

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:

24951-20-21

Child's Name:

N.B.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles Jelley Esq.

Date of Decision:

11/19/2021

THE PARENT'S CLAIMS AND THE DISTRICT'S RESPONSE

The Parents contend the District violated the Individual with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act when it allegedly failed to provide the Student with a free appropriate public education (FAPE).¹ In particular, the Parent argues the recent reevaluation is insufficient; the individual education programs (IEPs) and positive behavior support plans (PBSP) for the past two-plus school years are inappropriate. The Parents next contend the District failed to implement the IEPs and inappropriately disciplined the Student. The District asserts that at all times relevant, the Student received a FAPE. After a careful review, I find in favor of the Parents in part and in favor of the District in part for all of the following reasons.

STATEMENT OF THE ISSUE

Did the District fail to provide a free appropriate public education during the 2019-2020 school year? If yes, is compensatory education appropriate relief?

Did the District fail to provide a free appropriate public education during the 2020-2021 school year? If yes, is compensatory education appropriate relief?

Did the District fail to complete a full comprehensive evaluation of the Student's unique needs? If yes, is an Independent Educational Evaluation appropriate relief?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parent also makes denial of education claims under Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P- p.) followed by the exhibit number, School District Exhibits attached to the Motion to Dismiss will be marked as (Motion to Dismiss Exhibit A- p.) followed by the exhibit letter, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

The 5th Grade to 6th Grade 2019-2020 IEP and Progress Data

1. In March 2019, of 5th Grade, the IEP team met to develop the end of 5th Grade to 6th- grade IEP. (2019-2020) The IEP identifies the Student as a person with an "other health impairment (OHI) due to a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) [who, because of that disability] needs specially-designed instruction (SDI)." (S-2).
2. The Special Consideration section of the IEP provides that the Student's behavior impedes learning. When an IEP team concludes that a Student's behaviors impede learning, the District's standard IEP form provides the following: "The IEP team must develop a Positive Behavior Support Plan. (PBSP) that is based on a functional assessment of behavior that utilizes positive behavior techniques. Results of the functional assessment of behavior may be listed in the Present Levels section of the IEP with a clear measurable plan to address the behavior in the Goals and Specially Designed Instruction sections of the IEP or in the Positive Behavior Support Plan (PBSP) if this is a separate document that is attached to the IEP. A Positive Behavior Support Plan and a Functional Behavioral Assessment form are available at www.pattan.net (S-2 p.4). The IEP team did not complete a functional assessment of behavior (aka functional behavior assessment (FBA)).
3. The IEP calls for the Student to receive learning support. The Student participates in all aspects of the general education curriculum with specially designed instruction (SDI). The Student receives up to 30 minutes per day of previewing and reteaching inside the general education classroom. In particular, the Student receives another 30 minutes per day of itinerant emotional support services and up to 60 minutes per week of social skills training outside of the regular education classroom. The IEP team suggested that the Student utilize a

behavior support plan across all environments throughout the school day. (S-2 p.5 S-2 p.23).

4. Using the regular education core reading program called "Wonders" the Student receives instruction on the 5th grade level in the regular education setting. The Student's present levels in reading place the Student's reading at below grade level. (S-5 p.5).
5. The STAR Reading Assessment was administered on September 10, 2018, and January 3, 2019. The STAR reading test is a computerized test used to determine independent reading levels. An independent reading level is a passage the Student can read with no assistance. During the September 2018 assessment, while in 5th grade, the Student earned an independent reading level score of 2.7. In January 2019, the Student earned a grade level equivalent score of 2.2, comparable to the 2nd month of the 2nd-grade year. Based on the STAR, the Student's estimated independent reading range for book selection ranged from 2.10-3.10. This scoring range implies that the Student can choose books that are neither too easy nor too hard. (S-5 pp.4-6).
6. The Student took the Pennsylvania State Standardized Assessment (PSSA) in 4th Grade. The PSSA measures progress towards grade-level standards in English Language Arts (ELA), including reading, grammar, and writing skills. The Student scored "Below Basic" with a score of 871. To score proficient, Student would have to earn a score of 1000 or better. (S-5 p.5).
7. The PSSA assessment is broken into different sub-skill reporting categories. The Student earned the following scores: Literature Text skills: 6 out of 17 possible points, Informational Text skills, 8 out of 21 possible points, Writing skills, 1 out of 8 possible points, Language skills: 2 out of 9 possible points. (S-5 p.5).

8. The Student's 5th-grade report card states the Student's for the first and second marking period of 5th grade was a "1." A score of "1" means the Student is performing below the 5th-grade level. On the subcategory of Reading Comprehension, the Student again earned a "1." On the subcategory of Fluency, the Student scored a 1 in both marking periods. On the subcategory of Word Study, the Student scored a "1." (S-5 p.5).
9. The Student's IEP Reading Goal called for the Student to read and respond to the comprehension questions scoring at least 80% on 3 consecutive bi-weekly probes. The Student's annual goal is linked to the Pennsylvania Standards number CC.1.2.4.L.² The Student's progress monitoring scores report the Student earned the following scores: 2nd grade level-100%, 90%, and 100% on 3rd-grade level-materials scoring 90%. After reviewing the data, the IEP team decided that the Student's 4th to 5th-grade IEP reading goal would stay the same due to Student's third-grade comprehension level. (S-5 p.5).
10. The present level reports the Student participates in a small group Corrective Reading program. This group reading instruction takes place during fifth Grade RTI for 30 minutes every day. Corrective Reading is designed to promote reading accuracy (decoding), fluency, and comprehension skills of students in grades 4-12 who are reading below their grade level. The Student earned a score of 23.1% on the Corrective Reading assessment. (S-2 p.8).

² CC.1.2.4.L is a reference to the Standards Aligned System (SAS), developed by the Pennsylvania Department of Education. SAS is a comprehensive, researched-based resource to improve student achievement. CC.1.2 in particular targets reading Informational text all students read, understand, and respond to informational text – with emphasis on comprehension, making connections among ideas and between texts with focus on textual evidence at the 4th grade level. Standards Aligned System
<https://www.pdesas.org/default.aspx>

11. The Student struggles with writing and spelling unfamiliar words. The student scored a "2" on grade-level standards on the first two report cards. Based on the Student's then-current present levels, the IEP team decided that the Student's writing IEP goal would stay the same (S-2 p.6).
12. The Student participates in all parts of the general education math curriculum. During the 2018-2019 school year, the District utilized GoMath. The present levels provide that the Student requires extra time to complete math assessments. The present levels state the Student also requires test questions to be read aloud and requires a calculator or multiplication chart for basic math facts. (S-2 p.5-7).
13. On the 4th-grade Math PSSA assessment, the Student earned a "Below Basic" score of 819. A score of 1000 is proficient. The Student earned subskill scores of 9.09% in Number and Operations-Fractions, 0% in Number 12.50% Operations, 46.15% in Base Ten –Operations and 19% in Algebraic Thinking, 4% in Geometry Measurement and 10% in Data. (S-2 pp.6-7). These scores reflect the Student is performing below state grade-level standards.
14. On September 25, 2018, the Student took the Pennsylvania Classroom Diagnostic Tools (CDT). The CDT provides a snapshot of which students may struggle or exceed grade-level skills. CDT data provides information to guide instruction specifically targeted to meet students' strengths and areas of need, above or below grade level. The minimum CDT scale score is 400, and the maximum scale score is 2000 for all CDT assessments. The Student's scores are as follows: Total Test: 531 (red range) Numbers and Operations: 434 (red range) Algebraic Concepts: 578 (red range) Geometry: 651 (red range) Measurement, Data, and Probability: 446 (red range). (S-2 p.7). Scores in the "red zone" indicate below grade performance.

15. The IEP Math Goal was linked to the state standards. The IEP states, "Given a math computation problem, [redacted] will solve multiplication problems up to 2 by 2 digits scoring at least 80% on 3 consecutive bi-weekly probes. (CC.2.2.4.A.1) ³ The Student's Math present levels report that the Student earned the following progress monitoring scores: 0, 90, 20, 50, 0, 0, 100, and 100. After reviewing the eight (8) data points, the IEP concluded that the "Math" goal should stay the same. In the spring of 5th Grade, the present levels state that the Student was still working on multiplying one digit by one digit and has "not progressed." (S-2 p.14).

16. Behaviorally the Student struggled to stay focused and struggled to work independently. The Student uses task avoidance when given non-preferred assignments. The IEP includes a behavioral goal to stay on task with no more than two (2) prompts every 10 minutes. The present levels state that the Student needed between two (2) to six (6) adult prompts every 10-minutes to complete an academic task. (S-2 p.8).

17. The Parent input states that he thinks misbehavior occurs because the Student does not want to look "stupid" in front of peers. The Parent also stated that he believes the Student will first refuse help and then act out when problems arise. The IEP team concluded that the Student's disability of "other health impairment" (OHI) - ADHD combined- affects the Student's ability to focus on instructional tasks, complete grade-level instructional tasks, and retain information." (S-2 pp.8-9).

18. The present levels explain that the Student does not focus in class, does not do what is being asked for, lacks knowledge of what or how to do it, or does not want to do it. The IEP team decided that the Student's

- 3 Standard CC.2.2.4.A.2 calls for students to develop and/or apply number theory concepts to find factors and multiples at the 4th grade level.
<https://pdesas.org/Standard/Detail?linkStandardId=0&standardId=162208>

OHI disability also affects math computation skills, reading comprehension, and writing skills. (S-2 pp.8-9).

19. The present levels describe how the Student's ADHD combined impairs the Student's ability to follow directions, complete work on time and affects social skills. When provoked, the present levels acknowledge that the Student will engage in argumentative behavior or shut down completely. (S-2 pp.8-9).
20. The IEP team decided that the Student needs to improve writing, spelling, and grammar skills and improve the content produced in written assignments. The IEP team also decided that the Student needs to improve math computation and problem-solving skills. The team recommended using a calculator for math, extended time to complete some assignments/tasks, a reduced spelling list (10 words or less), adapted assessments, adapted spelling and math homework assignments. Finally, the team decided that the Student needed a behavior support plan to reinforce expected behaviors and develop social skills. (S- p.9).
21. As a rising 6th grader, the IEP included four broadly stated goals. The reading goal called for the Student to "read and respond to comprehension questions" at the 5th-grade level. The math goal focused on "multiplication problems up to 2 by 2 digits" at the 4th-grade level. The writing goals targeted writing "a paragraph including an introduction sentence (1 pt.), 3 supporting detail sentences (3 pts.), and a conclusion sentence (1 pt.) using proper grade level spelling and grammar" at the 4th-grade level scoring at least of 4/6 points. (S-2 pp.14-16). The IEP included a section titled "Program modification and SDIs" titled "Positive
22. Support Plan. (PBSP). The PBSP SDIs included 15 "Antecedent Behaviors," eight (8) replacement behaviors, 13 "Consequence"-reinforcement procedures to follow when the Student performs

replacement behaviors, and 11 "Consequence" strategies to follow when the Student performs a behavior of concern. (S-2 p.p.17-18). The PBSP does not include a goal statement, an expected level of achievement, baseline data or a progress monitoring timeline.

23. The IEP identifies 11 different SDIs. Two SDIs support a "Positive Behavior Support Plan" like the "Use of verbal reinforcement" when the Student displays on-task behaviors. (S-2 p.19). The remaining SDIs provide for the use of a calculator, extended time, pre-teaching, reteaching, a multiplication chart and a 10-second wait time. (S-2 p.19). The SDIs did not include a modified spelling list or any homework modifications listed in the present levels. (S-2 pp.18-20).
24. Although the present levels note the Student receives social work, social skills support by the guidance counselor, and private counseling during the school day, the IEP does not include any related services. (S-2).
25. The IEP does not include a counseling or social work goal or any SDIs supporting social skills development. (S-2).
26. The IEP does not describe how, where or when the English Language Arts (ELA) and Math skills are previewed or retaught during the school day. (S-2).
27. The IEP does not describe how or when the Student receives 60 minutes of social skills training outside of the regular education classroom. (S-2).

THE PROGRESS MONITORING REPORTS

28. The February 2020 6th grade to November 2020 7^h Grade Progress Monitoring time on task data states that the Student needed between 3 to 6 prompts every 10 minutes to stay on task. (S-3 p.2).
29. The February 2020 6th Grade to November 2020 of 7^h Grade Progress Monitoring data for Reading Comprehension states that the Student's scores ranged from 30 % to 60 %. (S-3 p.4).
30. The February 2020 6th Grade to March 2020 of 6^h Grade Progress Monitoring Math data states that the Student earned a 60% to 80% on addition problems with one variable. The progress report does not include data for April, May or June 2020, when the school was closed.
31. The September 2020 7th grade progress monitoring data on "Adapted Adding like and unlike rational numbers" states that the Student earned a 53% on a quiz. The progress monitoring narrative then states the grades appear in the grade book "class curve." The IEP does not identify that the Student's grades would be "curved." (S-3 pp. 5-6). The IEP does not call for the Student to receive instruction on addition problems, and the IEP does not endorse "curving" grades. (NT *passim*).
32. In October 2020 of 7th grade, the Student earned a "0 %," a "53%," and another "0%" on three Math quizzes. This progress monitoring datasheet does not explain if the three grades were "curved." The November 2020 progress narrative statement reports that the Student struggled in the hybrid environment and missed 10-days of school. (S-3 p.6).
33. The Students' 2019-2020 Third Quarter Writing Report card states that the Student earned a "1" indicating "Below Grade Level" performance in Reading, Reading Comprehension, Fluency, Work-Study, and Writing. The Student next earned a score of "N/A" meaning "Not assessed during marking period" in the Math Numbering system, Ratios and Proportional relationship, Statistics and Probability and a "1" in Expressions and

Equations. The Student also earned a "N/A" in Social Studies and a "1" in Science. (S-7).

THE 2019-2020 7th GRADE IEP

34. On February 19, 2020, the Parent and the District met to develop the 2019-2020, 6th to 7th Grade IEP. (S-5).
35. The present levels repeat the description of the Student's participation in regular education. The IEP reports that the Student continues to receive up to 30-minutes per day of previewing and reteaching inside the general education classroom. The present levels then note the Student receives 30-minutes per day of itinerant emotional support and up to 60-minutes per week of social skills training outside the regular education classroom. The IEP finally notes that the Student requires a behavior support plan across all school environments. (S-5 p.5).
36. The present levels report recently updated STAR Reading data. The STAR scores included another student's name; therefore, the STAR data is not reliable. (S-5 p.5 paragraph 3, line 2).
37. The present levels include the results of an Oral Reading Fluency (Orf) Assessment. The Orf narrative provides that the Student "can read aloud" from 142 to 193 words correct per minute at 100% accuracy. The report then states that the scores are below the 6th Grade reading fluency/accuracy level. The present levels then state that the end of the 6th-grade benchmark is 122 words per minute (WPM). Later on, the narrative provides that the September 2019 to January 2020, the Student WPM scores ranged from 40 WPM to 81 WPM. (S-5 pp.5-6). The inclusion of another Student's name in the scoring statement and the conflicts in reporting the Student's words correct per minute score range, and the explanation of the Orf reading scores makes this data useless. (NT *passim*).

38. In September 2018, the Student earned a "Below Basic" score on the Classroom Diagnostic Test (CDT) to assess the Student's math skills. The CDT is a standards-based, criterion-referenced assessment that provides students, parents, educators and citizens with an understanding of student and school performance related to the attainment of proficiency of the academic state standards. In January 2020, the Student earned another "Below Grade" level score. (S-5 p.6).
39. The IEP team identified the Student's needs to improve writing, spelling, grammar, math computation and problem-solving skills. (S-5 p.10).
40. During 6th Grade, the Student was disciplined 11 times. (S-5 p.9).

THE ANNUAL GOAL STATEMENTS

41. The IEP repeats the previous school year's on task for 10-minutes with adult prompting behavioral goal. The IEP changes the ELA reading goal from a 4th-grade level to match state standard CC 1.2.6.1. State standard CC 1.2.6.1 targets comprehending non-fiction and informational independently. The IEP Math goal references state standard CC 2.2.6.B., the 6th-grade state standard. The CC 2.2.6.B.2 standard calls for the Student to solve one-variable algebraic equations for inequality at the 8th-grade level. The IEP writing goal references the 4th-grade state standard CC.1.4.4. The writing goal calls for the Student to write a paragraph using proper grade-level spelling and grammar at the 4th-grade level. The IEP then repeats the program modification and SDIs for a PBSP. The PBSP and the behavioral SDIs repeat the same Antecedent prevention strategies, Replacement Behavior, Consequences reinforcement strategies listed in the previous IEPs. (S-5 p.19).
42. The IEP team then repeated the academic SDIs from the previous IEP. (S-5).

43. Like the February 2019-2020 IEP identifies "Learning Support" as the "Type of special education supports." (S-5 p.22). The IEP does not state who, when or how the Student receives "emotional support" for 30-minutes each school day. (S-5 p.5).

THE FEBRUARY 2020 REEVALUATION

44. The psychologist administered the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) to assess the student's overall intelligence. The WISC-V Full-Scale IQ is derived from a combination of ten subtest scores and is considered the most representative estimate of global intellectual functioning. Given the Student's significant pattern of testing discrepancies, the psychologist elected to use the General Ability Index (GAI) instead of the Full-Scale IQ to estimate the Student's overall ability. The GAI factors out the Student's significantly discrepant low scores and estimates an individual's abilities based on the verbal comprehension, visual-spatial and fluid reasoning composite scores. The Student's general cognitive ability GAI score of 81 falls in the Low Average range of intellectual functioning. The psychologist concluded the Student's testing profile indicates a significant and meaningful difference between the Student's ability to reason with and without words. The Student's Verbal Comprehension skills are a significant weakness. (S-4 p.3).
45. The psychologist administered the Wechsler Individual Achievement Test III (WIAT-III) to assess the student's overall achievement. The Student's Standard Scores (SS) on WIAT-III ranged from a low of 74 to a high of 101. The Student's WIAT-III percentile rank scores ranged from low at the 3rd percentile to high at the 42nd percentile. Although 10 of the 16 WIAT-III subtest scores were identified as a "Weakness," using a 1.5 standard deviation of measurement as a cut score, the psychologist

concluded the Student did not qualify as a student with a learning disability. (S-4 p.3).

46. The Student's 4-Sight Reading and Math score fell in the "Below Basic" range. (S-4 pp.3-4).
47. The Student's early elementary Dynamic Indicators of Basic Early Literacy Skills (DIBELS) and Group Mathematics Assessment and Diagnostic Evaluation (GMADE) reading scores fell in the "Below Basic" and "Risk" levels. The Students STAR reading scores ranged from less than first-grade skill levels at 0.8-grade equivalency, meaning eight months, to 3.6-grade equivalency (third-grade sixth month). (S-4 pp.4-7).
48. When the Student returned to in-person instruction, the District collected data to determine if the Student was eligible for COVID-19 Compensatory Education Services (CCS) in Reading, Writing, Math, and Behavior. After reviewing the "Post Reopening Baseline collected on September 1 through September 18, 2020, to the six-week data collected from September 22, 2020, to October 30, 2020, the District staff checked the box indicating the Student was not eligible for COVID Compensatory Services in Reading and Writing. Although Math and Behavior data was collected, the District staff left the "Yes" or "No" box unchecked. Later on November 10, 2020, the IEP team met and concluded that due to the Student's inconsistent test results and the failure to complete work during hybrid learning and ongoing behavioral issues, the Student was not eligible for CSS makeup services (S-6 pp.7-8).

THE NOVEMBER 2020 IEP REVISIONS

49. On November 10, 12, 19, 23, 2020, the District contacted the Parent to arrange for a video conference IEP meeting. On November 24, 2020, the Parties held a telephone IEP meeting. The November 2020 IEP included

scores from the 7th Grade CDT. The Student's CDT "Reading" scores fell in the "below proficiency" level. The Student's CDT Math and Science scores were not calculated as the Student could not complete each section in the designated time frame. (S-9 pp.6-9).

50. The November 2020 IEP revision summarized the Student's end-of-year performance before, during and after the school closure. In the first quarter of 7th Grade, the progress report states the Student struggled during hybrid learning. The IEP summary reports the Student's initial algebra baseline score of 50% dropped to 30%. (S-9 p.9). The Writing progress monitoring data states that due to "changing grading criteria," the IEP team could not report a baseline measure. (S-9 p.9).
51. The writing goal in the November 2020 IEP provides "Given a writing prompt or topic, the Student will write a paragraph including an introduction sentence (1pt), 3 supporting detail sentences (3pts), and a conclusion sentence (1pt) and using proper grade level spelling and grammar (1pt) scoring at least 4/6 on probes two times a month." The progress monitoring report states the Student did not meet the goal and needed to demonstrate more consistent results." The new goal required the Student "to produce an essay of varying length (1-5 paragraphs) with a focus on organizing ideas, concepts and/or information, using transitions to create cohesion, clarifying the relationship among ideas/concepts and providing a concluding statement scoring 3 out of 4 (75%) on the PSSA writing rubric on consecutive probes given twice per month. (CC.1.4.8.D)." CC.1.4.8: is the 8th Grade regular education writing standard. (S-10 pp.10-12). The proposed goal far exceeds the Student's writing ability. (NT *passim*).
52. Although the IEP team concluded the Student needed to improve written expression, spelling, grammar, math computation and problem-solving skills. The IEP instead included a behavioral, math-algebra, - and writing

goal. (S-9 pp.16-20). The IEP continues to note the Student needs extended time to complete classroom, local and state-wide tests. (S-9 p p.8-9, p.13).

53. The November 2020 IEP added a new SDI calling for the Student to take frequent 1 to 3-minute breaks during instruction. (S-9 p.22). The progress monitoring did not report data on this SDI. (S-10).

THE JUNE 14, 2021 FUNCTIONAL BEHAVIORAL ASSESSMENT

54. On June 14, 2021, the District's psychologist completed a functional behavioral assessment (FBA). (NT 199-200). The FBA notes the District arranged for the Student to take the medication [redacted] during the school day. Although the medication is administered in school, no one on the team knows why the Student is taking the [medication]. (NT 201, NT pp.278-281).
55. Rather than include an observation of the Student's behaviors in the classroom, the psychologist used disciplinary records to construct the FBA. (NT 204).
56. Under the general heading of "Identifying Problem Behaviors," the FBA datasheet lists the following six (6) "Problem Behaviors," 41 "Absences," 25 "Office Referrals.," The office referrals included 16 incidents of "Non-Compliance/Defiance," 1 incident of "Physical Aggression," 2 referrals for "Skipping Class," 1 for "Disrespect," and 1 referral for "Inappropriate Display of Affection." The "Inappropriate Language" 2, "Inappropriate Display of Affection," relates to the Student's involvement in [an inappropriate sex act on school property]. The FBA lists five (5) instructional strategies used to manage problem behaviors and six (6) strategies to teach expected behavior. The FBA identifies Reading, Math and Writing as tasks not presented at the Student's instructional level in the core class. The FBA next reports that the Student has difficulty with self-regulating skills, organizing time, completing assignments and

transitions. The FBA lists "Spending nights at various relatives," "Academic Failure," Missed Medications at school as of 5/10," "Conflict at school," Past trauma," Reprimands/Correction," "With Peers in large group classroom," "Non-preferred activity," "Other * [Inappropriate sexual behavior]," as "Antecedents. The "Other * [Inappropriate sexual behavior]" notations reference a comment that "/ school when [redacted] isn't being supervised [redacted] has ADHD, and it gets on her teachers' nerves." (S-9).

57. The FBA reports that "Adult Attention," "Peer Attention," most likely maintain the behavior. The FBA suggests that the Student avoids "Task Demand-non-preferred activities" Finally, the FBA lists nine (9) consequences that were tried to manage the problem behaviors, including "timeout," "referral to a social worker," "office referrals," five (5) in-school suspensions and six (6) out of school referrals. The psychologist noted she did not conduct a Student observation. (S-13).
58. As part of the FBA, the teachers completed a Behavioral Assessment System for Children ("BASC"). Hyperactivity was identified as a clinically significant behavior by two (2) teachers. (S-13 at 12, NT 208). Two (2) teachers through the BASC identified depression as a clinically significant behavior within the FBA. (S-13 at 12, NT 209).
59. The FBA BASC did not identify depression as a behavior that impeded learning (NT 209-10, See also S-13 at 2).
60. Inattention as a clinically significant behavior. (S-13 at 12, NT 210).
61. Inattention was not identified as a problem behavior within the FBA (See S-13 at 2).
62. Two (2) teachers identified Adaptability skills as clinically significant behavior. (S-13 at 12, NT 211).
63. During cross-examination, the District's psychologist conceded that Participation Skills should have been identified as an area of need.

Participation Skills are not identified as an IEP need. (NT 211-214 See also S-13 at 4).

64. Despite the Student's high BASC profile, the School District psychologist did not identify social skills as a social skills deficit. (NT 214-214; See S-13).
65. The School Psychologist did not discuss with the team whether organizational skills deficits should be identified as an area of need in the Behaviors of Concern section of the FBA. (NT 217; S-13 at 5). The FBA did not include an analysis of the Student's sexual behavior. (See S-13).
66. Although the District's social worker worked with the Student on anger, depression and withdrawal behavior that interfered with the Student's ability to get through the school day, the psychologist did not ask [Student] to participate in the FBA assessment. (NT pp.292-293).

THE STUDENT'S 2020-2021 FOURTH QUARTER REPORT CARD GRADES

67. As the school year ended, the Student earned failing grades in Technology, Language Arts, World History, Math, and Art. (NT 1-12, Student's Report Card at P-2). The Student grades ranged from 55% to 72%. (P-2). A grade of 55 is considered failing, while a score of 72 was a "C." When the school year ended, the IEP team did not consider extended school year services or regular education summer school. (NT *passim*).

STUDENT DISCIPLINE PROFILE

68. During the 2020-21 school year, the Student was placed on in-school suspension on six (6) school days. (S-17 pp.30-31).
During the 2020-21 school year, the Student was taken out of class and placed in timeout 11 times. (S-17). Timeout is not listed as an SDI or a PSBP strategy. (S-17 pp.22-24).

BEHAVIORAL HEALTH AND SOCIAL WORKER SUPPORTS

69. From September of 6th Grade to March 2020, the Student participated in a 30-minute group counseling session with the social worker and six other peers before the shutdown. (NT pp.305-308). The Student also meets with two additional private behavioral health counseling for 45-minutes two times per week during the school day. (NT pp.305-308, N.T.298-99).
70. The social worker sponsored a regular education behavior check-in card that was not part of the PBSP or the behavior goal. (NT. pp.310-313). The social worker did not collect data or monitor the Student's behavior. (NT *passim*).
71. The District's social worker knew that during 7th Grade, the Student stopped receiving the two in-school private behavioral health counseling sessions per week due to billing or insurance coverage issues. (NT 296).
72. The social worker was aware of the sexual acting out behavior [on school property]. (NT 298-300). The social worker did not discuss the sexual acting out behavior.

GENERAL LEGAL PRINCIPLES

Here the Parent, the party requesting the hearing, shoulders the burden of proof on the denial of FAPE claims.⁴ I now find the testimony and the records presented provide credible evidence about the events in dispute. I also find the testimony and Exhibits permit me to draw inferences and make a fine-grained analysis of the facts necessary to determine when the District either knew or should have known when the denial of a FAPE occurred. The Findings of Fact-above and the Discussion and Analysis below constitute the written

⁴ In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. In the role of fact-finders, special education hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *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).

Findings of Fact and Conclusions of Law required by the IDEA and state law. (20 USC § 1415(h)(4), 22 PA Code Chapter § 14.162).

THE IDEA GUARANTEES A FREE APPROPRIATE PUBLIC EDUCATION

Under the IDEA, a state receiving federal education funding must provide children within that state a FAPE. A FAPE includes special education and related services designed to meet their unique needs. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 756 (3d Cir. 1995) (quoting 20 U.S.C. § 1400(c)). "A school district provides a FAPE by designing and implementing an individualized instructional program outlined in an Individualized Education Plan (IEP), which must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the Student's intellectual potential." *PP v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 729-30 (3d Cir. 2009) "Meaningful benefit" means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal educational progress. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *KD. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018). 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2). Annually after reviewing the student's continuous progress monitoring data, districts must adjust, modify and revise the IEP goals, related services and SDIs to meet the student's then-current circumstances. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

A proper assessment of whether a proposed IEP meets the above FAPE standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010)(also known as the "snapshot rule"). If parents believe that the school district is not providing a FAPE for their child, they may file a due process complaint and request an impartial administrative due process hearing. 20 USC § 1415(f). If either party is aggrieved by the findings and decision reached

after such a hearing, the IDEA further allows that party to file a civil suit in state or federal court. *Id.*

PRIOR WRITTEN NOTICE

When a district proposes to take "action" or refuses to take "action," the district must provide the parents with prior written notice (PWN). PWN must give parents the information and time to understand the consequences of the proposed "action." 73 Fed. Reg. 73,008 (2008), 34 CFR 300.300(b)(4)(i). 34 CFR § 300.503(b)(1) through 34 CFR § 300.503(b)(7).

IDEA EVALUATIONS AND ASSESSMENTS

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, districts 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." 20 USC § 1414(b)(2)(C). These intertwined subparts of the IDEA regulations impose workman-like criteria that school officials must meet when evaluating a child to determine if the child is IDEA eligible.

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 CFR § 300.305(a)(1).

Second, based on their review of the 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." § 300.305(a)(2)(c). Under this step, 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 provided by the parent." See § 300.304(b). Third, all assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." § 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 IDEA eligibility and determines if the student needs specially designed instruction tailored to the child's educational circumstances.⁵

THE RELATIONSHIP BETWEEN THE EVALUATION, THE IEP AND FAPE

Once the district completes a full individual evaluation, provided the team determines the Student is IDEA eligible, the focus then shifts to creating an IEP that includes: a statement of the student's present levels of academic achievement and functional performance 34 CFR § 300.320(a); measurable annual goals designed to meet the student's needs resulting from the student's disability; that enable them to make progress in the general education curriculum 34 CFR § 300.320(a)(2)(i); provides for the use of appropriate special-designed instructional services 34 CFR 300.320(a)(4); and, continuous progress monitoring.⁶

⁵ 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*, U.S._____, 137 S. Ct. 988, 999 (2017).

⁶ A FAPE "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (*Endrew F.*, 137 S. Ct. at 1000).

SUBSTANTIVE AND PROCEDURAL COMPLIANCE

While individualization is the central consideration for purposes of the IDEA, districts are not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). The IDEA directs that an impartial hearing officer's decision must be made on substantive grounds. 20 USC § 1415(f)(3)(E)(i). If a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits 20 USC § 1415(f)(3)(e)(ii), 34 CFR § 300.513(a)(2). On the other hand, a substantive violation occurs when a school district fails to offer a FAPE that is reasonably calculated to provide meaningful benefit and significant learning. *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013).⁷

COMPENSATORY EDUCATION AND APPROPRIATE RELIEF

Courts and hearing officers have broad discretion in fashioning "appropriate relief" when either conclude a violation of an IDEA requirement has failed to provide appropriate educational services. 20 USC 1415 (i)(2)(C)(iii), 34 CFR 300.516 (c)(3). Compensatory education should place the student in the position they would have been in but for the IDEA violation.⁸ Compensatory

⁷ Parents' Section 504 claims here repackages the IDEA child-find, evaluation and FAPE claims as violations of § 504; therefore, for the same reason, in this instance the disposition of the IDEA claims for the most part resolved the Student's Section 504 FAPE claims. *K.D. by Theresa Dunn and Jonathan Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 256 (3d Cir. 2018) (Section 504 claims were a repackaging of those allegations underlying the IDEA claim).

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." *Id.*

education accrues from the point that the school district either knows or should have known (KOSH) of the FAPE injury to the child⁹ In this Circuit, a child is entitled to compensatory education for a period equal to the period of deprivation, provided that the hearing officer considers excluding the time reasonably required for the school district to rectify the problem. *Id.* This hearing officer views the reasonable rectification period as a fact-specific affirmative defense. With these fixed principles in mind, I will now turn to analysis and conclusions of law.

ANALYSIS AND CONCLUSIONS OF LAW

THE PARENT'S CLAIMS AND THE DISTRICT'S RESPONSES

First, Parents claim that the District failed to identify the Student as a person with a SLD. Second, they claim the District's practice of repeating the IEP goals and SDIs in an "as is" "cut and paste" fashion across school years is a *per se* FAPE violation. Third, they assert the failure to complete an FBA renders the offered behavioral goal, PBSP and SDIs useless. Fourth, they assert an overarching claim that even if the IEP is appropriate, the District failed to implement each IEP. Fifth, they seek a declaration that the District may no longer implement the once agreed on regular education Student "Safety Plan."

As a threshold defense, the District objects to any fact-finding surrounding the appropriateness of the 2019-2020 IEP. The District argues that absent testimony about the IEP, the Parents, by operation of law, failed to meet their burden of proof. The 2019-2020 IEP appears in the record as School District Exhibit# 2. In this Circuit, fact-finding about the appropriateness of an IEP is a question of fact. Current case law, in this Circuit, permits the hearing officer and reviewing courts to accept, review and rely on intrinsic and extrinsic evidence in making FAPE

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).

decisions.¹⁰ SD #2 was admitted without objection; therefore, the District's initial objection is denied

THE BEHAVIOR GOAL, THE PBSP AND THE FBA,

The Student's ADHD affects attention, concentration and learning throughout the school day. To address the effects of this condition, each IEP included a single goal calling for the Student to remain on task for 10-minutes with one prompt. To enable the achievement of this goal, the IEP included a suggested PBSP and SDIs. Parents contend the District's failure to complete an FBA or collect baseline makes the goal otherwise inappropriate. The District counters that other measures embedded in the IEP satisfy the FBA or baseline requirement. I disagree.

While neither the IDEA, its regulations, nor the applicable state regulations define the essential components of a PBSP, the case law and the District's model forms provide a working checklist of the tasks the District must complete to provide a working PBSP. First, in Pennsylvania, "Behavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques." 22 Pa Code 14.133(a). Each of the three IEPs included the identical language that required each IEP team to complete a "functional assessment" once the team decided the Student's behavior impeded learning. The staff did not explain why they checked the box in February 2019 and then waited until June 2021, some 18 months, to collect baseline data or complete an FBA.¹¹ For all the following reasons, this ongoing substantive violation caused a multi-year denial of a FAPE. I also find the 18-month delay in collecting baseline or completing an FBA contributed to a series of time outs, in-school suspensions, detentions and out-of-school suspensions. These exclusions from the class caused a standalone denial of

¹⁰ *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010), *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 270 (3d Cir. 2003).

¹¹ Pennsylvania case law provides that an "FBA is generally understood to include at least three steps: (1) a clear definition of the problem behavior; (2) data collection and observation describing the antecedents and consequences of the behavior; and (3) data that fosters a hypothesis about the function of the behavior. *H.D. v. Central Bucks School District*, 59 IDELR 275 (E.D. Pa. 2012)(once the objective data is reviewed, a team can design a personalized PBSP).

a FAPE. See, e.g., *A.W. v. Middletown Area Sch. Dist.*, 65 IDELR 16 (M.D. Pa. 2015) (lack of behavioral data prevented the district from developing a positive behavior plan, crafting IEP goals, or ruling out a specific learning disability). A comprehensive Order granting appropriate relief follows.

THE OVERARCHING SUBSTANTIVE AND PROCEDURAL VIOLATIONS¹²

First, the levels of reading, math, writing, and on-task are inadequate or insufficient. Second, the IEP goals are either vague, overly broad, or inadequate in many respects. Third, the progress monitoring reports data does not match the monitoring and measurement criteria listed in either the goal statements or the corresponding statements at the present level. This series of fundamental flaws denied a FAPE.

THE READING GOALS ARE INADEQUATE

The 5th to 6th-grade reading present levels states the Student's scores fall between 2.10 and 3.10. (meaning second-grade 10th month to third-grade 10th month)¹³. The present levels further describe that between September 10, 2018, and January 2019, the Student's reading level, reported on the STAR assessment, went from 2.7 in September 2018 to 2.2 in January 2019. The Student's report card provides additional data that the Student performed at the "Below Basic" in Reading. Next, the present levels explain that the Student received daily Corrective Reading instruction, and the teacher collected Corrective Reading assessment data. Corrective Reading assessment provides objective words per minute (WPM) data and objective "error" scores. While Corrective Reading data in most cases would be positive, here, the Student's present level WPM range was

¹² In March 2019, when the Student was in 5th grade the District offered a new IEP. The new IEP covered the March 2019 to June 2019 timeframe in 5th grade; that same IEP then restarted in September 2019, until March 2020 of Student's 6th. In February 2020, the District completed a reevaluation and then offered a revised 6th grade to 7th grade IEP.

¹³ This hearing officer is not endorsing the use of grade equivalents as an IEP present level metric; that said, it does convey the teams working knowledge of the Student grade level materials.

left blank while the error rate was reported. Absent both objective measures; the Corrective Reading, present level data, is useless.

Despite a stagnant below-grade STAR reading trend line, the District decided to repeat the same reading goal, SDIs, frequency, delivery, and intensity of instruction across school years. This practice, in this instance, runs afoul of the IEP team's responsibility to make necessary adjustments when the Student displays a lack of progress towards meeting the annual goals occurs. 34 CFR 300.324(b)(1)(ii).¹⁴ After a careful review of the extrinsic and intrinsic exhibits coupled with the testimony, I now find the repetition of the reading goal and the SDIs when offered were not individualized, personalized or reasonably calculated to the Student's known needs and circumstances. An Order granting appropriate relief follows.

THE WRITING PRESENT LEVELS ARE NOT CLEAR AND THE WRITING GOAL IS OUT OF REACH

Although the writing present levels are somewhat connected to the goal statement, the goal statements as offered are insufficient and not directly related to the Student's skill set. The 5th, 6th and part of the 7th-grade writing annual goals align with the 4th-grade state standards. The goal uses a "1 to 6" scoring rubric to grade the Student's work product. The "1 to 6" rubric does not describe what the Student must do to earn the score or explain what the Student needs to produce to earn a higher score. Simply stated, the standalone "1 to 6" rubric absent descriptors do not objectively explain what the Student can and cannot do in everyday terms. While the rubric identifies a "6" as the proficient score, the IEP sets the Student's expected level of achievement at a "4." Therefore, as written, if the goal is mastered, the Student would perform 4th-grade level skills at a less than an 80% level of accuracy. An 80% level of success at the 4th-grade level for

¹⁴ See also, *Questions and Answers on Andrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (EDU 2017), ED reinforced and clarified that if it turns out a child is not making progress at the level the IEP team expected, the team must revisit the IEP with the *Andrew F.* standard in mind and revise it as necessary to ensure the student is receiving appropriate special education and related services.

a 6th- 7th grader is not ambitious. At this rate of progress, the Student is otherwise expected to master 8th-grade material by graduation. I now find that expectation for this Student is not challenging.

While the Student's 7th-grade progress report admits that the Student made "limited" progress, "the 7th-grade team adjusted the goal upwards to the 8th-grade state writing standard. (FOF #43, S-10 pp.10-12). The new goal required the Student to produce an essay of varying length (1-5 paragraphs) with a focus on organizing ideas, concepts and/or information, using transitions to create cohesion, clarifying the relationship among ideas/concepts and providing a concluding statement scoring 3 out of 4 (75%) on the PSSA writing rubric on consecutive probes given twice per month. (CC.1.4.8.D)¹⁵ Applying the snapshot rule, the record is preponderant that the goal far exceeds the Student's then known writing skill set. Therefore, I now find, as written, this goal statement and expected learning outcome when offered was not appropriate. Accordingly, an appropriate Order granting appropriate relief follows.

THE MATH GOALS ARE INCONSISTENT AND NOT CHALLENGING

The math goal and present levels are woefully inadequate. The 6th grade Math goal asks the Student to solve 2 by 2 digit multiplication problems at an 80% level on 3 consecutive bi-weekly probes. The present levels report the Student scored "Below Basic" on the PSSA Math assessment. The PSSA breakdown indicates the Student scored 0% on Number and Operations in Base Ten, 10% on Measurement and Data, 12.50 % in Geometry, and 46.15% in Operations and Algebraic Thinking. The Student's CDT classroom Math scores fall in the lowest "Red" zone range from 434 to 651 [400 is a minimum score]. These scores indicate a significant gap between age and grade-level learning.

¹⁵ CC.1.4.8: is the 8th Grade regular education writing standard.

The math present levels further expose a severe fundamental flaw in each IEP math goal. The present levels later report that after two years of multiplying "one digit by one digit," numbers the Student "has not progressed." Aware of the "not progressed" finding and below-grade performance, the District recommended that the Student repeat the same multiplication goal statement with the same SDIs and intensity of instruction.

Neither the testimony nor the exhibits persuasively explain how repeating 4th grade multiplication problems, for the second time, as a 6th or as a rising 7th grader absent new SDIs or a change in the delivery of instruction was reasonably calculated to achieve significant learning.

Oddly and unexplained in the record, the February 2020 6th Grade to March 2020 of 6^h Grade Progress Monitoring Math data states that the Student earned a 60% to 80% on "addition problems with one variable problem." Later on, the September 2020 7th grade progress monitoring data reports that the Student earned a 53% on a quiz on "Adapted adding like and unlike rational numbers." The record does not explain why the team collected "adapted adding" data when the IEP calls for instruction on 2 digit multiplication. Then the progress monitoring narrative states that grades/data were reported with the notation "class curve." Yet, the IEP does not endorse "curving" data or grades or "adding like and unlike rational numbers" or grade averaging, yet someone collected data. (FOF # 31) Therefore, I now find that the math goals in all IEPs were not appropriate when offered. Therefore, an appropriate Order granting appropriate relief follows.

THE STAFF CHANGED THE PLACEMENT WITHOUT AN IEP MEETING

In the fall of 2019 through January 2020, the Student's off-task misbehavior slowly turned to verbal aggression and refusal to complete work. Rather than initiate an FBA, the "informal support team" met and changed the Student's placement. The change in placement substantially reduced the Student's instructional time in the co-taught ELA, Math and "Millionaire Club." Without the

benefit of an IEP meeting, a reevaluation or prior written notice, the "informal support team" placed the Student in a self-contained Emotional Support class. Although required, the District did not issue a NOREP, hold an IEP conference or issue procedural safeguards.

The record is clear; the new "Emotional Support" teacher did not read the IEP, provide small group or large group instruction, follow the PBSP or progress monitor the Student's academic or behavioral goals. This combination of substantive and procedural errors denied the Student a FAPE. These errors also substantially interfered with the Parent's participation in the IEP process. Accordingly, I now find this series of unilateral changes caused substantive and procedural FAPE violations. An Order granting appropriate relief follows.

THE GOAL'S MEASUREMENT CRITERION AND PROGRESS MONITORING DATA REPORTS ARE OUT OF SYNC

The behavioral 10-minute on-task goal called for data collection in three different environments two times per month. The progress monitoring data graphs and reports do not report data every 10-minutes across three environments. Instead, the on-task graphs reported data as a single score for a single class. The reading goal required data collection two times a month with criterion at 80% level; nevertheless, the graphs reflect a single data point each month with a range of scores from 40 to 70% level of achievement. The math multiplication goal called for data collection on three (3) consecutive bi-weekly probes, two times a month. The graph mistakenly plots a single score. I now find the mismatch between the criterion in the goal statement, and the progress monitoring data reduces the likelihood the Student made any progress.

The writing progress data is out of alignment with the goal statements. The initial writing data metric measured progress on a 6 point scale, collected three (3) consecutive times with bi-weekly probes. At one point, after averaging the data, a technique not authorized in the IEP, the teacher reported the Student's scored 1.5 points [out of 6 points], then projected at the Student would be

expected to score of 2 points, suggesting a .5 point level of growth. In contrast, the IEP called for the Student to score 4 out of 6 points at the 4th-grade level to measure success. This understating of the Student's expected level of success is unacceptable. After this unexplained representation of the Student's expected performance, the team recommended the Student continue to work on the same 4th-grade writing goal for a third year. (S-9 p.9).

When the record is viewed as a whole, I now find the mismatch between the progress monitoring data and the criterion in the goal statement makes the academic progress monitoring entirely unreliable as a measure of meaningful progress. An Order granting appropriate relief follows.

THE 2020 REEVALUATION REPORT IS INCOMPLETE, INSUFFICIENT AND INAPPROPRIATE

The Parties agree the Student is a person with a disability who needs SDI to learn. The parties disagree if the Student also qualifies for SDI as a person with an SLD. For all of the following reasons, my review of the reevaluation report leads me to conclude that the team failed to complete a full comprehensive evaluation. I also find the IEP lacks goal statements in all areas of need across the curriculum. Even assuming the District's discrepancy analysis is correct, the team failed to apply the alternative eligibility "age or state-approved grade-level" eligibility rule. Applying the "age or state-approved grade-level" eligibility criteria, I now find the Student is a person with an SLD who needs SDI.

Moreover, as a Student with ADHD, who qualifies for SDI, the below grade level performance requires additional goal statements and SDIs across the curriculum. First, I find that rather than use various assessment tools and strategies, the psychologist administered one standardized measure of intelligence, the WICS-V, and one standardized measure of achievement, the WIAT –III. This one test decision-making assessment strategy runs contrary to the IDEA "variety of assessment" rule.

Second, comparing the Student's single WICS's GAI IQ score with the Student's WIAT-III achievement standard scores, the psychologist concluded the Student did not qualify as a person with a SLD. While a discrepancy analysis is an endorsed assessment technique, the team used a single GAI IQ score as the "sole" measure of intelligence and the WIAT scores as the "sole" measure of achievement. I now find this "one score" application model violates the second IDEA, "no sole criterion rule." I reach this conclusion based on the psychologist's inability to explain the basis for the 1.5 standard deviation criterion used for the discrepancy analysis in this instance. Therefore, I now find the District must fund an independent education evaluation in all areas of suspected disability.

Third, I now find the team skipped over applying the "below state and grade level" SLD eligibility criteria. The Student's 10 WIAT-III low percentile subtest scores labeled as "Weaknesses," PSSA scores labeled as "Below Basic," CDT scores in the "Red Zone," and the low report card grades of "1" represent an SLD pattern of qualifying weaknesses. Viewing the record as a whole, I now find the team misapplied the state "age or state-approved grade-level" SLD eligibility criteria.

Even if not associated with a SLD, the 10 WIAT-III "Weakness" subtests are interrelated with the ADHD-OHI eligibility. The Student's percentile rankings from the 3rd to the 52%, when compared to same age and grade levels peers demand immediate attention by the IEP team. Accordingly, after reading the reevaluation applying 22 Pa Code §14.125(1)-(2) and 34 CFR §§ 300.307-311, I now find the Student's assessment profile meets the IDEA eligibility criteria to qualify as a person with a SLD.¹⁶ I also find that the Student's below grade

¹⁶ In *Letter to Zirkel*, 48 IDELR 192 (OSEP 2007), OSEP indicated that a state's use of the term "and/or" when listing evaluation techniques permits districts "to use RTI, severe discrepancy, and/or a third research-based alternative," to determine if "(1) The child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of

level local and state assessments scores lead me to conclude that the SLD disability adversely affects the Student's education and now requires additional personalized reading, math, and written expression SDIs. *See, V.M. v. Sparta Township Board of Education*, 63 IDELR 184 (D.N.J. 2014) (district violated state and federal law by failing to consider other evaluative data after its calculations showed less than 1.5 standard deviations between the student's intelligence and achievement) An comprehensive Order follows.

THE DISCIPLINE AND THE SAFETY PLAN CLAIMS

The above relief resolves the discipline and manifestation determination claims. The District developed the Safety Plan with the Parent's input and consent. The Safety Plan was developed in response to the Student's sexual acting out behavior. I now find the Parents failed to establish a direct nexus between the sexual acting out behavior with an IDEA or Section 504 disability. Therefore, I now find that I do not have jurisdiction over the regular education Safety Plan claim. The Parent's claim is denied and otherwise exhausted.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.

The calculation of appropriate relief is a multi-step process. First, once liability is established, the hearing officer must determine the date when the district either knew or should have known (KOSHK) the denial of a FAPE occurred. Second, the hearing officer must determine whether the qualitative and/or quantitative will make the student whole. Third, the hearing officer must calculate the amount of compensatory education to make the Student whole. Fourth, the hearing officer must then calculate the reasonable rectification period. Fifth, once the reasonable rectification period is calculated, the hearing officer must equitably reduce the amount of the compensatory education by the length of the reasonable rectification period. All the while, the hearing officer must always follow the guiding principle that "appropriate relief" must make the student "whole."

the following areas, when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards. 34 CFR 300.8 (c)(10).

The fundamental flaws in the February IEP were evident on the face of the document. Therefore, I now find the record preponderant that the District compensatory education KOSHK date is February 21, 2019; this date represents the first IEP.

Although the District did not provide evidence describing the reasonable rectification period, I will reduce the award by ten (10) school days or 70 hours. This amount represents the time when the school was closed due to the pandemic.

The magnitude of the IEP, FBA, and progress monitoring flaws prevent me from calculating quantitative hour-for-hour relief. Absent an accurate understanding of the Student's current social, emotional, behavioral skills deficits and losses; I cannot quantify a make-whole hour-for-hour remedy. Rather than under or overestimate the amount of compensatory education relief I now find pursuant to 34 C.F.R. §300.508(d), the District is ordered to fund a comprehensive compensatory education independent educational evaluation.

Next, to remedy the failure to provide a functional behavioral assessment and resolve the unanswered reevaluation questions, the District must now fund an independent educational evaluation, pursuant to 34 C.F.R. §300.508(d), in all areas of unique need and an FBA.

A comprehensive compensatory education evaluation and the independent educational evaluation may include but are not limited to evaluating the Student's abilities, achievement, academics, social, behavioral health, and transition needs. The behavioral evaluation and the independent educational evaluation will assist the team in determining what behaviors are impeding the Student's learning or progress. Each evaluation should be conducted by a properly licensed, certificated or credentialed individual selected by the Parent.

The record indicates the Student receives more than 2.5 hours per week of counseling/social skills services provided by the District social worker, the

guidance counselor and two outside mental health counselors. The record is unclear if these services should be included as related services. I leave it to the independent educational evaluators to determine if the Student also requires an evaluation for counseling or social work services. If they determine that this area is beyond their scope, they should refer, and the District should fund such an evaluation.

All evaluators should have experience with culturally sensitive evaluation techniques and with students who may or may not be acting out sexually to gain attention.

Once the FBA and independent educational evaluations are completed, the District must prepare a reevaluation report. After that, the Parties should meet to develop a new IEP.

To the extent practicable, the independent evaluator(s), in a separate report, should set out the essential elements of a well-articulated compensatory education plan. The make-whole compensatory plan should calculate and describe the type and amount of compensatory education services needed to place the Student in the same position the Student would have occupied but for the loss of the chance to make a meaningful educational benefit or significant learning.

Any disagreement over any or all of these evaluation results can be the subject of a future hearing.

The above equitable compensatory education relief is not an offset to any other legal relief that may or may not be available to the Student.

ORDER

And Now, this November 19, 2021, to correct the above procedural and substantive violation, the District is hereby **ORDERED** as follows:

1. The District is Ordered to pay the costs for a comprehensive compensatory education independent educational evaluation in all areas of unique need,

including but not limited to an evaluation of the Student's abilities, achievement, academics, social, behavioral, and transition needs.

2. The District is Ordered to pay the costs for a comprehensive independent educational evaluation in all areas of unique need, including but not limited to an evaluation of the Student's abilities, achievement, academics, social, behavioral, and transition needs. The independent educational evaluation should include a curriculum-based evaluation(s) in all core curriculum areas, including reading, writing, or math.
3. A properly licensed, certificated or credentialed individual should conduct each evaluation of the Student. The Parents can select any, and all evaluator(s) needed to evaluate the Student.
4. To the extent practicable, the evaluator(s), in a separate report, should set out the essential elements of a well-articulated compensatory education plan. The plan should include the type and quantity of compensatory education services needed to place the Student in the same position the Student would have achieved but for the loss of the chance to make meaningful benefit or significant learning.
5. The Parents have the authority to select any and all evaluators.
6. The comprehensive independent educational evaluation and the FBA in paragraph 1 and paragraph 2 of this Order should be completed within the timelines in 22 Pa Code Chapter 14. The IEP and PBSP should be prepared and offered within the standard timelines in 22 Pa Code Chapter 14.
7. The Parent's claim for compensatory education is stayed and/or dismissed without prejudice until receipt of the comprehensive independent comprehensive evaluation. If the Parties do not agree on the results in the compensatory education evaluation, the Parents should then refile or file another due process complaint to resolve the dispute over the make-whole remedy.

8. The District is Ordered to pay the full costs for all compensatory education services, at the rate charged by the service vendor who provides the Parent selected compensatory education services described in the comprehensive make whole compensatory education plan.
9. The Parents are authorized to select the individual(s) to provide any and all of the comprehensive make whole compensatory education services.
10. The District is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference, or in-person in any meeting(s) to review the IEE, the RR and the development of the next IEP. The decision to participate and the manner of participation in either the IEE review meeting, the RR meeting or the IEP meeting is best left to the sole discretion of the IEE evaluator(s).
11. The terms of this Order regarding the involvement of and payment for the IEE examiner(s) participation and the length of the term of the compensatory education will end once the District offers the Parents a revised IEP and a new Notice of Recommended Educational Placement (NOREP).
12. Nothing in this Order should be read to limit or interfere with the continued involvement of the IEE evaluator(s) once the duties described herein are discharged to such continued involvement as the Parties otherwise agree.
13. The compensatory education hours described in the comprehensive make whole compensatory education plan may take the form of any developmental, corrective, remedial or specially-designed instruction, including related services, transportation services to and from the services, transitions services, supplemental aids, one-one-one supports, overnight lodging, modifications, or accommodations, as these terms are defined in the current or future regulations implementing the IDEA/Section 504. 10. In their sole, absolute and unfettered decision, the Parents can select the compensatory education service provider(s).

14. As outlined in this Order, the District is directed to pay all invoices at the market rate charged by the provider where the service is delivered within 30-days.
15. The Parent is also permitted to self-fund and then obtain immediate reimbursement, within 30-days, for any and all costs associated with providing the compensatory education services described herein, including travel to and from the provider, lodging costs associated with providing any and all developmental, remedial, instructional, vocational, specially-designed instruction, related services, and transition services, otherwise described herein.
16. The Parents Safety Plan discipline claim is dismissed for lack of jurisdiction.
17. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
November 19, 2021
ODR FILE #25941