

STATE OF NEW HAMPSHIRE
STATE DEPARTMENT OF EDUCATION

[REDACTED] School District

IDPH-FY-24-04-047

SCHOOL DISTRICT'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES the [REDACTED] School District ("District"), by and through its attorneys, [REDACTED], and respectfully submits the following Requests for Findings of Fact and Rulings of Law:

I. Findings of Fact

1. The sole issue for this hearing is "Whether the Present Levels of Performance section of the Student's IEP should be amended to include grade level performance information." See Prehearing Order (May 22, 2024).
2. Student is identified under the IDEA as having a specific learning disability in the area of basic reading. See Core Documents ("CD") 1 at pg. 5; CD 13 at pgs. 81-82; CD 14 at pg. 106; CD 24 at pg. 162; CD 25 at pg. 184; Witness Testimony.
3. Students identified in the area of specific learning disability, basic reading generally require special education support in the areas of phonics, phonemic awareness, decoding, encoding and other elements of foundational reading skills. [REDACTED] Testimony.
4. During the 2023-2024 school year, Student was in 4th grade. See e.g. CD 1 at 5; Witness Testimony.
5. Student receives special education services from a reading specialist. Witness Testimony.
6. Student's reading specialist uses the Wilson Reading System to provide [REDACTED] reading support. Witness Testimony; CD 24.

7. Parents share decision-making for Student. CD 31 at pg. 235.
8. ██████ has a final restraining order in place that states, in part: “. . . For parent/teacher conferences or IEP meetings, the parties will schedule separate meetings.” CD 31 at pg. 239, ¶ 7.
9. Although the District is not a party to the restraining order, it has scheduled separate IEP Team meetings with the Parents during the 2023-2024 school year. Witness Testimony; CDs 2-3, 20-21, 31.
10. Student’s IEP Team met with ██████ on January 2, 2024 and with ██████ on January 9, 2024 to develop Student’s IEP for the period of January 18, 2024-January 17, 2025. See CD 1-3.
11. The initial draft of the IEP contained one paragraph in the academic needs section. CD 1 at 6.
12. Following the two IEP meetings, district staff reviewed the input received from both parents and updated the draft IEP. See e.g. CD 5, 6, 7.
13. An IEP with the creation date of January 29, 2024 was sent to Parents. CD 13-14.
14. This IEP included the following language in the Academic Needs section:

“██████ is a student with an identification of a specific learning disability in the area of basic reading. ██████ has grown leaps and bounds with reading and phonological awareness. ██████’s hurdle is ██████ anxiety. If ██████ gets “stuck” and does not understand ██████ will not self advocate for himself. Instead will just sit until the adult in the room asks ██████ [sic]. Once the direction has been explained again, ██████ does get started and is successful. ██████ does dislike writing and will push this off until the very last thing.

██████ has been making progress in ██████ IEP driven reading goals, while working in a 1:2 setting with a reading specialist and given specific accommodations for ██████ classroom and assessments. ██████ is currently reading with 95% accuracy and ██████ comprehensive is also at 95% accuracy. ██████ current scores are equivalent to a mid-year 4th grade level for reading. These are through the Wilson reading program and are an average of ██████ performance over a 6 week timeframe. The first 8 weeks of instruction this school year yielded a reading accuracy of 96% on early 4th grade work with a comprehension score of 85% with adult help.

For phonics, using the Wilson program, ██████ is working at the end of level 7 and beginning of level 8 out of 12 levels. This indicates finishing 3rd grade and beginning 4th grade. At ██████ current level ██████'s average scores are as follows: Words 93% Nonsense words 100% Sentences 93% Passages 93[.]

██████ will benefit from continued practice and work in a structured reading discipline, such as Wilson reading program, to continue to make gains and consistently produce these results in ██████ intervention times and work to generalize these skills to the classroom setting. ██████ will require continued interventions and accommodations to continue to independently apply these skills to the classroom setting.

██████ continues to struggle with the generalization of ██████ encoding and decoding abilities in the general education classroom. ██████ has completed 12 spelling tests this year and is averaging a 72.7% correct on the assessments. ██████ has achieved below 80% correct on 5 of these assessments (approximately 42% of the time).”

CD 13 at 82.

15. Both parents provided partial consent to this IEP. CD 13 at 96; CD 14 at 121.

16. The Team reconvened in February to discuss both Parents' concerns with the IEP. CD 20, 21.

17. In particular, ██████ was concerned that the statements that Student was “on grade level” did not accurately reflect Student's present levels. See e.g. CD 23 at 160.

18. An amended IEP was proposed on or about February 23, 2024. CD 24 and 25.

19. The Academic Needs section of the present levels was amended to state:

“██████ is a student with an identification of a specific learning disability in the areas of basic reading. ██████ has grown leaps and bounds with reading and phonological awareness. When taking on work ██████'s hurdle can be ██████ uneasiness and self-doubt when ██████ is unsure what to do. If ██████ gets “stuck” and does not understand ██████ struggles to independently self advocate for ██████ Instead will [sic] just sit until the adult in the room asks ██████ Once the direction has been explained again, ██████ does get started and is successful. ██████ does dislike writing and will push this off until the very last thing.

██████ receives differentiated instruction in ██████ classroom to work with ██████ current reading, encoding, and decoding abilities. ██████ struggles to consistently encode and decode words independently in the classroom.

██████ has been making progress in █████ IEP driven reading goals, while working in a 1:2 setting with a reading specialist and given specific accommodations for █████ classroom and assessments. The Wilson Reading System (WRS) is a structured literacy program designed to support students with reading difficulties. The WRS focuses on individualized specialized instruction in areas such as phonemic awareness, decoding and encoding based on the specific needs of each learner. The student progresses at their own pace based on mastery of each step per the program criteria. █████ is currently on step 7 of 12, and will continue to work on finishing all 12 steps. █████'s verbal comprehension is very good and gives explicit details of the story. █████ is stronger at these abilities when █████ is reading aloud or being read to, and will need to continue to work towards applying these abilities to silent reading fluency. █████ struggles to be able to share █████ thoughts in writing when answering comprehension questions. █████ requires assistance to formulate █████ answers in complete sentences and including the details █████ is able to give verbally.

When writing █████ will sometimes misspell words. These words tend to be phonic skills that haven't covered in the Wilson program (vowel team, diphthongs). █████ will work with the Reading Specialist to spiral back through the Wilson levels █████ has done to be sure █████ has mastered these previously taught skills.

██████ will benefit from continued practice and work in a structured reading discipline, such as Wilson reading program, to continue to make gains and consistently produce these results in █████ intervention times and work to generalize these skills to the classroom setting. █████ will require continued interventions and accommodations to continue to independently apply these skills to the classroom setting.”

CD 24 at 163, 25 at 185.

20. The 2/23/24 IEP includes goals that focus on encoding and decoding skills and applying those to writing. CD 24 at 172-173; █████ Testimony.

21. All of the District witnesses testified that the language in the February 23, 2024 academic needs section was appropriate. █████ █████ █████ █████ █████ Testimony.

22. █████ provided full consent to this IEP on February 28, 2024. CD 24 at pg. 180.

23. █████ provided partial consent to this IEP on February 29, 2024. CD 25 at pg. 200.

24. On February 26, prior to responding to the IEP, █████ indicated in email correspondence

that ■ wanted the Academic Needs section from the January 29, 2024 IEP to be “reinstated and fully replace the 2/23 text in that section.” CD 26 at pg. 208.

25. ■’s requested relief in ■ due process request sought to replace the present levels/academic needs in the 2/23/24 IEP with the academic needs section of the 1/29/24 IEP. See Request for Due Process.

26. However, ■ testified that ■ was only seeking to replace the 2-5 paragraphs and did not want to utilize paragraph 1 from the 1/29/24 IEP. ■’s Testimony.

27. On February 26, ■ was informed by ■. ■ that “special education interventions for remediation do not directly correlate to grade level skills.” Id.; ■’s Testimony.

28. Following receipt of ■’s partial consent, and in response to ■ request for more data about Student’s grade level, the District obtained additional information from Student’s classroom teacher and drafted potential alternate language for the present levels/academic needs section. CD 27-28.

29. On March 11, this language was communicated to both parents via email. Id.

30. ■ indicated that ■ was in agreement with these changes. CD 27 at pg. 211.

31. On March 15, ■ responded that the “changes are unacceptable and unnecessary.” CD 28 at pg. 214.

32. On March 19, ■. ■ responded stating: “. . . When there was an initial question regarding the 1/29/2024 present levels we spoke on the phone, and I explained that the statement comparing the Wilson program to grade level norms was an error. The Wilson Reading System is a criterion-referenced program and does not reference grade levels. Therefore, performance on the steps of the Wilson Reading Program in isolation is not sufficient to determine an overall

grade level for reading, which is a multifaceted task that includes not only phonics applications at the word level, but comprehension as well. The team needed to revise this portion of the present levels as was discussed when the team met again on 2/20/2024. The revised language is included in the current IEP.” Id. Ms. [REDACTED] offered to convene another Team meeting to discuss the IEP. Id.

33. On March 20, [REDACTED] responded, continuing to express disagreement with the revised present levels and attaching a screenshot from a Wilson program indicating that for that particular program for students in grades K-3, the levels typically correspond to a student’s grade level. Id.

34. The particular screenshot that [REDACTED] provided was for the Wilson Foundations program, which is a separate program from the Wilson Reading program. Height Testimony.

35. [REDACTED]’s background is not in education, [REDACTED] is not trained in administering the Wilson Reading System and does not teach reading. [REDACTED] Testimony.

36. A comparison of the present levels sections of the 1/29/24 and the 2/23/24 IEP indicates that there are several similarities. Compare CD 13 at 82 with CD 24 at 163; [REDACTED] Testimony.

37. In the March 11 email correspondence, the District offered to reinsert language from paragraph 5 of the 1/29/24 academic needs section pertaining to Student’s spelling grades into the present levels. [REDACTED] consented to that change; [REDACTED] declined. CD 27-28.

38. Ms. [REDACTED] has over 20 years of experience in the field of education. District’s Supplemental Document (“SD”) 33. [REDACTED] is certified by the State of New Hampshire in the areas of Special Education Administration, General Special Education and Specific Learning Disabilities. [REDACTED] is also certified by the State of New York in the area of Special Education and Reading K-12. Id.

39. [REDACTED]. [REDACTED] testified that teams tend to avoid the use of references to “grade level” because the term is very broad. Instead, teams try to focus on having more data-driven information in the present levels. [REDACTED] Testimony.

40. [REDACTED]. [REDACTED] became involved in Student’s Team after [REDACTED] was contacted by both parents about the language in the present levels section of Student’s IEP. [REDACTED] Testimony.

41. [REDACTED]. [REDACTED] testified that the reference to “grade level” performance in the January 29 IEP was in error as Wilson does not correlate to grade level. [REDACTED] Testimony.

42. There are no current evaluations that indicate that Student is on grade level in the area of basic reading. [REDACTED] Testimony; Exhibits.

43. Spelling tests correlate to encoding. [REDACTED] Testimony.

44. Student’s Aimsweb testing results showed average skills in the area of reading comprehension. [REDACTED] Testimony; Parent Exhibit (“PE”) 4.

45. In 2023, Student scored at a Level 1 in the 2023 State (SAS) testing, indicating that [REDACTED] was “below proficient in applying the English language arts/literacy knowledge/skills.” SD 58.

46. [REDACTED]. [REDACTED] the Special Education Building Level Coordinator, testified that [REDACTED] did not believe that the reference to grade level should be included in Student’s IEP. [REDACTED] Testimony; SD 37.

47. Student’s case manager, [REDACTED]. [REDACTED] testified that the present levels in the 2/23/24 IEP accurately and completely reflects Student’s academic needs and is consistent with the goals and services in [REDACTED] IEP. [REDACTED] Testimony.

48. Student’s classroom teacher, [REDACTED]. [REDACTED] presented credible evidence about Student’s classroom performance and [REDACTED] present levels. Testimony [REDACTED]. [REDACTED]

49. [REDACTED]. [REDACTED] has several years of experience teaching elementary education and has a

Master's in Elementary Education. SD 32.

50. Student's report card was released on March 29, after the 2/23/24 IEP was developed. PE 7.

51. Student's March 29 grades do not reflect the level of support that [REDACTED] receives in the classroom. [REDACTED] and [REDACTED] Testimony.

52. In particular, [REDACTED]. [REDACTED] testified that Student receives significant support in the area of reading in the general classroom setting and that [REDACTED] requires more teacher support than other fourth grade students. [REDACTED] Testimony.

53. Student's preferred independent reading books are typically at the second or third grade reading level. [REDACTED] Testimony.

54. [REDACTED]. [REDACTED] noted that although Student's reading grade was high, the "skills and work habits" indicates that [REDACTED] is not where [REDACTED] would expect [REDACTED] to be in fourth grade. [REDACTED] Testimony.

55. Student's spelling lists are typically at a third grade level. [REDACTED] Testimony.

56. From September 2023– February 2024, Student achieved 77% accuracy on the third grade level spelling tests and 66% accuracy on 4th grade level spelling tests. [REDACTED] Testimony; SD 44-45.

57. [REDACTED] [REDACTED] has over 20 years of experience in the field of special education and extensive experience in the field of reading. SD 34; [REDACTED] Testimony. [REDACTED] [REDACTED] has certifications in the following areas: Reading and Writing Specialist; General Special Education; Specific Learning Disabilities; Specialist in Assessment of Intellectual Functioning (SAIF); and English Education (5-12). SD 34.

58. [REDACTED] [REDACTED] was initially trained in the Wilson Reading System in 1999 and has

experience in administering the Wilson Reading System to students. SD 34 at 15; [REDACTED] Testimony.

59. The Wilson Reading System used for fourth grade does not provide a grade level equivalent. [REDACTED] Testimony; SD 39, 62.

60. [REDACTED] [REDACTED] communicated directly with Wilson Reading System staff who confirmed that the Wilson Reading System steps are not aligned to grade level and that it would be inaccurate to state that the steps are correlated with grade levels. SD 39; [REDACTED] Testimony.

61. Including the reference to “grade level” in paragraphs 2 and 3 of the academic needs section of the 1/29/24 IEP is not appropriate because the Wilson Reading System does not correlate with grade level. Id.

62. Student has made progress academically, however the present levels in the 2/23/24 IEP are appropriate and accurately reflect Student’s academic needs. See District Staff Testimony.

II. Rulings of Law

63. The District bears the burden of proof, by a preponderance of the evidence, as to “the appropriateness of the child’s program or placement, or of the program or placement proposed by the public agency.” RSA 186-C:16-b, III-a. Accordingly, the District bears the burden of proof that the present levels contained in Student’s 2/23/24 IEP were appropriate.

64. As the party requesting the Hearing, [REDACTED] bears the burden of proof that [REDACTED] request that the present levels be amended to include the references to “grade level” from the 1/29/24 IEP are necessary under the IDEA. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56-57 (2005) (holding that, unless state law states otherwise, the party bringing the due process request has the burden of proof under the IDEA); see Request for Due Process (requested relief).

65. A district makes a free, appropriate public education (“FAPE”) available to a student when it complies with the IDEA’s procedural requirements and offers an IEP that is reasonably calculated to enable the child to make meaningful progress in light of the student’s unique circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 399 (2017).

66. IEPs must include “[a] statement of the child’s present levels of academic achievement and functional performance, including – (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum . . .” 34 CFR 300.220(a)(1); Ed 1102.03(g) (defining IEP).

67. Nothing in the IDEA, federal regulations, state law, or state regulations require that the present levels section of an IEP include “grade level” references. 20 USC 1401 et seq.; 34 CFR 300.1, et. seq.; RSA 186-C; Ed 1100; see also District of Columbia Pub. Schs., 114 LRP 21550 (SEA D.C. Apr. 16, 2014) (citing 34 CFR § 300.320(a)(2)) (“Petitioner also alleged in the due process complaint that the IEP’s annual goals for mathematics, reading, written expression and social-emotional areas of concern were inadequate because there were no grade level equivalencies or present levels of performances articulated. The IDEA requires that each child’s IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum and meet each of the child’s other educational needs that result from the child’s disability. Each of the areas of concern in Student’s IEP does describe [REDACTED] present levels of performance. Petitioner has not cited any authority for requiring grade level equivalencies to be included in IEP annual goals”); Carlsbad Unified Sch. Dist., 109 LRP 5788 (SEA C.A. Dec. 18, 2008) (“Student provided no authority for the contention that District was required to provide grade level equivalencies in reading, writing, and math for Student. District witnesses testified that standard scores, scaled scores, and percentiles provide a more accurate

description of a student's present levels of performance than grade level equivalencies. For that reason, District personnel did not provide reports of Student's grade level equivalencies. Instead of grade level equivalencies, District assessors reported on Student's present levels using standard scores, scaled scores, and percentiles”); see also Antioch Unified Sch. Dist., 119 LRP 324 (SEA Cal. Dec. 28, 2018) (determining that the student did not provide any authority that the district was required to provide grade level equivalencies for reading, writing, and math present levels where the resource specialist testified that standard scores were more reliable measures than age and grade-level equivalencies.); District of Columbia Pub. Schs., 113 LRP 21681 (SEA D.C. Apr. 28, 2013)(finding that present levels of performance were appropriate without the grade level equivalency where the present levels were based on current data, observations, assessments, and information from the student’s teacher).

68. The term “academic achievement” is not defined in the IDEA and varies depending on the student’s circumstances or situation. See 71 Fed. Reg. 46662 (Aug. 14, 2006) (“‘Academic achievement’ generally refers to a child’s performance in academic areas (e.g., reading or language arts, math, science, and history) . . . the definition could vary depending on a child’s circumstance or situation, and therefore, we do not believe a definition of ‘academic achievement’ should be included in these regulations.”).

69. In New Hampshire, the term “academic achievement” is defined as “the student’s level of academic performance when measured against the general education curriculum.” Ed 1102.01(a).

70. The present levels of performance “essentially delineates areas of deficit to be addressed by IEP goals and objectives, and how the child’s disability affects [the student’s] participation in appropriate activities.” Pemi-Baker Regional Sch. Dist., IDPH FY 04-10-040 (N.H. SEA

Dec. 4, 2003). [REDACTED] is focused on the wording of the “present level of performance,” not the actual services of the IEP without any evidence of the alleged inadequacies. Id. (finding for the District where the District showed that the offered IEP was reasonably calculated to enable Student to make educational progress after the Parents contested the present levels of performance in an IEP but declined to permit an evaluation of the student); see also Timberlane Regional Sch. Dist., IDPH FY-04-04-081 (N.H. SEA May 21, 2004) (the IEP was appropriate and Parents did not present any “independent or credible” information that Student’s present levels of performance were incorrect or mandated different instruction).

71. A district is required to consider academic performance in the development of the IEP, but the particular weight of that information can depend on the student’s unique needs and alleged deficits. See Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 81 (1st Cir. 2016) (reasoning that academic performance and standardized tests are not the only considerations of academic performance in terms of eligibility for special education).

72. While an IEP must consider a student’s present levels of academic achievement and functional performance, and the IEP goals must be aligned with grade-level content standards, this alignment should not replace the individualized decision-making which is required in the IEP process. See Letter from Michael K. Yudin, Assistant Secretary, and Meldoy Musgrove, Director of the Office of Special Education Programs, to Colleague (Nov. 16, 2015), <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>.

73. For a student whose basic reading scores are below grade-level, but whose reading comprehension is at or above grade level, student’s present levels cannot generically state that the student is reading at grade level. See Letter from Michael K. Yudin, Assistant Secretary,

and Meldoy Musgrove, Director of the Office of Special Education Programs, to Colleague (Nov. 16, 2015), <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf> (providing an example of identifying present levels of performance and the student’s individual strengths and weaknesses including basic reading and comprehension grade levels).

74. IEPs do not need to include information required by parents if the information is not necessary for the student to receive a free appropriate public education (“FAPE”). Winkelman v. Parma City Sch. Dist., 51 IDELR 92, 294 Fed. Appx. 997 (6th Cir. 2008), cert. denied, 557 U.S. 946 (2009); see also Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 30 (1st Cir. 2008) (“The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits. Were the law otherwise, parents could endlessly parse IEPs into highly particularized components and circumvent the general rule that parents cannot unilaterally dictate the content of their child's IEP”) (citations omitted); see also Lancaster City Schs., 121 LRP 345533 (Ohio SEA, Aug. 20, 2021) (ruling that the IEP team had thoroughly assessed Student despite not including all recommendations from a report or medical letter).

75. An IEP does not need to be ideal to be appropriate, the IEP needs to be “reasonably calculated” to enable the student to make meaningful educational progress, consistent with the student’s circumstances. Andrew F.; see also C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 629 (1st Cir. 2019) (“Under both Andrew F. and our precedent, a court evaluating whether an IEP offers a FAPE must determine whether the IEP was reasonably calculated to confer a meaningful educational benefit in light of the child's circumstances”); D.B. v. Esposito, 675 F.3d 26 (1st Cir.

2012). School officials are afforded deference due to their expertise and the ability to “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [the] circumstances.” Esposito at 388, 399.

76. When determining whether an IEP is appropriate, the IEP is reviewed based on the information available at the time it was implemented, “rather than with the benefit of hindsight,” and substantial deference must be afforded “to the educational programs developed by educators and other experts.” Lessard v. Wilton-Lyndeborough Co-op Sch. Dist., No. CIV.05-CV-192-SM, 2007 WL 1221103, at *5–6 (D.N.H. Apr. 23, 2007), aff’d., 518 F.3d 18 (1st Cir. 2008).

77. As a matter of law, the reference to “grade level” with regard to the Wilson Reading System was not appropriate as the Wilson Reading System does not correlate to grade level.

78. The present levels in the 2/23/24 IEP accurately reflect Student’s level of academic performance as of 2/23/24.

79. The District established, by a preponderance of the evidence, that the present levels of performance (academic needs) section of Student’s 2/23/24 IEP was appropriate.

80. [REDACTED] did not meet [REDACTED] burden of proof in this due process proceeding.

81. The District is the prevailing party.

Respectfully submitted,

[REDACTED] School District

By and through its attorneys,

[REDACTED]

Dated: June 14, 2024

By: _____

[Redacted signature]

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I emailed a copy of the foregoing to Student's [Redacted] and a courtesy copy to Student's [Redacted]

Dated: June 14, 2024

By: _____

[Redacted signature]