

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

26241-21-22

Child's Name:

D.Z.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

12/2/2022

PROCEDURAL HISTORY

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act ("IDEA") and Section 504.¹ The Parent contends the District failed to locate, identify, evaluate, offer and provide the Student a Free Appropriate Public Education ("FAPE") during multiple school years. The Parents now seek an award of reimbursement for out-of-pocket tuition expenses and compensatory services.

On the other hand, the District argues that it complied with each Act. Furthermore, they assert two equitable affirmative defenses. First, they assert that if I find any violations, the Parents failed to provide proper notice of their intention to make a unilateral placement; otherwise, it bars recovery. Second, they assert that the two (2) year delay in filing the action undercuts any relief. The Parents respond that all delays result from the District's actions or inactions. In the alternative, they argue an error on their party is harmless.

For the reasons set forth below, I now find the Parents failed to establish preponderant proof that the District committed either a child find, evaluation, or denial of FAPE violation which in turn caused a substantive denial of the IDEA. I also find the Parents failed to provide preponderant proof of a Section 504 child find, evaluation, or FAPE violation. Therefore, I

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P- p.) followed by the exhibit number, School District Exhibits attached to the Motion to Dismiss will be marked as (Motion to Dismiss Exhibit A- p.) followed by the exhibit letter, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

must deny the Parents' request for reimbursement and compensatory education. To the extent the Parties seek a declaratory ruling on the June 2022 reevaluation, I now find that the reevaluation meets all overlapping IDEA and Section 504 child find and reevaluation standards. As the Parties did not submit a Section 504 Agreement or IEP, I express no other opinion. A Final Order follows denying the Parents' claims.

FINDINGS OF FACT

EDUCATIONAL HISTORY

1. At this time, the Student is a middle school [aged] student who lives in the Lower Merion School District ("District").² Stipulation 1.
2. In 2017-2018 the Student attended [redacted] Grade in the District. P-18.³

THE [redacted] 2018 DISTRICT EVALUATION

3. [redacted] P-5.
4. While in [redacted] grade (2017-2018), the Student was reported to be on par in writing, math and a strong reader. The Student appeared to use time efficiently, worked independently, and organized work, space, and belongings. The Student was also able to check completed work for errors.

³ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parents also claim violation of Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P#- p.) followed by the exhibit number, School District Exhibits will be marked with the letter S#- p. Followed by the exhibit letter, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

(P-18, p. 1). Overall, the Student demonstrated good work habits like listening attentively, completing assignments, and following directions. *Id.*

5. Due to an accident [redacted.] [Redacted], the Student was not able to do much, if any, physical activity. The teachers noted, and the record supports a finding of increased fidgetiness. (P-5, p. 2) (N.T. p.81).
6. [redacted] (N.T. p.217, p.218, p.221, pp.228, 229, P-4, P-5, S-6).
7. [redacted] (N.T. pp.226-27).
8. [redacted](P-5)
9. [redacted] (S-1, p.2; N.T. pp.232, 326).
10. [redacted] (S-1, p. 10, N.T. p.234).
11. During the [redacted] grade school year - 2018-19 school year - the Student was described as a capable writer who used varied sentence structure and was otherwise fluent with logical sequence. The Teacher reported that the Student's writing and organizational skills improved. The Teacher reported that the Student was able to listen attentively, follow directions, and organize work, space, and material. (P-19, p. 1).
12. On April 29, 2019, on the end of the year writing benchmark, the Student scored in the "Proficient" range. (P-22, p.1).

THE PRIVATE EVALUATION

13. Dissatisfied with the District's conclusions, the Parents sought a private evaluation. On the private Wechsler Individual Achievement Test Third Edition (WIAT-III) testing, the Student performed in the "Average" to "Above Average" range in most areas. The examiner noted that the Student's sentence composition/building subtests were at the 39th percentile. Reading accuracy fell at the 53rd percentile, sentencings combining at the 45th percentile, and spelling at the 55th percentile. Based on the Student's then-testing profile, the examiner did not find a specific

learning disability. (P-7, pp. 8-10, 16). The examiner noted poor handwriting skills in letter formation and spacing. The examiner recommended further assessment by an occupational therapist. (P-7 p.10).

14. Although the private examiner's behavioral observations during the private evaluation described the Student as a youngster who struggled with body regulation, "[a]ll rater reports showed Average scores in the areas of hyperactivity and attention problems." Other social/emotional rating scales demonstrated average scores in most areas. (P-7, pp.8, 15, 17-19).

THE DISTRICT REVIEW OF THE PRIVATE TESTING AND THE SECTION 504 AGREEMENT

15. On August 27, 2019, after receiving the June 2019 private evaluation, the District issued an IDEA permission to reevaluate and issued a prior written notice (PWN) and procedural safeguards. On September 23, 2019, the Parents consented. (P-8, pp.1, 3).
16. The Parties agreed that a full reevaluation should assess IDEA eligibility [redacted]. As recommended by the private evaluation, the proposed evaluation also included an OT evaluation.
17. On September 16, 2019, pending completion of the District's reevaluation, a 504 Service Agreement Team considered if the Student's private evaluators' diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) was a Section 504 disability. The District's Section 504 team included the principal, the classroom teacher, the instructional support teacher, the school counselor, and the Parent. After giving due weight to the private examiner's findings, the team accepted the ADHD finding. The team also concluded the Student's ADHD caused a substantial limitation in the Student's major life functioning of learning. At the meeting, the Student's Teacher explained that she modified how she taught the Student. To meet the Student's emerging needs around the ADHD impairment, the Teacher explained how she used teaching strategies like cueing questions, movement breaks,

including brain gym and walk and talk, along with finding "good fit books" and use of strategies such as "think aloud" and modeling. (P-9; N.T. at 40).

18. Following the Section 504 and Chapter 15 regulations, the 504 evaluation team determined the Student's ADHD substantially impaired the Student's concentration, thinking, and organization skills. After finding that the Student was otherwise eligible for a Section 504 Agreement, the team moved on and prepared a Section 504/Chapter 15 Service Agreement. The 504 Agreement included accommodations to minimize distractions, preferential seating, movement breaks, reminders to gain attention before delivery of information, repetition of directions - by Teacher and Student-; frequent check-ins and feedback, reminders about checking work, visual reminders to support focus, multiple modalities like chunking assignments, step-by-step instructions, opportunities to fix careless errors, consistent and positive reinforcement, and, access to the school counselor to support social engagement. On or about October 21, 2019, the Parents consented to the 504 Agreement. (P-10, p. 2).

THE IDEA REEVALUATION IS COMPLETED

19. The District's IDEA evaluation was completed on November 21, 2019. (P-12, S-5; N.T. P. 523, P.569).
20. The November 21, 2019, evaluation report (ER) included the following evaluation, assessment, rating, or ranking techniques:
 - Information provided by the Parents, including the June 2019 private evaluation (P-12, pp.2-4).
 - Input, observations, and recommendations from Student's Teacher (P-12, pp.5-6, p.7).
 - An observation was conducted by the District school psychologist (P-12, p.6).
 - A summary of the District's prior 2018 evaluation (P-12, pp.7-8).
 - A review of Student's state and local assessments (P-12, pp.8-9).

- A Student interview (P-12, p.9).
 - An assessment of Student's cognitive abilities with the Wechsler Intelligence Scale for Children Fifth Edition (WISC-5) (P-12, pp.9-12).
 - An assessment of Student's academic achievement Woodcock-Johnson Achievement Test Fourth Edition (W-J IV ACH) (P-12, pp.12-13).⁴
 - An assessment of the Student's social/emotional functioning using the Behavior Assessment System for Children (BASC-3) (P-12, pp.13-16).
 - An assessment of the Student's executive functions using the Behavior Rating Inventory of Executive Function (BRIEF-2) (P-12 pp.16-17).
 - [redacted],
 - An occupational therapy (OT) evaluation (P-12, pp.19-21).
21. This time the District's evaluation, consistent with the findings of the private evaluation, determined Student's academic achievement skills to be in the "Average" and "Above Average" and, at times, in the "Superior" range. (P-12, pp.12-13).
22. [redacted] (P-5, p.1; P-12, pp.18-19).
23. The Student's social/emotional functioning in the school setting fell primarily in the "Average" range. (P-12, pp. 15-17).
24. Like the private evaluation, the District's evaluation determined the Student did not present as a person with a Specific Learning Disability. The team did not consider if the Section 504 ADHD disability was an IDEA-based "other health impairment" (OHI). The evaluation team, including the Parents, concluded that although the Student was a person with ADHD, the Student did not otherwise require IDEA-based specially-designed instruction. This conclusion led the team to find that the Student was not IDEA eligible. Instead, the evaluation team recommended that the Student continue to receive accommodations through a 504 Service Agreement. The IDEA evaluation team

recommended that the District's regular education staff provide "interventions" for writing and/or organizational skills. (P-12, pp.24-26).

25. [redacted] (P-12, p.27; N.T. at 47). The record reflects that after the District issued prior written notice, the Parents did not contest the District proposed "action" or findings. (P-12, pp.24-26).
26. Parents signed the IDEA evaluation report and checked the box indicating they were in "agreement" with the findings. They accepted [redacted], a Section 504 Agreement, and regular education interventions. (P-12, p. 27; N.T. at 103).
27. Although the Student's recent writing benchmark scores fell in the "Proficient" range, the ER team recommended continued progress monitoring. The report recommended that "[i]f organizational skills and writing progress at this level of [monitoring] support is not sufficient, consider the need for further evaluation to determinate a higher level of support." (P-12, p.26; N.T. at 598). The report did not note how far the score must dip before a reevaluation would occur. (N.T. *passim*).
28. Following the IDEA evaluation, at the end of November 2019, the Student was referred to the District's Achievement Team for writing and organizational monitoring. The Achievement Team typically involves the school psychologist, the principal, the guidance counselor, and regular education teachers and meets weekly to review student concerns and discuss possible supports in the regular education setting. (S-23; N.T. at 717, 730). The record does not reflect how the team met, collected data, or sought Parental input. The record does not indicate what interventions were trialed or progress monitored. (N.T. *passim*).
29. On December 12, 2019, Parents signed a Notice of Recommended Educational Placement (NOREP) agreeing to the provision of [redacted] Section 504/Chapter 15 accommodations. (P-13; N.T. at 104). The

December 2091 NOREP noted the Student would receive "Supplemental Intervention in the regular instructional environment [redacted]" (P-15; N.T. at 106). *Id.* The NOREP does not explain what "Supplement Intervention in the regular instructional environment" included. *Id.*

THE SECOND 504 MEETING

30. Following the District's IDEA evaluation, another 504 Team Meeting was held on January 9, 2020, to review and revise the Student's 504 Agreement, if needed. Before that meeting, the Parent provided significant input regarding the suggested 504 accommodations. At the same time, the Parents expressed multiple logistical questions regarding implementation issues, like how small group testing would occur. (P-16; P-24, pp.7-10). Following the meeting, the Student's 504 Agreement was revised. The revised 504 Agreement included additional accommodations based on the recommendations outlined in the District's IDEA Evaluation Report. *Id.*

31. The revised Section 504 Accommodations included the following:

- "Teachers will gain Student's attention before delivery of information" became "Teacher will establish eye contact and get [student's] attention before providing instructions. When possible, pair verbal instructions with visual cues so [Student] can review them should [Student] get off task."
- "Teachers will chunk assignments" became "Teacher will break multi-step assignments into smaller, more manageable tasks and have Student practice doing this as well." (P-10; P-17).
- New accommodations targeted organizational needs, such as "Teacher will assist [redacted] in creating ... systems for organization including use of checklists, binders with dividers and folders." Others supported legible handwriting such as "Teacher will provide slant board during classwork; Teacher will provide handwriting checklist; Teacher will provide adapted

paper such as three-lined or highlighted lines when needed." Additional accommodations for focus were also added, such as, "The teacher should consider having [redacted] complete tests and standardized assessments in a less distracting or small group setting;" and "The teacher will prompt [redacted] to slow down, check [student's] work, and show [student's] work." (P-17, p.2).

32. On January 9, 2020, the Parent signed and accepted the 504 Service Agreement. (P-17, p.3, N.T. p.108).
33. All teachers implemented the Student's 504 Agreement. [redacted] (N.T. p.367).
34. The Teacher gave the Student a three-ring binder with dividers to assist with organization. The Student was able to make eye contact. The Teacher would obtain the Student's attention in various ways, including flicking on the lights, counting down, clapping hands, and using physical proximity. (N.T. at 378-80).
35. After giving directions, the Teacher would ask if the Student understood the directions and completed "check-ins" with probing questions, if necessary, to ensure understanding and direct the Student to the correct conclusion. The Teacher provided movement breaks, nonverbal cues, preferential seating, and conferencing to help prompt the Student to answer a question with greater depth. (N.T. at 383-86).
36. According to Student's regular education teacher, the Student was otherwise on task. The regular education teacher commented the Student did not need additional support beyond what was given in the classroom. The regular education teacher further noted that the Student could access and complete the [redacted]-grade writing curriculum and progressed somewhat within the curriculum. As the school year went on, the Student's

focus, content, and writing organization seemed to improve. (N.T. p.484, p.489, and p.492).

37. The Teacher also used colored folders, share pockets, checklists, and binders to support organization. She would check in with [Student] for understanding. To support the Student's attention and focus concerns, the Teacher used non-verbal cues such as a knock on the table or pointing to the board and verbal cues such as "1-2-3, eyes on me." She also chunked assignments, reminded the Student to slow down and recheck work, and provided a handwriting checklist. The classroom teacher found that the accommodations provided were effective and that the Student was otherwise able to access the curriculum. (N.T. at 494-97, 505).
38. The classroom teacher did not report or note interfering classroom behaviors in class and no other teacher ever reported ADHD-like interfering behaviors to her. The Teacher was surprised when she received Parent's email in March 2020 regarding ongoing in-home behavioral/mental health concerns. Before that email, the teacher did not recall hearing about or having any concerns regarding Student's social, emotional, or behavior/mental health. (N.T. pp. 499-500, p.502, p.513).
39. Overall, the teachers noted that the Student needed to learn how to plan and edit writing samples. While writing legibility and conventions were areas of concern, the Teacher believed the Student was meeting grade-level state standards and expectations for most writing domains, including focus, content, organization, and style. (P-20).

THE SCHOOL SHUTDOWN AND THE SWITCH TO ONLINE LEARNING

40. In February 2020, before the shutdown, the Student scored Proficient and Advanced on reading and math benchmarks. (P-22, p.2).
41. The school closed on March 13, 2020, in response to the COVID pandemic. (N.T. *passim*).

42. Initially, instruction was asynchronous for the first two weeks after the schools were forced to shut down due to COVID. After that, the District began providing virtual instruction to all students for about 2 ½ hours per day, with students receiving approximately an hour's worth of instruction in reading and 45 minutes to an hour's worth of instruction in math. Also, there were open times when students could sign on and be with their teacher for any help or support. (N.T. p.54, pp.286-87).

THE UNILATERAL PLACEMENT AT THE PRIVATE SCHOOL

43. The Parent began researching private schools in March 2020. The Parent first spoke with the private school on April 23, 2020. On April 30, 2020, the Parents submitted an application for admission. On the application, Parents reported that the Student did well in school and was loving, kind, and well-behaved. Parents also reported that the Student had attention and executive functioning issues which prevented Student from reaching full academic potential. In the application, Parents did not raise any concerns regarding Student's behavioral health or note written expression deficits. (P-24, p. 31, S-8, pp.59, p.61, N.T. p.117, p.119, p.180).

44. By email dated July 20, 2020, the Parent withdrew the Student from the District. In her email to the Principal Parent conveyed that she was "super appreciative of all the help and attention [Student] received. The Parent did not make any claim that the District's programming was inappropriate or request that the District fund Student's unilateral placement. The only request in the email was for a special education evaluation for Student's sibling. (P-24). The email did not state the Parents were seeking tuition reimbursement. *Id.*

45. Mother and Father signed the contract for the private school on July 20, 2020, and July 21, 2020, respectively. (S-8, p.91).

46. Before filing the March 18, 2022, due process Complaint, the Parents never asked the District to fund the private placement. The Parents waited almost two years before they filed the due process Complaint. (N.T. pp.119-20; P-24, p.34; P-44, p.1).

THE PRIVATE SCHOOL YEARS

47. On March 1, 2021, and again on April 4, 2021, the Mother and Father signed an enrollment contract with the private school. (S-8, p.100).

48. In August 2020, the Student began [redacted] grade at the private school. The private school completed an internal assessment and began providing direct instruction at the below [reacted] on a 3-2 level reading. The Student did not present with specific language, decoding, or dyslexic diagnosis. (P-26; P-31, p.2, N.T. p.161, p.188).

49. The private school did not assess how the Student's executive functioning deficits or ADHD otherwise affected learning. (N.T. at 208, 215).

50. Notes from the Student's March 2, 2021, private school conference indicate the Student's instructional and learning challenges included the organization of time and materials and an impulsive learning style – needed to slow down, think things through, and work more thoughtfully. The March 2021 report does not identify reading or writing deficits. (S-8, p. 66).

51. The Student began the 2021-2022 school year -[redacted]- with an instructional reading level below the [redacted] grade level. (P-37, p.2).

52. The Student's April 6, 2022, "learning profile meeting" notes indicate the Student was recommended to receive additional support in the areas of peer relations and self-image after the medication was initiated. The "profile" also recommended that the Student be referred for "executive coaching" as needed. (S-8, p.57).

THE PARENTS CONTACT THE DISTRICT AND THE NEXT REEVALUATION

53. In the spring of 2022, not quite two (2) years after the Student left the District, the Parents reached out to the District, indicating that the Student might return to the District and requested information on possible programming options. (P-44, p.1, N.T. p.647).
54. A new Permission to Reevaluate was issued, and a certified school psychologist completed a reevaluation. (P-44; S-10; N.T. at 715-16).
55. The June 10, 2022, reevaluation included parental input; a review of records including prior evaluation reports, report cards, and benchmark assessments; teacher input; a classroom observation; and assessments for cognitive functioning, academic achievement (including a writing sample analysis), attention and executive functioning, social/emotional/behavioral functioning, and an OT evaluation. (P-44; N.T. at 650-57, 659).
56. Based on then-current data, however, the 2022 reevaluation concluded the Student was now eligible for IDEA-based specially-designed instruction under the eligibility classification of OHI -ADHD. The District examiner also concluded the Student now met the IDEA criteria for a specific learning disability that also required specially-designed instruction in writing. [redacted] (P-44, p.47).
57. Concerning the OHI disability, the psychologist explained that as of June 2022, Student's ADHD adversely impacted the Student's education to a point where the Student now required direct instruction. The District examiner concluded that the Student's profile now demonstrates "higher levels of difficulty shown in the data that [she] obtained when compared to the data obtained in the November 20, 2019] evaluation." (N.T. p.674, p.708).
58. When the Student's BASC, BRIEF, and Conners rating scales of attention and executive functioning are compared, the Student's profile also indicates the Student, in June 2022, needed specially-designed instruction. (See

BASC- 21 scales/indices on 1/20/2019, evaluation- P-12, p.15 placing the Student at the *At-Risk* level with ratings between 60-69, BRIEF rankings on 10/2022 ER - P-44, p.37, - 13 scales/indices, at *Clinically Significant* on 11/20/2019, ER- P-12, p.17- *and* Conners rankings on seven (7) scales at the *Elevated/Very Elevated* level at 65 or above, found in the 6/12/2019 Private ER p-7, p.18 and the 6/10/2022, reevaluation, at - P-44, p.34).

59. Concerning the classification of SLD in written expression, the examiner explained that it is hard to parse out aspects that are attributed to ADHD, but as of June 2022, Student's difficulties went beyond just executive functioning challenges. Instead, [student's] difficulty was putting [student's] thoughts on paper in a manner that was correct mechanically and grammatically. (N.T. at 667).

STATEMENT OF THE ISSUES

1. Did the District fail to locate, evaluate, and appropriately educate the Student during [the school years attended]?
2. Did the District fail to provide the Student a free appropriate public education, under Section 504, from March 18, 2020, through June 2020? If not, is the Student entitled to compensatory education?
3. Was the District's placement from March 2020 through June 2020 appropriate?
4. Was the family's unilateral placement, at the private school, for the 2020-2021 and 2021-2022 school years appropriate? If yes, do the equities weigh in favor of the family?
5. Is the family entitled to be reimbursed for the private tuition and related services provided during the 2020-2021 and 2021-2022 school years provided at private expense?

CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES

Generally, the burden of proof consists of two elements, the burden of production and persuasion. At the outset of the discussion, it should be

recognized that the burden of persuasion lies with the party seeking relief.⁵ Accordingly, in this case, the burden of persuasion must rest with the Parents who requested this administrative hearing. The overall outcome is determined by applying a preponderance of the evidence standard. Hearing officers, in the role of fact-finders, are responsible for making credibility determinations of the witnesses who testify.⁶ I now find each witness testified to the best of their recollection about the actions taken or not taken by the team in evaluating, instructing, and designing the Student's program. As explained in detail below, I will now, on occasion, give more or less persuasive weight to the testimony of certain witnesses when I find that the witness failed to cogently describe how they either distributed the applicable procedural safeguards, evaluated, instructed, and progress monitored the Student's circumstances or communicated with the other Party.

THE IDEA ELIGIBILITY DECISION-MAKING RULES

Special education means "specially-designed instruction," which requires the district to adapt "the content, methodology, or delivery of instruction." Specially-designed instruction must "address the unique needs of the child that result from the child's disability." And finally, specially-designed instruction must "ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children."⁷

IDEA eligibility decision-making requires a two-step analysis. First, the team must determine if the alleged disability meets one or more of thirteen (13) disability categories. Second, the team must determine if, as a result of the

⁵ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁶ *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11- 12 (M.D. Pa. 2014), *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

⁷ 34 C.F.R. § 300.39(b)(3).

disability, the child's educational performance is adversely affected such that the child requires specially-designed instruction. 34 C.F.R. § 300.8(a) (1).

THE DISTRICT'S DUTY TO LOCATE, EVALUATE AND IDENTIFY DISABLED STUDENTS

Districts have a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statute." Even if parents do not cooperate fully with a district's efforts to identify a student, districts still have a responsibility to identify students who need IDEA protections.⁸ The IDEA "child find" duty" does not require schools to evaluate every struggling student formally.⁹ A school's failure to identify a disability at the earliest possible moment is not, per se, actionable. *Id.* However, once school districts have a "reasonable suspicion" that the student is otherwise IDEA eligible, the district must fulfill its child find obligation within a reasonable time frame. *Id.*

Once on notice, the failure to conduct a sufficiently comprehensive evaluation can be either a procedural or substantive violation. Substantive child find violations can cause a denial of a FAPE.¹⁰ Stated differently, the child find trigger or starting point occurs when the school district reasonably suspects that the child may be eligible under the IDEA. Once the child find duty is triggered, the district must initiate a comprehensive evaluation of the child within a reasonable period of time. Therefore, to avoid a substantive violation, an evaluation must be sufficiently comprehensive to assess all of the child's suspected disabilities.¹¹

THE ELEMENTS OF THE DISTRICT'S COMPREHENSIVE ASSESSMENT

⁸ *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)), 20 U.S.C. § 1412(a)(3)(A), 34 C.F.R. § 300.111(a), (c), Taylor, 737 F. Supp. at 484.

⁹ *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

¹⁰ *D.K.*, 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy a district's "child find" obligations)

¹¹ 20 U.S.C. § 1414(b)(3)(B), 34 C.F.R. § 300.304(c)(4), (6).

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments, classroom-based observations, and additional observations by teachers and other service providers.¹² Second, based on their review of that existing data, the evaluation team must "identify what additional data, *i.e.*, testing, ratings, rankings or assessments, if any, are needed to determine if the child has a qualifying disability in a timely fashion."¹³

Evaluators must "use a variety of assessment tools and strategies" to determine whether the student is a person with a disability. Districts may "not use any single measure or assessment as the sole criterion" for determining whether the child is a person with a disability or if the student needs specially-designed instruction.¹⁴ Districts must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."¹⁵

A comprehensive evaluation must ensure the child is "assessed in all areas of suspected disability." At the same time, it does not have to identify and diagnose every possible disability.¹⁶ Finally, the evaluation must be "sufficiently comprehensive to identify all the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified."¹⁷

THE FIRST SUSPECTED IDEA DISABILITY

¹² 34 C.F.R. § 300.305(a)(1).

¹³ 34 C.F.R. § 300.305(a)(2)(c).

¹⁴ 20 U.S.C. § 1414(b)(2)(B).

¹⁵ 20 U.S.C. § 1414(b)(2)(C).

¹⁶ *D.K.*, 696 F.3d at 250 (3d Cir. 2012) (quoting 20 U.S.C. § 1414(b)(3)(B), 34 C.F.R. § 300.304(c)(4).

¹⁷ 34 C.F.R. § 300.304(c)(6).

Under 34 CFR §300.309 (a), an eligibility group may determine if a child has a specific learning disability. The IDEA regulations at 34 C.F.R.

§300.8 (c)(10) recognize a specific learning disability as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term does not apply to children with learning problems primarily due to visual, hearing, or motor disabilities, including an intellectual disability or an emotional disturbance, or who are environmentally, culturally, or economically disadvantaged. 34 C.F.R. §300.8 (c)(10)(ii).

A group of qualified professionals and the child's parents must complete the assessment process. 34 C.F.R. §300.308. The assessment group may determine a child has a specific learning disability when the child does not achieve adequately for the child's age or to meet State-approved grade-level standards.

Assessments of children with suspected learning disabilities must include measures in one or more of the following areas, "oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem-solving." 34 C.F.R. §300.309 (a)(1).

The regulations also allow the district to identify students with a specific learning disability using one of several different decision-making models. First, the evaluation group may identify children with a specific learning disability if the child does not meet age or state-approved grade-level standards. Second, the group may identify a student using a process based on the child's response to scientific, research-based intervention. Third, and finally, the group may identify students if the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to

age, on state-approved grade-level standards, or intellectual development. 34 C.F.R. §300.309 *et seq.*

According to 34 C.F.R. §300.309 (b), the group must also ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, as described in 34 C.F.R. § 300.304 through 34 C.F.R. §300.306. Districts must collect "data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel."

The assessment must also include "data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, all of which was provided to the child's parents." *Id.*

Finally, at the state level, eligibility criteria adopted by the state (1) must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, and (2) must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures. 34 C.F.R. §300.307

IDENTIFICATION OF CHILDREN SUSPECTED OF HAVING AN "OTHER HEALTH IMPAIRMENT"

Unlike the specific learning disability criteria above, the statute does not define the term "other health impairment" (OHI). The regulations, however, provide the following: "Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems

such as . . . attention deficit hyperactivity disorder; and [the impairment], (ii) Adversely affects a child's educational performance."¹⁸

IDEA FAPE INCLUDES A WRITTEN INDIVIDUAL EDUCATION PROGRAM

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Court held that provided the procedures outlined in the Act are followed, the IDEA's FAPE requirement is met when districts provide personalized instruction and support services that are reasonably calculated to permit meaningful benefit. The Third Circuit applying *Rowley* has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit."¹⁹ Districts meet the obligation of providing IDEA FAPE to eligible students through the development and implementation of an IEP that is "'reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential."²⁰ Recently, the Supreme Court, discussing the *Rowley* standard, stated that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."²¹

Endrew, Rowley, and the IDEA clearly state that IEPs must be responsive to the child's identified educational needs. The *Endrew* court also commented that "the IDEA demands [that]... an educational program be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." At the same time, school districts are not required to provide the "best" program but one that is procedurally and substantively appropriate in light of a child's unique circumstances. *Id.* Case law further provides that the appropriateness of an IEP is judged "as of the time it is

¹⁸ 34 C.F.R. § 300.8(c)(9).

¹⁹ *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

²⁰ *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009).

²¹ *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

offered to the student, and not at some later date," this holding is otherwise known as the "snapshot" rule.²²

An IEP sets out a comprehensive, personalized program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents.²³ An IEP must contain, among other things include, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.*²⁴

CASE LAW ENDORSES TWO FORMS OF IDEA VIOLATIONS

A school district may violate the IDEA in several ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements."²⁵ "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits."²⁶

Generally, not all procedural violations amount to a denial of a FAPE. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process, or causes a deprivation of educational benefits. A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*

SECTION 504 CHILD FIND AND ELIGIBILITY RULES ARE MORE EXPANSIVE

²² *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

²³ 20 U.S.C. § 1414(d)(1)(B).

²⁴ 20 U.S.C. §§ 1401(26), (29).

²⁵ *Rowley*, 458 U.S. at 206).

²⁶ *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07).

While the IDEA, for the most part, follows a two-step eligibility process limited to thirteen (13) disabilities. Section 504, scope of coverage is much broader.²⁷ Section 504 regulations do not include a defined list of disabilities or impairments.²⁸ Instead, Section 504 eligibility arises when after an evaluation, the team concludes that the child has a "physical or mental impairment" that "substantially limits" one or "more major life activities."²⁹ The Americans with Disabilities Act (ADA) amendments and regulations are often relied on to interpret Section 504 eligibility.³⁰ The ADA describes a "physical or mental impairment" as "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitor-urinary; hemic and lymphatic; skin and endocrine; or any mental or psychological disorder, such as organic brain syndrome, emotional or mental illness, and specific learning disabilities." ³¹ The term "substantially limits," while not defined by Section 504, is described in ADA Title II regulations. A determination of a "substantial

²⁷ 34 C.F.R. § 104.3(j)(2)(ii), *Dear Colleague Letter*, 58 IDELR 79 (OCR 2012) (reminding districts that they must interpret the definition of a "disability" liberally when evaluating a student's Section 504 eligibility). See also *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015), and *Palo Verde (CA) Unified Sch. Dist.*, 56 IDELR 177 (OCR 2010) (noting that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as medication).

²⁸ OCR has commented that it would enforce the Section 504 regulations in a manner consistent with the ADA Amendments Act of 2008 (ADAAA). *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015). See also, *Snowflake (AZ) Unified Sch. Dist.*, 102 LRP 38676 (OCR 03/24/98).

²⁹ 34 C.F.R §104.36-evaluation process, 34 CFR 104.3 - definitions.

³⁰ The ADAAA amended the Rehabilitation Act's definition of disability to conform it to that of the ADA. 28 CFR 35.108 (a)(1). See, 42 USC 12102 (D). See also *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015) and *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2016)..

³¹ 34 C.F.R. §104.3 (j)(2)(i).

limitation" includes a review of three factors: 1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent, long-term impact or expected impact of the impairment.³² Nonetheless, not every impairment will constitute a disability.³³ Stated another way, the criteria for determining eligibility under Section 504 is broader, or some might say more inclusive, while the IDEA is limited to thirteen (13) defined classes of disability.³⁴

THE SCOPE OF FAPE OFFERED UNDER SECTION 504 DIFFERS FROM THE SCOPE OF IDEA FAPE SERVICES

When students are dually eligible under the IDEA and Section 504, the IDEA and Section 504 provide similar causes of action. For dually eligible students, the same conduct is often used to form the basis for the IDEA claims that can be used to bring claims under Section 504. However, procedural rights and remedies differ for only eligible students under Section 504.

Section 504's regulations require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."³⁵ Unlike the IDEA, the Section 504 regulations define a free appropriate public education as the provision of both regular or special education and related aids and services that: (1) Are designed to meet the individual educational needs of handicapped persons as adequately as the

³² The Title II implementing regulations include extensive list of "rules of construction" that spell out how the District must use to determine whether an impairment substantially limits an individual in a major life activity. 81 Fed. Reg. 53,229 (2016), 28 CFR §35.108 (d)(1).

³³ 28 C.F.R. §28.108 (d)(1)(v).

³⁴ *L. G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012) *Yankton Sch. Dist. v. Schramm*, 24 IDELR 704 (8th Cir. 1996), *reh'g en banc denied*, 112 LRP 18821 (8th Cir. 10/01/96). See also *Chicago Sch. Dist. 299*, 54 IDELR 304 (SEA IL 2010) (finding that an Illinois school district denied FAPE to a sixth grader when it decided that a 504 plan was "sufficient" and an IEP would be "too intrusive"), and *Granite Sch. Dist.*, 122 LRP 10083 (SEA UT 12/07/21) (finding that because assessment data did not support removing the student from special education, the district may have denied the student FAPE by changing IEP into a Section 504 plan).

³⁵ 34 C.F.R. §104.32.

needs of non-handicapped persons are met under 34 CFR 104.33 (2). Are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34 - educational setting; evaluation and placement decisions must comply with 34 CFR 104.35, and any (3) disagreements over offered services are subject to the procedural safeguards found at 34 CFR 104.36.³⁶ For Section 504 eligible only students, the Third Circuit stated in *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) that fact finders must apply a "reasonable accommodation. *Id.* The *Ridley* court further held that Section 504 "accommodation" must offer the opportunity for "significant learning" and "meaningful benefit."³⁷ Courts within this Circuit have also rejected assertions that litigants in Section 504 FAPE disputes must establish more than a denial of a FAPE.³⁸

APPROPRIATE RELIEF UNDER THE IDEA INCLUDES TUITION REIMBURSEMENT TEST

Courts in IDEA FAPE disputes apply the three-part test to determine whether parents, after refusing an offered IDEA FAPE, are entitled to tuition reimbursement for their unilateral placement in a private school.³⁹ Under the *Burlington-Carter* test, the party seeking reimbursement relief must show:

³⁶ *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41(3d Cir. 2013). FAPE under the IDEA is an affirmative duty to provide an appropriate program of personalized accommodations or modifications that are comparable to and as equally effective as to the offer of benefits provided to others. Some courts describe FAPE under Section 504 as a negative prohibition against failing to provide an equal opportunity to access the same benefits as non-disabled peers.

³⁷ *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 154 (3d Cir. 2014)(not precedential), *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 600 (3d Cir. 2014), and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010), *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000), and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010).

³⁸ *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 488, 489 n.10 (E.D. Pa. 2011) (rejecting the argument that to prevail under Section 504, a plaintiff must prove not only a denial of a FAPE but also that the denial was "solely on the basis of disability"); *Neena S. ex rel. Robert S. v. Sch. Dist. of Philadelphia*, 2008 U.S. Dist. LEXIS 102841, 2008 WL 5273546 (E.D. Pa. Dec. 19, 2008).

³⁹ *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993)

(1) The public school did not provide a FAPE; (2) Placement in a private school was proper; and (3) The equities weigh in favor of reimbursement. Stated another way the parent must establish each of the three prongs of the *Burlington-Carter* test to prevail. Thus, failure on any one of the prongs is fatal to a demand for reimbursement. Indeed, if parents fail to establish the test's first prong, the analysis immediately ends.⁴⁰

The Third Circuit has not yet decided, and District courts' are split if tuition reimbursement is an available remedy in Section 504 only FAPE disputes.⁴¹ Case law next suggests that if parents assert standalone Section 504 discrimination claims, tuition reimbursement is a legal remedy requiring proof of deliberate indifference. While other courts hold that if parents make Section 504 "accommodation" or "modification," FAPE claims tuition reimbursement is an equitable remedy.

With these fixed principles in mind, I will now analyze the claims, the affirmative defenses found in the testimony, the non-testimonial extrinsic evidence, and the applicable law.

CONCLUSIONS OF LAW AND ANALYSIS

THE PARENTS' IDEA CHILD FIND, AND IDEA EVALUATION CLAIMS ARE LACKING

The Parents failed to muster preponderant evidence that the Student's learning disability evaluation was either procedural or substantively flawed. First, the record is preponderant that the reevaluation included a variety of assessments. Second, the evaluation report included mandatory Parental input, an observation, and Teacher input. Third, the record is clear that the

⁴⁰ *Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist.*, No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at *15 (E.D. Pa. Aug. 14, 2017) (Burlington-Carter analysis stops once hearing officer concludes District offered a FAPE), See also, *N.M. v. Central Bucks Sch. Dist.*, 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014)(same).

⁴¹ Compare *Lauren G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375 (E.D. Pa. 2012) (collecting district court cases) with *Pocono Mt. Sch. Dist. v. T.D.*, 2018 U.S. Dist. LEXIS 121824 (M.D. Pa., July 20, 2018) (collecting district and Third Circuit cases) (In *Pocono*, the Third Circuit applying a deliberate indifference standard vacated the District Court Order, as moot, reversing Hearing Officer's award of tuition reimbursement in a Section 504 dispute).

District's staff gave due weight to the Parents' private evaluation. Fourth, all completed assessments were norm-referenced, otherwise valid, and widely accepted to determine all areas of suspected IDEA disabilities. Fifth, the completed assessments were administered following the test makers' instructions. Sixth, based on the Student's superior test scores in the earlier [redacted] evaluation, the record is preponderant that prior to receiving the private evaluation, neither the Parents nor the District had any reason to suspect a qualifying disability. Seventh, the record is preponderant that the District provided the Parents with timely notice and procedural safeguards when they concluded that the Student was not a person with a learning disability. Accordingly, applying a preponderance of evidence standard, I now conclude that the Parents failed to establish that the District's IDEA reevaluation failed to assess the Student in all areas of suspected disability.

THE PARENTS' SUBSTANTIVE ALLEGATIONS ABOUT THE ANALYSIS AND SCORING OF THE REEVALUATION DATA ARE ALSO LACKING

The Parents' cross-examination of the District's psychologists focused on how the psychologist administered, scored, and interpreted standardized testing results. While Parents' theory on cross-examination was strong, targeted, and thorough, the elicited proofs lacked preponderant corroborating evidence supporting a violation. Absent testimony from an expert psychologist, the cross-examination of the District staff does not support Parent's theory on cross.

Although proof that the Student's achievement percentile ranks varied by as much as 20 plus percentile points, when compared to full-scale IQ or GAI scores, the elicited testimonial evidence fails to establish that the variation in percentile ranks was severely "discrepant." Furthermore, the proofs fail to establish that the variable percentile scores establish a "pattern of strengths and weaknesses" within the meaning of the IDEA. The record is preponderant, and while the percentile ranks are variable, all rankings fell in

the "High Average" to "Average" range. Therefore, the arguments over the percentile data set and IQ scores cut against a finding of a specific learning disability.

**THE STUDENT'S BENCHMARK WRITING SCORES DO NOT ESTABLISH
A SPECIFIC LEARNING DISABILITY ELIGIBILITY**

The Parents pointing to the Student's [early grades] "Below Basic" to "Proficient" benchmark writing scores contend that the District should have suspected a learning disability [redacted]. This argument is premised on an incomplete understanding of the benchmark scores found in the "Student Profile" – P-22. The Student's Writing Profile includes data from three different types of writing prompts "Informational," "Opinion," and "Narrative." Each writing prompt requires the Student to exhibit five (5) different domains - form, content, styles, conventions, and organization. Each domain is then judged on a scale from one (1)-to four (4), making 20 points the highest score possible. The writing prompts are given in the "Fall," "Mid-Year," and at the "End" of each school year. The difficulty for each of the three prompts escalates as the school year advances. After reviewing the record, I now conclude that the Parents' cross-examination based on comparing the benchmark scores across school years exaggerated the raw score differences recorded in the Student's writing profile and created several interpretation dilemmas. I need to explain.

In the "Fall" of [redacted] Grade, on the "Information" prompt, the Student scored "Basic" with a raw score of 11. In the Fall of [the next school year], the Student on the [redacted] Grade [level] "Information" prompt scored in the "Below Basic" level with a raw score of 9. Finally, in [the next school year] on the [redacted] Grade [level] "Information" prompt, administered at the "Mid-Year" point, the Student earned a raw score of 13 at the "Basic" level.

Absent consistent seasonal testing, along with normative grade level expected raw scores from the test maker, the writing data set does not tell us if the Student learned, improved, or is performing at a discrepant below grade level. Simply put, all we know is that the Student's raw score went down as the difficulty level went up. The same analysis holds for the "Opinion," and the "Narrative" writing prompts. Therefore, absent valid normative data from the test maker, the Parents' argument that the changes in the raw scores establish either an IDEA disability or demonstrate an "adverse effect in educational performance" is left unproven.

On the other hand, the District's psychologist cogently and credibly explained how she analyzed the Student's norm-referenced standard scores and shared her explanation with the Parents and the evaluation team. After reviewing the psychologist's conclusions, a team of knowledgeable people, including the Parents, accepted the psychologist's recommendation that the then-existing data set did not support a finding of a specific learning disability. The Parents' cross did not undermine the psychologist's analysis or the team's review or conclusions when viewed as a whole.

While I may agree with the Parents that report card descriptors like "Approaching" and "Emerging" are somewhat subjective, the report card descriptors alone do not establish a "pattern of strengths and weaknesses." The record does, however, demonstrate that the Parents' elicited proofs lack preponderant evidence that the psychologist failed to either correctly calculate the Student's scores or give due weight to the writing benchmark scores or the private testing data set. Therefore, applying the IDEA eligibility and assessment standards, I now conclude that during the First and Second [redacted] school years, neither the Student's classroom performance nor testing profile raised any "red" flags of a specific learning disability.

WHILE THE ADHD IMPAIRMENT IS AN IDEA "OTHER HEALTH IMPAIRMENT," THAT FINDING ALONE DOES NOT ESTABLISH THE STUDENT NEEDS SPECIALLY-DESIGNED INSTRUCTION

After giving due weight to the private evaluator's ADHD diagnosis, the District asked, and the Parents agreed to an IDEA reevaluation. The IDEA reevaluation team collected data to determine if the ADHD impairment met the criteria for an IDEA disability as an "other health impairment." In a timely fashion, the District collected standardized norm-referenced ability and achievement testing, Parental input, classroom performance measures, teacher comments, and measures of executive functioning, attention, concentration, and organization.

The Student's BASC, Connors, and BRIEF ratings represent valid attention, concentration, and organizational measures. The rating data set, from each assessment, across raters trended in the solid "Average" range. The Parents, teachers, and Student BASC "Clinical" and "Adaptive" rankings, while trending towards a finding of an IDEA "other health impairment" disability, when viewed as a whole, fail to prove that the Student needed specially-designed instruction. Stated differently, none of the attention, concentration, or organizational measures establish that the Student's "educational performance" was "adversely affected."

The Parents' recurring contentions that the Student's one to two years below grade level private school scores, collected upon enrolling, do not persuasively counter the otherwise uncontested normative assessment data set. The private school assessment instruments are not normed referenced; therefore, the private school measurements lack content validity. Absent content validity and standardization, the private school scores are not comparable to the WIAT, WICS, or Woodcock data sets. The absence of content validity measures undermines the usefulness of private school data. Furthermore, the private school data set did not allow the team to gauge how the Student was performing on repeated assessments on grade-related standards assessments.

When the private school data is compared to the WIAT and Woodcock "Average." The "High Average" and "Superior" achievement scores diminish the persuasiveness of private schools below grade data set. Finally, additional secondary facts undermine the persuasiveness of the Parents' analysis. The private school witness's testimony failed to reconcile how the Student could earn below-grade scores [redacted]. Therefore, after a careful review of the extrinsic and non-extrinsic evidence, I now find the Parents' IDEA eligibility "other health impairment" child find and denial of FAPE claims lack preponderant proof.

THE SECTION 504 AGREEMENTS OFFERED A FAPE

First, as this is not a Section 504 discrimination dispute, thus, I am not required to judge the appropriateness of Section 504 Agreements using a deliberate indifference standard. Second, contrary to the Parents' arguments, the Rowley and Endrew IDEA meaningful progress standard is not applicable here. Instead, I now find that precedential and non-precedential Third Circuit Section 504 only FAPE case law requires me to apply a "reasonable accommodation" or "reasonable modifications" analysis. The Third Circuit, in *Ridley*, rejected *Rowley's* "reasonably calculated" test in 504 disputes. In *Ridley*, the Court held that fact finders, in Section 504 only FAPE disputes, must use a "reasonable accommodations" analysis instead of the *Rowley* analysis. The court then held that the proffered "accommodation" must ensure that the student's regular or special education services provide for "meaningful participation in educational activities" and "meaningful access to educational benefits." *Id.* *Ridley* next concludes that the "accommodations" offer students an equally effective opportunity for "significant learning" and "meaningful benefit."⁴²

⁴² Under the IDEA, courts look to the Student's "individual circumstances," under the Section 504 regulations courts apply a "reasonable accommodation" analysis. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) (citations omitted). See also, *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (holding that to determine whether the student "was afforded an appropriate education," the

Later in *K.K. v. Pittsburgh Public Schools*, 64 IDELR 62 (3d Cir. 2014, unpublished), the court extended *Ridley* and found that despite a student's lack of educational progress, the district's accommodations were otherwise able to satisfy the FAPE standard under Section 504. Following *Ridley* and *K.K.*, the Third Circuit Court next found in *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104 (3d Cir. 2018), that "courts use the terms "reasonable modifications" in Title II and "reasonable accommodations" in Title I as "interchangeable" phrases in judging whether a district's failure to accommodate for a student's FAPE needs is actionable. (*Berardelli*, citing *McElwee v. County of Orange*, 700 F.3d 635, 640 n.2 (2d Cir. 2012) (collecting cases). These cases and others referenced below support the proposition that Third Circuit case law has consistently refused to extend the *Rowley* or *Endrew* test to Section 504, only FAPE disputes. Applying these holdings, I now conclude that if a student with a disability is not eligible for IDEA services, like here, and the student is eligible for 504 services, the district must provide equally effective accommodations, modifications, and related aids and services. I next conclude that the accommodations, modifications, and related aids and services must offer an equally effective opportunity to achieve "significant learning" and "meaningful benefit." Finally, the plain language of the regulations requires that Section 504 FAPE offer students "comparable" and "equally effective services." *Id.*

As to the necessary proofs, the emerging trend in this Circuit requires Parents to show the district's failure to provide "comparable" services or take "reasonable "steps to accommodate the student's disability" denied a FAPE. Next, the proofs must demonstrate a denial of meaningful participation, benefits, or access to otherwise available services.

Court should consider "whether [the student] was provided significant learning and conferred a meaningful benefit").

Applying these longstanding principles, I now find, based on this record, absent expert testimony, the Parents have not met their burden of proof. The record here does not demonstrate that the accommodations or modifications failed to offer or provide an opportunity for "significant learning" or "meaningful benefit."

The record is preponderant that once the District, in September 2019, was aware of the ADHD impairment, the District promptly identified the Student as a person with a Section 504 disability. Next, the record is preponderant that a group of knowledgeable persons met, gave due weight to the outside testing, and then jointly developed a working Service Agreement with the Parties. The Agreement included Parental, Teacher, and input from a knowledgeable group of people who worked with the Student. The record is also clear that the offered accommodations targeted the known effects of the Student's ADHD-related attention, concentration, organizational, and thinking needs.

While not all of the Parent's demands, questions, and concerns were fully resolved, the District provided the Parents with their procedural safeguards before the Agreement was implemented. Only after the Parents consented to the Agreement did the District implement the Agreement as offered.

Accordingly, from a procedural standpoint, the record supports a finding that the District followed all applicable Section 504 procedural and substantive requirements.⁴³

THE JANUARY 2020 SERVICE AGREEMENT OFFERED A FAPE

Later in January 2020, after reviewing the IDEA reevaluation, a team of knowledgeable persons met for a second time. At the second Service Agreement meeting, the District added six (6) more accommodations like personalized prompts to slow down, a slant board during classwork, a handwriting checklist, adapted paper, and support from a school counselor,

⁴³ 34 C.F.R. §104.31-36.

and the opportunity to go back and fix errors. Cognizant that the Student might struggle somewhat, the Section 504 team requested that the building-level Student Achievement team offer regular education interventions and monitor progress. The Achievement team met sometime in late January or early February 2020 to implement the promised monitoring of the Student's writing skills. While the record is unclear what or when, or if any, interventions were trialed from mid-January 2020 through June 2020, the record is clear that the Parents failed to prove that the lack of "interventions" interfered with the Student's participation in or access to the benefits otherwise provided to others. Thus the timely offer of regular education interventions and the offered "accommodations" complied with applicable Section 504's child find, accommodations, and FAPE requirements.

While the Parents and the private school teacher argue that the Student's low test scores are evidence of a lack of "meaningful participation" or "meaningful benefit" justifying the unilateral placement, I do not see it that way. Taken as a whole, the Parents' and the private school teacher's testimony does not contradict the District teachers' statements that the Student was provided "reasonable accommodations."

The Parents' after-the-fact argument relying on the private school data set violates the "snapshot" rule and otherwise relies on a questionable data set. Finally, the suggested finding that the private school placement was necessary is based on otherwise inadmissible after-acquired evidence found only in the private school testing, and report cards is relatively thin. Even assuming the private school testing is accurate and the after-acquired evidence is probative, the testimony and the evidence cannot be applied retroactively to establish an alleged earlier-in-time from September 2019 through June 2020.

THE ALLEGED FAILURE TO IMPLEMENT THE AGREEMENT DURING THE SHUTDOWN

To the extent that the Parents complain that the District failed to implement the Agreement during the shutdown, I beg to differ. The record is clear that the teachers, before the shutdown and to the extent practicable during the shutdown, provided individualized cueing strategies, additional time to take tests, a writing checklist, and additional time to complete assignments at all times relevant. The testimony is also clear that several accommodations, like the writing slant board, lined paper, and color-coded folders, were not provided when the Student was at home. The record, as a whole, does not demonstrate that the Student's ADHD substantially limited writing; therefore, I have to question why these accommodations were ever offered in the first place. Assuming *arguendo* the writing accommodations are necessary, the record does not demonstrate how the failure to get the slant board and the paper to the Student in any way denied the Student the opportunity to participate or receive meaningful benefits. The record does not support a finding of a denial of a FAPE.

Applying *Ridley, K.K., Berardelli, T.R.* and the snapshot rule, I now find that any interruption from March 2020 to the end of the school year did not deny the Student an equally effective opportunity to "meaningful participate." I next find that the services provided during the shutdown offered the Student an equally effective opportunity to reach the same results and otherwise achieve "significant learning and meaningful benefit." The Student, like the others, was provided scheduled lessons, frequent teacher feedback, and comparable services, through online and distance-based instruction.

Finally, I conclude the argument that I must impose a strict *per se* rule of liability for any failure to provide all accommodations during the shutdown under these circumstances is a step too far. A strict *per se* rule of liability fails to reconcile the evidentiary requirement that the moving party, the Parents, must demonstrate that the alleged failures resulted in a denial of

benefits, services, participation, or opportunity. A *per se* liability theory impermissibly shifts the Parents' burden to prove substantive harm. Therefore, I now find that the record does not support the Parents' attempt to advance either a strict liability test or a run-of-the-mill failure to accommodate analysis during the shutdown.

TUITION REIMBURSEMENT IS NOT APPROPRIATE RELIEF

Since the Parents failed to establish an IDEA denial of a FAPE, I need not move forward with the two remaining Burlington-Carter prongs. Further, as the District provided the Student with a Section 504-only FAPE, I do not need to decide if tuition reimbursement, in this instance, is an equitable or legal remedy in a Section 504-only FAPE dispute. Finally, absent a violation, compensatory education is not warranted. An appropriate Order follows in favor of the District.

ORDER

And now the 2nd day of December 2020, I now find in favor of the District and against the Parents.

1. At all times relevant, the District procedurally and substantively complied with the IDEA evaluation, child find, and FAPE standards.
2. At all times relevant, the District complied with the child find, evaluation, and Section 504 FAPE requirements.
3. The Parents' tuition reimbursement and compensatory education claims are denied.
4. All other claims and affirmative defenses not otherwise raised or stated here are denied, and the same are exhausted.

Date 12.02.2022

/s/Charles W. Jelley, Esq. LL.M
Special Education Hearing Officer
ODR FILE # 26241-22-23 .