

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer Final Decision and Order

ODR No:

26447-21-22

OPEN HEARING

Child's Name:

D.B.

Date of Birth:

[redacted]

Parent:

[redacted]

Local Education Agency:

Williamsport Area School District
2780 West Fourth Street
Williamsport, PA 17701

Counsel for the LEA:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

08/05/2022

Introduction

This special education due process hearing concerns the educational rights of a child (the Student).¹ The Student's Parent (the Parent) requested this hearing against the Student's public school district (the District). The Student receives accommodations in school pursuant to Section 504 in accordance with a document known as a Section 504 Service Agreement.² Pennsylvania regulations implementing Section 504 in schools are known as Chapter 15.³

In March 2022, the District evaluated the Student at the Parent's request to determine if the Student was entitled to special education under the IDEA.⁴ The Pennsylvania regulations implementing the IDEA are known as Chapter 14.⁵ The District concluded that the Student is not entitled to special education under the IDEA but is entitled to accommodations under Section 504. The Parent disagreed with the District's determination and requested this hearing. The Parent asks me to find that the Student is entitled to special education under the IDEA and order the District to offer an IEP for the Student.⁶

The record of this case reveals some procedural errors on the District's part, but does not include a preponderance of evidence that the Student is a "child with a disability" as defined by the IDEA.⁷ Consequently, I must deny the Parent's claims.

Issues⁸

The issues presented for adjudication are:

1. Is the Student a child with a disability as defined by the IDEA?
2. If the Student is a child with a disability as defined by the IDEA, what must the Student's IEP include?

¹ While this is an open hearing, except for the cover page, identifying information is omitted to the extent possible.

² "Section 504" is Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

³ "Chapter 15" is 22 Pa Code § 15 *et seq.*

⁴ The "IDEA" is the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

⁵ "Chapter 14" is 22 Pa Code § 14 *et seq.*

⁶ An "IEP" is an Individualized Education Program, as defined at 20 U.S.C. § 1401(14).

⁷ The definition of "child with a disability," discussed below, is found at 20 U.S.C. § 1401(3).

⁸ The parties parse the issues somewhat differently in their writings, but these are the issues that the parties confirmed were submitted for adjudication. See NT 16-17.

Findings of Fact

I informed the Parent of the IDEA and Chapter 14's disclosure rules on May 9, 2022, when I sent an email describing my hearing procedures.⁹ On June 18, 2022, the District filed a motion to exclude the Parent's evidence based on her failure to make disclosures.¹⁰ After a few back-and-forth emails, the Parent moved to continue the hearing to a later date so that she could make disclosures. I granted that request and postponed the hearing. I also extended the disclosure deadline and further explained how to make disclosures. I also explained that my authority to admit evidence over valid disclosure-based objections was limited. Despite all of this, the Parent did not make any disclosures. NT at 8-9.

Even so, during the hearing, I permitted the Parent to testify and present evidence over the District's objection. As I explained at the time, I was overruling the District's valid, well-placed objections in deference to the Parent's *pro se* status and so that I could make a complete record. *See, e.g.* NT 38-39. By doing so, I have enabled the parties to create a complete record, including all testimony that the parties chose to elicit. But this does not mean that I assign equal weight to all evidence. I assign no weight to documents entered as Parent's exhibits that the District had never seen before the hearing. I assign no weight to portions of the Parent's testimony concerning those documents. A portion of the remainder of the Parent's testimony and documents are not relevant to the claims presented or have little probative value for other reasons.¹¹

In addition to the above, I make findings of fact only as necessary to provide context and resolve the issues before me.¹² As a result, my findings are limited even in comparison to the modest record of this case. I find as follows:

The 2018-19 School Year

⁹ The IDEA's disclosure rules are found at 20 U.S.C. § 1415(f)(2). Chapter 14's disclosure rules are found at 22 Pa. Code § 14.162(k). While the Student receives accommodations pursuant to Section 504 and Chapter 15, the issues presented in this case arise under the IDEA and Chapter 14.

¹⁰ This objection was made by email and is something akin to a combined motion in limine and motion to dismiss, both of which I denied.

¹¹ The District raised relevancy objections during the hearing, some of which were sustained, and exhibits were excluded as a result. Those offered-but-excluded exhibits are also preserved. *See, e.g.* NT 44-45.

¹² The record includes some evidence of an eye examination that the Parent shared with the District after requesting this hearing, and the actions that the District took in response to that examination. I do not discuss that aspect of the record here because of the nature of the evidence, the Parent's failure to disclose, the low probative value of that evidence regardless of disclosure, and because there is no claim that the Student requires special education because of vision impairment or blindness.

1. On December 11, 2018, a third party diagnosed the Student with Oppositional Defiant Disorder (ODD), Generalized Anxiety Disorder, and ADHD. The Student was enrolled in the District at this time. S-2.
2. The third-party evaluator also diagnosed the Student with Parent-Child Relational Problems (an IDC-10 diagnosis), noting that the Student exhibited problematic behaviors at home. At school, the Student was thriving but “struggles at times at school with [] behavior in reaction to feeling bullied.” *Id.*

The 2019-20 School Year

3. The Student attended a private religious school for a short period at the beginning of the 2019-20 school year. The Student enrolled in and has attended school at the District since that time. NT 44, 100.
4. On January 21, 2020, the parties implemented a Section 504 Service Agreement (the 504 Agreement or the 504 Plan) for the Student. The 504 Plan included three accommodations (S-3. Quotations are found at S-3 at 1):
 - a. “[Student] will have a pass to guidance that can be used when [Student] is feeling frustrated or upset in class.”
 - b. “Frequent checks for understanding.”
 - c. “Frequent checks to monitor academic work completion and reminders to utilize revision/make up opportunities.”
5. During the 2019-20 school year, the Student took honors-level academic courses in English, U.S. History, Algebra, and Biology. The Student earned Cs in those courses, which the District defines as an average grade. In contrast, the Student earned As non-honors courses (Drama, Music, and Physical Education) and a B in course identified as “CAR PATH/FIN LIT.”¹³ S-19.

The 2020-21 School Year

6. The January 2020 504 Plan expired on June 5, 2020. S-3
7. On August 13, 2020, the Parent requested in writing that the District evaluate the Student to determine whether the Student required

¹³ In my experience, “FIN LIT” refers to financial literacy, but the record does not explain the designation.

special education. S-7. The District sought the Parent's consent to evaluate on August 18, 2020. The Parent provided consent the same day. S-8

8. On August 20, 2020, while the special education evaluation was pending, the District offered, and the Parent accepted, a 504 Plan identical to the January 2020 504 plan. S-4.
9. On October 23, 2020, the District completed its evaluation and issued an Evaluation Report (the 2020 ER). The 2020 ER included, among other things, narrative input from the Parent and teachers, a vision screening, and a review of records. S-9
10. As part of the 2020 ER, the District administered the Woodcock Johnson-IV Test of Cognitive Abilities, which is a standardized, normative test of intellectual ability. This test yields a General Intellectual Ability or GAI score, which is like an IQ score. The Student's GAI was found to be 116, which is within the "High Average" range. The GAI is calculated from several sub-test scores, all of which were in the "Average" to "High Average" ranges except for the "Letter-Pattern Matching" score, which was in the "Superior" range. S-9.
11. As part of the 2020 ER, the District administered the Woodcock Johnson-IV Test of Academic Achievement, which is a standardized, normative test of academic skills in reading, math, and written expression. Both Woodcock Johnson tests are designed so that they can be compared to each other to determine if a child's academic performance aligns to expectations based on the child's intellectual ability. The Student's Woodcock Johnson academic tests scores were all in "Average" to "High Average" range, as would be expected based on the Student's GAI. S-9.
12. As part of the 2020 ER, the District administered the Behavioral Assessment System for Children, III (BASC-III), which is a standardized, broad-ranging, behavioral rating scale completed by teachers and parents. S-9
13. On the BASC-III, the Parent's ratings placed all the Student's behaviors and adaptive skills in the Clinically Significant range except for Aggression, Conduct Problems, Somatization, Social Skills, and Leadership. This indicates that the Parent observes a clinically significant level of a host of other behavioral symptoms (e.g. Hyperactivity, Depression, Atypicality, Functional Communication, etc.). However, the Parent's F Index score was in the Caution range,

indicating that the Parent may have either over-rated the Student's negative behaviors or observes a higher rate of negative behaviors than others. S-9.

14. Two of the Student's teachers also completed the BASC-III for the Student. The teachers' ratings were mostly like each other and significantly different from the Parent's ratings. Neither teacher triggered an F Index warning. None of the teachers' behavioral ratings fell into the Clinically Significant range but both teachers' ratings placed the Student in the At Risk range in the Social Problems Index and one teacher's ratings placed the Student in the At Risk range in the Behavioral Symptoms Index. Several sub-tests scores for both teachers fell in the At Risk range. For adaptive skills, One teacher's rating placed the Student in the Clinically Significant range for Social Skills and the other teacher's rating placed the Student in the Clinically Significant range for Study Skills, both of which are sub-tests. Neither teachers' rating elevated the Adaptive Skills Index to the Clinically Significant range. S-9.
15. The BASC-III also includes a self-rating scale that the Student completed. The Student self-ratings fell into the Clinically Significant range in 12 of 21 scales resulting in At Risk index scores for School Problems and Personal Adjustment. Index scores for Internalizing Problems, Inattention/Hyperactivity, and Emotional Symptoms were in the At Risk range. As a result, all the Student's self-assessment index scores were in the At Risk or Clinically Significant ranges. The evaluator concluded that social stress was the greatest area of concern from the Student's perspective and that conclusion is supported by the Student's pattern of sub-test scores. S-9.
16. The BASC-III also yields executive functioning scores, although the BASC-III is not typically used as a fine-grained executive functioning assessment. Regardless, none of the teachers' scores placed the Student in the At Risk range or higher. Rather, most scores were in the Not Elevated range. Both teachers placed the Student's Problem Solving Index in the Elevated Range, and one teacher's ratings produced an Overall Executive Functioning Index in the Elevated range. S-9.
17. Ultimately, the 2020 ER concluded that that the Student does not require special education. This conclusion was presented in an unusual style. The ER was written on a standard Pennsylvania form. In the Conclusions section of that form, the District checked a box to indicate the "student does not have a disability and therefore is NOT ELIGIBLE

for special education.” Beneath that box, the District wrote (S-9 at 12):

[Student’s] learning profile shows no evidence of any learning disabilities. [Student] is bright and capable. [Student] does have ADHD and anxiety. These are not rated to be a significant concern in the classroom based on teacher rating scale responses, although there has been distractibility observed in certain classroom settings. The rigorous content and fast pace of the honors courses require strong study skills, time management, and consistent work completion, which is sometimes lacking with [Student]. These weaknesses may interfere with [Student’s] grades considering [Student’s] current classes, but are not sufficient to warrant eligibility under and of the categories required for special education services. [Student’s] 504 [Plan] can continue to be appropriate to address [Student’s] needs in the classroom setting.

18. The District issued a Notice of Recommended Educational Placement (NOREP) after determining that the Student did not qualify for special education. The NOREP continued the Students placement in “regular education.” The Parent approved the NOREP on October 29, 2020.
19. During the 2020-21 school year, the Student again took honors-level academic courses, earning a B in Chemistry, Cs in English and Geometry, and a D in Civics/Government. In non-honors courses, the Student earned an A in Culinary Arts and a B in Spanish. S-19.

The 2021-22 School Year

20. The August 2020 504 Plan expired on June 30, 2021. S-4.
21. On August 23, 2021, the District offered a 504 plan identical to the prior 504 plans. The Parent accepted the offer on September 30, 2021. S-5.
22. There is no evidence suggesting that the District discontinued the Student’s accommodations between the first day of the 2021-22 school year and September 30, 2021.
23. Early in the 2021-22 school year, the Student became upset by feeling that there was not enough time to complete a test. NT 133-134. In

response, on October 8, 2021, the parties added "Extended time for testing (50%)" to the Student's 504 Plan. S-6.

24. In late October, 2022, the Student was involved in a verbal/physical altercation with another student in school. Peers recorded the altercation. The record as a whole supports a finding that the Student was mortified not only by the incident and by the recordings, but also by after-the-fact self-examination. Around the same time, the Student was missing school to attend therapy appointments, was behind in schoolwork and was generally overwhelmed. *Passim. See, e.g.* NT 165-166.
25. The altercation prompted the Parent to seek another special education evaluation from the District. *See, e.g.* S-15 at 1.
26. On November 5, 2021, the Parent again requested in writing that the District evaluate the Student to determine whether the Student required special education. S-11. The District responded with an evaluation consent form on November 10, 2021. At this point, however, the Parent had moved which caused some confusion through no fault of either party. *See* S-12, S-13.
27. On January 26, 2021, the District sent an evaluation consent form to the correct address. The Parent provided consent the same day. S-14.
28. On March 18, 2022, the District completed its evaluation and drafted an Evaluation Report (the 2022 ER). S-15.
29. As part of the 2022 ER, the District solicited input from the Parent through a parent input form and through behavioral rating scales. The Parent completed and returned the rating scales, but not the input form. Consequently, the District relied upon notes from various conversations with the Parent around the time of the 2022 ER and the parent input in the 2020 ER. S-15.
30. The 2022 ER included an in-school observation by the evaluator, written teacher input, an interview with the Student, a review of records, a sensory profile completed by an Occupational Therapist, rating scales including the Behavior Ratings of Executive Functions-II (BRIEF-II), the Connors-3 (a scale that targets ADHD-related behaviors), and a re-administration of the BASC-III. S-15.
31. Regarding the 2022 observation, the evaluator found that the Student was on-task most of the time in the observed classes except for

Anatomy and Physiology. The Student was off-task 75% of the time during that class observation, which was discrepant from peers in the same class at the same time. S-15.

32. Regarding the 2022 teacher input, most teachers reported that the Student was well-behaved but that the Student was missing assignments and needed help with planning, tracking, and completing assignments (e.g. "I highly suggest the use of an agenda or something for [Student] to keep track of due dates." "[Student's] grade right now is a bit low because when [Student] misses an assignment, [Student] misses the practice to prepare for an assignment."). S-15.
33. Regarding the 2022 Student interview, the Student reported that maintaining a busy schedule in school and with after school sports and activities helps maximize time outside of home and minimize stress from home – but the sports and activities can be a source of stress as well. The Student was remorseful about the altercation with another student but reported having no close friends with whom to discuss those feelings. The Student was looking forward to living away from home during college. S-15.
34. Regarding the 2022 Sensory Profile, the Occupational Therapist concluded that the Student would benefit from sensory breaks and should have 30 minutes per quarter of consultative occupational therapy. In this context, "consultative" does not mean time where a therapist works with the Student. Rather, this is time for teachers to talk with an Occupational Therapist to be sure that the Student is receiving appropriate breaks and that the Student's sensory needs are not interfering with the Student's education. S-15.
35. Regarding the 2022 BASC-III, three teachers rated the Student. None of the teachers triggered an F Index warning. All teachers' ratings resulted in all index scores in the average range except that one teacher's ratings placed the Student in the At Risk range for Anxiety. To the extent that the BASC-III can be used to assess executive functioning needs, all three teachers' ratings placed the Student in the Not Elevated range for Overall Executive Functioning, but one teacher's ratings fell into the Elevated range in the Emotional Control Index. S-15.
36. The Parent also completed the BASC-III, and the Parent's ratings on that assessment produced an F Index warning in the "extreme caution" range (higher than in 2020). This is a statistical indicator that the Parent's ratings reflect an overly-negative view of the Student's

behaviors. As a result, the Parent's BASC-III ratings are not invalid *per se*, but must be interpreted with extreme caution (as the warning indicates) and in relation to other less-biased information. With that caution, the Parent rated the Student's behaviors in the Clinically Significant range nearly across the board. S-15.

37. The Student also completed the BASC-III self-rating. Unlike in 2020, the Student's self rating produced an F Index warning in the "extreme caution" range (like the Parent). With that warning, the Student's self-ratings were all in the Clinically Significant range except for Attitude to School and Self-Reliance. While these scores must be interpreted with extreme caution, they are consistent with the Student interview in the 2022 RR. There, the Student was remorseful about the peer altercation and perceived the Student's own actions as socially unacceptable to the point that he could not discuss the matter with other peers. S-15.
38. Regarding the BRIEF-II, which is a rating scale that targets behaviors related to executive functioning, two teachers rated the Student. Unlike the BASC-III, the teachers' ratings on the BREF-II were not similar. One teacher's ratings placed the Student in the "mildly elevated range" in two index scores but, taken as a whole, showed few problems. The other teacher's ratings placed the Student in the Clinically Elevated range across several domains, all of which represent weakness for the Student. S-15.
39. If the Parent completed the BREF-II, it is not reported in the 2022 ER. S-15.
40. The Student completed a BREF-II self-assessment. The results of that self-assessment are more like the results of the teacher who found Clinically Elevated behaviors in several domains. The Student's self-ratings showed clinically significant difficulties in Emotional Control, Emotional Regulation, and Shift (which is the ability to change focus from one activity to another). S-15. In the context of the BRIEF, emotional control and regulation are related to executive functioning skills as opposed to broad assessments like the BASC.
41. Regarding the Conner's 3, the rating scale is referenced but the results are not reported. This appears to be an error, as the results are discussed in the evaluator's conclusions. *See, e.g.* S-15 at 13, 18.
42. The District's evaluator reviewed assessment results to determine if the Student qualified for special education under the IDEA eligibility

categories of Emotional Disturbance or Other Health Impairment. The evaluator concluded that the Student fit neither category and, therefore, did not qualify for special education. Rather, the Evaluator concluded that the Student's needs could be met through the 504 Plan. S-15 at 18-19.

43. As with the 2020 ER, the District's completion of the Conclusions section of the 2022 ER was odd. The District checked the same "does not have a disability" box and wrote a similar explanation beneath the box. S-15 at 20. The District also commented that the Student's resumption of outside therapy should be beneficial as well. *Id*, see also S-15 at 18-19.
44. The Parent disagreed with the 2022 ER and notified the District of that disagreement on or around April 1, 2022. See, e.g. S-15 at 21.
45. On May 1, 2022, the Parent requested this hearing.
46. During the 2021-22 school year, the Student took two Advanced Placement or "AP" classes that, depending on the Student's scores on national tests, could be accepted by colleges and universities for course credit.¹⁴ Those classes were AP English and AP Statistics. The Student earned Ds in both classes. S-19.
47. The 2021-22 school year is the only school year for which quarterly grades are presented. The Student started the year by earning Cs in both AP classes at the end of the first quarter. Those grades declined to "Es" – which the District defines as failing grades – by the fourth quarter, resulting in D averages for the school year. The decline in AP English was gradual throughout the year while the decline in AP Statistics was variable, bouncing from C to E to D to E across the four quarters.¹⁵ S-19.
48. During the 2021-22 school year, the Student also earned As in Psychology and Physical Education (both two-quarter class in the first and second quarter), a B in Culinary Arts, a C in Sociology (a two-quarter class in the third and fourth quarter), and a C in Anatomy and Physiology. S-19.

¹⁴ The record reveals only the Student's class grades, not the Student's AP test scores. Additionally, while the record is silent about this point, in my experience colleges and universities have considerably different policies and broad discretion as to whether they will accept AP classes for credit.

¹⁵ The District has no F grade. The range is A (90-100), B (80-89.99), C (70-79.99), D (65-69.99), E (1-64.99). S-19

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. This does not mean that I assign equal weight to all testimony. Hearsay, no matter how fervently believed by the witness, cannot form the basis of this decision. Further, evidentiary issues discussed above impact upon how I weigh the evidence, which includes testimony.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

Eligibility for Special Education

The term “eligibility” is a colloquialism not found in the IDEA. The term refers to the fact that children who satisfy the IDEA’s definition of a child with a disability are entitled to special education so that they receive a free appropriate public education (FAPE), but children who do not meet that definition have no such entitlement.

In this context, eligibility determinations require a two-part analysis that flows from the IDEA’s definition of a child with a disability, found at 20 U.S.C. § 1401(3):

The term “child with a disability” means a child—
(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
(ii) who, by reason thereof, needs special education and related services.

First, the analysis requires a determination as to whether the Student has a qualifying disability. Second, the analysis requires a determination as to whether the Student, by reason of the disability, requires special education. If both questions are answered in the affirmative, the Student is eligible for special education and has a right to a FAPE.

Discussion

The Student has a Disability Recognized by the IDEA

There is preponderant evidence in the record that the Student has a disability that is recognized by the IDEA. For IDEA purposes, the Student is a child with an Other Health Impairment (OHI). The IDEA’s federal implementing regulations define OHI as follows, at 34 C.F.R. § 300.8(c)(9):

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 asthma, attention deficit disorder or attention deficit hyperactivity

disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

There is no dispute that the Student has ADHD, which is explicitly included in the definition of OHI. There is preponderant evidence in the record that the Student's ADHD adversely affected the Student's educational performance during the 2021-22 school year. Education goes well beyond report card grades. In the 2022 ER, nearly all teachers who provided input reported that the Student's poor executive functioning (time management, organization, work completion, and the like) had a direct, negative impact upon the Student's academic performance. The only assessment in the 2022 ER that directly targets executive functioning skills was the BRIEF-II. Two teachers and the Student completed the BRIEF-II. One of those teachers and the Student found clinically significant elevations in behaviors suggesting executive functioning problems. Unlike other assessments, the Student's self-report on the BRIEF-II did not trigger reliability warnings. The teacher input and BRIEF-II were also consistent with the Student's off-task behaviors in class during one of the observations.

These executive functioning problems constitute the limited alertness in the definition of OHI. While there is no smoking gun in the record that directly links the Student's executive functioning problems to the Student's ADHD, the record offers no other explanation. Finally, I find that Student's executive functioning problems do adversely affect the Student's educational performance because the Student's teachers said so in the 2022 ER – a document fully supported by the District. All three elements of the OHI definition are satisfied.

Evidence in the record that the Student is a child with an Emotional Disturbance is not preponderant. The IDEA's federal implementing regulations define Emotional Disturbance as follows at 34 C.F.R. § 300.8(c)(4)(i):

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

There is some evidence in the record that the Student has an inability to build or maintain satisfactory relationships, but that evidence is not preponderant. It comes mostly from the Student interview, in which the Student reported that the Student's perception of peer relationships may be inaccurately negative. That evidence is also contrary to teacher input, classroom observations, and the Student's desire to stay in the school environment as much as possible to avoid stress at home. The "long period of time and to a marked degree" element are also not met.¹⁶

There is no evidence that the Student meets the definition of any of the other IDEA-recognized disabilities or disability categories. In terms of what special education the Student might be entitled to, these classifications are irrelevant. If the Student qualifies under any of the IDEA's classifications, the Student is entitled to a FAPE. The classification does not prohibit or proscribe any type of special education.

The Record Does not Support a Finding that the Student Needs Special Education

The Parent has satisfied her burden to establish that the Student has a disability recognized by the IDEA. I go on, therefore, to determine if, by reason thereof, the Student needs special education and related services.

The District argues that the Student is academically successful, passing all classes and earning "mostly As, Bs, and Cs." *District Closing* at 2. That is true on the whole, but not reflective of the Student's grades in core

¹⁶ Either during or immediately following the altercation with another student, the Student made a brief comment that might be considered suicidal ideation. The District acted on that comment with appropriate seriousness but determined that the Student was not suicidal. The comment does not constitute a "marked degree" *per se*, but if it did, the duration element would still not be met.

academic classes during the 2021-22 school year. In those classes, the District's argument hinges on the definition of success. The Student took rigorous AP classes and passed those classes. But, in most circumstances, passing D grades are evidence that special education may be needed. It is rare in my experience that schools point to passing Ds as evidence that special education is unnecessary. Nevertheless, the District's argument has merit in this case because of the Student's academic placement.

The record provides no satisfactory explanation of the Student's AP placements. *See, e.g.* NT 214-216. Generally, in the District, host of factors from teacher recommendations to parental preferences to student-counselor discussions go into course selection, but nothing reveals why this Student was placed in those classes. It is logical to think that a D in an AP class might have been a much higher grade in a similar, non-AP class, but there is no evidence in the record of this case for such a finding. There is evidence, however, that the Student's AP classes require a level of executive functioning that is difficult for the Student. This is seen throughout both ERs and seen by comparing the Student's performance in honors and AP classes to the Student's performance in academically rigorous classes that are not honors or AP classes. The difference is striking, especially in the 2021-22 school year.

The only evidence in the record of this case that the Student requires special education is that the Student's executive functioning deficits have a negative impact on the Student's academic performance. But that negative impact is seen almost exclusively in classes in which unusually high executive functioning skills are expected. The IDEA does not guarantee strong grades at all, let alone in AP classes. Taking those classes out of the equation (or, alternatively, recognizing that the Student passed those classes even with low grades) there is no evidence that the Student requires special education to derive a meaningful benefit from the Student's education.¹⁷

I find that the Student has a disability recognized by the IDEA but does not, by reason thereof, require special education. As a result, I affirm the substance of the District's eligibility determination.

¹⁷ The same is not true for Section 504. To whatever extent honors and AP classes are available to all students in the District, the District is obligated to provide regular education accommodations to the Student so that the Student has equal access to those honors and AP classes. I do not share the District's confidence that the Student is receiving appropriate accommodations under Section 504, but questions of the District's compliance with Section 504 vis-à-vis this Student are beyond the scope of this hearing.

Procedural Compliance

I am empowered to require procedural compliance with the IDEA even when I do not find a FAPE violation. I will require the District to revise and reissue both the 2020 ER and the 2022 ER. The Student has a disability but, based on the record of this case, does not require special education. To reflect this, the District must uncheck box "A." and check box "B." on page 20 of S-15.

Summary and Conclusions of Law

Functionally, the Parent requested this due process hearing to appeal the District's determination that the Student is not entitled to special education. The District twice found that the Student did not require special education and refused to provide special education on that basis.

On the record of this case, I find that the Student satisfies only the first part of the two-part special education eligibility test. The Student has a qualifying disability. However, evidence that the Student requires special education is less than preponderant. The Student does not meet the IDEA's definition of a child with a disability.

The District's 2022 ER incorrectly suggest that the Student does not have a disability. This is a procedural violation, and I order the District to correct that violation and re-issue the 2022 ER.

ORDER

Now, August 5, 2022, it is hereby **ORDERED** that the District must uncheck box "A." and check box "B." on page 20 of S-15, which is the Evaluation Report dated March 18, 2022.

All other claims and demands are **DENIED**.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER