

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

CLOSED HEARING
ODR File Number: 21107-18-19

Child's Name: E. S. **Date of Birth:** [redacted]

Parent:
[redacted]

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Hearing Officer: Charles W. Jelley Esq.

Date of Decision: **07/26/2019**

Introduction

The Parents of an elementary school-age Student filed the instant due process Complaint seeking compensatory education alleging the District's decision to exit the Student from special education services violated the Student's right to receive a free appropriate public education (FAPE) as defined by either the Individuals with Disabilities Education Act (IDEA) and/or Section 504 of the Rehabilitation Act.¹ The District argues that at all times relevant, it complied with all substantive and procedural requirements of the IDEA and Section 504. For all of the following reasons after carefully considering all relevant facts, I find in part for the Parents and for the District in part. Hence, under these particular facts, the Student's request for compensatory education is denied. All other claims not addressed herein are dismissed with prejudice.²

Issues

1. Is the Student a person with a disability, within the meaning of the Individuals with Disabilities Education Act; if yes, is the Student entitled to an award of appropriate relief in the form of compensatory education?
2. Is the Student a person with a disability, within the meaning of Section 504 of the Rehabilitation Act; if yes, is the Student entitled to an award of appropriate relief in the form of compensatory education.

¹ The Parents' claims arise under 20 U.S.C. §§ 1400-1482 and Section 504. 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) or 22 Pa. Code Chapter 15 *et. seq.*. The Parents' Section 504 claims arise under the Section 504 FAPE regulations found at 34 §§ C.F.R. §§ 104.30-36. Due to the number of issues, the number of school years at issue, the availability of the Parents' in and out of state experts, and the multiple evaluations at issue the time to complete the hearing exceeds the regular hearing time line. The Decision Due Date was extended for a good cause, upon written motion of the Parties. Due to exigent circumstances beyond the control of the Parties and this hearing officer the closing arguments deadline was extended for a good cause. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

² After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issues in dispute.

The Parents' counsel's statement of the issues in dispute and this hearing officer's confirmation of the Parents' statement of the above issues are found in the Notes of Transcript at Volume 1, pages 6 through 8. The record is clear that Parents' counsel raised two issues and a request for appropriate relief in the form of compensatory education for each alleged violation. In their written closing statement, the Parents' counsel went astray when he argued additional claims, not raised in the statement of the issue. The Parents' statement of the issues and this hearing officer's confirmation of the matters in dispute, in pertinent part, provides as follows:

HEARING OFFICER JELLEY: All right. Andrew, can you state the issue as you see it from the Parents' perspective? What is the issue for today's hearing?

MR. SCHWEIZER: Eligibility is the crux of it. Are you able to hear me?

HEARING OFFICER JELLEY: Yes, sir. Go ahead.

MR. SCHWEIZER: At the crux of this case, we have an issue over eligibility. But at the very least, Parents believe that their child necessitates a 504 Plan.

There's been in, I guess, March 2018, late March of 2018, the student was stripped of an IEP, and since no services have been in place, there's been no 504 Plan and no IEP since that date.

Parents are attempting to get some supports in place for the student so that [Student] can receive a Free Appropriate Public Education.

HEARING OFFICER JELLEY: So if I'm understanding the Parents' issue, is the child an eligible child under the Individuals with Disabilities Education Act, one. Two, is the -- if not, is the child an eligible child under Section 504, Chapter 15. And then three, if the child is otherwise eligible for an IEP or some type of appropriate relief in the form of compensatory education.

Are those the three statements of the issue?

MR. SCHWEIZER: Correct.

HEARING OFFICER JELLEY: Okay. Is that your understanding, Michael, of what you're here to defend today?

MR. MUSONE: Yes. [NT Volume 1 pp.6-8].

Beginning on page 72 of their closing Brief and continuing until page 82, the Parents raised multiple IDEA denial of FAPE claims arising in First and Second grade, a Section 504 discrimination claim and Parental denial of FAPE participation claim. These additional topics/claims were not otherwise included in Parents' counsel's statement of the issue as set forth above. The above claims not stated on the record were not argued or otherwise responded to in the District's closing statement. Therefore, I will not adjudicate the Parents' additional denial of FAPE or discrimination claims. Accordingly, any claims not stated on the record and confirmed above by this hearing officer on the record are dismissed with prejudice.

Findings of Fact

The Student's Long History of Food Sensitivity, Swallowing and Dysphagia

1. To address the Student's long-standing swallowing and sensory aversion to eating different textures, shapes and foods, the Student, since preschool, regularly participated and continues to participate, in an outpatient Occupational Therapy (OT) learning to eat program. As a result of the sensory aversion to eating different foods, the Student has a long-standing diagnosis of dysphagia.³ To address the dysphagia, a private OT provides and the Student participates in a sensory-based program, to reduce the Student's long-standing inability to touch, smell, chew and eat different foods (NT 171-173).
2. The OT program includes a systematic desensitization program whereby the Student is exposed to a variety of foods, by smelling, touching, tasting, licking, chewing and eating new and old foods (NT 171-173). Since preschool, the Student has learned to eat 20 to 25 different foods. The

³ Dysphagia is the medical term used to describe difficulty swallowing. Dysphagia includes difficulty starting a swallow (called *oropharyngeal dysphagia*) and the sensation of food being stuck in the neck or chest (called *esophageal dysphagia*). Oropharyngeal dysphagia can result from abnormal functioning of the nerves and muscles of the mouth, pharynx (back of the throat) and upper esophageal sphincter (muscle at the top end of the swallowing tube). Dysphagia <http://patients.gi.org/topics/dysphagia/>

Student's sensory aversion to eating a variety of foods has led to bouts of constipation, which at times has led to hospitalization to relieve the bowel and bladder medical issues (NT 175-205).

3. To attend the hospital-based food sensitivity OT services, the Student either leaves school early or comes to school late. Parents provide transportation to and from all appointments and drop the Student off at school (NT pp.187-190). At times, the school drop-offs lead to tantrums, acting out and misbehavior (NT *passim*). After each tantrum, the Student is easily redirected (NT *passim*).
4. The third-party medical records note the Student has a severe eating problem that substantially limits the Student's ability to swallow and eat a variety of foods. The Student's eating problem is an oral motor dysfunction, which at times creates sensory issues that limit the Student's ability to swallow, chew, and properly use the tongue to eat, taste and manage a variety of foods/textures (NT pp.171-206, NT *passim*).
5. The hospital-based treatment team recommended and the District agreed to provide the Student the modifications, adjustments and accommodation to the school lunch menu whereby the Student would always have a choice of 20 to 25 foods the Student can eat (NT pp.140-150, NT 171-206, S-27, S-28).
6. As a consequence of swallowing, dysphagia/food sensitivity, the Student when compared to same-age peers has a restricted diet limited to 20 to 25 foods and has been hospitalized for bowel and bladder problems (P-2, NT pp.140-150, NT 171-206, S-27, S-28).

Historical Background: The Student's Kindergarten Enrollment and the First Reevaluation

7. Prior to the Student enrolling in the District, the Student received early intervention services from the local intermediate unit (S-11).
8. In July 2013, the Student was diagnosed with a disruptive behavior disorder. In December of 2013, based upon the data gleaned from the Autism Diagnostic Observation Schedule Model 2 (ADOS-Model 2) the Student was diagnosed with autism spectrum disorder and a disruptive behavior disorder. The RR highlights the Student's then-current communication and social interaction scores and the Student's repetitive behaviors suggested the autism spectrum disorder diagnosis (S-12).

9. On February 2, 2016, the District issued a Permission to Reevaluate (PTRE) to determine the Student's eligibility for IDEA school-age services. The Parents agreed and promptly returned the PTE. On August 30, 2016, the District completed the reevaluation report (RR).⁴
10. To assess the Student's overall intellectual ability, the examiner administered the Stanford Binet Intelligence Scale Fifth Edition (SB-V). On this administration of the SB-V, the Student attained a Full-Scale IQ of 106, which placed the Student within the solid Average range. The measures on SB-V designed to assess intellectual functioning suggest the Student performed as well as, or better than 66% of same-age peers (S-12).
11. To obtain updated academic performance data, the psychologist administered the Bracken Basic Concept Scale-Revised. On the Bracken scale, the Student attained a School Readiness Composite Standard Score (SS) of 109, which also falls within the solid Average range. A SS of 109 indicates performance at the 73rd percentile. The Student's School Readiness SS is consistent with the Student's SB-V cognitive SS (S-12).
12. The Student earned above-average scores on the Comprehensive Assessment for Spoken Language (CASL), the Peabody Picture Vocabulary Test, the One Word Expressive Vocabulary Test (S-12). The Student's scores on the Goldman Fristoe Test of Articulation revealed no articulation errors. (S-12).
13. The RR notes the Parents and the District agreed to complete a Functional Behavioral Analysis (FBA) during the fall term of the kindergarten school year (S-12).
14. As part of the RR, the Mother completed the Childhood Autism Rating Scale (CARS) and the Asperger Syndrome Diagnostic Scale (ASDS) (S-12). The CARS scale provides an estimate of the overall symptomatology associated with autism spectrum disorder (S-12). The Mother's CARS rating results placed the Student within the lower end of the "Severely Autistic" classification (S-12).
15. On the ASDS scale, the Mother's ASDS ratings noted the Student struggled to play with others without hurting peers. On the ASDS the Student earned an autism spectrum disorder Quotient of 103. An autism spectrum disorder

⁴ Although this is the Student's first evaluation upon enrollment in the District, for IDEA purposes this is the Student's second evaluation. The first evaluation occurred when the Student enrolled in the intermediate unit preschool; therefore, using the IDEA nomenclature, I will refer to the District's first evaluation as a reevaluation.

Quotient of 103 indicates the Student falls within the “Likely” range of the autism spectrum disorder (S-12). After reviewing all of the data, the Parents and the District members of the team concluded based upon the Student’s then-existing profile that the Student met the IDEA eligibility criteria as a person with the disability of autism. The team also concluded the Student needed SDI to learn. The RR also notes the Student’s CARS and ASDS ratings met the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-IV) criteria for autism spectrum disorder (S-12).

Additional Historical Facts: The Student’s Kindergarten IEP

16. In early October 2016, after reviewing the RR, the District drafted and the Parents accepted the Student’s first IEP. The present levels of educational performance included all of the community based behavioral health care records about the autism diagnosis. The IEP notes the Student has an “intense” history of disruptive and dysfunctional behavior in the home and community. The Student’s IEP team also accepted the third party medical reports noting the Student’s sensory needs, dysphagia, restricted diet, and food sensitivity. After giving due weight to the third party reports, the IEP team then concluded that Student needed added physical movement and tactile experiences during the school day to address sensory, behavioral, and dysphagia related food sensitivity needs and circumstances. The IEP also notes the Parents have a working relationship with a number of outside professionals, including a physician, and OT and additional professionals from a local specialty hospital who work with the Parents and the Student to address the Student’s sensory needs and the Student’s inability to eat a variety of age-appropriate foods (S-16).
17. The October IEP included three behavioral goals and four forms of specially - designed instruction (S-16). The IEP also called for the Student to receive SDIs in the Itinerant Learning Support classroom and in the regular education setting (S-16).
18. At the time the IEP was written the teachers reported the Student was following the Kindergarten rules and routines. The teacher input includes anecdotal reports how the Student was performing well within the daily expectations for the second month in Kindergarten (S-16).
19. On August 10, 2016, the District issued and the Parents approved the Notice of Recommended Educational Placement (NOREP) agreeing to the IEP and placing the Student in Itinerant Learning Support (S-18).
20. In October 2016, to better understand the Student’s social participation, behavioral and sensory needs, the District completed and the Parents

accepted the results of a Functional Behavioral Assessment (FBA). The FBA include multiple observations of the Student across a variety of settings throughout the school day. The results of the FBA indicated the Student did not display any significant behaviors of concern or any behaviors that impeded the Student's learning in the school. The FBA incorporated the results of a Behavior Assessment Scale of Children Self Report Interview (BASC-Self-Report). The Student's BASC Self-Reporting scores indicate no apparent behavioral difficulties in the school environment. Given the Parents' reports of behavioral issues in the home, the team decided to monitor the Student's behavior in the school environment (S-22). After reviewing the then existing data, the District decided and the Parents agreed the Student did not require a behavior support program (S-18, NT *passim*).

Additional Historical Facts: The District's OT Evaluation and the May 2017 RR Update

21. On May 19, 2017, in response to the Parents' request for an Occupational Therapy (OT) evaluation, the District assessed the Student's OT needs and then updated the then-current RR. As part of the RR update the Parents provided the District with information/data about the Student's third-party OT sessions, sometimes before, during and after school, targeting the Student's then-current swallowing, dysphagia and food sensitivity (S-13).
22. After receiving data from the Student's third-party OT, the District completed a school-based OT assessment. Shortly after that, the Parties met to review the results of the OT assessment. The updated RR included the results of the Beery Developmental Test of Visual-Motor Integration (Berry -VMI), the Miller Function and Participation Scales (M-Fun), and the Fine Motor and Visual Motor Sensory Profile-School Comparison ages 4:0-7:11 assessment (S-13). The OT evaluation did not assess the Student's swallowing, eating difficulties (S-13).
23. On the Berry-VMI, the Student earned an average SS of 95. The anecdotal observation notes the Student completed the test in an organized manner displaying coordinated line drawing through straight and curved paths. Likewise, on the M-FUN, the Student's scaled score fell between 7-13

indicating average skills when compared with same-age peers. Overall, the Student displayed-appropriate hand function, executive function and on-moto visual perception (S-13).

24. To identify any potential challenges in the classroom, the OT asked and the Student's teacher agreed to complete a Sensory Profile School Companion rating checklist. According to the results of the Sensory Profile School Companion, the Student's scores all fell within the "Typical Performance" level, meaning that the Student's sensory functioning profile did not indicate a need for OT intervention in the school (S-13). The examining OT did not contact the Student's private OT dysphagia specialist, she did not assess the Student's swallowing disorder, food sensitivities or observe the Student during lunch (NT *passim*, S-13).
25. When the updated RR was finalized the team, including the Parents, concluded the Student was not eligible for school-based OT services. The RR included a caveat that should the data and information gleaned from the progress monitoring throughout the year indicate the Student achieved independent functioning, across domains at appropriate developmental levels the team should consider discontinuing the IEP. Assuming the Student reached the anticipated level of independence, the IEP notes the District should then provide the Student with a Section 504 agreement (S-13). The RR did not assess the Student's swallowing, dysphagia, or include the private OT as a member of the reevaluation team (NT *passim*, S-13).
26. In May of 2017, at the end of kindergarten, the IEP team met to develop the Student's First-grade IEP. The proposed IEP present levels note the Student had a very successful kindergarten year. Academically the Student's scores indicated above grade level scores in math and reading. The Student's Kindergarten report card indicated satisfactory performance on all 14 domains of a successful learner (S-17).
27. The IEP notes that although the Student was diagnosed with autism, attention deficit hyperactivity disorder (ADHD) and a disruptive behavior disorder, the Student did not experience any functional or academic delays

in the kindergarten grade level education curriculum. The present levels further state the Student progressed at the same rate and level as the Student's same-age peers at either grade levels or above. The proposed First grade IEP included one behavioral goal and four somewhat generic SDIs (S-17).

28. On or about May 31, 2017, the IEP notes the District collected data and updated the Parents about the Student's behavior in school. The Kindergarten teacher described the Student as a "model Student." The learning support teacher noted the Student demonstrated appropriate conversational skills and excellent sportsmanship. The progress monitoring data indicated the Student met the IEP goals related to interacting with peers, responding to peers and demonstrating coping behaviors regarding directives from peers and adults throughout the school day (S-17).

Additional Historical Facts: The Functional Behavioral Assessment

29. On October 9, 2017, the District repeated the FBA to assess reports of anxiety during the school day at drop off and when leaving home to go to school (S-23). The FBA data notes that on six occasions, the Student was not able to separate from the Parent at the drop-off. The data indicates that once the Mother left the building, the Student was able to transition back to class (S-23). The working hypothesis, at the time, was premised upon a belief that the Student was displaying signs of separation anxiety; therefore, the IEP team, including the Parents, decided to monitor the Student's misbehavior (S-23).

Additional Historical Facts: The June 2017 IEP

30. On June 1, 2017, the District and the Parents met to develop the second-grade IEP. The IEP included one behavioral goal and four generic SDIs. The team, including the Parents, agreed the Student should continue to receive Itinerant Learning Support and SDIs in the regular education classroom (S-17).

31. To obtain additional qualitative data about the Student's behavioral and emotional functioning within the school environment, the team, including the Parents decided to update the RR. The teachers completed the

Achenbach Child Behavior Checklist. The Achenbach Child Behavior Checklist (ACBCC) rating scale provides pertinent information about the Student's emotional and behavioral functioning. The ACBCC checklist data did not indicate behavioral, social, attention or emotional deficits or needs (S-14)

32. After reviewing the then existing data, the team also decided to administer the Behavior Assessment System for Children, Third Edition-Parent Teacher Rating scales (BASC-3). The BASC-3 assesses emotional and behavior symptomology associated with hyperactivity, aggression, conduct problems, externalizing problems, anxiety, depression, learning problems, adaptive skills, school problems, leadership and functional communication. As part of the RR, the Mother, two teachers and the student-teacher completed a BASC-3 assessment of the Student's behavioral and emotional functioning. On sixteen (16) out of 20 BASC-3 subscales, the Mother rated the Student's behaviors at the clinically significant range. The teachers, on the other hand, on 20 out of 20 subscales, rated the Student's behavior as Average (S-14). The Mother asked and the District agreed to disregard the BASC-3 ratings completed by the student-teacher. Although the student teacher's data was disregarded, the Student's profile continued to indicate Average age-appropriate emotional and behavioral functioning (NT *passim*, S-14).
33. The RR update included five different observations conducted over several days across subject areas. During the classroom observation, the psychologist noted that although the Student was distracted by a peer, the Student continued to complete the assigned tasks. On October 6, 2017, the Mother completed the ADOS. Overall, the Student demonstrated a number of age-appropriate responses, which at that time, were considered a strength and a sign of emerging steady progress. Students with an autism disorder typically score between 7 and 9 on the ADOS-2. The Student earned a score of 1, well below the cutoff score. The results suggest a great deal of positive growth (S-14).

34. After reviewing the then existing data, the RR team concluded that the Student presented as a person with the IDEA disability of an other health

impairment (OHI) and autism. The RR also noted that the Student had an anxiety disorder, ADHD and a disruptive behavior disorder. In light of the wealth of longitudinal data across two school years, the District members of the team concluded, over the Parents' objection, the Student, although identified as a person with an OHI and autism, no longer needed SDI. The District members of the RR team then concluded, while the Student no longer needed SDIs, the Student did, however, need the supports of a Section 504 plan. The team noted the paramount concern was to ensure the Student was provided with a hot lunch and regular sensory breaks through the day (S-14).

35. The IEP team after reviewing all of the existing data recommended a series of Section 504 accommodations should be put in place to address the Student's sensory needs, food hypersensitivity, restricted eating choices and dysphagia (S-14 p.21). After the meeting, the Parents disagreed with the team's conclusion and requested an independent educational evaluation (IEE). The District approved the request with the assistance of the Parents' legal counsel, agreed to a specific out of district independent evaluator (S-14, S-27). The Section 504 plan was never offered or implemented.

The Independent Educational Evaluation Results and Data

36. As part of the IEE, the Student and three teachers once again completed the BASC-3 rating scales. The teachers' ratings did not yield any "at-risk" or "clinically-significant" areas of concern. The teachers and Student's self-evaluation BASC-3 did not demonstrate an impairment in social function otherwise required for identification as a Student with a disability. The independent evaluator administered multiple norm-referenced nationally recognized standardized tests. As part of the IEE assessment process, the private examiner reviewed the Student's educational records, interviewed the Parents, the teachers, conducted an FBA and completed a clinical observation (P-15).

37. The Student's Woodcock-Johnson ability and Woodcock-Johnson achievement scores all fell in the solid "Average" or "Above Average"

range. The evaluator noted that 11 out of 13 of the Student's standard scores (SS) on the Woodcock-Johnson achievement test fell in the Above Average range while one fell in the Average range. The Student's attention and executive functional scores as assessed on the Behavior Rating Inventory of Executive Functioning Second Edition (BRIEF-2) indicate the Student did not display clinical or educationally significant levels of executive functioning or attention difficulties (S-28). The Student's perceptual and memory skill assessments indicated average scores (P-15).

38. While observing the Student, in class, for the better part of a day, the IEE examiner completed an FBA. The FBA results in conjunction with the clinical interview did not identify any behaviors that were either interfering or impeding the Student's learning (P-15).
39. All sources of BASC-3 data indicate that the Student displays notable strengths, both academically and socially, in the school. Recognizing the disparities in the BASC-3 ratings, of the Student in the home and in the school, the independent evaluator recommended the family continue in-home community-based mental health treatments (S-28).
40. After reviewing all of the available data, the IEE examiner concluded that at the time of the IEE, the Student did not display any characteristics of a Student with an IDEA disability. The evaluator also concluded the Student did not need specially-designed instruction (P-15).

The Review of the IEE, the Updated RR and the Proposed NOREP Exiting the Student from IDEA Services

41. On or about March 23, 2018, the District, the Parents, along with their advocate, and the IEE examiner met and reviewed the IEE. The Parent disagreed with all of the independent examiner's findings suggesting the Student should be exited from IDEA services. The District accepted the independent examiner's IEE findings. On March 23, 2018, and again on August 31, 2018, the District issued prior written notice indicating that after reviewing the October 2017, the May 2017 and the March 2018 IEE data the District believed the Student was no longer a person with a disability in need of specially-designed instruction. Although the District did not issue prior written notice under Section 504, the District-based upon the then existing data, also concluded and told the Parents the Student did not require a Section 504 Agreement (S-19, S-20).

The Parents' Second Independent Evaluation and Diagnostic Clarification

42. In June 2018, after disagreeing with the IEE results and the District's proposed action to exit the Student from IDEA services, the Parents obtained a second independent evaluation in the form of a "diagnostic clarification." This time the independent evaluation was performed by a private local psychologist/provider of community based behavioral health services (P-56, P-63 NT pp.480-507).
43. The second evaluation included a clinical interview with the Student and the Parents. Along with the interview the examiner administered the Bender Visual-Motor Gestalt Test, Second Edition (Bender 2), the Wechsler Abbreviated Scale of Intelligence Second Edition (WASI-II), the Conner's Continuous Performance Test Third Edition, the Adaptive Behavior Assessment System Third Edition (ABAS-3), the Conner's Comprehensive Behavior Rating Scales-Parent Assessment Report (CCBRS Parent), and ADOS-II (P-56). The evaluator spent between 60 to 90 minutes with the Student during the evaluation (NT p.503). The private evaluator did not observe the Student in the school setting and he did not undertake any testing to determine if or how anxiety was impacting the Student in the school setting (NT p. 503, NT pp.480-507).
44. On the WAIS-II the Student earned an Average SS of 98. On the CPT-3, the Student had a total of two atypical T-scores which are associated with the likelihood of having a disorder characterized by attention deficits. On the ABAS-II adaptive score, based upon the Mother's reporting, the Student earned a General Adaptive Composite score of 67, in the extremely low range of adaptive functioning. On the CBRS-P, the Mother's ratings across all 10 subscales fell in the Very Elevated range. On the ADOS-2, the Student earned an ADOS-2 Comparison score, of 2, which indicates a low probability of autism. Diagnostically, the second evaluator concluded the Student's profile met the criteria for a DSM-V diagnosis of ADHD combined presentation and a generalized anxiety disorder. The evaluator recommended the Student should continue to receive community-based behavioral health services (P-56, P-63 NT pp.480-507)
45. The second private evaluator concluded that the first IEE examiner's testing was an accurate representation of the Student's then-current ability and achievement. The second private evaluator also agreed with the first IEE examiner's conclusion that the Student no longer met the IDEA or the DSM criteria as a person with autism (P- 56; NT p. 505).
46. The second private evaluator noted that the first IEE examiner prepared a

“quite a comprehensive evaluation.” The second private evaluator then noted he had no reason to repeat the previous assessments that the IEE examiner administered (NT p. 505).

47. Upon receiving the second private evaluator’s full report and a hand written note from the Parents requesting another IDEA assessment, the District sent the Parents a Permission to Reevaluate (PTRE). The Parents refused to sign the PTRE and later refused to return the Notice of Recommended Educational Placement (NOREP) suggesting the Student exit all IDEA special education services. After giving the Parents a reasonable period of time to respond to the prior written notice, in late March-early April 2018, the District exited the Student from all SDIs and IDEA services (NT p.464-465 NT p.690-692, P-56).
48. On or about April 6, 2018, the Superintendent sent a letter to the Parents, along with a copy of their procedural safeguards. The letter stated the District would continue to provide the Student with a modified lunch menu, consisting of the Student’s preferred food list. The letter also directed the District staff to monitor how much and what types of food the Student ate during the school day (S-28). Soon after that, the District went back to providing Student with preferred foods (NT p. 697).

The Third Private Diagnostic Evaluation and Review of the Records

49. In December 2018, while the due process proceedings were ongoing, the Parents through counsel requested and this hearing officer granted the Parents’ request for a brief continuance to have a third private evaluator review the Student’s records. The third private evaluator completed record review, which also included an internet-based virtual, “abbreviated” evaluation of the Student (P-64, P-63, NT pp.511-571).
50. Although the purpose of the third private evaluation was to determine if the Student needed additional support in the school setting, the third private evaluator like the second private evaluator, did not speak with any of the previous evaluators, the teachers, the private OT provider or the community based treatment staff (P-64 P-63, NT pp.511-571).
51. The third private evaluator stated that this instance was the first time she was asked to review a file and did not consult with a school, the community providers or teachers (P-64, P-63, NT pp.511-571).

52. The third evaluator reported that after a review of the file and based on Parents' reports, the Student would benefit from an IEP. The third private evaluator never criticized the selection, scoring or interpretation of the three previous assessments completed by the District, the IEE examiner, or the second private evaluation (P-64; P-63, NT pp.511-571). The third private evaluator admitted she never confirmed any of the Parents' reports/statements with the teachers or of the community-based treatment staff. Without corroboration from knowledgeable outside individuals, the third private evaluator relied heavily on the Parents' description of the Student's behavior, events in school and the community (P-64, NT pp.601-605).
53. The third private evaluator's testimony corroborated, supported and at times expanded upon the medical testimony about the Student's dysphagia, food hypersensitivity and the need for a coordinated and specific feeding protocol in school and at home (P-63, NT pp.511-57, P-64).
54. Although the third private evaluator suggested that the Student's level of anxiety affected the Student's school performance, the third private evaluator did not observe the Student in school, in the home, in the community. The third private evaluator did not administer any specific protocols to assess, measure, or gauge the Student's, then-current, level of anxiety (P-63, NT pp.511-571, NT p.603-605).
55. The third private evaluator asked and the Mother agreed to complete a BASC-3 rating checklist. The third private evaluator did not ask the District or the community-based health providers to complete another round of BASC-3 ratings. When asked about specific behavioral and/or emotional concerns, the Mother reported that the Student does not like school, has trouble making friends and creating meaningful friendships. The Mother also reported that the Student has very limited diet, seems to be withdrawn, and more emotional than before (P-64, P-63, NT pp.511-571).
56. On the BASC-3 the Mother endorsed "at-risk" concerns in the areas of hyperactivity, anxiety, depression, resiliency, somatization, bullying, and withdrawal. The Mother also rated the Student's behaviors as "clinically significant" in the areas of aggression, atypicality, anger control, emotional self-control, and executive functioning. In the area of adaptive functioning, the Mother endorsed concerns in the areas of social skills, leadership, study skills, functional communication, and adaptive skills. The third independent evaluator then concluded the Student's symptom profile on this BASC-3

was suggestive of possible ADHD, emotional control concerns, and an autism spectrum disorder (P-64, P-63, NT pp.511-571).

57. Relying upon the Mother's single BASC-3 rating and after reviewing the Student's records, the third private evaluator made multiple findings, recommendations and conclusions about the need for IEP services. First, the third private evaluator based upon her review of the record and the BASC-3 concluded the Student was a person with autism, an OHI, and ED. The third private evaluator did not explain how she determined that the Student's autism, OHI, or ED adversely affected the Student's education. Second, the third private evaluator did not explain how she determined given the three diagnoses the Student needed specially-designed instruction. Third, the third private evaluator recommended that the Student would benefit from yet another assessment with the ADOS. Although the third private evaluator did not review the ADOS protocols, she recommended that ADOS should be readministered, by someone with expertise in autism. The third private evaluator never explained why she disagreed with any of the other ADOS scores, the previous examiner's training or interpretation of the ADOS scores. (P-64). Fourth, while the third private evaluator recommended another FBA, she failed to provide a clinical rationale why the previous data was flawed, incomplete, or insufficient. Fifth, the third private evaluator never explained what assessment tools or data suggested the Student needed individual counseling at school. Sixth, the third private evaluator, who is not an OT, recommended an OT assessment to address school based sensory concerns related to noise sensitivity. Seventh, after reviewing the data, the third private evaluator did, however, provide factual support why the District and the private OT should work together to expand the Student's preferred list of foods. Eighth, the third private evaluator did cogently describe and explain the basis for a series of recommendations, accommodations, and modifications needed to expand the Student's food choices, overall diet, and lunch options. Ninth, the third private evaluator failed to provide any factual support regarding the recommendations supporting pragmatic language skills or social skills instruction. Tenth, the third private evaluator made generalized statements regarding medication management (P-64, NT pp.511-571).

Miscellaneous Credibility Determinations

58. The District paid the first independent evaluator who completed the IEE over five thousand dollars to complete the Student's IEE and participate in the due process sessions (P-66).
59. On one occasion, during the course of the hearing, the private IEE evaluator passed notes to the LEA and the District's co-counsel making fun of and criticizing the Parent's witnesses (NT pp.155-168 HO #2).
60. The first private IEE evaluator sat next to the District's attorney and the District's director of special education when he passed the derogatory notes (NT pp.155-168).
61. The first independent evaluator has a doctorate in school psychology and is also a certified, school psychologist. The first independent evaluator also completed a two-year post-doctoral training program with a specialization in clinical neuropsychology. The first independent evaluator is also a Board-Certified psychologist by the American Board of School Neuropsychology (NT p.319-322).
62. The Parent's second independent evaluator is a doctorate level licensed clinical psychologist, who operates a private practice in the Commonwealth of Pennsylvania (P-63).
63. The Parent's third independent evaluator earned a doctorate in psychology, is Board Certified Behavioral Analyst (BCBA) and is a licensed psychologist in the Commonwealth of Pennsylvania (P-64).

Applicable Legal Principles

Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion rests with the Parent, who

requested this hearing. In IDEA disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

Hearing officers, as fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *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).

This hearing officer now finds the District's and the Parent's witnesses were credible, and their testimony was essentially consistent with respect to the actions taken or not taken by the District in evaluating the Student for IDEA and/or Section 504 eligibility. The testimony overall was essentially consistent, with minor variations, on factual matters in dispute.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others; hence, based upon factors like, the time, frequency and/or duration of contact with the Student, the witness's familiarity with the Student's educational, behavioral, social and/or dietary needs, the witness's understanding of test data, the Student's classroom performance, behavior in the home/community and any individual Student specific circumstances discussed herein I will give certain witnesses' testimony more persuasive weight than others.

The Student's private third party OT targeting the swallowing, dysphagia and food sensitivities and the third independent evaluator's testimony about the same was clear and cogent; hence, on this topic, I will give their testimony more significant weight than District staff, the IEE examiner or the second independent evaluator.

On the IDEA disability topic and the conjoined topic does the Student need SDI, I give the IEE evaluator and the District staff great weight and the second private evaluator moderate weight. On the same topic, due to the third independent evaluator's limited, remote and tangential contact, I will now give her opinions, conclusions and suggested findings, recommendations and opinions about the Student's IDEA eligibility and need for specially-designed less weight. Finally, I disagree with the Parents' assertions that first IEE examiner was biased, conflicted, or under the District's influence. While I agree with the Parents that his conduct in this hearing was obtuse, rude and not helpful, but for the payments from the District to the evaluator for services rendered here, which is not atypical, I do not find any direct or indirect evidence of bias, collusion, or a conflict. While the witness's conduct was distracting, abrasive and somewhat disappointing, the

Parents failed to provide preponderant proof that the witness's conduct while offensive, rose to the level of actual bias or prejudice. Therefore, the request to strike the evaluation and the testimony is rejected.

Students with Disabilities and Section 504 Eligibility

Students with physical health impairments/disabilities are eligible under Section 504 if their condition substantially limits one or more major life activities, such as a major bodily function. Pursuant to Section 504 a "Handicapped person means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Under Section 504, a student is eligible for special education and services if the impairment is one which "substantially limits one or more major life activities." 34 C.F.R. § 104.3 (j)(1). An impairment is substantially limiting if it limits the ability of an individual to perform a major life activity as compared to most people in the general population. 28 C.F.R. § 35.108(d)(1)(v). Determining whether a condition substantially limits a major life activity requires an individualized assessment. 28 C.F.R. § 35.108 (d)(1)(vi). Major life activities include bodily functions like the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 28 C.F.R. § §35.108(c)(1)(ii).

Section 504 and Chapter 15 Child Find and FAPE Requirements

Section 504 contains its own child find requirement that is similar, but not identical, to the child find requirement of the IDEA. Section 504 requires districts to annually "undertake to identify and locate every qualified [individual with a disability] residing in [the district's] jurisdiction who is not receiving a public education." 34 C.F.R. §104.32 (a). Section 504 also requires districts to evaluate students "who, because of handicap, need or are believed to need special education or related services." 34 C.F.R. §104.35 (a). Likewise, under Pennsylvania Chapter 15, a "protected handicapped student" is a student who 1) Is of an age at which public education is offered in that school district; and 2) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and 3) Is not IDEA eligible. *See* 22, Pa. Code § 15.2.

Section 504 and Chapter 15 Evaluation Requirements

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a-c) and the parallel provisions at Chapter 15, each require a recipient of federal financial aid to conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any actions with respect to the initial placement of the person in regular or special education

and any subsequent significant change in placement. A recipient to which this subpart applies must establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. Tests and other evaluation materials used must have been validated for the specific purpose for which they are used and they must be administered by trained personnel in conformance with the instructions provided by their producer. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient. In interpreting evaluation data and in making placement decisions, the district/recipient shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. School districts must establish procedures to ensure that information obtained from all such sources is documented and carefully considered. The regulations further require that any decision about a student's program/placement is made by a group of persons, who are knowledgeable about the child, the meaning of the evaluation data, and the continuum of local placement options 34 C.F.R. §104.34. The Section 504 regulations also require the district to provide parents with a copy of their procedural safeguards. *Id.*

IDEA Child Find and IDEA Eligibility

School districts have a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statut[e]." This continuing obligation is commonly referred to as the IDEA's "child find" requirement. A child find claim requires the hearing officer to determine the following, did the school district have reasonable suspicion that the child might be eligible under the IDEA. If so, did the district initiate the evaluation of the child within a reasonable period of time? If the answer to either inquiry is a violation of the IDEA, what remedy if any, the hearing officer should order to correct the alleged violation is a question of fact. *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). At the same time, the IDEA child find duty does not demand that schools conduct a formal evaluation of every struggling student or administer every possible test. *D.K. v. Abington Sch Dist.*, 696 F.3d 233, 249 (3d Cir. 2012); *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019)

Failure to conduct a comprehensive evaluation is a procedural and substantive violation. Substantive child find violations and procedural violations can result in a denial of a FAPE. *D.K.*, 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). Therefore, an evaluation must

be sufficiently comprehensive to assess all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Simply stated, the child find trigger or starting point occurs when the school district has a reasonable suspicion 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. The determination of whether the district's evaluation is legally appropriate and sufficient requires the hearing officer to answer three interrelated questions: First, is the proof preponderant that the child meets the IDEA criteria for one or more of the recognized classifications? Second, if so, is the proof preponderant that the child's disability adversely effects the student's educational performance? And, third, is the proof preponderant that the IDEA classification results in the need for special education?⁵

IDEA's Comprehensive Assessment Process

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 evaluators, must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. 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 and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c).

Under the first step of the evaluative process, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information

⁵ Zirkel, P. (2018). An adjudicative checklist for child find and eligibility under the IDEA. *West's Education Law Reporter*, 357, 30–31.

provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child needs specially-designed instruction.

Autism is an IDEA Eligible Disability

Because the IDEA includes its own standard for autism eligibility, a medical diagnosis of autism does not in itself qualify a student for special education and related services. The IDEA defines autism as a developmental disability that affects verbal communication and social interaction. 34 C.F.R. § 300.8 (c)(1)(i). The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). Other characteristics of autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." Additionally, the IDEA offers the following guidance: " For a child to meet the IDEA's definition of autism, the eligibility team must determine that the child has: (1) impairments in communication; (2) impairments in social interaction; (3) patterns of behavior, interests, or activities that are restricted, repetitive, or stereotypic; and (4) unusual responses to sensory experiences. *Id.*

Emotional Disturbance is an IDEA Eligible Disability

In order to qualify as a "student with a disability" under the IDEA, a student must meet the definition of one or more of the categories of disabilities. 34 CFR §300.8 (a)(1). Pursuant to the IDEA Part B regulations, 34 CFR §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.

A student needs to exhibit only one of the five criteria under the definition of an emotional disturbance to potentially qualify for special education and related services under the ED classification, but the student must exhibit the criteria to "a marked degree" over "a long period of time." 34 CFR §300.8(c)(4)(i). While 34 CFR §300.8(c)(4)(i) states that a student with an emotional disturbance must manifest at least one of the above-identified characteristics described in subsections (A) through (E) above the phrases "to a marked degree" and for "a long period of time" are undefined.

Other Health Impairments are an IDEA Disability

Students with an OHI can be identified as IDEA eligible, provided that they have limited strength, vitality, or alertness. At times some students may have a heightened alertness to environmental stimuli. In either case, the OHI must adversely affect the child's educational performance. 34 CFR § 300.8 (c)(9), See, *In re: Student with a Disability*, 119 LRP 18518 (SEA MO 05/03/19) (finding that the student's behavior was typical of kindergartners and did not impact his educational performance; hence the child was ineligible under the IDEA).

In most cases, a student's average or better grades or the ability to be redirected will establish that, despite an ADHD diagnosis, the OHI condition does not adversely affect educational performance.⁶

IDEA FAPE Standards

The IDEA and state and federal regulations obligate local education agencies (LEAs/districts) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the Supreme Court considered anew the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S. ____, 137 S. Ct. 988,

⁶ See, *C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, unpublished) (where grades and test scores showed that the student continued to perform despite the ADHD diagnosis the student's condition didn't adversely affect educational performance); *San Lorenzo Unified Sch. Dist.*, 116 LRP 7340 (SEA CA 02/09/16) (a student who sometimes became inattentive or hyperactive and was able to successfully return to the task at hand, with redirection, was not adversely affected); *District of Columbia Pub. Schs.*, 115 LRP 16786 (SEA DC 02/02/15) (because his grades and test scores remained satisfactory, despite impulsive behavior a middle schooler with ADHD was not IDEA eligible under the category of *OHI*), *District of Columbia Pub. Schs.*, 64 IDELR 123 (SEA DC 2014) (the student's ADHD did not negatively impact his educational performance where the student's psychoeducational evaluation determined that the student had no difficulty completing grade-level work in reading, math, and written language); and *Norwalk Bd. of Educ.*, 73 IDELR 163 (SEA CT 2018) (the fact that a student was at or exceeding academic benchmarks by the end of kindergarten helped show that his Connecticut district correctly found him ineligible under the IDEA).

999, 197 L.Ed.2d 335, 350 (2017). The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials but also by the input of the child’s parents or guardians. The *Endrew* Court explained that “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. The *Endrew* standard is not inconsistent with the long-held interpretations of *Rowley* by the Third Circuit.

Compensatory Education can be Appropriate Relief

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.⁷ Compensatory education should place the child in the position they would have been in but for the IDEA violation.⁸

Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child.”⁹ A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *Id.*

With these fixed principles in mind, I will now turn to the analysis of the instant dispute.

⁷ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)).

⁸ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job.”

⁹ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

Overview, Discussion and Analysis of All Claims

The Parents' Claims for Appropriate Relief and the District's Responses

Upon filing a due process Complaint, the Parents as the moving party accepted the burden of proof to establish the District failed to timely and comprehensively evaluate the Student in all areas of suspected disability. Here the Parents contend the characteristics of the Student's IDEA disability were readily apparent each school year and continue to the present. The Parents next contend that the LEA's decision to terminate IDEA and/or Section 504 supports and services is wrong-headed. Taken as a whole, the Parents make a boot strap argument contending that since the previous evaluations of records dating back to kindergarten and first grade then found the Student was a person with autism and IDEA eligible the findings in the IEE and the subsequent RRs, at issue are just plain wrong. The District, on the other hand, argues that while the findings in the initial evaluation and reevaluation were accurate when completed, the District's then current test results, coupled with the Parents' IEE data and all subsequent independent evaluations reflect the Student is no longer IDEA eligible. When viewed as an integrated whole the District argues despite the existence of multiple disorders the Student's current academic, behavioral and learning needs do not reflect either a current IDEA disability or a need for specially-designed instruction. The District next argues, in a similar bootstrap fashion, that the IDEA determination that the Student is not IDEA eligible is preponderant proof that the Student is not a person with a disability within the meaning of Section 504.

After studying the exhibits, the multiple third party evaluation reports, the testimonial and non-testimonial extrinsic evidence and rereading the testimony, for all the reasons set forth below I now find that the District's IDEA determination to exit the Student from IDEA services is correct. Therefore, the Parents' IDEA claims and demand for compensatory education is denied. At the same time, I now find that the District's Section 504 determination that the Student is not a protected handicapped Student or a person with a disability within the meaning of Section 504 is incorrect. The Student's eating, swallowing and food sensitivities are disabilities squarely fit within the meaning of a Section 504 disability.

Furthermore, the record is preponderant that the long history of these conditions substantially limits several of the Student's major life functions. At all times relevant, the District treated the Student as a person with a disability and provided the Student with an equally effective commensurate equal opportunity to participate in all benefits and privileges otherwise available to non-handicapped students.

Accordingly, while the District did not develop a written Section 504/Chapter 15 Agreement, the Student did not suffer a loss or a denial of benefits, services or privileges; hence, based upon the instant facts, I will not be awarding any compensatory education services. An appropriate Order follows.

The District's Current IDEA Eligibility Determination is Correct

Parents make two independent arguments that the District made substantive and procedural errors in reevaluating the Student's IDEA and Section 504 eligibility. While the Parents contend the IEE evaluator was biased, but for their self-serving contentions the record does not support a finding of bias. On two or more occasions, the Parents were free to cross-examine the first independent evaluator about the alleged bias. Each time they cross-examined the IEE evaluator, they failed to link his obtuse, coarse and off-putting conduct to any improprieties. The Parents failed to offer any persuasive preponderant testimonial or non-testimonial extrinsic proof, from the two other independent evaluators noting bias or any other misconduct. Accordingly, as the record now stands, I do not find any credible support for their bias or their prejudice arguments; hence, the argument is rejected.

As to claims that the decision to exit the Student from services and the RRs are substantively or procedurally flawed, courts in this circuit have held that a failure to evaluate, identify and offer a student with a disability an IEP is a denial of a FAPE. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012). The record is preponderant; this dispute is not one of those instances.

In this dispute, over three school years the District, with input from the Parents, completed four reevaluations. The four reevaluations included input from the Parents, include multiple observations of the Student, input from the teachers and multiple individuals, and input from persons in and outside of the District who had direct ongoing contact with the Student.

The record is preponderant that all of the existing standardized ability and achievement tests performed were nationally recognized, technically sound and were administered as directed by the maker of the test. The record is also preponderant that all of the Student's ability and achievement testing data, on both measures, as scored by all evaluators, fall in the solid average range. While the record is clear the Parents are dissatisfied with the interpretations of the then existing testing data, when the record is read as a whole, the proposed action to exit the Student from IDEA services is correct. First, the Parents failed to prove that multiple assessments did not target and otherwise gauge the Student's behavioral, academic speech/language and sensory needs. The Parents failed to prove the school-based OT assessment that found the Student not eligible for school-based OT services was insufficient.

Likewise, the Parents failed to prove that the Student's speech, language and communication test scores which, for the most part, were all in the solid average range adversely affected the Student's education. The multiple FBAs properly identify the antecedent triggers and the consequences associated with the Student's misconduct. To the extent the Student misbehaved in school, a central source of their alleged substantive errors, the record is preponderant and the testimony is persuasive that after the drop off the Student was easily redirected back to the classroom and learning. The record is preponderant that the drop off tantrums did not interfere, impede or adversely affect the Student's ability to be redirected, earn passing grades or interfere with the Student's advancement to the next grade.

After calling two independent evaluators, the Parents failed to prove that either the IEE examiner or the District's evaluators improperly selected, administered, or scored the assessment protocols. As for the contentions the IEE is flawed, the evidence is preponderant that the IEE examination, unlike either of the subsequent independent reviews, included 14 different nationally recognized technically sound assessment strategies, a complete review of the Student's testing profile/data, Parental input, teacher input, a clinical interview of the Parent/Student, an FBA and a direct observation of the Student in a variety of environments throughout the school day. A simple comparison of the time the IEE examiner spent with the Student against the time the other evaluators spent with the Student is revealing. Unlike the second and third independent evaluators' findings, the results of the IEE were fully vetted by a team of knowledgeable people, including the Parents. While not dispositive, the vetting and review process is a relevant factor. To the extent the Parents claim they did not have sufficient time to review the report, the Parents did not prove that the allegedly abbreviated review time substantially interfered with their ability to participate in the reevaluation process, impeding their relationship with counsel or the lay advocate. After receipt of the IEE, the District prepared a timely report. All of the above included the Parents, their then-current lawyer, and advocate. In short, the District staff cogently described the substantive and procedural basis supporting the decision to exit the Student. The Parents' claim that the RR and the IEE evaluations or reevaluations were tainted, defective, or flawed is rejected.

After looking at all of the then-existing data, the District staff methodically discussed and methodically answered the requisite IDEA eligibility criteria. For example, in applying the IDEA two-pronged eligibility criteria the evaluation team and the IEP team after reviewing the data accurately concluded that the Student's standardized test scores, current classroom/school-wide behavior, including average to above-average test, quiz, and report card grades all of which are in the solid average range support a finding the Student does not currently need SDI.

Neither the Parents in their testimony nor the two independent evaluators pointed to a pattern of test scores, Student behaviors, inattentiveness, distractibility or misconduct that indicates any of the three alleged IDEA disabilities adversely affected the Student's education.

To the extent the Parents' third independent evaluator suggested the opposite, for all of the following reasons, I do not find her testimony persuasive, helpful or cogent. First, the third independent evaluator's testimony suggesting that the District should redo the ADOS is not supported by facts in the record. The third independent evaluator did not have any actual knowledge that the previous examiners were not trained in the administration, scored the protocol wrong or interpreted the data in a manner not supported by the maker of the ADOS. Distilled to its essence, the Parents' argument rests upon the single contention that the differences in the Student's ADOS scores over time, suggesting a change in autism diagnosis, is wrong. The trend line in the District's and the IEE examiner's reports cogently and persuasively rebuts the Parent's argument. The Parents' over-reliance on the ADOS scores misses the mark for several reasons. The IDEA regulations eschew finding an IDEA of disability on the results of one sole measure. Even assuming *arguendo*, the ADOS trend line is off base, the District's refusal to repeat the ADOS testing is not *per se* violation of the IDEA assessment requirements. In light of the multiple administrations of other corroborating tests, like the BASC-3, the CARS, the Conners, and the ACBCC the testimonial and the non-testimonial extrinsic evidence does not in any way support the Parents' IDEA eligibility claims.

Neither the Parents in their presentation of the proofs nor the third independent evaluator ever explained or reconciled the inconsistency between the second and the third expert's opinions about the Student's diagnosis, needs and circumstances. In short, the Parents in an *ipse dixit* fashion argue that the hearing officer should ignore the opinions of the District's psychologist, the second independent evaluator, the IEE examiner, the District's evaluation/IEP team and instead favor the Parent's lone expert opinion who did not talk to the others is rejected.

Granted, while the Parents' expert is well qualified, the expert's testimony on the IDEA eligibility determination misses the mark. First, the Parents fail to recognize that the expert's opinions are not based upon a direct observation of the Student in the school, on the bus or in the home. Second, the third expert did not consult with the district staff, with the IEE examiner or the second independent evaluator, the local community behavioral health center staff. All of these factors, individually and collectively weigh against the persuasiveness of the expert's broad-based IDEA eligibility opinions.

The Parents' third expert's argument supporting IDEA eligibility ignores the fact, even assuming the Student is a person with autism, OHI or ED, the existing data sets do not establish that the Student's ability, achievement and classroom performance, in the solid average range, is in any way adversely affected to the point the Student needs SDI. Granted, the Student at times on the bus and after returning to school from outside dysphagia OT services acts out; however, the record is preponderant that the frequency, intensity and severity of the misbehavior does not interfere or impede the Student's learning, education, grades, peer or adult interactions. The Parents' IDEA eligibility argument fails to factor in the revealing fact that the District's staff, who had eyes on the Student in the classroom, the hallways, in gym class, in the cafeteria and on the bus are in some way better-qualified to discuss, opine and describe the Student's day to day behavior, rate of learning and degree of need. The evidence is preponderant that the District's staff, the IEE examiner and not the third expert are more familiar with the Student. Likewise, the District staff and not the third expert are more familiar with the Student's communication skills, adaptability, peer relations, and social skills in the school and during extracurricular activities.

Accordingly, after reviewing all of the testimonial and the non-testimonial extrinsic evidence in the record that would otherwise justify a contrary conclusion, I now find the Parents failed to meet their burden of proof regarding the Student's IDEA eligibility; hence, the Parents' IDEA claim and demand for compensatory education is denied. This IDEA finding, however, does not end the analysis; as the District's Section 504 eligibility determination requires this hearing officer to undertake a somewhat different eligibility analysis.

The Student is Section 504 Eligible as a Person with a Disability

I agree with the Parents that the evidence is preponderant that the Student is a person with a disability as defined by Section 504. To be eligible under Section 504, a student must be determined, as a result of a long history, including requisite evaluations, to have a "physical or mental impairment" that "substantially limits one or more major life activities." 34 C.F.R. §104.3. A "physical or mental impairment" is: "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; 34 CFR 104.3 (j)(2)(i). The Student's eating, food sensitivities, dysphagia, constipation and bladder problems meet the physical and mental impairment criteria. Section 504 defines "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 CFR 104.3 (j)(2)(ii).

The Student's long history of eating, swallowing, food sensitivity and dysphagia provides preponderant proof that these conditions limit the Student's learning and self-care. The Parents presented un rebutted evidence describing how the Student's food sensitivity, swallowing, and dysphagia affect the Student's bowel, bladder and learning.¹⁰

Beginning in kindergarten and continuing to the present, the District accepted the Student's medical provider's diagnosis of the Student's eating, swallowing, food hypersensitivity and dysphagia.

The record is replete with un rebutted testimony and non-testimonial extrinsic documents describing how the Student's medical conditions substantially limits and otherwise interferes with the Student's major life functions.¹¹

On more than one occasion, the Student has been hospitalized for bowel and bladder problems. Each time the Student missed school. The record is also preponderant that the Student's conditions require the Student to miss school to participate in third-party OT services.

The record is unchallenged that even after the District declared the Student did not require IDEA services the District's superintendent, who at times attended these proceedings, instructed the cafeteria staff to provide the Student with a modified lunch menu. Absent the adjustments to the lunch menu, creating a situation that fostered the Student's equal access to the cafeteria services the Student would be isolated. No one from the District cogently rebutted the testimony from the OT dysphagia therapist or the third independent psychologist about the disorder, how the disorder substantially limits the Student or the need for the lunch menu accommodations.

Accordingly, while the District did not formally provide the Parents with a Section 504 Agreement, the Student's needs were otherwise met; therefore, the Student's claim for compensatory education is denied.

¹⁰ Philadelphia School District, Office for Civil Rights, Eastern Division, Philadelphia (Pennsylvania) 19 IDELR 529, 19 LRP 2120 (November 9, 1992) (dysphagia is a condition that can substantially limit a student's major life activities such as learning) See, 34 C.F.R. Section 104.3(j).

¹¹ Taken as a whole these conditions limit the Student's major life function. Section 504' FAPE protections create coextensive requirements, which at times like this instance otherwise requires districts to provide handicapped students with a commensurate equal opportunity to receive equally access to equally effective aids, services and benefits in the least restrictive setting

Conclusion

In this instance, after reviewing the existing data and after giving due weight to the testimony of all of the witnesses I now find the Parents failed to provide preponderant proof that the District erred in evaluating the Student as a person with a disability or exiting the Student from IDEA services. At the same time, the District failed to identify the Student as a person with a disability within the meaning of Section 504. Accordingly, the District is Ordered to provide the Student with a Section 504/Chapter 15 Agreement that provides the Student with a modified lunch menu, and a commensurate opportunity to purchase lunch in school. Since at all relevant times, the District modified the lunch menu and provided the Student with equal access to all aids, benefits and services otherwise available to other students the Parents' claim for compensatory education is denied. An appropriate Order follows.

Order

And now, this 26th of July 2019, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parents on all IDEA eligibility claims. The claim for compensatory education is denied.
2. I find the Student is a person with a disability within the meaning of section 504. Therefore, I also find in favor of the Parents and against the District on the Student's Section 504 claims. The claim for compensatory education is denied.
3. Twenty (20) days before the first day of school the District is Ordered to convene a Section 504 team meeting, at which the District is directed to prepare, offer and provide the Student with a Section 504 agreement that includes all needed aids, modifications and/or related services to enable the Student to purchase and eat lunch at school.
4. All other claims for violations of the IDEA or Section 504 and for appropriate relief including any other affirmative defenses are dismissed with prejudice.

Date: July 26, 2019

s/ Charles W. Jelley, Esq. LL.M.
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