

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:

23640-1920AS

Child's Name:

B.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

1/ 21/21

INTRODUCTION

Student ¹ is currently [redacted], enrolled in [redacted] in the District (District) and eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student has attended school in the District since the 2016-2017 school year, entering as a fourth-grader. In April 2020, the Parents filed a due process Complaint against the District alleging it failed to provide Student with a free appropriate public education (FAPE), as required under the IDEA, Section 504 of the Rehabilitation Act of 1973 (Section 504), and the American with Disabilities Act (ADA), as well as the federal and state regulations implementing those statutes.³

The case proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting school closures.⁴ During the hearing, the Parents sought to establish that the District failed to provide Student with FAPE throughout Student's enrollment, requested compensatory education, reimbursement for the independently conducted educational evaluation and prospective relief.⁵ The District maintained that its educational programming, as offered and implemented, was appropriate for Student and that no remedy is due.

For reasons that follow, the claims of the Parents must be granted in part and denied in part.

¹ In the interest of confidentiality, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² The Parents IDEA 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).

³ The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq.

⁴ This hearing required six separate video-conference sessions. Because of schedule conflicts, availability of witnesses, including the necessity for additional sessions, the decision due date was extended for a good cause, upon written motion of the parties.

⁵ The Complaint requested an IEE as relief. However, the District agreed to the performance of an IEE. The Parents now seek reimbursement for its full cost which the District contends exceeds its authority to approve. (P-2, P-30) The Parents also seek monetary damages under the IDEA, Section 504 and Title IX and the ADA. (P-2)

ISSUES

- 1) When did the Parents know, or should they have known of the alleged actions that formed the basis of their complaint?
- 2) Did the District fail with respect to its child find obligations to identify Student as a child with a disability and eligible for services under the IDEA and/or Section 504, prior to March 23, 2020?
- 3) Were the District's January 17, 2019, and March 23, 2020 evaluation reports appropriate?
- 4) If the District's evaluation reports were not appropriate, are parents entitled to an independent educational evaluation at public expense?
- 5) Was the District's April 2020 IEP appropriate?
- 6) Should student be awarded compensatory education?

FINDINGS OF FACT

1. Student is [redacted], enrolled in [redacted] in the District.
2. Student is a resident of the District.

2016-2017 School Year – Fourth Grade

3. Student entered the District at the start of the 2016-2017 school year, as fourth grader. (S-4)
4. During enrollment, the Parent disclosed on Student's school health record a diagnosis of ADHD and prescription for [medication]. (S-4, S-22, p. 3; N.T. pp. 618-619)
5. In October 2016, the Parent contacted the District seeking insight into Student's classroom behavior. The teacher replied that Student received warnings for talking/disrupting others but attributed the behavior to being new and making friends. Parent advised the District that Student loses privileges at home for school misbehavior. (P-29, pp.1, 6; N.T. 870-871)
6. In December 2016, the District internally discussed Student's interaction with another student and the need to keep them separated. (P-29, pp.2-3; N.T. 880-881)

7. On January 17, 2017, Student received two (2) days of recess detention for [violating classroom rules]. (S-21; N.T. 877-878)
8. In April 2017, the Parents and the District discussed Student's disruptive classroom behaviors, including refusal to complete assignments, walking around the classroom, disturbing other students, ignoring redirection, and inappropriate lunch and recess behaviors. (P-29, p. 8, S-28; N.T. pp. 633-634)
9. On May 1, 2017, the District suspended Student from the school bus for threatening to [harm a student]. (S-21, p. 19, P-29. pp. 10-11)
10. Student's final grades at the end of the 2016-2017 school year were either S (satisfactory) or above 90%. (S-24, p. 1)
11. During the 2016-2017 school year, Student was absent for nine days. (S-5)

2017-2018 School Year-Fifth Grade

12. Student was enrolled in the fifth grade during the 2017-2018 school year.
13. On October 5, 2017, Student received after-school detention for [inappropriate behavior]. (S-21; N.T. 77-78)
14. On October 30, 2017, Student received three (3) days of recess detention for calling another student [inappropriate names]. (S-21; N.T. 79)
15. On November 15, 2017, Student received three (3) days of recess detention and four (4) days of after school detention for calling another student [inappropriate names]. (S-21; N.T. 79)
16. On December 8, 2017, Student received two (2) days of recess detention for [inappropriate behavior] in the bathroom. The Student did not admit the behavior but was observed by others. (S-21)
17. On March 8, 2018, Student received three (3) days of after-school detention for threatening to [severely injury another student]. (S-21)
18. In April 2018, the Parents contacted the District about Student's behavior and eligibility to attend a field trip. (S-28, p. 25; N.T. 642)
19. On May 7, 2018, the Parent submitted an overnight field trip permission to the District authorizing the administration of [medication] to the Student for treatment of a conduct disorder. (S-3; N.T. 595)

20. Student received a final grade of S in Art, Computer, Handwriting, Health, Music PE, Library, and N-Conduct. Student received final grades of 86-English, 81-Math, 78-PSSA Math, 82-Reading, 88-Science, 74-Social Studies, 78-Spelling.

21. During the 2017-2018 school year, Student was absent from school for seven days. (S-5)

2018-2019 School Year – Sixth Grade

22. Throughout sixth grade, Student continued to engage in behaviors that resulted in consequences from the District. (S-22)

23. During Student's 2018-2019 school year, the District adopted elementary/intermediate school-wide behavior guidelines. The guidelines defined level 1 (teacher managed behaviors), level 2 (teacher managed behaviors), and level 3 (office managed behaviors) and provided examples and possible consequences. (S-13)

24. On the August 23, 2018, school physical examination report provided to the District, the Parent indicated Student was prescribed [medication] and disclosed Student had either been bullied or engaged in bullying behavior, exhibited changes in social relationships, grades, eating or sleeping habits; withdrawn from family/friends and has shown a general loss of energy, motivation, interest, or enthusiasm. (S-22, pp. 11-13)

25. On September 4, 2018, the Parent completed a District requested Student information card and indicated Student was prescribed [medication] for anxiety. (S-22, p. 14)

26. On September 18, 2018, the Student received three (3) days of recess detention for a classroom disruption that involved disrespectfully yelling at the teacher. (S-21; N.T. 83-84)

27. On September 19, 2018, the Student received two (2) days of recess detention for disrupting the school bus. (S-21)

28. On September 22, 2018, the Parent contacted the District seeking additional resources to assist with Student's difficulties in reading and spelling, and comprehension. In response, the District suggested that Student re-read the books several times to assist with comprehension and moving Student's seat to help with classroom focus. (P-29, p.38; N.T. 540-541)

29. On September 24, 2018, Student received two (2) days of recess detention for standing on the school bus, moving to other seats while the bus was moving, and cursing. (S-21)

30. On October 5, 2018, the Student received two (2) days of recess detention for taking [another student's] ball away. (S-21)

31. On October 10, 2018, the Parent contacted the District indicating Student's struggle with grades and inviting help in order to increase the grade. In response the classroom teacher

reported that Student had failed to complete any geography assignments. The teacher also expressed concern for Student's "less than desirable" distracted and disruptive classroom behavior. In reply, the Parent indicated the lack of assistance from the guidance office although requested and expressed frustration with the District's lack of response to their concerns about Student. (P-29, pp. 40-43)

32. On October 12, 2018, the Student received ISS, referred to as "small group instruction," for [harming another student]. (S-21)
33. On October 16, 2018, the middle school principal⁶ suggested to Parents that a sixth-grade team meeting would help determine any issues with Student. In response, the Parents reiterated Student's behavioral and educational struggles and that an IEP might help. (P-29, p. 53)
34. On October 23, 2018, Student received ISS for disruptive class behavior, [redacted], and calling a classmate [inappropriate names]. (S-21; N.T. 90)
35. On October 24, 2018, the principal contacted the Director of Special Education requesting that she contact the Parents about testing "for a possible 504 plan". (P-29, p. 54)
36. On November 7, 2018, Student received two (2) days of ISS for [disruptive behavior during lunch]. (S-21)
37. On November 7, 2018, the Student received a seven (7) day bus suspension for [disruptive behavior on the bus]. (S-21)
38. On November 8, 2018, the District sent permission to evaluate to the Parents. On November 16, 2018, the Parents consented to the initial evaluation of Student. (S-6)
39. On January 11, 2019, the Student received ISS for [an altercation with another student]. (S-21).
40. On January 17, 2019, the District completed its evaluation of Student. (P-4, S-29)
41. The ER summarized information provided by the Parent, math teacher input, current grades, a classroom observation, medical information, previous report card information, state and local assessment data, the results of District performed cognitive and achievement assessments, behavioral rating scale results (BASC-3, (Conners 3), (SAED-

⁶ The District's middle school principal is [redacted]. (P-29, p. 54)

2), functional behavioral analysis conclusions, data collection of 2018-2019 school discipline records and teacher data. (P-4, S-29)⁷

42. Parents' input of medical concerns included ADHD, conduct disorder, and generalized anxiety disorder. Student medications included [redacted]. (S-29, pp.1,4)
43. Parents' input of behavioral concerns included impulsive reactions, emotional disturbances, anxiety, trouble with peers, and attention deficits. (S-29, p.2)
44. Parents reported Student exhibited difficulty with reading comprehension, spelling, writing, needs multiple repetitions, is aggressive, impulsive, and unable to concentrate. (S-29, p.2)
45. Grades of 70% and above are considered passing in the District. Student's grades at the time of the evaluation were science -98%, math 2-68%, geography-100%, spelling-58%, PSSA math-75%, math 1-89%, reading-65% and literature-62%. (S-29, p. 2; N.T. 54-55)
46. The school psychologist utilized the behavioral observation of students in schools (B.O.S.S) during the classroom observation to determine Student's on-task/off-task behaviors. The BOSS data indicated Student was on task 75% of the time and off-task 25% of the time while peers were on-task 92% and off-task 8%. Student's off-task behavior included arguing with a peer, staring at the board, playing with the whiteboard, looking around, and playing with clothing. (S-29, p.4)
47. On cognitive assessments, the WISC-V, Student received a FSIQ of 93-average and a GAI score of 95-average. (S-29, p. 6)
48. On the Woodcock-Johnson Tests of Achievement-IV, Student demonstrated average to low average broad reading, basic reading, and fluency skills. In broad written language and written expression, Student demonstrated average to low average skills. In broad math and math calculation, Student's performance fell in the average to low average range. (S-29, p.9)
49. The BASC-3 rating scales completed by the Parent indicated elevated scores for attentional behavioral and emotional control. Clinically significant scores were noted in the areas of depression, at-risk scores were reported in externalizing problems, internalizing problems, behavioral symptoms index, aggression, conduct problems, and anxiety. At-risk areas were noted in anger control, bullying, and emotional self-control. On the executive functioning index, no extremely elevated concerns were noted. Still, elevated scores were noted in the overall executive functioning index, attentional control index, behavioral control index, and the emotional control index. (S-29, p. 11)
50. Parent completed rating scales suggested Student may have some difficulties with concentrating, following directions, making careless mistakes, maintaining self-control,

⁷ (BASC) Behavioral Assessment System for Children, Third Edition (BASC); (SAED-2) Scales for Assessing Emotional Disturbance-Second Edition

regulating impulsive behaviors, displaying outbursts, having sudden/frequent mood changes, and/or periods of emotional instability. (S-29, pp 11-12)

51. One teacher completed the BASC-3 rating scales. Those ratings indicated clinically significant scores in externalizing problems, aggression. At-risk scores were noted in conduct problems, depression adaptability, and leadership. Clinically significant scores in bullying were noted. At-risk areas were noted in anger control, emotional self-control, executive functioning, negative emotionality, and resiliency. The executive functioning index indicated extremely elevated concerns in emotional control, suggesting that Student may have difficulties with displaying outbursts, sudden/and or frequent mood changes, or excessive periods of emotional instability. The elevated scores suggested that Student may have some difficulties with maintaining self-control and regulating impulsive behaviors. (S-29, pp. 12-13)
52. On the self-rating scale completed by the Student, clinically significant scores were noted in the areas of school problems, attitude to teachers, and self-esteem. At-risk scores were noted in internalizing problems, emotional symptoms, personal adjustment, attitude to school, locus of control, social stress, depression, sense of inadequacy, and relations with parents.
53. On the Conners 3 completed by the Parent, Student received a very elevated rating in the areas of inattention, hyperactivity/impulsivity, learning problems, executive functioning, defiance/aggression, and peer relations (S-29, p.15)
54. On the Connors 3 completed by one classroom teacher, Student received a very elevated rating in defiance/aggression and peer relations. Student received an elevated or very elevated rating for conduct disorder and oppositional defiant disorder. (S-29, pp. 15-16)
55. On the SAED-2⁸, Student's index scores on the Parent and teacher ratings indicated many emotional and behavioral problems. The Parent's scaled score was 138, and the teacher's scaled score was 119. The District concluded that Student's scores were significantly high. (S-29, p.16)
56. For inclusion in the ER, the District conducted a functional behavioral analysis (FBA) that collected data from a classroom observation and school discipline records. The discipline records indicated Student had nine reported incidences within four months. (S-29, p. 19)
57. The FBA concluded that in an educational environment, with peers present, Student will engage in aggression, inappropriate comments/language, and refusal to gain adult and/or peer attention. The District did not recommend an individual positive behavior support plan. (S-29, p.19)

⁸ The SAED-2 addresses the USDOE educational disability called emotional disturbance (ED). It captures significant characteristics including inability to learn, relationship problems, inappropriate behavior, unhappiness or depression and physical symptoms or fears. A scaled score of 17 or higher is "highly indicative" of ED. (S-29, p. 16)

58. The ER noted no concerns with motor skills, visual-spatial skills, or visual-motor skills. (S-29, p. 22)
59. The ER noted that Student's diagnoses of ADHD and conduct disorder could not be ruled out. (S-29, p. 22)
60. The ER concluded Student did not meet the criteria for identification as having a specific learning disability. (S-29, p. 22)
61. The ER noted that Student had significant difficulties with symptoms of ADHD in the home but not in school and no evidence that physical conditions had a severe impact on educational performance. The ER concluded that Student did not meet the criteria for identification as a student having Other Health Impairment (OHI). (S-29, p. 22)
62. The ER noted that although behavioral ratings indicated Student presented with significant behavioral emotional concerns indicative of an emotional disturbance, there was no evidence that these had been present for an extended period of time to have an adverse impact on educational performance. The ER concluded that Student did not meet the full criteria for identification as a student having an Emotional Disturbance (ED) and requiring specialized instruction. (S-29, p. 23)
63. The evaluating school psychologist explained that an extended period of time meant that she never heard Student's name before, no previous referral to the child study process had occurred, so evidence was lacking that Student's behaviors were impacting Student or others in the classroom in an extended manner (N.T. 173)
64. The ER noted that a section 504 plan could service Student's needs. (P-29, p. 23)
65. The ER concluded that the student did not need specially designed instruction and therefore was not eligible for special education. (S-29, p. 21; N.T. 101)
66. On January 24, 2019, the Parents contacted the District expressing concerns with Student's reading and spelling. The teacher offered work to complete at home to bring Student's grade up to passing. (P-29, p. 69; N.T. pp. 598-599)
67. On January 28, 2019, Student received an ISS for defiance, [disruptive behavior and disrespectful language toward school staff]. (S-21)
68. On January 30, 2019, Student received eighteen (18) days of after school detention for [disrespectful behavior towards a teacher]. (S-21)
69. On February 11, 2019, the Student received an after-school detention for [disruptive and disrespectful behavior on the bus]. (S-21)
70. On February 18, 2019, the District invited Parents to a section 504 planning meeting. (S-7)

71. On February 19, 2019, Student received an out of school suspension for [a physical altercation with another student]. (S-21)
72. On February 25, 2019, the District issued a NOREP proposing the continuation of regular education. The Parent signed the NOREP indicating agreement. (S-8, p. 1, S-9, P-6)
73. On February 26, 2019, the District offered an initial 504 plan. The plan referenced diagnoses of ADHD and a conduct disorder. The plan proposed breaking down tasks, repetition of directions, a highly structured environment, frequent prompting, positive peer pairing, sight distance between desks, directives - then walk away, refrain from argument, prompting a second time, 120 minutes of monthly social work support. The Parents signed the plan indicating agreement. (S-9)
74. From March 4, 2019, through March 27, 2019, Student engaged in at least eight behavioral incidents ranging from creating class disruptions to threatening to [injure] another student. For the incidents, Student received disciplinary sanctions ranging from recess with the principal to after-school detention. (S-21)
75. From April 5, 2019, through April 30, 2019, the Student engaged in at least seven behavioral incidents ranging from calling classmates profane names to [redacted]. Student received disciplinary sanctions from a conference to recess detention. (S-21)
76. From May 16, 2019, through May 29, 2019, the Student engaged in at least five behavioral incidents ranging from calling a student profane names to bus misconduct. Student received disciplinary sanctions ranging from three days of bus suspension to three days of after-school detention. (S-21)
77. On March 11, 2019, Student's reading teacher contacted the Parents advising of an attempt to correct Student's behavior resulting in Student screaming at the teacher. (P-29, p. 78)
78. At the conclusion of the 2018-2019 school year, Student received final grades of S in: Art, Computer, Handwriting, Health, Music PE, Library, and a grade of N-Conduct. Student received final grades of 85-English, 72-PSSA Reading, 89-Math, 64-Statistics/Geometry, 76-PSSA Math, 75- Reading, 89-Science, 98-Geography, 70-Spelling. (S-26)
79. During the 2018-2019 school year, Student was absent twenty-two days. (S-5)

2019-2020 School Year – Seventh Grade

80. During the 2019-2020, school year Student attended the seventh grade in the District. (S-10)
81. On October 4, 2019, the Parent and the District agreed to a section 504 plan that incorporated all previous services and permitted Student to listen to audiobooks during SSR. (S-10)
82. Between September 29, 2019, and October 30, 2019, Student engaged in at least ten disciplinary incidents ranging from dress code violations to creating disruption (talking loudly, calling out, cursing at others, shouting). Student received disciplinary sanctions ranging from a conference to ISS. (S-21)
83. In November 2019, the District placed Student into a District operated alternative education program for three weeks. (P-29, p. 182; N.T. 221-222, 556-558, 814-815)
84. While attending the alternative education program, Student witnessed incidents involving a drug transaction and a physical assault. The police were called to investigate at least one incident and spoke to Student. (N.T. 560-561, 604-605, 828-829)
85. From December 4, 2019, through December 13, 2019, Student engaged in three behavioral incidents ranging from a dress code violation to calling a student foul names. Student received a conference as a consequence. (S-21)
86. In a December 6, 2019, letter Student's psychiatrist indicated a Disruptive Mood Dysregulation Disorder (DMDD) diagnosis and anxiety and suggested psychoeducational testing of Student. (S-11, S-16, p. 5; N.T. 176)
87. From January 6, 2020, through January 31, 2020, Student engaged in at least nine behavioral incidents ranging from refusing to take a test to disrupting a class during a test. Student received disciplinary sanctions ranging from a conference to ISS. (S-21)
88. At the end of January 2020, during the third marking period, with Parent agreement, the Student was placed in an emotional support classroom where a class-wide behavioral support plan was implemented based on a level and point system. (P-31, S-15; N.T. 367, 423)
89. On February 14, 2020, the District's Emotional Support teacher emailed the Parents about Student's [mental health]. The District advised the Parents to admit Student to a psychiatric hospital. (P-23; N.T. 390-391).

March 2020 District ER

90. The Parents consented to an evaluation of Student. (P-15, S-16)
91. On March 23, 2020, the District issued its evaluation report (ER) of Student. (P-15, S-16)

92. The March 2020 ER indicated the reason for referral as the letter from the Student's psychiatrist indicating an additional mental health diagnosis. (P-10, S-16, p.1)
93. The March 2020 ER contained a summary of Parent and teacher input, a classroom observation⁹, medical and social information, adaptive behavior information, summary of the current 504 plan, a summary of previous cognitive and achievement assessments from the January 2019, BASC-3, and SAED rating scale data from the Parent, Student and teacher, information from the 2019 functional behavioral analysis (FBA), previous assessment information, and current achievement assessment results from the WIAT-III. (S-16)
94. Classroom teachers reported Student had significant difficulties with work completion, falling asleep, arguing, looking around during instruction, playing with items during instruction, and being easily bothered. (P-15, p. 34)
95. The FBA determined academic skills, self-regulation (difficulty staying on task, following rules), and study skills as deficits. The District was unable to generate a hypothesis/conclusion and recommended that the current plan continue to extinguish behaviors of concern. (P-15, p. 29, S-16, p.31)
96. The ER determined Student had needs to improve math calculation skills, improve self-monitoring skills in the educational environment, and increase attention to task and work completion skills. (S-16, p. 33)
97. The BASC-3 completed by the Parent indicated clinically significant concerns scores in the area of anxiety, and at-risk scores were noted in the areas of internalizing problems, conduct problems, depression, and negative emotionality. (S-16, p. 34)
98. The BASC-3 completed by the teacher noted at-risk concerns in anger control, executive functioning, negative emotionality, and resiliency.
99. The BASC-3 completed by the Student indicated significant concerns with school problems, attitude to teachers, internalizing problems, locus of control, social stress, depression, sense of adequacy, somatization, emotional symptoms, self-esteem, ego strength, and functional impairment. At-risk areas noted included attitude to school, sensation seeking, anxiety, attention problems, personal adjustment, relations with parents, interpersonal relations, anger control, and test anxiety. (S-16, p. 34)
100. Based on the BASC-3 ratings reported by the Student, the evaluator concluded that significant emotional symptoms were present. (S-16, p. 34)

⁹ Because of the closure of schools during the COVID-19 pandemic, the March 2020 ER incorporated the classroom observation information conducted for the January 16, 2019 ER.

101. Conners-3 ratings by the Parents indicated significant concerns with learning problems, executive functioning, defiance/aggression, and peer relations with symptom counts met for conduct disorder and oppositional defiant disorder. (S-16, p. 34)

102. The teacher completed Conners-3 ratings indicated significant concerns with inattention, hyperactivity/impulsivity, learning problems, executive functioning, and defiance/aggression with symptom counts met for ADHD combined presentation and oppositional defiant disorder. (S-16, p. 34)

103. The SAED-2 rating scales completed by a teacher and the Parent indicated significant concerns with inappropriate behavior. (S-16, p. 34)

104. The ER noted a statistical significance between overall cognitive ability and academic performance in math calculation skills. Behavioral ratings indicated that Student's diagnoses could not be ruled out at this time. (S-16, p. 38)

105. The ER recognized Student's ADHD diagnosis. The ER noted Student's difficulty maintaining focus and attention in class, based on behavior ratings, and observed Student is impacted mainly by difficulties with regulating emotions and behaviors within the school setting, rather than difficulty maintaining vitality within the educational environment. Based on that information, the District determined that Student did not meet the criteria for identification as OHI. (S-16, p. 38)

106. The school psychologist testified that although concerns existed with attention, they were not consistently reported, as the emotional regulation issues. (N.T. 108)

107. Based on the ER, the District concluded that Student was eligible for special education as a student with ED and in need of specially designed instruction. (S-16; N.T. 35, 39, 181)

108. On March 21, 2020, the Parents, through counsel, indicated disagreement with the District's March 2020 ER and requested reimbursement for an independent educational evaluation (IEE). (P-2)

109. On April 8, 2020, the District issued a NOREP to the Parents agreeing to provide the reimbursement, for the IEE, in accordance with District Policy 113.4. (S-18)

110. On April 17, 2020, the Parents filed a Complaint seeking a due process hearing. (P-2)

April 2020 IEP

111. On April 20, 2020, the IEP team met and proposed an IEP offering itinerant learning support for implementation during the 2020-2021 school year. (P-19)¹⁰

¹⁰ Apparently, the District proposed an initial IEP and revised IEP both dated April 20, 2020 (P-19). The Parents filed their Due Process Complaint on April 27, 2020. In its Answer, the District indicates that the Parents' Complaint references a draft IEP, dated April 20, 2020. (S-2) The draft IEP was revised (final IEP), sent to the Parents but also bears the date of April 20, 2020. (S-19). During testimony, it is unclear whether the Parents received the final IEP.

112. The Parent provided revisions to the IEP and the District re-issued the document as the final IEP. (S-19; N.T. 458-460, 489-498)

113. During the 2019-2020 school year, Student was absent eleven and half days. (S-5)

IEE

114. On July 20, 2020, the Parents obtained an independent educational evaluation (IEE) school-based neuropsychological evaluation of the Student. (P-30)

115. The IEE was comprehensive and thorough and included a review of records, opportunities for teacher and Parent input, aptitude and achievement testing, and assessments of social, emotional, and executive functioning. (P-30)

116. The IEE concluded that Student met the criteria for ED and OHI. The OHI determination was based on characteristics of an attentional disorder and depressive disorder and diagnosed DMDD and ODD that adversely affected Student's performance.

117. The IEE provided numerous suggestions for intervention strategies and recommendations for incorporation into Student's educational programming. (P-30)

118. The District's school psychologist reviewed the IEE and agreed that eligibility under both OHI and ED are appropriate for Student. (N.T. 108, 186)

119. On August 18, 2020, the Parents received the NOREP for the draft (first) IEP. Parent disagreed that the IEP was appropriate. (P-32; N.T. 246)

120. Parents did not receive the revised IEP (final) until September 2020. (N.T. 345-346)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The Burden of Proof

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), held that

the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence that the moving party is entitled to the relief requested. The burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the hearing officer. The burden of persuasion, in this case, was borne by the Parent, the filing party. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. Whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

Witness Credibility

It is the responsibility of the hearing officer, as factfinder to determine the credibility and reliability of witnesses’ testimony. 22 Pa. Code §14.162 (requiring findings of fact); *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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*, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings.

Hearing officers, as factfinders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her ability and recollection concerning facts necessary to resolve the issues presented. However, the weight accorded the evidence was not equally placed. The District school psychologist, who was qualified to speak to the areas in which she was so recognized, provided testimony that was not deemed to lack credibility. However, that testimony was unpersuasive with respect to the impact of collected data on the conclusions reached in both evaluations.

The findings of fact were made as necessary to resolve the issues; thus, not all the testimony and exhibits were explicitly cited when unnecessary. However, in reviewing the

record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' comprehensive closing statements.

General IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate considering a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above 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); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Child Find and Evaluation Requirements

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. § 1414(a)(1)(C)(i). The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted). The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an eligible child [], the content methodology or delivery of instruction.” 34 C.F.R. § 300.39(a)(2).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all the child’s individual needs are examined.

Conduct of evaluation.

In conducting the evaluation, the local educational agency shall—

(A) 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— (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the

child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) 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

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b).

The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B).

Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When parents disagree with a LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Here, the Parents obtained private evaluations on their own and now seek reimbursement. The standards for an LEA evaluation, however, apply to addressing the issue in this related context.

Least Restrictive Environment

Another critical premise in the IDEA is the obligation that eligible students be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards: To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

Full participation in the IEP process does not mean, however, that an LEA must defer to parents’ wishes. See, e.g., *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents’ demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); see also *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child’s special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must decide, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999)(same).

Section 504 and ADA Principles

In the context of education, Section 504, and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a).

Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit”. *Ridgewood, supra*, 172 F.3d at 247. Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). Section 504 further prohibits discrimination based on a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

To establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood, supra*, 172 F.3d at 253. The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.* The evaluation is conducted by a local educational agency (LEA)

such as a school district.

Pennsylvania's Chapter 15 regulations similarly obligate the LEA to obtain sufficient information to determine whether a child is a "protected handicapped student" and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6. Additionally, a parent must be given an opportunity to meet with school district representatives to discuss any evaluations and accommodations, and be notified of the procedural safeguards that attach. *Id.*

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are also essentially identical. *Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those statutes. See, e.g., *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). The IDEA statute of limitations also applies to Section 504 claims such as those raised here. *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009). In this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

IDEA Statute of Limitations

The IDEA expressly provides that a party "must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(c); see also 34 C.F.R. § 300.511(e). In other words, "[t]he IDEA statute of limitations is triggered when the [filing party] knew or should have known about the action that forms the basis of the complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, *28-29, 2008 WL 2798306, *10 (W.D. Pa. July 18, 2008). The IDEA also expressly provides for two specific exceptions to the two-year limitation period permitting claims beyond that

timeframe to a parent who was prevented from requesting the hearing as a result of: (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D); see also 34 C.F.R. § 300.511(f). There is a causation element to these exceptions. *Id.*; *D.K. v. Abington School District*, 696 F.3d 233 (3d Cir. 2012). The *D.K.* Court has also clarified that a misrepresentation must be intentional and egregious, and also involve statements about resolving the parties' dispute; and, that the withholding exception applies to information that the IDEA requires an LEA provide in that section of the statute. Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. § 46540-01 at 46706 (August 14, 2006)). This is a "highly factual inquiry." *Id.* The Third Circuit recently reaffirmed the importance of the knew or should have known date in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 606 n. 4 (3d Cir. 2015). Generally speaking, the fact-finder must determine whether the actions or inaction by an LEA "are sufficient to alert a reasonable parent that the child would not be appropriately accommodated." *Brady P. v. Central York School District*, 2018 U.S. Dist. LEXIS 43230 at *19, 2018 WL 1367325 at *7 (M.D. Pa. 2018).

The Third Circuit also explained in *G.L.* that there is obvious tension between the obligation to timely pursue a claim against an LEA as a diligent plaintiff and the need for participation in the parent/LEA collaboration process that is inherent in the IDEA: On the one hand, although a child's right to special education under the IDEA does not turn on parental vigilance, *M.C. v. Central Regional School District*, 81 F.3d 389, 397 [3d Cir. 1996], parental vigilance is vital to the preservation and enforcement of that right. ... Parents are often in a position to be forceful advocates for their children and through their vigilance and perseverance to help fulfill the IDEA's promise of a free appropriate public education. That "cooperative process . . . between parents and schools" that results from a parent's action, after all, is at the very "core of the statute" itself. *Schaffer*, 546 U.S. at 53. *G.L.*, 802 F.3d at 625.

Statute of Limitations - KOSHK

The first issue to be addressed is the scope of the Parents' claims since the discussion that follows is dependent on that determination. On April 17, 2020, the Parents filed their Complaint seeking relief including compensatory education, under the IDEA and Section 504, from the beginning of the 2016-2017 school year until the District develops an appropriate educational program for Student. The District contends that the statute of limitations limits the Parents' claims to matters that arose on or before April 17, 2018 – or two (2) years prior to the date the Complaint was filed.¹¹

In their Complaint, the Parents suggested January 17, 2019 as the “knew or should have known” (KOSHK) date. At hearing, the Parents suggested they did not know or have a reason to know of the actions forming the basis of their claims until October 10, 2018.¹² Specifically, the Parents argue that it was not until October 10, 2018, during an email correspondence with a classroom teacher that they became aware that the District's actions constituted a denial of FAPE. On that day, the Parents in an email exchange with the District expressed frustration at the “blatant disregard” from District staff in response to their repeated requests for assistance with Student's needs. The Parents contend, it was not until that point, they had the “sufficient critical facts” to understand that the District's actions had become a denial of FAPE. The District contends that the Parents knew Student was diagnosed with conduct and mood disorders as well as ADHD and of the numerous in school behavioral incidents. Based on this knowledge, the District contends the Parents had a great deal of information and they knew or should have known there were issues that required their legal attention.

The Parents in this matter had knowledge of Student's behavioral and functional concerns and made no attempt to conceal this information from the District. They disclosed the medications Student was prescribed as well as the psychiatric diagnoses the drugs were intended to address. However, that does not mean the Parents knew that Student's needs were unaddressed by the District. From early in the fourth grade, the Student compiled a troublesome disciplinary record, fraught with aggression, bullying, threats of violence, disrespect, class, and bus riding disruptions. Throughout the fourth, fifth and into the sixth grade, the District implemented both

¹¹ The parties agreed to defer a ruling on the scope of the claims until the final decision.

¹² The Parents are not asserting either exception to the statute of limitations.

consequences and interventions to ostensibly address the Student's negative behaviors. However, not until an email exchange where the Parent's alarm and frustration grew at what they perceived as the lack of concern for their child's behavior did the District react. I determine the KOSHK date to be October 10, 2018. As such, the Parents claims from the 2016-2017 school year onward will be considered.

The Parents' Claims

Child Find

2016-2017 School Year -Fourth Grade

The first claim is that the District did not comply with its child find obligations and timely evaluate and identify Student as eligible for special education during the 2016-2017 school year. Student entered the fourth grade, new to the District and undoubtedly trying to make friends, adjust and acclimate to an unfamiliar school. From a behavioral standpoint, the beginning of the 2016-2017 school year was relatively uneventful. However, in October, the Parent's raised concerns with the fourth-grade teacher that a change in Student's behavioral color chart reflected some inappropriate behaviors. The teacher indicated that Student's talking did disrupt others, a warning was given, but the behavior continued. The teacher attributed some of this behavior to the adjustment process and Student's attempt to make friends. Although other minor incidents occurred related to peer conflict, homework completion, and creating classroom disruption, later in the Spring of 2017, signals appeared that Student might be experiencing considerable emotional difficulties. In May 2017, Student threatened to [injure a peer]. For this behavior, Student received recess detention and a bus suspension; however, no further intervention occurred by the District. Unknown to all, this would be the start of an aggressive and defiant filled behavioral history. When this threat occurred, it was nearly the end of the school year, no obvious academic issues were evident, and except for the May incident, Student's school-based behavior was manageable. Overall, there were no glaring academic issues, only occasional behaviors, and one profoundly disturbing incident. In isolation, that episode was not sufficient to alert the District that an evaluation was needed. The Parents have not preponderantly established that the District failed concerning its child find responsibilities

during the 2016-2017 school year.

2017-2018 School Year-Fifth Grade

Next, the Parents contend that throughout the fifth grade, Student's academic, social, emotional, behavioral, and executive functioning deficits were so significant that the District should have recognized the need for an evaluation. For most of the school year, Student's behavior was unpleasant and disruptive, meriting the discipline received. However, in March 2018, Student's second shocking threat, [redacted], was on the outer limits of acceptance within a public-school setting. At this point, Student was an elementary school student, immature, undoubtedly aggressive, and with a nastier mouth than some. His grades, although not stellar, were mostly average to above average. However, with the exception of the threat, the other documented behaviors (name-calling, [disruptive behavior]) are concerning but not enough to trigger the District's child find obligations. The Parents have not preponderantly established that the District failed with respect to its child find responsibilities during the 2017-2018 school year.

2018-2019 School Year-Sixth Grade

Student entered the sixth grade during the 2018-2019 school year. At this point, Student's negative behaviors increased in frequency and intensity. In addition, the District was put on notice of Student's compromised social-emotional functioning. In August 2018, through a routine health inquiry, the Parent disclosed to the District that Student had either been bullied or engaged in bullying behavior, exhibited changes in social relationships, grades, eating or sleeping habits; withdrawn from family/friends, and had shown a general loss of energy, motivation, interest, or enthusiasm. By September 4, 2018, the District had knowledge of Student's diagnoses of anxiety, ADHD, and the need for daily medication [redacted] to address behavior and regulation issues. At this point, the combination of Student's compiled disciplinary history, diagnoses, and medications along with social-emotional disclosures should have been recognized by the District as "red flags" and triggered a deeper inquiry. Early in this school year, the District had information that Student was struggling with social-emotional symptoms that likely manifested through a poor ability to interact with others throughout the school day. After looking at a variety of factors, including school behavior and functioning, disciplinary and

medical information, and the communication between the parties, the District should have formulated a reasonable suspicion that an evaluation was necessary.

By October 2018, the Parents concerns grew, and they contacted the school for assistance and guidance. This was the same event that triggered the Parents' KOSHK awareness. At that point, the school principal suggested to Parents that a sixth-grade team meeting would help determine any issues with Student. In response, the Parents suggested an IEP. These events were the catalyst for an evaluative process that began in November 2018. Although the period of deprivation was brief, the District did violate its IDEA child find responsibilities toward this Student from September 4, 2018, until November 9, 2018, the date the District issued a permission to evaluate to the Parents.

District Evaluations

January 17, 2019 ER

In November 2018, the Parents consented to the initial evaluation of the Student. The District completed the evaluation in January 2019. The Parents challenge the District's January 17, 2019 evaluation as not sufficiently comprehensive to identify Student's needs. The District did use various assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, including the Parents' concerns. However, the ER was not sufficiently comprehensive to identify all of this child's special education needs, and the District's conclusions were unsupported by the information collected during its evaluative process.

The ER noted that Student had significant difficulties with symptoms of ADHD in the home but not in school and that physical conditions did not severely impact educational performance. As a result, the District concluded that Student did not meet the criteria for identification as a student having Other Health Impairment (OHI). Likewise, the ER noted that although Student presented with significant behavioral, emotional concerns indicative of an emotional disturbance, evidence was lacking that the concerns had been present for an extended period and adversely impacted educational performance. As such, the ER concluded that Student did not meet the criteria for identification as a student having an Emotional Disturbance (ED).

The District's conclusions appeared to hinge on its determination that no severe impact on Student's educational performance existed to justify specialized instruction.

Since enrollment in the District, the Parent disclosed that Student was diagnosed with ADHD and conduct, anxiety, and mood disorders for which various medications were prescribed. Through emails requesting assistance, responses to Student's repeated school infractions, and medical information supplied, the Parents also indicated their concerns that Student's inability to regulate behaviors negatively impacted academic functioning within the school setting. At the time of the ER, Student was failing several classes. However, the District's January ER relied upon input from only one teacher and did not request input from the Spelling, Reading, or Literature teachers where Student was failing classes.

Despite Student's lengthy history of in-school aggression, disrespect, and classroom disruptions resulting in various imposed disciplinary measures, the District requested social, emotional, behavioral, and executive functioning rating scale information from one teacher. On the BASC-3, the sixth-grade teacher provided ratings in the clinically significant range for externalizing problems, aggression, and bullying. At-risk areas were noted in anger control, emotional self-control, executive functioning, negative emotionality, and resiliency. The executive functioning index indicated extremely elevated concerns in emotional control, suggesting that Student may have difficulties with displaying outbursts, sudden/and or frequent mood changes, or excessive periods of emotional instability. The elevated scores suggested the possibility of Student difficulties with self-control and regulating impulsive behaviors. Similarly, the Connors 3 indicated very elevated ratings in the areas of defiance/aggression and peer relations for Student. The educator completing the SAED-2 indicated both inappropriate behavior and depression characteristics present regarding Student, although the school psychologist confirmed only one factor is necessary for a finding of eligibility of ED. Finally, the classroom observation of Student determined on-task behaviors for 75% of the time and off-task behaviors 25% of the time. Student's off-task behavior included arguing with a peer, staring at the board, playing with the whiteboard, looking around, and playing with clothing. By January 2019, Student had accumulated numerous interventions, most within the classroom, no doubt

resulting in interference, disruption, and the loss of valuable instructional time to the Student and others.

Although I cannot substitute my own judgment for the evaluator, the evidence in this case is overwhelming that the District's conclusions that Student did not require specially designed instruction failed to consider all collected data. Clearly, the District discounted negative information collected, failed to solicit information from a cross-section of teachers, and minimized the adverse impact of Student's behavior on the educational day. This evidence preponderantly supports the conclusion that the District's January 2019 RR did not meet IDEA criteria.

On February 26, 2019, the District offered an initial 504 plan. The plan referenced diagnoses of ADHD, a conduct disorder, and proposed strategies including breaking down tasks, repetition of directions, a highly structured environment, frequent prompting, positive peer pairing, and 120 minutes of monthly social work support. The 504 plan was inadequate. It was based on what has been determined to be a legally inadequate and insufficient evaluation.

For the remainder of the 2018-2019 school year, Student's behavior deteriorated. Reading and spelling grades declined, detention occurred with regularity for many offenses ranging from threatening [to harm school personnel], cursing, screaming at a teacher, creating disruptions in class, and [redacted]. Student was apparently in a great deal of distress, with actions compromising Student's safety and that of others. Education is much more than academics; an appropriate educational experience encompasses "all relevant domains under the IDEA, including behavioral, social, and emotional." *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010)(citation omitted) Based on the evidence in this matter, the Parents have preponderantly established that the January 2019 ER and resulting section 504 plan in place for the remainder of this school year were insufficient, and denied Student FAPE.

2019-2020 School Year

Student entered the seventh grade at the beginning of the 2019-2020. Although the 504 plan was updated to recognize Student's diagnosis of an oppositional defiant disorder, it remained ineffective. Throughout the fall, Student's pattern of disruptive, aggressive, and sometimes dangerous behavior continued with the accrual of a multitude of disciplinary incidents. In November 2019, the District placed Student into a District operated alternative education program. Student remained in that program for three weeks. In that program, Student witnessed two disturbing incidents, one with police intervention, involving drugs and a physical assault. Post-placement accounts conflict concerning whether the experience was harrowing or beneficial. By December 2019, a psychiatrist diagnosed Student with Disruptive Mood Dysregulation Disorder (DMDD), anxiety and suggested psychoeducational testing.

From January 6, 2020, through January 31, 2020, Student engaged in at least nine behavioral incidents ranging from refusing to take a test to disrupting a class. Student received disciplinary sanctions ranging from a conference to ISS. At the end of January 2020, during the third marking period, with Parent agreement, the Student was placed in an emotional support classroom where a class-wide behavioral support plan was implemented based on a level and point system. In February 2020, the District contacted the Parents and reported Student's [mental health concerns]. The District's ongoing inability to meet Student's educational needs is distressing. Clearly, this Student was in a great deal of pain and, on the surface, meeting the most basic of academic requirements. However, this Student's ability to access the educational environment was undoubtedly compromised, punctuated by outbursts, refusals, and disruptions that resulted in a deprivation of a complete school experience.

March 23, 2020 ER

In March 2020, the District evaluated Student for the second time. The Parents contend that the District's March 23, 2020, was insufficient because it failed to: evaluate all of Student's educational needs, correctly identify an OHI impairment, and make recommendations beyond the section 504 plan. The Parents have established by a preponderance of the evidence that the March 2020 evaluation report was inadequate, not meeting IDEA requirements. The March 2020 ER, unlike its predecessor, concluded that Student met the eligibility criteria for ED and needed

specially designed instruction. However, although acknowledging the ADHD diagnosis, the ER concluded Student did not meet the criteria as a child with OHI.

The March ER failed to adequately consider Student's behavioral and medical history, the Parent and teacher input regarding focus and attention, and their collective impact on Student's educational functioning. Based on the results of the ER, the District concluded that Student needed to improve math calculation skills, improve self-monitoring skills in the educational environment, and increase attention to task and work completion skills. Student's struggle with executive functioning was evident from the Parent, the teachers, and the Student. Collectively, they expressed concern about conduct, executive functioning, inattention, hyperactivity/impulsivity, learning problems, and defiance/aggression issues. These behavior ratings concluded that Student had great difficulty maintaining focus and attention in class. Student was diagnosed and medicated for ADHD because of the difficulty presented by this condition. Even the attempted 504 plans acknowledged the need to provide accommodations for Student's symptoms associated with ADHD. Overall, the March 2020 ER was not sufficiently comprehensive to identify all this child's special education needs.

April 2020 IEP

Next, the Parents contend that the District's April 2020 IEP was inappropriate because it failed to offer specially designed instruction; indicate Student's needs outlined in the March 2020 ER; include adequate and appropriate goals and offer research-based programming to implement the behavior plan. In response, the District asserts that the IEP could not be implemented because face to face instruction, recently resumed. An IEP must be based on a comprehensive and accurate ER. Having determined that both the January 2019 and March 2020 evaluation reports were inadequate, the offered April 2020 IEP is also inadequate. Furthermore, the revised IEP was not shared with the Parents until September 2020, well after the request for due process. Furthermore, testimony during the hearing was not clear which IEP, the draft or revised was in dispute.

IEE Request

In March 2020, the Parents, through counsel, indicated disagreement with the District's March 2020 ER and requested reimbursement for an independent educational evaluation (IEE). The District agreed to reimburse the Parents for the requested IEE in accordance with a school district policy. The IEE was comprehensive and thorough and concluded that Student met the criteria for ED and OHI. The District agreed that the IEE was appropriate and that Student met the criteria for both OHI and ED.

The current dispute concerns the dollar amount for reimbursement to the Parents. The NOREP issued to Parents confirming the District funded IEE clearly stated that the reimbursement amount was controlled by a named school district policy. It is unfortunate that the Parents could not obtain an IEE within the financial constraints agreed to. However, I am unwilling to change the terms of the agreement.

Compensatory Education

An award of compensatory education is appropriate in this matter. Compensatory education may be an appropriate form of relief where an LEA knows or should know that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

An award of compensatory education must reflect consideration of all circumstances, and on this record, it is not possible to calculate a qualitative make whole remedy. Thus, the quantitative approach must be used. The remedy must be equitable under the circumstances.

The Parents seek full days of compensatory education for every day of deprivation on the grounds that Student's disabilities impacted both classroom and non-classroom settings. I decline to adopt that analysis. When the District developed an IEP, it offered itinerant learning support. Although a determination has occurred that the April 2020 IEP was inadequate, that nevertheless serves as a starting point to craft an equitable compensatory education determination. Balancing Student's behavior and mental health needs with Student's academic needs, as well as the lack of special education services, this hearing officer concludes that an award of one hour per day of compensatory education is appropriate from September 4, 2018 (child find trigger date) to November 9, 2018 (issuance of PTE). Because the subsequent 504 plans and evaluation were deficient, the second period of compensable deprivation is from January 17, 2019 (ER issued) through the last day of the 2019-2020 school year.

Prospective Relief

The Parents seek compensatory until such time the District offers an appropriate program and placement. That request is denied. The parties now have access to a comprehensive District funded IEE. Both parties agree it is appropriate. The District shall be directed to reconvene the IEP team to incorporate appropriate revisions to the Student's program and develop an appropriate IEP consistent with the July 20, 2020, IEE.

CONCLUSION

Based on the foregoing, the Parents have established by a preponderance of evidence that the District violated its IDEA and Section 504 obligations toward this child through both inappropriately conducted evaluations of Student and the resultant lack of appropriate programming through the 504 plans and offered IEP. The first period of deprivation was from September 4, 2018 until November 9, 2018. A second period of deprivation occurred from the

issuance of the completed ER, on January 17, 2019 until the end of the 2019-2020 school year. An award of compensatory education is appropriate and ordered below.

ORDER

AND NOW, this 21st day of January 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District did deny Student FAPE during the 2018-2019 school year from September 4, 2018, to November 9, 2018.
2. The District did deny Student FAPE from January 17, 2019, to the end of the 2019-2020 school year.
3. To remedy the denial of FAPE, Student is awarded one (1) hour of compensatory education for each day that Student attended school from September 4, 2018 to November 9, 2018 and from January 17, 2019 to the end of the 2019-2020 school year.
4. The award of compensatory education is subject to the following conditions and limitations.
 - a. Student's Parents may decide how the compensatory education is provided.
 - b. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs.
 - c. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.
 - d. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through an appropriate IEP to assure meaningful educational progress.

- e. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.
 - f. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).
 - g. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents.
 - h. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.
5. The District shall reconvene a meeting of Student's IEP team to include the Parents within ten calendar days of this order to develop a new IEP for Student that incorporates appropriate revisions to the Student's program consistent with the July 20, 2020, IEE.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Joy Waters Fleming
Joy Waters Fleming, Esquire
Special Education Hearing Officer
January 21, 2021