

*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**

26282-21-22

#### **Child's Name**

T.G.

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

#### **Counsel for Parent**

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

07/25/2022

## Introduction

This special education due process hearing concerns T.G. (“student”), a student who resides in the Cumberland Valley School District (“District”).<sup>1</sup>

The student’s parents claim that the student should be identified as a student who is eligible for special education under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>2</sup> as a student with a specific learning disability in multiple areas—basic reading, reading fluency, written expression, mathematics problem-solving, and mathematics calculation.

By allegedly failing to identify the student as eligible under IDEIA, and consequently provide special education programming, the parents claim that the District denied the student a free appropriate public education (“FAPE”). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).<sup>3</sup> Parents seek compensatory education and reimbursement for private tutoring.

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<sup>1</sup> The generic use of “student”, and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 (“Chapter 14”).

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 (“Chapter 15”).

The District counters that the student does not qualify as a student with a disability and at all times has appropriately educated the student. Accordingly, the District argues that the parent is not entitled to any remedy.

For reasons set forth below, I find in favor of the parents in part and in favor of the District in part.

### **Issues**

1. Is the student eligible for special education as a student with a disability under the IDEIA?
2. If so, is the student entitled to compensatory education and/or the parents entitled to reimbursement?

### **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

***[redacted] 2018-2019 [School Year]***

1. The student's family has been engaged in regular psycho-educational testing of the student from an early age. (Parents' Exhibit ["P"]-1, P-2, P-3, P-21; see *generally* Notes of Testimony ["NT"] at 47-149).
2. In August 2018, [redacted], the student underwent a private psycho-educational evaluation. (P-1).
3. The student's full-scale IQ, on a [redacted] cognitive ability test, was 101. (P-1 at pages, 2, 7-11).
4. On achievement testing, given the student's intellectual ability, the student showed statistically-significant discrepant scores in the written expression composite (82), due to a low achievement score in the alphabet writing fluency subtest (80). All other achievement scores were non-discrepant given the student's intellectual ability. (P-1 at page 3).
5. In a recurrent theme throughout this record, the evaluator utilized a general ability index score, which accounts for the test-taker's executive functioning ability, of 108 for the student's cognitive ability. (P-1 at pages 3, 7-11).
6. Even utilizing the general ability index as representative of the student's intellectual ability, the student's statistically-significant scores did not markedly change. The spelling subtest score (88), as a component of the written expression composite, became statistically discrepant. (P-1 at page 3).
7. Still, even though the student was "young" [redacted], the evaluator opined that the student should be identified with specific learning

disabilities in basic reading, math calculation, and written expression. (P-1 at pages 3, 15-17).

8. The private evaluator recommended that the August 2018 evaluation report be shared with the District, but the family did not share the report until September 2021, as part of an evaluation process undertaken by the District. (P-1 at page 20; School District Exhibit ["S"]-7 at page 5; NT at 49-51).
9. In March 2019, [redacted], the student underwent another private psycho-educational evaluation by the same private evaluator. (P-2).
10. The private evaluator utilized the same cognitive testing scores from the August 2018 evaluation and updated the achievement testing. (P-2 at page 2).
11. None of the student's achievement scores were statistically discrepant from the student's cognitive testing, although the student showed relative weakness in spelling. (P-2 at page 2).
12. The March 2019 private evaluation did not identify the student as a student with any specific learning disabilities. The evaluator opined "Overall...it is clear that (the student) is making meaningful educational progress in the (District's) general education [redacted] program and should continue to receive instruction in the general education setting." (P-2 at pages 6-7, 10).
13. The family did not share the March 2019 private evaluation report until September 2021, as part of an evaluation process undertaken by the District. (S-7 at page 4).

14. The District engages in regular curriculum-based assessments as part of its screening process for potential learning difficulties. (S-11 at pages 26-29; NT at 515-525).
15. By May 2019, the student was achieving at levels described in various assessments as low-risk, meets expectations, proficient, or advanced, although the student was described as some-risk in sight-word identification. (S-11 at page 29).
16. The District utilizes standards-based grading, where a student's progress in the District's curriculum is gauged through the mastery of Pennsylvania academic standards in various curricular areas. On the District's trimester academic year, a student is tested each trimester on a standards-based assessment where the student is evaluated as "mastering" that standard, "nearly mastering" that standard, or needing "remediation". (See, e.g., P-41; NT at 525-533).
17. In June 2019, on the student's year-end standards-based report card [redacted], the student showed mastery or near-mastery of all standards in every trimester and complete mastery of all standards by the end of [the school year] (P-30; S-1).

***[redacted] 2019-2020 [School Year]***

18. By December 2019 and January 2020, on curriculum-based assessments in English/language arts and mathematics, the student was achieving at levels described as approaching grade level (on a reading assessment) and low-risk, although the student was described as some-risk on the first administration of a curriculum-based measure of reading. (S-11 at page 28; NT at 419-420).

19. By February 2020, at the end of the second trimester of the student's [school] year, the student had shown mastery or near-mastery across all standards in the first two trimesters except for capitalization/punctuation/spelling, where the student showed the need for remediation. (P-28, P-29; S-11 at pages 1-2).
20. By February 2020, the student had shown mastery or near-mastery of all reading standards and mastery of all mathematics standards. (P-28 at pages 1-6; S-2 at pages 1-14, S-11 at pages 1-2).
21. In mid-March 2020, the COVID-19 pandemic led to the statewide closure of Pennsylvania schools, at first on a planned-for temporary basis and eventually for the remainder of the school year.
22. The District provided online synchronous instruction to students for the remainder of the school year but suspended grading and did not perform any curriculum-based assessments or screening in the spring of 2020. (S-11 at page 28; NT at 58-60, 507-511).
23. In April 2020, the student's family sought out private tutoring for reading. (P-38 at page 1; NT at 60-62, 253).
24. The private tutoring in reading utilizes an intensive reading curriculum that involves multi-sensory, direct, sequential instruction in reading, and ultimately instruction in writing. (P-38 at pages 1-6; NT at 250-252, 266, 283-285).
25. The student's parents have engaged the private reading tutor since April 2020 through the time of the hearing. The tutoring has almost always been delivered remotely, utilizing videoconference technology. (P-38; NT at 116-117, 255-256, 286-298).

26. In June 2020, the District issued remote learning feedback to characterize attendance/participation in remote learning sessions, work completion, and communication. The student was rated as highly engaged in the remote learning environment over the period April – June 2020. (P-27; S-2 at page 15).

***[redacted] -2020-2021- [School Year]***

27. In the 2020-2021 school year, [redacted], due to the family's concerns with a return to in-person instruction, the family chose to have the student complete [the school year] in the District's online virtual academy. (NT at 64, 119-121, 511-513).

28. The virtual academy was under the administrative control of a specially-designated District administrator and on the rolls of a specific District elementary school (which was not the student's elementary school of residence). To the extent that the virtual academy sensed that the student was struggling in the online environment, or required some degree of change in programming, the administration of the student's District elementary school of residence would be notified. There was no notification by the virtual academy to the student's school of residence of any academic or learning difficulties. (NT at 511-515).

29. By September and October 2020, on beginning-of-year curriculum-based assessments in English/language arts and mathematics, the student was achieving at levels described as low-risk and proficient in most assessments, although the student scored basic and some-risk on mathematics assessments and some-risk on the curriculum-based measure of reading in the fall. (S-11 at page 27).

30. In January 2021, on middle-of-year curriculum-based assessments in English/language arts and mathematics, the student was achieving at levels described uniformly as proficient and low-risk. (S-11 at page 27).
31. There were no standards-based grades issued in the first trimester.<sup>4</sup> In February 2021, at the end of trimester 2, in language arts the student had shown mastery or near-mastery across all standards except for capitalization/punctuation/spelling, identifying main ideas in written text, and describing relational elements (series of events, concepts, steps) in a text, where the student showed the need for remediation. (P-25 at pages 1-3, S-3 at pages 2-4).
32. In February 2021, at the end of trimester 2, in mathematics, the student had shown mastery or near-mastery across all standards except for solving money problems with currency and coins, and telling time to five minutes, where the student showed the need for remediation. (P-25 at pages 4-5, S-3 at pages 5-6).
33. In April 2021, [redacted], the student underwent another private psycho-educational evaluation by the same private evaluator. (P-3; S-5 at pages 1-29).<sup>5</sup>
34. The student's cognitive ability was assessed, yielding a full-scale IQ of 106. (P-3 at pages 2, 10-14).
35. On achievement testing, given the student's intellectual ability, in reading the student showed statistically-significant discrepant scores

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<sup>4</sup> On report cards in the [2020-2021 school] year, there is a section called "trimester 1", but standards-based grades are reported only for trimesters 2 and 3. (P-25, P-26; S-3).

<sup>5</sup> The report was referred to using both party exhibits. Citation will be made only to the parent's exhibit (P-3).

in the pseudoword decoding subtest (82) and the oral reading accuracy component of the oral reading fluency subtest (83), but no other statistically-significant discrepant scores although, given these subtest scores, the basic reading composite was nearly discrepant (91). All other achievement scores in reading, both subtest and composite scores, were non-discrepant given the student's intellectual ability. (P-3 at page 3).

36. On achievement testing, given the student's intellectual ability, in mathematics the student showed a statistically-significant discrepant score in math problem solving (84) and a nearly discrepant in math fluency/subtraction (91). The mathematics composite score was also a statistically-significant discrepant score (88). All other achievement subtest scores and the math fluency composite were non-discrepant given the student's intellectual ability. (P-3 at page 3).

37. On achievement testing, given the student's intellectual ability, in written expression, the only score which was not statistically discrepant was all the sentence-combining component (102) of the sentence composition subtest. The sentence-building component (77) was a statistically-significant discrepant score, leading to a combined sentence-composition subtest score that was statistically discrepant (88). The alphabet writing fluency (90) and spelling (87) subtests were also statistically discrepant, leading to a statistically-significant discrepant composite score (85) in written expression. (P-3 at page 3).

38. The evaluator utilized a general ability index score, which accounts for the test-taker's executive functioning ability, of 111 for the student's cognitive ability. (P-3 at pages 3, 11).

39. Utilizing the general ability index as representative of the student's intellectual ability, the student's basic reading composite score (91) would slip into the range of statistically-significant discrepancy, as would the math fluency/subtraction (91) subtest. The student's total reading (94) and mathematics fluency (94) composite scores would become nearly statistically discrepant. The student's global total achievement composite would become statistically discrepant (93). (P-3 at pages 3, 18-21).
40. In the April 2021 private evaluation, the private evaluator recommended that the student be identified as a student with specific learning disabilities in basic reading, mathematics problem-solving (called "math reasoning" in the report), mathematics calculation, and written expression. (P-3 at page 24).
41. In May 2021, on end-of-year curriculum-based assessments in English/language arts and mathematics, the student was achieving at levels described as proficient and low-risk, except for one literacy measure where the student was achieving basic. (S-11 at page 27).
42. In June 2021, at the end of trimester 3, in language arts the student had shown mastery or near-mastery across a majority of standards. The following standards showed the need for remediation: W/W/W/W/H concepts in text, using text and search tools to find information in text, identifying main ideas in written text, revision and editing, and narrative writing. (P-25 at pages 1-3, S-3 at pages 2-4).
43. In June 2021, at the end of trimester 3, in mathematics the student had shown mastery or near-mastery across a majority of standards. The following standards showed the need for remediation: place-value concepts to 1000, addition/subtraction with place-value

concept 101-1000, grouping as foundation for multiplication, partitioning shapes as foundation for fractions, telling time to five minutes, and addition/subtraction word problems involving length. (P-25 at pages 4-5, S-3 at pages 5-6).

44. The student's standards-based need for remediation increased markedly in the third trimester of [the 2020-2021 school year]. (P-25; S-3, S-11 at pages 3-6).

45. The District's standards-based grading system provides excellent, question-level, granular data for teachers to assess with precision where material is new, or where a student might need extra support, or where a student might need re-teaching (i.e., all of which might be signaled by the "remediation" result). It is less effective in providing an assessment of growth, or lack of growth, over time as it does not portray gradations of 'banked' success, especially for a general reader and for parents. (NT at 530-541).

46. An example of this lack of transparency is that a standards-based probe might only have two questions. If the student gets one question correct and one incorrect, the standards-based assessment may mark that standard for "remediation" based on a two-question probe. Also, standards-based progress is not an average or progression over time; only the most recent score on a probe is used. Thus, a student may have scored at the mastery or near-mastery level on certain probes in a standard, but if the very last probe indicates "remediation", that last score is the basis for reporting that the student requires remediation for that standard. Again, it is very confusing in this regard for a general reader and for parents to know where a student. (See, e.g., S-11 at page 42 under the "Geometry" standard; NT at 535-539).

47. For fact-finding in this process, where the focus is on progress or on a signal for support (if not specially-designed instruction), the best way to understand the standards-based grading system is to look for definitive trends over probes in a certain standard. The graphed standards-achievement in certain school years, and over time, also provide a concise way to understand the student's performance in the standards-based grading system. (S-11 at pages 1-10).

***[Redacted]-2021-2022- [School Year]***

48. In July 2021, the parents emailed the District, requesting that the student receive an individualized education program ("IEP"). (P-36 at page 1).

49. In August 2021, on the eve of the school year, the parents provided the April 2021 private evaluation report to the District. (S-7 at page 2).

50. For [the 2021-2022 school year], the student returned to in-person instruction at the District. (NT at 78-79).

51. As the school year began, the District undertook an evaluation process for the student.

52. By October 2021, on beginning-of-year curriculum-based assessments in English/language arts, the student was achieving at levels described as low-risk on one assessment and "monitor" in a second assessment. On beginning-of-year curriculum-based assessments in mathematics, the student scored high-risk, some-risk, and basic on mathematics assessments in the fall. (S-11 at page 26).

53. In October 2021, the District school psychologist gathered input from the student's teachers and parents. (P-5, P-6, P-8, P-9, P-10; S-6).
54. The physical education, art, and music teacher did not report any academic concerns, although two of the three indicated that the student was sometimes inattentive or unfocused and required re-direction. (P-8, P-9, P-10).
55. At the outset of the school year, the student's classroom teacher was a long-term substitute for approximately five weeks (late August to early October). In the first week of October, the student's permanent teacher took over the class for the remainder of the school year. (P-5; S-6 at pages 4-5; NT at 313-314).
56. The input of the long-term substitute in early October found the student to be below average in writing content, writing mechanics, spelling, and math reasoning, and to be average in all other academic areas. The teacher described her concerns with the student's learning as follows: "struggles with generating ideas, writing stamina, and spelling...tends to write phonetically". She described her concerns with the student's approaches to learning as follows: "very distracted and has difficulty staying on task and completing assignments, especially writing". She described the student's needs in the classroom as follows: "requires a lot of reminders to stay on task, especially during writing....does not complete any assignment independently....is reading near grade level but needs small group instruction in math." (P-5; S-6 at pages 4-5).
57. The input of the student's parents indicated concerns in spelling, writing, and grammar. (P-6).

58. In early November, just prior to the issuance of the District's evaluation report ("ER"), having worked with the student for over a month, the permanent classroom teacher provided her input. The teacher found the student to be below average in writing content, writing mechanics, and spelling and to be average in all other academic areas. The teacher reported that the student "can become distracted with fidgets/classmates but is easily redirected. At times (the student) may miss directions or require one-on-one support". The teacher reported that general education, classroom-wide interventions were utilized with the student, who required no individual interventions. (P-7; S-6 at pages 1-3).
59. In mid-November 2021, the District issued its ER. (P-14; S-7).<sup>6</sup>
60. In the November 2021 ER, the student's general intellectual ability score (equivalent on the instrument used by the school psychologist to a full-scale IQ score) was 98. (S-7 at pages 14-15).
61. On achievement testing in the November 2021 ER, given the student's intellectual ability, the student showed no statistically-significant discrepant scores. Areas of relative weakness included the number matrices subtest (86), sentence writing fluency subtest (86), spelling subtest (87), the calculation subtest (89), math calculation composite (89), and broad written language composite (89). (S-7 at pages 15-17).
62. On behavior ratings for the November 2021 ER, the student's teacher rated the student consistently in the average range except for at-risk rating in the learning problems sub-scale and the school

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<sup>6</sup> The report was referred to using both party exhibits. Citation will be made only to the SD's exhibit (S-7).

problems index. The ratings of the student's father were consistently more elevated than the teacher's ratings. The student's father rated the student as at-risk in the following sub-scales: hyperactivity, aggression, conduct problems, depression, attention problems, and activities of daily living. The father rated the student as at-risk in the externalizing problems and behavioral symptoms indices. Neither rated the student with clinically significant behavior ratings. Based on these ratings, the student's behavior at home is markedly more complicated than at school. (P-11; S-7 at pages 17-18).

63. On attention ratings for the November 2021 ER, the student's teacher rated the student uniformly in the average range across all ratings. The student's father rated the student as very elevated in inattention, executive functioning, attention deficit hyperactivity disorder/inattentive type. The student's father rated the student as high average in defiance/aggression. The student's father rated the student as elevated on the restless/impulsive global index and the total global index. The student's father rated the student as average in all other ratings. Based on these ratings, the student's attention issues at home are more complicated than at school. (P-12 at pages 6, 8, 14; S-17 at pages 18-19).

64. Neither the private evaluator nor the school psychologist identified the student as a student with a health impairment such as ADHD or other behavior-related special education need. (P-3, P-14; S-5, S-7).

65. On executive functioning ratings for the November 2021 ER, the student's teacher rated the student uniformly typical across all ratings. The student's father rated the student as mildly elevated in organization of materials, and potentially clinically elevated in working

memory, task monitoring, and the cognitive regulation index. The student's father rated the student as typical in all other ratings. Based on these ratings, the student exhibits more dysregulation of certain elements of executive functioning at home than at school. (S-7 at pages 19-20).

66. The District's school psychologist concluded that the student does not have a disability and is not eligible for special education. (S-7 at pages 23-28; see generally NT at 411-497).
67. In late November 2021, at the end of trimester 1, in language arts the student had shown mastery or near-mastery all standards, except for grade-level decoding skills, which showed the need for remediation. (P-41 at pages 3-5).
68. In late November 2021, at the end of trimester 1, in mathematics the student had shown near-mastery in only one standard. All other standards assessed in the trimester showed the need for remediation. (P-41 at pages 9-10).
69. In December 2021, the District issued a notice or recommended educational placement ("NOREP"), confirming that the District did not find the student eligible under the terms of the IDEIA, recommending instead that the student receive accommodations in the regular education setting through a Section 504 plan. Parents rejected the NOREP. (P-15).
70. In December 2021, the District proposed a Section 504 plan, which the parents rejected. (P-16; S-8).
71. In January 2022, the District proposed a revised Section 504 plan, which parents rejected. (P-17; S-9).

72. By late January 2022, on middle-of-year curriculum-based assessments in English/language arts, the student was achieving at levels described as support, low-risk, and “college pathway” on assessments. On middle-of-year curriculum-based assessments in mathematics, the student scored basic and some-risk on certain assessments, and low-risk on a separate assessment. (S-11 at page 26).
73. In early February 2022, a Section 504 plan addendum process was rejected by the parents. (P-18; S-9).
74. In late March 2022, at the end of trimester 2, in language arts the student had shown mastery or near-mastery a majority of all standards, except for capitalization/punctuation/spelling and inferential questioning with text, where the student showed the need for remediation. (P-41 at pages 3-5).
75. In late March 2022, at the end of trimester 2, in mathematics the student had shown mastery or near-mastery in three standards, with a need for remediation in three standards: multiplication and division fluency, telling time to the nearest minute, representing and interpreting data in tables/charts/graphs. (P-41 at pages 9-10).
76. In late March 2022, the parents filed the special education due process complaint that led to these proceedings. (P-19; S-10).
77. In April 2022, the private evaluator updated her achievement testing of the student. Utilizing the evaluator’s full-scale IQ score for the student from the April 2021 evaluation (106), the student exhibited statistically-significant discrepancies in the essay composition subtest (75), sentence composition subtest (80), written expression composite (86), math fluency/addition subtest (87), math

fluency/subtraction subtest (89), and mathematics fluency composite (89). (P-21 at page 2).

78. Utilizing the evaluator's general intellectual ability score (111), additional areas of statistically discrepant scores include the math problem solving (91), mathematics composite (91), orthographic fluency subtest (93), math fluency/multiplication subtest (94), pseudoword decoding subtest (94), and numeric operations subtest (94). (P-21 at page 2).

79. In the April 2022 private evaluation report, the private evaluator identified the student as having specific learning disabilities in basic reading, reading fluency, written expression, mathematics problem-solving, and mathematics calculation. (P-21 at page 16).

80. In May 2022, the private evaluator responded by letter to parents' counsel, answering certain questions posed to her by counsel about her April 2022 report. (P-37).

81. In June 2022, at the end of trimester 3, in language arts the student had shown mastery or near-mastery in nearly all standards, except for determining and explaining the central theme in a literary text, where the student showed the need for remediation. (P-41 at pages 3-5).

82. In June 2022, at the end of trimester 3, in mathematics the student had shown near-mastery in two standards, with a need for remediation in four standards: identifying/classifying/comparing shapes and attributes, solving word problems involving measurement and estimation, interpreting data in tables/charts/graphs, and determining the area of a rectangle with addition and multiplication skills. (P-41 at pages 9-10).

83. The student’s standards-based assessments in English and language arts over the 2021-2022 school year show very consistent growth in levels of mastery and near-mastery. Levels of remediation grew slightly, but are also very consistent across the school year. (S-11 at pages 7-8).
84. The student’s standards-based assessments in mathematics over the 2021-2022 school year show very little growth in levels of mastery and near-mastery. Levels of remediation grew dramatically across the school year. (S-11 at pages 9-10).
85. The testimony of the evaluators—the private evaluator and the District school psychologist—were both accorded weight. These witnesses hold starkly divergent views of whether or not the student is eligible under IDEIA, but each of those positions, as laid out by these witnesses, is strong. Thus, as set forth below, it is the evidence outside of the strict assessment data and their opinions which provide insight into the result of this decision. (NT at 159-243, 411-497).

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness’s testimony. Where particular emphasis was accorded to a witness’s testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

## Discussion

### ***IDEIA/Denial-of-FAPE***

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), local education agencies are under a “child find” obligation, requiring states, through its local education agencies, to ensure that “all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated.” (34 C.F.R. §300.111(a)(i); see 22 PA Code §14.121). This provision places upon school districts the “continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.” *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009). See also 22 PA Code §14.122(a). The evaluation of children who are suspected to have a disability must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

Where a school district conducts an evaluation under its child-find obligation, that evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in

determining” whether the student is a child with a disability and, if so, what must be provided through the student’s IEP in order for that student to receive FAPE. (34 C.F.R. §300.304(b); 22 PA Code §14.102(a)(2)(xxv)). The evaluation must assess “all areas related to the suspected disability”, must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”, and must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and (34 C.F.R. §300.304, generally, and specifically at §§300.304(b)(2-3),(c)(4); 22 PA Code §14.102(a)(2)(xxv)).

Finally, in Pennsylvania, “to determine that a child has a specific learning disability, the school district or intermediate unit shall address whether the child does not achieve adequately for the child’s age or meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and scientifically based instruction appropriate for the child’s age or State-approved grade-level standards....” and “shall...(use as a potential identifying process)...a process that examines whether a child exhibits a pattern of strengths and weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual

ability and achievement, or relative to age or grade.” (22 PA Code §14.125(1),(2)(ii)).<sup>7</sup>

At the outset, one must be mindful of the instruction of the IDEIA set forth above that no single measure or assessment as the sole criterion for determining whether a child is a child with a disability. Where the question is eligibility for a specific learning disability, that measure/assessment would be the matrix of cognitive ability and achievement scores in terms of whether a student exhibits statistically-significant discrepancy between those scores. That is the necessary starting point in working toward a determination that a student has a specific learning disability. But other data—like the evidence presented here such as teacher input, curriculum-based assessments, and grades (in this case, standards-based grading)—must be examined to provide a complete picture of the student’s learning. Each area which where the parties dispute the student’s potential eligibility, namely reading, written expression, and mathematics, will be examined in turn.

*Reading.* The District’s ability/achievement matrix did not find that the student had scores that were statistically discrepant to a significant degree. (Finding of Fact [“FF”] 60, 61, 66). The private evaluation found that the

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<sup>7</sup> The “following areas” quoted in the citation include nine areas where Pennsylvania recognizes qualification for a specific learning disability, which include the areas which serve as the basis of parents’ claims—basic reading, reading fluency, written expression, mathematics problem-solving, and mathematics calculation. (22 PA Code §14.125(1)).

student's ability/achievement matrix scores were not markedly discrepant; on certain subtests, the student was significantly discrepant, more so when the cognitive profile accounted for executive functioning with the general ability index. (FF 34, 35, 38, 39). But even over time and using the general ability index, the student's ability/achievement profile does not support a strong conclusion that the student has deeply discrepant scores in reading.

The additional data would support a conclusion that the student does not have a specific learning disability in reading. None of the teacher input indicates any concern or difficulty with reading. (FF 53-56, 58). Overall, the student's performance in reading on curriculum-based assessments and screening, and on standards-based grading, were very consistent and strong. (FF 15, 16, 18, 19, 29, 30, 32, 41, 42, 52, 67, 72, 74, 81, 83). While parents argue that the private tutoring supported the student's reading levels, making up for deficits in the student's reading, the private evaluator opined that it would not be possible to parse out where the District's instruction in reading and the private tutoring in reading (see NT at 179-180, 229-232). The private tutoring certainly provided strong enrichment in reading, but tutoring of the student in reading is a minor point—the record strongly supports a conclusion that throughout the student's enrollment in the District, the student has never shown needs that would lead to identification of the student as student with any specific learning disabilities in reading.

*Written Expression.* The District's ability/achievement matrix did not find that the student had scores that were statistically discrepant to a significant degree. There were, however, relative weaknesses in certain areas of written expression—sentence writing fluency, spelling, and broad written expression. (FF 60, 61, 66). The private evaluation found that the student's ability/achievement matrix scores were almost uniformly discrepant in written expression, except for only one component of one subtest. (FF 34, 37). So with the private evaluation of April 2021, ability/achievement testing would appear to signal that the student might have statistically discrepant scores in written expression. Parents, however, did not provide this report to the District until August 2021 on the eve of the 2021-2022 school year. (FF 49).

The additional data, however, supports a conclusion that the ability/achievement matrix from the private evaluation, indicates more than a need for support in written expression, and points to a specific learning disability in written expression. The District's curriculum-based assessments/screening are generally for English/language arts, and sometimes specifically in reading, but is not broken out for writing. Therefore, those assessments/screenings cannot enter into this analysis nor into the District's understanding of the student's need in written expression.

In February for each of [the 2019-2020 and 2020-2021 school years], the student's standards-based grading showed the consistent need for

remediation in capitalization/punctuation/spelling. (FF 19, 31). Still, the student was performing admirably in the District's curriculum to this point and nothing in the literacy assessments pointed to explicit needs in written expression.

This changed in the fall of [2021], as the District was evaluating the student. By August 2021, the District had the April 2021 private evaluation with its ability/achievement scores in written expression. More pointedly, in October 2021, as part of the long-term substitute teacher's input for the evaluation, the student's teacher rated the student as below average in writing content and writing mechanics. And almost all of her specific, handwritten concerns were related to written expression and the student's needs in that area. This was confirmed in November 2021 with the input of the permanent classroom teacher, who also rated the student as below average in writing content, writing mechanics, and spelling. (FF 58). This constellation of factors—ability/achievement testing which pointed on one hand to statistically discrepant results in written expression, on the one hand, and relative weakness in multiple areas of written expression, on the other hand, as well as explicit concerns from multiple teachers about the student's needs in written expression—supports the conclusion that the District, in its November 2021 ER, should have identified the student as a student with a specific learning disability in written expression.

*Mathematics.* The District's ability/achievement matrix did not find that the student had scores that were statistically discrepant to a significant degree. There were, however, relative weaknesses in certain areas of mathematics calculation. (FF 60, 61, 66). The private evaluation found that the student's ability/achievement matrix scores were statistically discrepant in math problem-solving and the mathematics composite score. (FF 34, 36). Using the general ability index to represent the student's cognitive ability, no score in mathematics became statistically discrepant although the student's mathematics fluency composite became nearly statistically discrepant. (FF 39). Therefore, the ability/achievement analyses would seem to point to the potential need for support, stronger perhaps than in reading but not as strong as in written expression.

The additional data supports a conclusion that the District cannot be faulted for not identifying the student in the November 2021 as a student with specific learning disabilities in mathematics calculation and mathematics problem-solving. Eventually, though, by the time the 2021-2022 school year came to its end in June 2022, the student should have been identified as a student with these specific learning disabilities.

Over [the 2018-2019 and 2019-2020 school years], the student's curriculum-based assessments/screening results and standards-based grading showed no need for support in mathematics. (FF 15, 17, 18, 19). In [the 2020-2021 school year], there were mixed results at the outset of the

school year in the curriculum-based assessments/screening but on the middle-of-year and end-of-year assessments/screening, the student was performing well in mathematics. (FF 29, 30, 41). The standards-based grading in [the 2020-2021 school year] showed progress in the second trimester grading, but by the end of the school year, the third trimester grading showed that the number of areas requiring remediation, especially in standards requiring math calculation, markedly increased. (FF 32, 43).

All of this additional data, when taken together, indicates that the student may have been showing some degree of academic difficulty in mathematics calculation near the end of [the 2020-2021 school year] but the student's performance overall does not support a finding that the District should have identified the student as a student with any learning disability in mathematics.

In the beginning of [the 2021-2022 school year], things began to change, albeit without explicit clarity, in the student's assessments in mathematics. In her input for the November 2021 ER, the long-term substitute teacher found that the student was performing below average in math reasoning; the permanent teacher, however, rated the student as average. (FF 56, 58). The curriculum-based assessments/screening and standards-based grading both showed signs that the student was performing below expectations in mathematics, but these measures came almost

contemporaneously with, or just after, the issuance of District's ER. (FF 52, 68).

While one might point to this input and this group of assessments/grading in the fall of 2021 as triggering a finding that the student was exhibiting specific learning disabilities in mathematics, it is the considered opinion of the hearing officer that this cannot be the case. It was really only in this two-month period—October and November 2021—that a quantity of data was surfacing in that potential regard. And even with some findings in the ability/achievement scores from the private evaluation and ER, there was not yet any 'momentum' in the data. This is supported by the curriculum-based assessment/screening and standards-based grading in January 2022, where both were less definitive and show mixed results in the student's achievement in mathematics. (FF 72, 75).

By June 2022, at the end of the 2021-2022 school year, however, the student's achievement in mathematics clearly shows that the student's up-and-down pattern of performance in mathematics had taken a dramatic turn. There was no end-of-year curriculum-based assessment/screening data presented on this record, but the standards-based grading shows that, going into [2022-2023 school year], the student is eligible for special education as a student with specific learning disabilities in mathematics calculation and mathematics problem-solving. (FF 82, 84). This dramatic decline in the

student's performance provides the in-school data that reflects into the private evaluator's understanding of the student's needs in mathematics.

Accordingly, the student is not eligible as a student under the IDEIA with any specific learning disabilities in reading. As of November 2021, the District should have identified the student as having a specific learning disability in written expression and, as of June 2022, as having specific learning disabilities in mathematics calculation and mathematics problem-solving.

### ***Section 504/Denial-of-FAPE***

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).<sup>8</sup> The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

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<sup>8</sup> Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

Therefore, the foregoing analysis is adopted here— the student does not have any specific learning disability in reading but should have been identified, as of November 2021, as a student with a specific learning disability in written expression and, as of June 2022, as a student with specific learning disabilities in mathematics calculation and mathematics problem-solving.

### ***Compensatory Education***

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

The evidentiary scope of claims and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015).

In terms of the nature of the compensatory education, the G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most

cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective.

In this case, parents in their complaint seek an identified quantity of hours of compensatory education hours. Therefore, parents seek a quantitative, hour-for-hour compensatory education award.

The two areas where the student might be awarded remedy are for a denial-of-FAPE for not identifying the student, in November 2021, as a student with specific learning disability in written expression and, in June 2022, as a student with specific learning disabilities in mathematics calculation and mathematics reasoning.

As will be set forth more fully below, parents will not be reimbursed for private tutoring in written expression. Therefore, compensatory education will be awarded as a remedy in that regard. With the issuance of the District's ER in mid-November 2021, the student should have been identified as a student requiring specially-designed instruction in written expression. Given approximately one month to allow for the IEP team to meet and to craft an IEP (which would include the school break for the Thanksgiving holiday), by mid-December 2021, the District should have had an IEP in place to provide special education to the student for written expression. Therefore, through the end of the 2021-2022 school year approximately 24 school weeks passed without this programming in place. With a quantitative award of one hour of compensatory education per school week for instruction in written expression, the student will be awarded 24 hours of compensatory education for this denial-of-FAPE.

The student is not entitled to remedy for the lack of an identification in mathematics. Only at the end of the school year, with the third trimester standards-based grading results in mathematics, does the entire

constellation of evidence coalesce around this finding. In the order accompanying this decision, the student's IEP team will be ordered to meet to craft an IEP, and the goals/specially-designed instruction can be crafted to meet the student's needs in mathematics. But there has been no denial-of-FAPE in this regard prior to June 2022.

### ***Reimbursement***

Parents claim that they should be reimbursed for tutoring expenses which, in their view, they were forced to undertake as a result of the District's alleged omissions. Long-standing case law and the IDEIA provide a framework for the potential tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). This framework involves the three-step Burlington-Carter analysis. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)). The Burlington-Carter analysis will be utilized to examine the parents' claim for reimbursement of tutoring expenses.

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's FAPE obligations to see whether the school district has met those obligations. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the placement or services undertaken by the parents as a result of the school district's denial of FAPE. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties to see if the equities might, or should, impact any reimbursement remedy.

Here, the parents have met their burden of persuasion at the first step of the Burlington-Carter analysis for the District's denial of FAPE by not identifying the student as eligible under the IDEIA as a student with a specific learning disability in written expression. The more intricate consideration is whether the parents have met their burden of persuasion at the second step of the Burlington-Carter analysis.

At step two of the Burlington-Carter analysis, the parents services must be appropriate for the student given the student's needs. Here, the parents have not met their burden of persuasion that the private tutoring materially supported the student's needs in written expression. The private tutoring was heavily focused on the student's reading ability. While there was some element of spelling and some writing involved in the reading program utilized by the private tutor, there is very little in this record about how the tutor worked with the student in written expression. (P-38 at pages

1-6). The private tutor testified to some degree of instruction in writing, but testimony in this regard was minimal as compared to her testimony about instruction in reading and provided no detail about the instruction in writing. (NT at 257, 266, 283-285). Too, the invoices for the tutoring are simply noted as the number of hours and hourly rate; there is no detail the tutor's services address her work in reading, or writing, or both (P-38 at pages 11-34). Taken in its entirety, then, there is not enough evidence in the record to indicate the type of instructions or services which the tutor provided in written expression, at least to the level that it would support reimbursement for global tutoring services.

Therefore, the appropriateness of that tutoring cannot be gauged, and the parents' claim for reimbursement for those services fails at step two of the Burlington-Carter analysis. Still, the parents are not without remedy, as compensatory education will be awarded.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Cumberland Valley School District did not deny the student a free appropriate public education by not identifying the student as eligible for special education as a student with specific learning disabilities in reading.

The school district denied the student a free appropriate public education by not identifying the student, as of November 2021, as eligible for special education as a student with a specific learning disability in written expression. The student is awarded 24 hours of compensatory education, for the reasons set forth above.

The school district denied the student a free appropriate public education by not identifying the student, as of June 2022, as eligible for special education as a student with specific learning disabilities in mathematics calculation and mathematics problem-solving. Given the chronologies involved, there is no remedy necessary for this denial of a free appropriate public education.

Additionally, as soon as possible the student's IEP team shall meet to craft an IEP with annual goals and specially designed instruction to support the student's needs in written expression, mathematics calculation, and mathematics problem-solving, with a view to having the IEP in place for the outset of the upcoming 2022-2023 school year.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

07/25/2022