reduced to a report by Ms. **[REDACTED]** between March 8 and March 26, 2021. Ex 205. TEC also provided speech testing on March 12 and 26, 2021, which was reduced to a report by Ms. **[REDACTED]** on May 3, 2021. Ex 103

21. An IEP meeting was timely held on May 4, 2021. The IEP identified **[REDACTED]** with a "specific learning disability" classification in the areas of reading and written language. The IEP included the following:

a) Specific, measurable goals that identified benchmarks.

b) Testing accommodations were written into the IEP. Other accommodations were also written into the IEP, which included allowing for alternate location, directions re-read, extended time, and modified assignments as needed.

c) In addition, the IEP contained specialized education services in the form of reading for 20 minutes per day, spelling for 45 minutes per day, writing for 30 minutes per day, and speech for 30 minutes per week.

d)

e)

[REDACTED]

Ex. 206.

22. Unbeknownst to TEC, **[REDACTED]** took **[REDACTED]** to an optometrist the previous day on May 3, 2021. Dr. **[REDACTED]** specializes in diagnosing binocular vision issues. Dr. **[REDACTED]** diagnosed **[REDACTED]** with moderate convergence insufficiency and deficient saccadic eye movements. The care plan for these diagnoses was a recommended in-office vision therapy program. Trans. 34:9-25 and Ex. 227.

23. Dr. **[REDACTED]** testified that convergence is a skill that is learned by most children, and one out of four kids of **[REDACTED]** age would have some level of convergence disorder. Trans 35:1-13.

24. Petitioners informed the IEP team of Dr. **[REDACTED]** diagnosis the following day in the IEP meeting. Ex. 117. Based on that discussion, some handwritten adjustments were made on the IEP including the following:

a) Adjustments included three accommodations: "worksheets copied in colored paper (blue or green); text to speech as needed; math word problems read aloud as needed."

b) Another adjustment was the box for no extended school year was scribbled out and the box was checked that sates: "ESY decision to be documented before end of current school year."

c) Finally, in the section stating, "Other factors that are relevant to this IEP proposal" the team included: "None – review accommodations based on recommendations from visual specialist."

Ex. 206.

25. Ms. **[REDACTED]**, Ms. **[REDACTED]**, and Ms. **[REDACTED]** worked with the **[REDACTED]** to schedule and provide specialized instruction online from May 4 to the end of the school year. The scheduling was difficult and the interactions were not as frequent as the IEP contemplated. Trans at 263:13-266:2 and Ex 204c.

26. TEC did not document a decision regarding ESY services by the end of the 2020-2021 schoolyear as required by the IEP. Ex. 206.

27. **[REDACTED]** continued to take **[REDACTED]** to Dr. **[REDACTED]** office for therapy between May 26, 2021 to August 26, 2021. Dr. **[REDACTED]** testified, and the patient notes confirmed, that **[REDACTED]** condition improved due to therapy.

Dr. **[REDACTED]** noted in an examination on February 12, 2022, that **[REDACTED]**

[REDACTED]

28. On July 12, 2021, Dr. **[REDACTED]** office sent some recommended classroom

accommodation to **[REDACTED]**. *Id.* Dr. **[REDACTED]** testified that the recommendations were not meant to be mandatory accommodations, "but rather ideas to help the school understand what type of accommodations that should be made." Trans. at 48:16-25.

29. Ms. **[REDACTED]** testified that TEC agreed to meet for a follow-up IEP meeting before the 2021-2022 school year began. TEC attempted to set up a meeting contacting the **[REDACTED]** the day before school started. Trans. at 166:19-167:18. Principal **[REDACTED]** testified that TEC did not agree to meet before school started, but understood that **[REDACTED]** would request a renewed IEP when they had documentation from Dr. **[REDACTED]** Trans. at 1173:22-1177:4.

30. The online learning option was not available for the 2021-2022 school year; TEC was holding in-person classes only. **[REDACTED]** did not bring **[REDACTED]** back to school at the beginning of the school year. Principal **[REDACTED]** wrote a letter to **[REDACTED]** dated August 23, 2021, indicating the school's expectation that **[REDACTED]** attend school. Ms. **[REDACTED]** testified that the services being provided at the end of the previous school year caused **[REDACTED]** eye strain, headaches, and emotional breakdowns. Ms. **[REDACTED]** testified that **[REDACTED]** were not interested in **[REDACTED]** returning to school until a new IEP could be created incorporating Dr. **[REDACTED]** suggested accommodations. Trans. at 167:20-169:23, Ex. 115, and Ex. 116.

31. TEC tried on August 15 to schedule a meeting for August 30, 2021. **[REDACTED]** indicated they needed to "check with their lawyer," which delayed the meeting. The meeting was finally convened on September 14, 2021. Trans. at 1229:25-1230:15.

32. During that meeting, the **[REDACTED]** expressed concern that the regular coursework and the special services provided by the school were actually doing damage to **[REDACTED]** eyes and Ms. **[REDACTED]** suggested that damage might be permanent. Dr. **[REDACTED]** dismissed that suggestion in his testimony. Trans. at 35:20-36:12; 944:13-945:11.

33. Principal **[REDACTED]** testified that the group discussed the accommodations recommended by Dr. **[REDACTED]** and discussed how they might work in a class setting. The IEP team created and signed an Amendment to IEP dated September 14, 2021 ("Amendment"), that suspended the services detailed in the May 4, 2021 IEP for a period of six weeks. Principal

[REDACTED] testified the team agreed to suspend the services in the previous IEP to get **[REDACTED]** back to school where some of the accommodations could be tested in the classroom. Trans. at 1230:2-1233:17 and Ex. 210.

34. The Amendment listed accommodations paraphrased as follows: suspend testing and instruction once triggers are observed, use enlarged print (size 18 or larger), limit clutter in the environment and on assignments, close seating, written notes, text read aloud, test orally, reduce amount of workload, use math manipulatives, use a slanted work surface for writing and reading, assign breaks as needed, call parents when **[REDACTED]** shuts down. These accommodations were substantially similar to the recommended accommodations of Dr. **[REDACTED]**, and the Amendment also indicated that further accommodations would be made "as deemed appropriate by the eye doctor." Ex. 210.

35. The Amendment also contemplated that **[REDACTED]** would attending for a limited time period for "reintegration…with increasing attendance, as determined by the team." Parents were also to provide supplemental instruction with teacher support during the evaluation period. The Amendment also included prior written notice that this plan constituted a free appropriate public education and included procedural safeguards. The IEP team members, including Ms. and Mr. **[REDACTED]** signed the document, and Ms. **[REDACTED]** and Mr. **[REDACTED]** also signed as attendees. *Id.*

36. TEC allowed Mr. **[REDACTED]** to stay in the classroom each day during the reintegration period. Mr. **[REDACTED]** brought **[REDACTED]** to school from 1:45 to 3:00 p.m. for12 days (September 20-23, September 27-30, October 4-7, 2021). Ex. 221.

37. **[REDACTED]** grade teacher **[REDACTED]** created detailed notes of each day and every accommodation provided. All accommodations from the Amendment plus a few others were made during that time. Ex. 213. Some accommodations were a work in progress, but Ms. **[REDACTED]** was resourceful in developing and integrating accommodation ideas including using a slant board on a thick binder for **[REDACTED]** while the adjustable desk was on order. Also, she allowed **[REDACTED]** to use her computer monitor because it was a large screen. Ms. **[REDACTED]** worked directly with **[REDACTED]**. She even developed baseline assessment scores for **[REDACTED]** in just 12 days. *Id.* and Trans. at 290:1-308:9.

38. On October 7, 2021, Ms. **[REDACTED]** asked Mr. **[REDACTED]**, "What is the

future for [**[REDACTED]**] academically? Is he coming back for a longer time?...what is the future for him?" Mr. **[REDACTED]** responded saying he did not have answers to those questions. He then began to tell Ms. **[REDACTED]** how frustrated he was about the services. Ms. **[REDACTED]** testified that his face got red, and his voice escalated. He became angrier and angrier, and he shouted at Ms. **[REDACTED]**. She indicated she knows the family from her ward and loves them. She had never seen Mr. **[REDACTED]** angry like that. Ms. **[REDACTED]** took Mr. **[REDACTED]** "litany of vituperations" personally because she was trying hard to make the accommodations. She felt like it was almost a personal attacked and she was "crying during the whole time." Mr. **[REDACTED]** tried to comfort Ms. **[REDACTED]** with a side hug, and she refused because she was hurt. Trans. at 312:1-317:1.

39. Ms. **[REDACTED]** reported this verbal attack to Principal **[REDACTED]**. Principal **[REDACTED]** wrote an email to the **[REDACTED]** indicating that they could drop **[REDACTED]** off at the office, but because of the "negative interactions between Mr. **[REDACTED]** and school staff and the interruption it has become," **[REDACTED]** were denied any further access to the "classroom or school." Ex. 243.

40. **[REDACTED]** did not take **[REDACTED]** back to school after that date. Save for the twelve days in September and October 2021, **[REDACTED]** did not attend school at TEC during the 2021-2022 school year. There is no evidence in the record that **[REDACTED]** sought for a homeschool exemption.

41. Despite the foregoing, Ms. **[REDACTED]** made ongoing efforts to connect with the **[REDACTED]**, provide materials and curriculum, and offer support to **[REDACTED]**. She emailed the **[REDACTED]** on no less than six occasions between August 20, 2021 and January 31, 2022. Ex. 236

42. On October 11, 2021, Mr. **[REDACTED]** responded to Principal **[REDACTED]** email and requested an IEP meeting. Mr. **[REDACTED]** acknowledged Ms. **[REDACTED]** efforts, but stated the accommodations were "not being completely followed." As such, he reiterated a list of accommodations that the **[REDACTED]** believed were appropriate that they culled from Dr. **[REDACTED]**, conversations with USU professor **[REDACTED]**, and from online research from the Boulder Vision Therapy website. Ex. 243, Ex. 113, and Trans. at 162:20-25.

43. On October 21, 2021, Principal **[REDACTED]** created two detailed documents—one titled Prior Written Notice and the other Prior Written Notice of Refusal to Take an Action. Those documents were written in preparation of an upcoming IEP meeting scheduled the first week of November 2021. The documents detailed the accommodations TEC was providing or was willing to provide. They also detailed requests and the basis for refusing some requests including paying for a neuropsychological evaluation, one-on-one all-day services, and a change to the school's curriculum. Ex. 218.

44. The **[REDACTED]** parent advocate could not make the meeting in November and then the **[REDACTED]** indicated they came down with COVID, so the meeting times were cancelled. Trans. at 1198. The Prior Written Notice and the Prior Written Notice of Refusal to Take an Action prepared by Principal **[REDACTED]** were never sent to the **[REDACTED]** 1189:7-1190:22.

45. TEC attempted to communicate with **[REDACTED]** to set up a new IEP meeting. Several attempts were made to set and keep a meeting between October and December 2021. The team was finally able to meet on December 8, 2021. Trans. at 1188:3-1190:22.

46. During the December 8, 2021, meeting, TEC asked for permission to have USDB conduct an evaluation and the referral for evaluation was signed by Ms. **[REDACTED]** That referral for evaluation also contained a prior written notice for evaluation/reevaluation and under "Areas to be assessed," the box for "Adaptive behavior" and "Vision" were checked so that USBD could conduct further assessments. Ex. 121.

47. During that same meeting **[REDACTED]** announced they were seeking a neuropsychological evaluation, and they indicated they would have results from that evaluation by January 6, 2022. A meeting was set for January 7, 2022, so the team could review the results from both evaluations. Trans. at 1243:1-1244:6

48. **[REDACTED]** also delivered a request for an independent educational evaluation IEE for speech. TEC followed up in a January 5, 2022 email providing a list of possible vendors. Later the same day, **[REDACTED]** responded with a more detailed request for "receptive, expressive, pragmatic language and articulation." The attorneys communicated about the nature of speech testing versus language testing on January 10, 2022, but there was no apparent resolution. Ex. 222. **[REDACTED]** did not communicate with Principal

[REDACTED] any further regarding this request for an IEE.

49. The record is not clear regarding some apparent conflict over the completion of the USDB testing and whether it would be completed in time for a January 7, 2022 meeting. There was discussion that the **[REDACTED]** did not consent to the full battery of testing offered by USDB, and TEC's counsel canceled the meeting. However, USDB indicated they had enough information to file a report, which they did on December 7, 2022. Ex. 228 and Ex. 240.

50. The USDB report indicated that **[REDACTED]** did well with the testing. USDB indicated that Dr. **[REDACTED]** report suggested **[REDACTED]** made great improvements, but USDB still had concerns and made recommendations for accommodations according to its own testing. The USDB report made eleven suggestions for accommodations. Ex. 125.

51. **[REDACTED]** also sought a neuropsychological evaluation for **[REDACTED]** at roughly the same time. It is unclear from the record the date the evaluation was completed, but the record suggests the report was delivered in late January. That evaluation used data from TEC's psychoeducational assessment report and compared it with measurements from other assessments. Dr. **[REDACTED]** indicated that both tests are good and "show[ed] the same results." Trans. at 215:19- 216:10. The neuropsychological evaluation built upon the psychoeducational assessment conducted by Ms. **[REDACTED]**, but it went much further to provide diagnoses related to **[REDACTED]** mental and behavioral disorders as well as his sight disorder. Ex. 127.

52. The neuropsychological evaluation stated that **[REDACTED]** academic gains are impressive, largely due to his hard work and support at home. As **[REDACTED]** gets older, however, his anxiety over his academic performance increases, and he will need greater support through his IEP. Dr. **[REDACTED]** provided a list of recommendations for parents and the school. Many of the recommended accommodations were being implemented by TEC in September and October and some were similar to the recommendations made by USDB. *Id.*

53. TEC sent an email to the parties to set up an IEP meeting on January 27 or 28, 2022. On January 21, 2022, Mr. **[REDACTED]** wrote back and indicated those dates and times did not work. Principal **[REDACTED]** responded on January 24, 2022, asking for dates and times that would work. Principal **[REDACTED]** did not receive a response. Ex. 221.

54. Instead, Petitioners filed their Complaint on January 25, 2022.

IV. ANALYSIS

A. General Legal Standards

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs. 20 USC §1400(d); 34 CFR §300.111(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE of a disabled student. 20 USC §1415(b)(6).

B. Child Find

All children with disabilities . . ., regardless of the severity of their disabilities, and who are in need of special education and related services, are [to be] identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). Child find requires a district to evaluate a child when it suspects or has reason to suspect that the child has a disability and needs special education services as a result. *E.S. v. Konocti Unified Sch. Dist*., 55 IDELR 226 (N.D. Cal. 2010). Suspicion "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist*., 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)). The child-find obligation is in no way absolute. *Legris v. Capistrano Unified Sch. Dist*., 79 IDELR 243 (9th Cir. 2021) (holding that evidence of a student's solid academic performance can bolster a district's argument that a special education evaluation was unnecessary.). However, failure to meet child find requirements is a matter of serious concern that can deny a FAPE to a student whom a district should have identified. The failure to identify and evaluate may entitle the student to compensatory education or tuition reimbursement accruing from the time the district first should have suspected the disability. *T.B. v. Prince George's County Bd. of Educ*., 72 IDELR 171 (4th Cir. 2018); *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996, unpublished); *Lakin v. Birmingham Pub. Schs*., 39 IDELR 152 (6th Cir. 2003); and *Department of Educ. v. Cari Rae S*., 35 IDELR 90 (D. Hawaii 2001).

[REDACTED] teachers assessed him regularly, and his state scores reflected a young student performing at or above class averages except for spelling and reading words per minute.

Indeed, **[REDACTED]** math scores and his DIBELS composite reading score in **[REDACTED]** grade were well above the class average. In **[REDACTED]** grade, **[REDACTED]** showed that he continued to struggle in spelling and in reading words per minute (SOF 5). As **[REDACTED]** aged, his disabilities became more limiting, and Ms. **[REDACTED]** was more outspoken with teachers with concerns about her son.

Despite **[REDACTED]** satisfactory performance, **[REDACTED]** wrote in an email that Ms. **[REDACTED]** had mentioned something about dyslexia during the 2019-2020 school year (SOF 13). It is not known what conversation that email refers to, but clearly some communication occurred. Indeed, TEC had delivered to **[REDACTED]**, by some means, a Consent dated February 13, 2020. The record is not clear how that was delivered or whether one had previously been signed as Ms. **[REDACTED]** testified (SOF 7). TEC was on notice that **[REDACTED]** needed to be evaluated, and it took steps to do so. Whether the resulting failure to follow through on the obtaining consent was the fault of the **[REDACTED]** or TEC is not clear from the record as Ms. **[REDACTED]** claim that she signed a consent previously is not corroborated.

The record is clear, however, that TEC failed to follow up in the fall and winter of the following school year to evaluate **[REDACTED]**. Emails exchanged by members of the staff showed that Ms. **[REDACTED]** concerns about dyslexia were communicated to multiple members of the staff, that teachers were concerned about **[REDACTED]** speech and overall performance, and Ms. **[REDACTED]** and Ms. **[REDACTED]** discussed interventions with Ms. **[REDACTED]**. Arguably, the steps were part of the MTSS process to determine if **[REDACTED]** would respond to interventions. However, Ms. **[REDACTED]** did not put interventions in place, and TEC had already determined to evaluate **[REDACTED]**. (SOF 12 to SOF 15). There was no reason to postpone or delay evaluation any further, but TEC plainly failed to initiate child find at the beginning of the 2020-2021 school year. Finally, on February 18, 2021, Ms. **[REDACTED]** finally had a conversation with Ms. **[REDACTED]** and discussed dyslexia. She explained the role and limitations of a school to diagnose specific disorders, but she ultimately obtained a consent to evaluate **[REDACTED]** (SOF 16 and SOF 17). That conversation marked the date TEC began performing its child find obligations.

C. Evaluation

In general, schools are obligated to "conduct a full and individual initial evaluation…before the initial provision of special education and related services to a child with a disability under this subchapter." 20 USC §1414(a)(1)(A). Critical for this matter:

> In conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability; and the content of the child's individualized education program…[and] not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 USC §1414(b)(2)(A)-(B) (internal citation numbering omitted) (*See also* 34 CFR §§ 300.304). Moreover:

> As part of an initial evaluation (if appropriate) and as part of any reevaluation the IEP Team and other qualified professionals, as appropriate, shall review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—whether the child is a child with a disability…and the educational needs of the child.

34 CFR 300.305.

The IDEA requires an IEP to include "a statement of the special education, related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 34 CFR 300.320 (a)(4). However, the IDEA does not require that the IEP identify the specific methodology that the district will use. 34 CFR 300.320 (d)(1).

Ms. **[REDACTED]** completed a comprehensive psychoeducational assessment for **[REDACTED]** compiling data from school records, prior testing, and observations and by issuing several researched-based, norm-referenced assessments including Wechsler Intelligence Scale for Children, Woodcock Johnson, Comprehensive Test of Phonological Processing, and Behavior Assessment System for Children. The comprehensive psychoeducational assessment was completed and reduced to a report by Ms. **[REDACTED]** between March 8 and March 26, 2021.

TEC also provided speech testing on March 12 and 26, 2021, which was reduced to a report by Ms. **[REDACTED]** on May 3, 2021. (SOF 20).

[REDACTED] argued during the hearing and in the briefing that the evaluation was merely a partial evaluation because the evaluation did not specifically include testing for dyslexia or other vision impairments. Courts have held that dyslexia is a term that is often overused and symptoms of dyslexia fall into a broader category under the IDEA: Specific Learning Disability. The Ninth Circuit has stated that districts are free to use the term "dyslexia" in evaluation reports, nothing in the IDEA requires them to assess students for dyslexia (as opposed to SLD generally). An evaluation is appropriate so long as it addresses all areas of suspected disability and identifies all the child's needs. *Crofts v. Issaquah Sch. Distr*. No. 411, 80 IDELR 61 (9th Cir. 2022). In that case, the Court specified the evaluation used a "battery of assessments" of student's reading and writing skills using very similar assessments to those used in this matter. *Id.* Ms. **[REDACTED]** attempted to explain to Ms. **[REDACTED]** that the school does not test for dyslexia, but rather, it tests for academic classifications (SOF 17). The record is clear that the evaluation was relevant and comprehensive.

D. FAPE

In 2017, the Supreme Court provided guidance for what it means to provide a FAPE in the landmark case *Endrew F. v. Douglas Cnty. Sch. Dist*., 137 S. Ct. 988 (2017). It states:

> A FAPE, as the Act defines it, includes both special education and related services. Special education is specially designed instruction to meet the unique needs of a child with a disability; related services are the support services required to assist a child to benefit from that instruction. A State covered by the IDEA must provide a disabled child with such special education and related services in conformity with the child's individualized education program, or IEP.

Id. (internal quotes and citations omitted).

The Court went on hold: "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." *Id.* at 999. An appropriate education program requires the "expertise of school officials" in collaboration from parents as part of an IEP team. In addition, "any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court

regards it as ideal." *Id.* While *Endrew F.* and subsequent court decisions have created a clear standard requiring progress, the cases are less clear on how to measure progress or the setting in which progress must occur.

1. IEP

The IEP team at TEC, including Ms. **[REDACTED]**, met on May 4, 2021, and reviewed significant data, including school records and classroom test scores; the psychoeducational report; and observations. From that data, the record demonstrates the IEP team developed and signed an IEP that detailed measurable goals and objectives, specialized services, and accommodations for **[REDACTED]**, which were intended to help him make academic progress. The IEP contains prior written notice of FAPE based on the PLAAFP, and the IEP team provided a copy of procedural safeguards as required. All of this was acknowledged by Ms. **[REDACTED]** signature as well as the signatures of the other IEP team participants, including Ms. **[REDACTED]** parent advocate (SOF 21).

According to the record, Ms. **[REDACTED]** also brought up Dr. **[REDACTED]** visit during the IEP team meeting. Not much was known by the IEP team on that date about Dr. **[REDACTED]** visit other than **[REDACTED]** was diagnosed with convergence insufficiency and deficient saccadic eye movements, and **[REDACTED]** would undergo vision therapy for this condition (SOF 22). The IEP team made some modifications to the IEP to incorporate additional accommodations and a commitment to review accommodations that would be provided by Dr. **[REDACTED]**. Those modifications were incorporated into the IEP signed by all members present (SOF 24).

As stated, **[REDACTED]** parents withdrew him from the classroom in February 2021 and enrolled him in the online learning program based on the claim that he was being bullied at school. Principal **[REDACTED]** was unable to find evidence to support the claim of bullying (SOF 18). Nonetheless, **[REDACTED]** spent the last month of the 2020-2021 school year learning remotely from home. Ms. **[REDACTED]**, Ms. **[REDACTED]**, and Ms. **[REDACTED]** scheduled times to provide specialized instruction, but scheduling was difficult, and the record is not clear regarding the frequency or effectiveness of the instruction (SOF 25). Moreover, TEC did not provide ESY to

[REDACTED] during the summer despite the IEP indicating it would be considered by the IEP

Throughout the summer, **[REDACTED]** attended vision therapy in Dr. **[REDACTED]** office and did exercises at home. Dr. **[REDACTED]** testified, and his reports confirm, that **[REDACTED]** condition improved due to therapy, and the following year, an evaluation stated that **[REDACTED]** convergence insufficiency largely resolved. The evaluation made no further mention of the deficient saccadic eye movements (SOF 27).

Ms. **[REDACTED]** testified that TEC agreed to meet for a follow-up IEP meeting before the 2021-2022 school year began. TEC attempted to set up a meeting contacting the **[REDACTED]** the day before school started. Principal **[REDACTED]** testified that TEC did not agree to meet before school started, but **[REDACTED]** would request a renewed IEP when they had documentation from Dr. **[REDACTED]** (SOF 29).

The online option was not available for the 2021-2022 school year; TEC was holding in-person classes only. **[REDACTED]** did not bring **[REDACTED]** back to school at the beginning of the school year. Principal **[REDACTED]** wrote a letter to **[REDACTED]** dated August 23, 2021, that indicated the school's expectation that **[REDACTED]** attend school. Ms. **[REDACTED]** testified that the services being provided at the end of the previous school year caused **[REDACTED]** to have eye strain, headaches, and emotional breakdowns. Ms. **[REDACTED]** testified that **[REDACTED]** were not interested in **[REDACTED]** returning to school until a new IEP could be created incorporating Dr. **[REDACTED]** suggested accommodations (SOF 30).

TEC tried on August 15 to schedule an IEP meeting for August 30, 2021. **[REDACTED]** indicated they needed to "check with their lawyer, which delayed the meeting. The meeting was finally convened on September 14, 2021 (SOF 31). Based on information from **[REDACTED]** that **[REDACTED]** eye condition prevented him from accessing his education, the Team was willing to make changes to the IEP. **[REDACTED]** provided a long list of accommodations that they believed **[REDACTED]** needed and described that **[REDACTED]** had suffered severe headaches and behavior problems because his eyesight made it difficult to read and write.

Essentially, they indicated the May 4, 2021 IEP was doing harm to **[REDACTED]**; **[REDACTED]** mother testified she believed **[REDACTED]** might suffer permanent damage, although that claim was not supported by any medical documentation (SOF 31 and SOF 32).

Principal **[REDACTED]** indicated the team was just anxious to get **[REDACTED]** back into school. The IEP team agreed upon the Amendment to the IEP that suspended the special services in the May 4, 2021 IEP, and instead, provided several accommodations to do further observation. **[REDACTED]** agreed to allow **[REDACTED]** to come back to school for a short period in the afternoon for reintegration with the agreed upon accommodations (SOF 33 to SOF 35). Principal **[REDACTED]** agreed to allow Mr. **[REDACTED]** to attend class with **[REDACTED]** during this time. **[REDACTED]** [**REDACTED]** grade teacher, Ms. **[REDACTED]**, kept copious notes of her instruction and the accommodations provided. This took significant effort for Ms. **[REDACTED]**, and in some respects, she went above and beyond the requested accommodations. Ms. **[REDACTED]** started compiling baseline assessment scores to measure **[REDACTED]** progress (SOF 36 and SOF 37).

[REDACTED] attended class for one to two hours on 12 separate days. Ms. **[REDACTED]** asked Mr. **[REDACTED]** on October 7, 2021 what he thought **[REDACTED]** future was to gauge whether **[REDACTED]** could start coming back to class more regularly. The conversation triggered Mr. **[REDACTED]** and his anger escalated quickly. He launched into a litany of vituperations toward the school and its personnel. Ms. **[REDACTED]** felt the vitriol was directed at her as she was the one working to implement the accommodations for **[REDACTED]**. Ms. **[REDACTED]** became very emotional, and Mr. **[REDACTED]** tried to differentiate her efforts from the failures of others. Mr. **[REDACTED]** tried to give Ms. **[REDACTED]** a side hug at that point, which she refused. (SOF 36 to SOF 38). Ms. **[REDACTED]** reported this verbal assault to Principal **[REDACTED]**, and principal **[REDACTED]** completely restricted the **[REDACTED]** access to **[REDACTED]** classroom and partially to the school (SOF 39).

Significant testimony from the **[REDACTED]** indicated that the accommodations offered in the Amendment and the accommodations provided by Ms. **[REDACTED]** were inadequate, and in some instances, harmful to **[REDACTED]**. The **[REDACTED]** also argued they were prevented from actively participating as members of the IEP team. The record does not support

these views. Ms. **[REDACTED]** testimony, her detailed notes, and testimony from other staff members all demonstrated that the school was providing the accommodations agreed upon in the Amendment (SOF 37). The record shows the accommodations contained therein are similar to those recommended by Dr. **[REDACTED]**. Moreover, the **[REDACTED]** were repeatedly invited to meetings and the school did not hold meetings without them. They brought an advocated to IEP meetings and parents signed the May 4, 2021 IEP and the September 14, 2021 Amendment. Lastly, Mr. **[REDACTED]** was provided full access to the classroom to monitor provision of the accommodations. TEC was making reasonable efforts to maintain an IEP that was reasonably calculated to help **[REDACTED]** make progress.

2. Progress

[REDACTED] argued the program that was offered for **[REDACTED]** during his **[REDACTED]** grade year was insufficient to provide FAPE. They argued that the curriculum being used by TEC was actually hurting **[REDACTED]**. The IDEA provides extensive procedural protections to the parents of disabled children, including their participation in the development of the IEP and the right to review all relevant school records. 20 U.S.C. § 1415(b)(1); *Nathan F. ex rel. Harry F. and Amy F. v. Parkland Sch. Dist.,* 2004 WL 906219 (E.D. Pa. Apr. 27, 2004). The applicable law, however, does not permit parents to usurp the school district's role in selecting its staff to carry out the IEP's provisions. *G.K. ex rel. C.B. v. Montgomery Cty. Intermediate Unit,* 2015 WL 4395153 (E.D. Pa. July 17, 2015). Nor, as stated, do parents have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *J.E. v. Boyertown Area Sch. Dist.,* 834 F. Supp. 2d 240, 246 (WD Va. 1992).

The question of progress is very difficult to ascertain in this matter because **[REDACTED]** did not attend school almost the entire 2021-2022 school year. Parents who withdraw students unilaterally typically seek an alternative placement. **[REDACTED]** effectively homeschooled **[REDACTED]** despite never seeking a homeschool exemption. *See* Utah Code §53G-6-204. It is clear from the record that the school made continual efforts to engage the **[REDACTED]** and asked them to return **[REDACTED]** to Ms. **[REDACTED]** class (SOF 41). The **[REDACTED]** were not only trying to dictate the manner in which the school provided services, when the **[REDACTED]** did not agree with the school, the IEP team, or Ms. **[REDACTED]**, they became

angry and stopped bringing **[REDACTED]** to school altogether. Again, the **[REDACTED]** signed the May 4, 2021 IEP and the September 14, 2021 Amendment, which signified their approval with the offer of FAPE. Right up to the time Petitioners filed a Complaint, TEC was trying to set up IEP meetings. The **[REDACTED]** canceled some meetings, and the TEC canceled at least one meeting. Unfortunately, none of this was helpful to **[REDACTED]**.

The **[REDACTED]** obtained a neuropsychological evaluation for **[REDACTED]** in January 2022. That evaluation provides some insight as to **[REDACTED]** progress, or lack thereof (SOF 46). That evaluation built upon the psychoeducational assessment conducted by Ms. **[REDACTED]** but went further to provide diagnoses related to **[REDACTED]** mental and behavioral disorders and his sight disorder. Dr. **[REDACTED]** indicated generally that **[REDACTED]** had made progress over time based on his hard work, maturation, positive parenting, and home-based intervention. However, the scores on assessments from January 2022 were generally similar to assessments from March 2021. Despite that fact, Dr. **[REDACTED]** extolled **[REDACTED]** basic skills and optimism for growth and progress, although as **[REDACTED]** age, he will need greater support through his IEP (SOF 50 and SOF 51).

Again, it is typical for parents to unilaterally withdraw **[REDACTED]** and seek an alternative placement. The *Endrew F*. decision is such a case, and in this context, the *Endrew F.* rule can be restated: if a student unilaterally withdraws from the public school to go to the private school, the question is whether the public school previously provided or offered an IEP that was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. A more recent case expanded on that idea. The District Court in the District of Columbia explained if a school makes an offer of FAPE and the parents refuse the offer, there is only so much a school can do. Therefore, when parents make clear their intent to withdraw a student and enroll the student elsewhere, districts need not provide services, but they still must make an offer of FAPE. *Rizo v. District of Columbia,* 80 IDLER 68 (D.D.C. 2022). Furthermore, no student with a disability who is homeschooled full time has an individual right to receive any of the special education and related services the student would receive if enrolled in a public school. State Rules VI.D.

On one hand, **[REDACTED]** failed to bring **[REDACTED]** to school and simultaneously

failed to seek an alternative placement. They were ostensibly homeschooling **[REDACTED]** despite failing to seek a homeschool exemption. **[REDACTED]** stopped bringing **[REDACTED]** to school despite TEC following the Amendment, which they signed. The accommodations in the Amendment were substantially similar to the recommended accommodations made by Dr. **[REDACTED]**. **[REDACTED]** made demands for other accommodations that were not supported by the IEP team, and **[REDACTED]** claimed that TEC was causing **[REDACTED]** harm, but those claims were not consistent with testimony of the service providers.

On the other hand, TEC made procedural errors. First the IEP team failed to provide information under section of the Amendment: "The following options were considered and rejected for these reasons." Further, the Amendment only suspended the services in the May 4, 2021 IEP for a period of six weeks, but no prior written notice was given to parents regarding what IEP provision were in place after the Amendment. In October, Principal **[REDACTED]** had prepared detailed prior written notices that clearly constituted an offer of FAPE, which would have likely cured the procedural error in the Amendment. However, the record suggests those documents were never shared with parents. Ms. **[REDACTED]** sent emails to **[REDACTED]**, but those alone did not constitute a prior written notice.

[REDACTED] did not make the progress he should have made, particularly during his **[REDACTED]** grade year. However, as outlined, both parties bear some of the blame for **[REDACTED]** lack of progress. The **[REDACTED]** are responsible for unilaterally keeping **[REDACTED]** home from school and complicating efforts to develop a new IEP. As stated previously, schools in Utah are not responsible to serve a student that is homeschooled. While the parents in this case failed to seek a homeschool exemption, **[REDACTED]** was ostensibly being homeschooled from October 2021 to the end of the school year. At the same time, TEC must be held accountable for its procedural failures to provide a clear offer of FAPE and any other prior written notice. Based on the complexity of the facts and resulting difficulty in allocating fault, the Hearing Officer will order an equitable remedy that divides the responsibility between the parties.

E. Compensatory Education

In the Complaint, Petitioners proposed compensatory educational services for a period of

not less than two years prior to May 4, 2021, the date of the first IEP. Complaint at 2. However, the Complaint was not filed until January 25, 2022. State Rules limit due process complaints to "violation[s] that occurred not more than two years before the date the…LEA knew or should have known about the alleged action" unless the parents were somehow prevented from filing a complaint. State Rules IV.G. There is no claim that the Complaint was filed untimely, nor were Petitioners prevented from filing the Complaint. However, the State Rules do not specify what happens to requests for relief for ongoing violations prior to two years before a complaint is filed. Utah law emphasizes that prompt and fair final resolution of disputes is required. Utah Code §53E-7-208. By analogy, a two-year statute of limitations is reasonable, and two-year statute of limitations are generally accepted. *See e.g., Bd. of Educ. v. Aragon*, 2004 U.S. Dist. LEXIS 34653.[3] Therefore, the Hearing Officer will not consider alleged violations for compensatory education prior to January 2020.

Furthermore, the facts do not support a remedy that extends back before the 2019-2020 school year. Despite her claims that she made teachers aware of concerns since **[REDACTED]** was in **[REDACTED]** (SOF 3), there is nothing in the record that shows Ms. **[REDACTED]** mentioned any express concerns about dyslexia until sometime during the 2019-2020 schoolyear (SOF 4). It is unclear what was communicated, when, and to whom, but Ms. **[REDACTED]** admitted the school knew of the concern. In February 2020, TEC attempted to obtain consent to evaluate. While there is some disagreement on the finer points of this issue, the record demonstrates that the school was actively trying to comply with its child find obligations at that time. The school failed, however, in the fall to follow up with those obligations and no further effort was made to evaluate **[REDACTED]** until February 2021.

Based on the foregoing, the Hearing Officer will seek to compensate Petitioners in ordering compensatory education services for the following: (1) the delay in child find that occurred between the beginning of **[REDACTED] [REDACTED]** grade year until the time when TEC obtained a new consent form and initiated an evaluation in February 2021; (2) the missed

[3] Three Circuits, the 1st, 3rd, and 9th, permit relief extending back more than two years based on how state regulations are worded. (*See S. v. Regional School Unit 72*, 73 IDELR 223 (1st Cir. 2019) *G.L. v. Ligonier Valley School District Authority*, 66 IDELR 91 (3d Cir. 2015), *Avila v. Spokane School District 81,* 69 IDELR 202 (9th Cir. 2017). The Tenth Circuit does not follow this minority view.

opportunity to provide ESY to **[REDACTED]** after the completion of the 2020-2021 school year; and (3) for making procedural errors during the fall and winter of the 2021-2022 schoolyear. Any compensatory education award is an equitable remedy intended solely to allow **[REDACTED]** to recoup progress he should have made during aforementioned time frames.

F. Attorney Fees

Petitioners have requested reimbursement for attorney fees and costs. In matters governed by the IDEA, federal district courts have jurisdiction over attorney fees claims. 20 U.S.C. § 1415(i)(3). That section states in part:

> The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy….In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—(i) to a prevailing party who is the parent of a child with a disability; (ii) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Id. Federal courts have consistently held that jurisdiction of attorney fees claims under IDEA extend beyond the time a case is decided in an administrative proceeding. *E.g.*, *E.D. v. Newburyport Pub. Sch.*, 654 F.3d 140, 143 (1st Cir. 2011) ("eligibility for a fee award is not lost even when subsequent developments render claim moot overall."). Therefore, the issue of attorney fees and costs must be addressed by the federal court.

V. DECISION

Based upon the foregoing findings and analysis, the Hearing Officer makes the following decision divided by issue:

1. Between the beginning of the 2020-2021 schoolyear and February 18, 2021, Respondent failed in its child find obligation and unreasonably delayed evaluation of **[REDACTED]** for special education, which likely impeded **[REDACTED]** progress.

2. Respondent failed to consider ESY for **[REDACTED]** after the 2020-2021 school

year, which likely impeded **[REDACTED]** progress.

3. The bulk of the failure for **[REDACTED]** lack of progress during the 2021-2022 schoolyear falls on the **[REDACTED]** for unilaterally pulling him out of class and ostensibly homeschooling him throughout the year. The accommodations described by the Amendment were in place, but the **[REDACTED]** stopped bringing **[REDACTED]** to school.

4. However, TEC also made procedural errors during the 2021-2022 schoolyear, which included: failing to provide prior written notice of options considered and rejected in the September 14, 2021 Amendment; failing to send the prior written notice prepared in October for Petitioners; and failing to send any other prior written notice to Petitioners between the time the Amendment had expired and December 8, 2021, when it issued a prior written notice as part of the referral for evaluation. These procedural errors complicated the IEP process, which impacted **[REDACTED]** access to special education and related services.

5. The Hearing Officer has no jurisdiction over the question of attorney fees and costs.

6. To the degree the Hearing Officer can order reimbursement of medical services, the Hearing Officer declines to do so.

VI. ORDER

Based upon the foregoing Decision, the Hearing Officer **HEREBY ORDERS** an award of compensatory education for **[REDACTED]** in an amount up to 60 hours in the area of reading, up to 225 hours in the area of written language (spelling and writing), and up to 18 hours in speech/language. These hours are calculated by adding the time allotted under the May 4, 2021 IEP for those specialized services covering a period of 180 days. The parties shall work out a schedule for **[REDACTED]** to receive these compensatory education hours during the next three years starting from the date of this order. If the parties mutually agree in writing that **[REDACTED]** has made sufficient progress in any area, or for some other reason no longer needs the compensatory education services, the hours may be reduced by mutual consent. TEC, at its sole discretion, can provide the compensatory education services, or it can contract out for a qualified third party to provide the compensatory education services. If Respondents refuse the services, this Order shall no longer have any force or effect.

Dated this 24th day of June, 2022.

*/s/ Douglas R. Larson*_____
Douglas R. Larson
Hearing Officer

CERTIFICATE OF SERVICE

On the 24th Day of June, 2022, a copy of the foregoing Decision and Order was sent by electronic mail to the following:

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By: /s/ Douglas R. Larson
Douglas R. Larson
Hearing Officer