

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

OPEN HEARING

ODR File Number:

22265/18-19

Date of Hearing

October 10, 2019

Child's Name:

A.J.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Zachary Meinen Esquire
Montgomery Law LLC
1420 Locust Street, Suite 420
Philadelphia, PA 19102

Local Education Agency:

Russell Byers Charter School
1911 Arch Street
Philadelphia PA 19103

Counsel for the LEA

Maria Ramola, Esquire
McKenna Snyder LLC
350 Eagleview Boulevard, Suite 100
Exton, PA 19341

Hearing Officer:

Linda M. Valentini, Psy.D, CHO
Certified Hearing Official

Date of Decision:

November 10, 2019

BACKGROUND

Student¹ is a 1st grade child who enrolled in the Charter School's (School) Pre-K program at age 4 ½. At the end of Student's Pre-K year, Student received an evaluation under the auspices of Student's local school district, and was identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations. However, the School subsequently reversed the eligibility determination when Student was in Kindergarten. Student is currently regarded as an "individual with a disability" (Attention Deficit Hyperactivity Disorder) as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a "protected handicapped student" under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15). The parties presently dispute whether Student is eligible under the IDEA.

In reaching my decision I carefully considered the witnesses' sworn testimony, documents admitted into the record, and the parties' written closing legal arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based on the record before me I find in favor of the Parent.

¹ In the interest of confidentiality and privacy Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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).

ISSUES

1. Is Student eligible for special education services under the IDEA?
2. If Student is eligible for special education services, at what point should the School have made an eligibility identification?
3. If Student is ineligible for special education services under the IDEA, is Student eligible for a Section 504 Plan?
4. If Student is eligible for a Section 504 Plan, at what point should the School have made an eligibility identification?
5. If Student is eligible for special education services, or if Student is eligible for a Section 504 Plan, and the School did not make a timely eligibility identification, is Student entitled to compensatory education, in what form and in what amount?
6. Is the Parent entitled to reimbursement for the private psychoeducational evaluation she obtained for her child?

FINDINGS OF FACT²

Student's Academic Abilities

1. At age 4 ½ Student began attending the School for Pre-K in the 2017-2018 school year. [NT 334-335; J-1]
2. Student's grandmother is a 1st grade teacher, and Student was provided structured education from infancy on. Upon entrance to Pre-K

² Transcript page references to witnesses are as follows: School BCBA - NT 36 through 82; School Psychologist - NT 83 through 160; Private Evaluator - NT 163 through 233; Teacher/Tutor Previous Year - NT 236 through 270; Current Teacher - NT 271 through 298; Director of Special Education - NT 299 through 328; Occupational Therapist - NT 330 through 333; Parent - NT 334 through 367. Counsel are commended for offering Joint Exhibits and for presenting their cases in a clear and efficient manner such that the hearing was completed in one session.

Student had already been taught many of the basic reading and math foundational skills. [NT 355-356]

3. The Parent is concerned that when material becomes more difficult and Student has to work to learn, then academic problems will arise. [NT 355-356]
4. Student's 2017-2018 Pre-K report card shows all Proficient and Advanced academic grades and for the most part, Basic to Proficient grades in Social and Work Skills. [NT 316; J-3, J-13]
5. Developmental Reading Assessments results during the 2018-2019 Kindergarten school year showed Student to be on or slightly above the expected levels for most of the school year, and by the end of Kindergarten Student's DRA level was equivalent to mid to end of first grade, or a half to whole grade level ahead of chronological grade. [NT 237-238, 255]
6. The current 1st grade teacher noted that Student is doing very well academically in her classroom, is one of her best students test-wise, volunteers and participates, and when finishing work ahead of peers is about 80 to 90 percent accurate. [NT 275, 287-288]

Pre-K Behavioral Problems and Finding of IDEA Eligibility

7. When Student was in Pre-K the Parent received a lot of phone calls from the teacher that Student was not staying in Student's seat, was spinning around on the carpet, was going under the table, wasn't following directions, and was crying when having to move Student's color³. [NT 335-336]

³ Apparently when the children behaved or misbehaved a color representing the child's behavioral status was moved up or down.

8. Student was having tantrums with inconsolable crying and meltdowns at home as well as at school, with more being seen in the home. [NT 336]
9. The Parent noted that Student would spin a lot on Student's knees, would line toys up, and would have a lot of problems when there was an issue with the routine. She also noted that Student doesn't have back and forth conversations, such as if you speak to Student, Student will say hello, but won't continue the conversation. The Parent also noted that Student has a lot of sensory issues such as wanting to crash or bang into things, wanting to touch things, to smell things, and makes a lot of noises and sounds. [NT 340-341]
10. Toward the end of Pre-K, the Parent requested an evaluation from her school district of residence and signed a permission to evaluate form on April 12, 2018. The Parent noted concerns about Student's behavior that included meltdowns, sensory issues with certain clothing, problems interacting with others, difficulty with speech, self-care issues, and other atypical behaviors that the Parent believed to be indicative of autism. The Elwyn SEEDS program conducted the evaluation on June 15 and June 18, 2018. [NT 337-338; J-4]
11. The Elwyn evaluator learned from Student's Pre-K teacher at the School that although Student was very bright and ahead academically, Student often had difficulty sitting still, tended to call out a lot during group activities, and would often fall or roll around on the floor. The teacher described Student as lacking impulse control as demonstrated by shouting out during activities. [J-4]
12. Student's Pre-K teacher also observed that while Student did not typically hit classmates, Student often got into arguments with them. The teacher also observed that Student did not respond well to being

“partnered up” with “Male Mentor”⁴ in the classroom, crying during these sessions, resulting in their discontinuation. [J-4]

13. Student’s Pre-K teacher further reported that Student’s temper tantrums continued (but with decreased frequency), that Student tended to whine and cry when upset, and that Student became upset when believing that other children were “laughing at” Student. [J-4]
14. Emails from a teacher to the Parent documented behaviors: October 2017 – [redacted]; October 2017 – [redacted]; December 2017 – written up for behavior; February 2018 – reacts to consequences for very disrespectful behavior by throwing a fit and screaming and crying. [J-2]
15. Formal assessment resulted in Student’s being over two standard deviations (-2.2) below the mean in Social and Emotional Development. [J-4]
16. Elwyn conducted a “Sensory Observation” which noted intermittent eye contact, standing and rocking during the evaluation, resting head on table, yawning and rubbing eyes for extended periods, heavy breathing when concentrating on tasks, purposely crashing and falling when performing gross motor tasks, and tripping when leaving the room. [J-4]
17. The Elwyn evaluator concluded with regard to sensory processing that Student would benefit from support to help gain skills to maintain attention to activities and people, as well as help Student to seek out

⁴ It is unclear who this Male Mentor was or what “partnering up” means. The reference to the Male Mentor was made in a document that was introduced during the hearing but not thoroughly reviewed at that time.

sensations in a safe way that will allow participation in play and learning activities. [J-4]

18. The Elwyn evaluator concluded that Student had more than a 1.5 standard deviation delay in one or more areas of development and the delay(s) resulted in the need for specially designed instruction. [J-4]
19. On August 7, 2018 Elwyn convened a meeting and drafted an IEP to improve Student's attention and sensory processing skills for participation in age appropriate learning, play, and daily routine tasks. The IEP provided for 45 minutes per week of specialized instruction and 45 minutes per month of occupational therapy. [J-5]
20. On August 20, 2018 the Parent sent an email to the School's special education director, informing her that Student had received an evaluation and now had an IEP. The Parent provided these documents to the School's special education director on August 21, 2018. [NT 339-340, 357; J-5]

Kindergarten - Continuing Behavior Problems

21. The School did not provide Student with special education services or the OT related service when Student entered the school age Kindergarten program. Instead, on September 4, 2018, the School issued a Prior Written Notice/Permission to Evaluate "due to [Student's] early intervention services for a school-aged evaluation". [J-6]
22. Write-ups in Student's file documenting inappropriate behaviors in Kindergarten included: September 2018 – out of seat, calling out, throwing crayons; November 2018 – jumped at teacher, vandalism, threatened teacher, continued insubordination. [J-7]

23. In Kindergarten the Parent continued to receive phone calls from the Dean of the School at least weekly, that Student was pulled out of classroom and into the Dean's office because Student was [redacted] disruptive. [NT 344]
24. The School imposed consequences for these behaviors such as loss of participation in recess, removal from the classroom, withholding items the other children were given such as tablet computers and told they were just for 'the good kids', and being singled out to sit separately. [NT 344]
25. The School was going to suspend Student in Kindergarten when there was a write-up for 'graffiti or something on a table' but when the Parent asked the School for an incident report the School changed its mind and said Student could come in the next day. [NT 345]
26. The incidents were not being reported to the Parent in paper form. Rather, they were coming to her via phone calls. [NT 346]
27. The Parent reports that Student's vocal tics are so frequent that she doesn't notice them anymore except when other people turn around and look. Sometimes the tics are noises and sometimes they are repetitions of a word or phrase. Student [redacted]. These vocal tics became noticeable over the past year and a half. [NT 348-349]

School's First Evaluation and Finding of No Disability and No IDEA Eligibility

28. The School's evaluation was completed on November 2, 2018 and the evaluation report was updated with BASC-3 results from both the Parent and Student's Kindergarten teacher on November 5, 2018. [J-8]

29. The reason for referral that the School cited in the evaluation report did not mention that the evaluation was being conducted due to previous eligibility, but instead noted the reason for referral as 'Parent request' and concerns with attention span and "a lot of notes sent home for being active and disruptive." [J-8]
30. The November evaluation consisted of a single 15-minute class observation and there was no functional behavior assessment. [J-8]
31. The School's psychologist noted that although the Parent was reporting more problems at home than the teacher did at school, Student's behaviors in school included the inability to sit in a chair for a long time, bothering other children, and always doing something to garner the adult's attention; these behaviors were noted to go on "all day" in all classes,. [J-8]
32. Teacher input forms were completed by staff that had only known Student for two weeks. The BASC-3 Consistency Index for the teacher "was elevated to Caution," which indicated to the evaluator that there was a "high probability that the obtained ratings across BASC-3 scales might not be sufficiently reliable to interpret." [J-8]
33. Even though the teacher's BASC-3 scores were not sufficiently reliable for interpretation, because Student's strengths included the ability to read and write, and Student could finish work before classmates finished, the evaluator concluded that problems were prevalent only at home and the classroom behaviors were likely to be more related to the slower pace of the class than to an inherent behavior problem. She recommended that Student be given additional work to complete after Student finished the assigned class work when peers were still working on the original assignment. [J-8]

34. The evaluator's reasoning was that because Student's behaviors did not impede Student's academics, Student was not eligible for school-age services pursuant to IDEA criteria. As a result, in early November 2018 Student lost the eligibility for special education that had been conferred in August 2018, three months previously. [J-8]
35. There is no evidence of the evaluator's having reviewed the previous Elwyn information including the June 2018 Elwyn evaluation report, the August 2018 IEP, or any of the recommendations or provisions that flowed from Elwyn's assessment. The School's evaluation does not mention anywhere that Student was already found in need of specialized instruction and occupational therapy, nor does it mention the evaluation by Elwyn. [J-4, J-8]
36. The School issued a Notice of Recommended Educational Placement (NOREP), declaring Student not to have a disability, and to be ineligible for special education services; the Parent disagreed and retained legal counsel who filed a Complaint on November 27, 2018. [J-10]

School's Reevaluation and Finding of Disability but Ineligibility under IDEA

37. The Parent withdrew her complaint when the parties agreed to tolling the statute in order to have a new evaluation performed by a different School Psychologist, as well as provision of a Functional Behavioral Assessment ("FBA") and an Occupational Therapy evaluation. The School issued a new Permission to Evaluate on December 17, 2018, it was signed by Parent on December 20, 2018, and it was sent to the School's counsel by Parent's counsel on December 29, 2018. [NT 308-309; J-12]

38. The School stipulated on the record that while the School was closed on December 29, 2018 for winter break until sometime in the first week of January 2019, it would have completed the reevaluation report in a timely fashion before the end of February (February 27, 2019 was Day 60). However, due to a clerical oversight, the School did not receive the signed permission form until February 27, 2019. The new school psychologist completed the reevaluation report on April 2, 2019, 94 days after the signed permission form was transmitted to School's counsel. The completion of the reevaluation report was 34 days beyond the statutory requirement.⁵ [NT 25-26; J-17⁶]
39. Meanwhile, on December 10, 2018 Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by a developmental pediatrician at a local hospital exclusively for children. [J-11]
40. The School's second school psychologist reviewed the first school psychologist's report and did not disagree with anything in the report. That report included findings that Student did not have a disability at all and did not require specially designed instruction. [NT 85]
41. The school psychologist utilized the BRIEF-2 to gather data regarding executive functioning. She noted that while the teacher's endorsements on the BRIEF-2, an instrument that assesses executive

⁵The hearing officer wonders why the School did not inquire of the Parent or of its own counsel about the status of the signed permission form given that the reevaluation was related to the parties' resolving the due process dispute.

⁶ J-17 turned out to be a version of the evaluation that was missing three pages that included the school psychologist's observation of Student and teacher reports. The hearing officer asked that the School provide a complete copy of the report, but it was not provided. The absence of the requested document would not change the outcome of this decision, however. [NT 105-107]

functioning, showed Student's behaviors being Clinically Significant for Inhibit, Self-Monitor, and Emotional Control, there were no problems with cognitive aspects of executive functioning such as organization, working memory or initiating/continuing on task. She also noted that Student's report cards continued to show high academic achievement. [J-17]

42. The school psychologist utilized the Conners-3rd Edition to gather behavioral data. Student was "Very Elevated" in the categories of Inattention, Hyperactivity/Impulsivity, Defiance/Aggression, and Peer Relations. The DSM-5 symptom scales indicated 'Very Elevated' for ADHD Inattentive Type, ADHD Hyperactive/Impulsive Type, and Oppositional Defiant Disorder, and they were 'Elevated' for Conduct Disorder. [J-17]
43. While the school psychologist noted that both Student's Preschool teacher and the Kindergarten teacher observed that Student continued to be disruptive to peers, she emphasized that at times this disruption occurred when Student had completed classroom assignments before other students and was therefore bored. [NT 269, 275]
44. As part of the reevaluation, in March 2019 the School's contracted Board Certified Behavior Analyst (BCBA) conducted an FBA, performing four observations of Student over two days for a total of about six hours. Over these six hours of observation Student left Student's seat 51 times, Student destroyed property 5 times, Student inappropriately socialized 19 times, and Student called out 101 times. The BCBA indicated that in none of these behavioral observations did the behavior result from Student's completing work early. [NT 41-44, 52, 55]

45. The BCBA concluded based on the FBA that Student required a Positive Behavior Support Plan (PBSP). [NT 62-63; J-16, J-18]
46. The BCBA also recommended “functional communication training” which would be provided by classroom teachers and aides after he reviewed the FBA report with them, and that he would oversee the process and ongoing instruction given his role as a general behavioral consultant for the School. [NT 57-59]
47. As part of the reevaluation the School conducted an Occupational Therapy (OT) assessment on March 1 and March 29, 2019. The occupational therapist concluded that Student “scored as ‘definite difference -- more than others’ in multiple Sensory Profile sections. The occupational therapist recommended consultative OT services. The school psychologist reviewed the OT evaluation when gathering data for her evaluation report. [NT 93, 331; J-17]
48. Although according to the parent and the teacher Student has some social difficulties, the school psychologist concluded that while [Student] displays some of the characteristics of Autism Spectrum Disorder, these are “likely explained by [Student’s] ADHD” and “sensory sensitivities”. [J-17]
49. After the reevaluation, as was the case for the November 2018 evaluation, the School did not convene a meeting to determine eligibility. The School’s practice is to simply accept the findings of the evaluators and only meet to discuss their recommendations. Eligibility for special education services or a 504 Plan is determined solely by the school psychologist. [NT 306-308]
50. The school psychologist concluded that Student met the classification for Other Health Impairment (OHI) based on ADHD but did not qualify for special education services. The school psychologist came to this

conclusion because Student is “a bright child who achieves within or above grade level academically... [Student] is one of the first to complete a task and then may become disruptive.” She noted that Student only had two disciplinary referrals in the academic file, an assertion that is inaccurate. She opined that a Section 504 Plan was appropriate instead of an IEP because the supports Student needed were “accommodations” and “modifications” to address Student’s focus, self-regulation and other inappropriate behaviors but were not specially designed instruction. [NT 88-89, 140-143; J-17]

51. The school psychologist recommended that the Parent pursue additional evaluation related to autism “outside of the school setting.”⁷ [NT 119-121]
52. The school psychologist recommended that the 504 Plan should include a Positive Behavior Support Plan; skilled occupational therapy; access to interesting independent projects and assignments Student can work on after completing assigned work; social skills training from the counselor to improve social skills; teaching of language to help Student express needs and coping skills for frustration, anger, sadness and anxiety; frequent attention checks by teachers; sensory breaks at least every 15 minutes; preferential seating; and offering jobs to improve self-esteem. [J-17]
53. Accordingly, the School offered a 504 plan on May 1, 2019 which included a positive behavior support plan, occupational therapy and

⁷ The Parent secured an appointment for Student to have an autism evaluation at a community agency on October 14, 2019. [NT 341]

counseling. The Parent did not sign the NOREP accompanying the 504 Plan.⁸ [J-18, J-20]

54. The 1st grade teacher is “informally” implementing the proposed Section 504 Plan because of her observations of Student’s needs. Student is not currently receiving OT or counseling. [NT 291-294]

Further Descriptions of Student in Kindergarten⁹ and 1st Grade

55. The director of teaching and learning provided Student with small group (5 students) instruction and lessons tied to reading and character standards three times a week for 20-40 minute sessions from September 2018 to March 2019. He noted that Student was bright, but engaged in “calling out”, was “kind of fidgety”, required “multiple directions”, required “close proximity” and “light touches” and would be given “brain breaks” to “get our wiggles out”. He had immediately identified Student as someone who needed extra help, and concurred that Student needed a behavior plan. [NT 241, 264; J-19]
56. Student needed more of these types of interventions than other students, but the director of teaching and learning commented that Student was “young” and needed to be taught how to cope with [Student’s] feelings. He also did not find that Student’s behaviors of

⁸ There are conflicting interpretations about whether or not the 504 Plan could be implemented. The Parent maintains she rejected the denial of IDEA-eligibility determination, but consented to the 504 plan’s implementation pending the results of the instant due process matter. The school team maintains that it offered to implement the 504 Plan in the interim to see how it would go, but that the Parent did not agree to this offer.

⁹ The Kindergarten teacher was unavailable to testify.

calling out or rolling on the rug interfered with other students in the small groups or whole class.¹⁰ [NT 239, 241-248, 264-265]

57. The current 1st grade teacher noted that Student “can follow directions and follow along as we read” but has to be redirected on average, five to seven times during a 50 minute reading block, for wiggling, shifting and fidgeting. When Student is extra fidgety or talkative, the teacher will seat Student close to her, or deliver instruction close to Student. [NT 275-276, 280, 285-288]
58. The teacher feels that a one-on-one aide would be helpful for Student, whose behavior among her 26 students she placed as high as the top 3 worst behaved in her classroom, which contains several children with IEPs or Section 504 Plans. The previous year’s teacher, reporting that Student’s inappropriate behaviors happened all day and were pervasive, considered that, “Maybe [Student] should have a one-on-one.” [NT 284, 290; J-8]
59. Once or twice in a 50-minute block Student will talk or make a [redacted] sound of which Student admits to being aware. Peers may ask Student to stop. The BCBA also noted these spontaneous non-communicative noises and estimated that they occurred about 25% of the time he was observing Student for the FBA. [NT 65-69, 276-280]

11

¹⁰ The Parent recalled that at the 504 meeting the director of teaching and learning described many of Student’s behaviors such as rolling on the ground, spinning, making weird noises, calling out, constantly getting out of seat, bickering with others, and various atypical sensory seeking/avoiding behaviors. [NT 354-355]

¹¹ On July 26, 2019 Student received a neurological evaluation at the hospital specializing in children and was diagnosed with a Chronic Vocal Tic Disorder. [J-23]

60. The teacher does not agree with the ED classification from the private psychological report, as in her estimation students with this classification are “aggressive, impulsive, harmful to themselves and others and suicidal” and Student is none of these. [NT 290-291]

Private Evaluation

61. The Parent obtained a private evaluation dated July 7, 2019. The private evaluation consisted of a thorough review of existing evaluation data; a clinical observation; and testing with the KBIT-2, WRAT-4, BASC-3, BRIEF-2, and CARS-2-QPC. [J-23]

62. The private evaluator found that cognitive ability and academic achievement were consistent with the previous evaluations’ findings that Student was in the average to above average range. [J-23]

63. With regard to Student’s social/emotional, behavioral, and sensory functioning, the private evaluator found that current and prior evaluation results indicate that [Student] is manifesting a number of clinically significant behaviors, all of which are of a long-standing nature and continue to prove problematic in terms of ability to remain focused on task, appropriately interact with peers and adults, and establish positive interpersonal relationships. The private evaluator opined that behavioral and social/emotional deficits are far more significant and problematic than the results of both prior School evaluation reports suggest. [J-23]

64. Although the private evaluator agrees that some of the services offered in the School’s proposed 504 Plan are a “good starting point” he concludes that: “It is the opinion of the current examiner, that [Student] is eligible for, and in need of, an individualized program of specially designed instruction based on a primary classification of Other Health Impairment (ADHD - predominantly

hyperactive/impulsive presentation) and a secondary classification of Emotional Disturbance based on a diagnosis of Generalized Anxiety Disorder. Given the chronic and significant behavioral and social/emotional concerns that [Student] manifests, a 504 Plan is not sufficient to meet [Student's] complex learning needs at this point." [J-23]

65. The private evaluator predicted that, "Unless appropriate and robust interventions are implemented expeditiously and with fidelity, [Student] is at risk for developing even more problematic mental health issues in the immediate future (e.g. Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder)." The private evaluator believes that as the material becomes more difficult, Student's struggles will have a negative impact on future academic development without the appropriate program in place. [J-3]
66. The school psychologist reviewed the private evaluation report and created an additional Evaluation Report on August 16, 2019. At the School's request, the school psychologist revised the report a month later to address the emotional disturbance classification. [NT 111; J-24]
67. The school psychologist disputed the emotional disturbance classification because Student makes consistent academic progress within grade level expectations, behavior records do not indicate "severe" behaviors as there were only two written referrals in the discipline record, and "teachers and staff do not report significant signs of anxiety." [J-24]
68. While the school psychologist believes that emotional disturbance is a "really stigmatized label" to put on a young child without extreme confidence that the classification correctly represents a child's needs,

the private extensively experienced psychologist testified that he seriously considers an ED diagnosis before conferring it and would never provide such a recommendation without significant justification and a sufficient amount of data. [NT 126, 225-226]

69. The school psychologist disagreed with all the private evaluator's conclusions regarding eligibility and programming needs. She concludes that "in order to provide [Student] with a Free and Appropriate Education (F.A.P.E.) (sic) to meet [Student's] needs at school while ensuring the least restrictive environment in accordance with I.D.E.A. (sic) the team disagrees with [the private evaluator's] recommendations to place [Student] in special education at this time." [J-24]

Legal Basis

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof.

Charter Schools

A charter school acts as the LEA for its students, and assumes the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and Section 504 and their respective implementing regulations. 34 C.F.R. 300.209(c); 22 Pa. Code §§ 14.103, 711.3. Chapter 711 *et. seq.* of the Pennsylvania School Code, "Charter School and Cyber Charter School Services and Programs for Children with Disabilities", contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Code Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.* Further references therefore will be to the IDEA and/or its regulations as well as to Section 504 and/or its regulations.

Transition

All children who are not provided with transition services will remain eligible for the Early Intervention services described in their preschool Individual Education Program when they enter kindergarten. *D.B by M.B and A.B.v. Fairview Sch Dist.*, 117 LRP 45742 (W.D. PA. 10/31/17) (summarizing PA guidelines on EI transition).

Child Find

Students with disabilities are entitled to a free, appropriate, public education (FAPE).

The IDEA and its implementing 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. This obligation is commonly referred to as "child find." Under the IDEA's "child find" requirement, a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." This includes children who are suspected of having a disability but who receive passing grades and are "advancing from grade to grade." (34 CFR 300.111(c) (emphasis added)). See *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Perrin v. Warrior Run Sch. Dist.*, 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Section 504 imposes a similar obligation. See *P.P. v. West Chester Area School District*).

FAPE

A child with a disability who requires specially designed instruction is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Chapter 711 *et. seq.* of the Pennsylvania School Code, "Charter School and Cyber Charter School Services and Programs for Children with Disabilities", to receive a free appropriate public education (FAPE). FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." See *Ridley* citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational

standards within the jurisdiction of the public agency that apply to all children.34 CFR § 300.39(b).

The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual potential.” *Shore Reg’l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). In *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court considered a lower court’s application of the *Rowley* standard, concluding that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

Section 504¹²

Section 504 provides, “No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....” 29 U.S.C. § 794. A recipient of federal funds that operates a public elementary or secondary education program “shall

¹² Pennsylvania has decided to implement the statutory and regulatory requirements of §504 at the state level through the enactment of Chapter 15.” *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App’x 148, 153 n.3 (3d Cir. 2014) (quoting 22 Pa. Code § 15.1). Because Chapter 15 does not preempt or expand the rights and liabilities under Section 504, courts treat Chapter 15 as coextensive with Section 504. *A.W. ex rel. H.W. v. Middletown Area Sch. Dist.*, Civ. Action No. 13-2379, 2015 U.S. Dist. LEXIS 9774, 2015 WL 390864, at *15 (M.D. Pa. Jan. 28, 2015); see *K.K.*, 590 F. App’x at 153 n.3.

provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1). Accordingly, an LEA may not discriminate against a disabled student in the provision of a FAPE and must afford disabled students an equal opportunity to receive a FAPE in the LRE.

Under Section 504, the educational performance of a student with a disability need not be adversely affected to trigger eligibility. However, the impairment must substantially impair a major life activity. 34 CFR 104.3(j)(2)(ii). *See also Dear Colleague Letter*, 58 IDELR 79 (OCR 2012) (reminding LEAs that they must interpret the definition of a "disability" liberally when evaluating a student's Section 504 eligibility).

Evaluations

An LEA's failure to consider relevant information about the student's needs or individual circumstances in making an eligibility determination may, at times, result in a denial of FAPE. *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012).

In order to meet their FAPE obligations, LEAs must conduct a comprehensive evaluation of a student in all areas of suspected disability, identify those students with a disability, develop a comprehensive IEP tailored to the Student's unique needs, and have the IEP in place before the start of each school year 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1414(d). The comprehensive evaluation is used as a basis to develop, define and determine the scope and breadth of the services that meet the child needs.

The IDEA sets forth three broad criteria that the LEA must meet when evaluating a child's eligibility for services under the IDEA. First evaluators, must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[can]not

use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C).

The IDEA regulations impose additional criteria that school officials must use when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2), (c). Under the first step of the analysis, 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 id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation or the reevaluation both confirms the child's potential disabilities, identifies the child's individual circumstances and examines whether the child still needs specially-designed instruction.

Under the regular evaluation timeline, "initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60-calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted." 22 Pa. Code § 14.123(b).

Assuming the child is eligible, the LEA must then develop a legally sufficient IEP, including measurable ambitious goals, with challenging objectives, related services and specially-designed instruction, all of which must be provided in the least restrictive setting 20 U.S.C. § 1414(b)(2)(A).

Independent Educational Evaluations (IEE)

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

The Third Circuit has applied 34 C.F.R. § 300.502 to permit reimbursement not only when parents expressly disagree with an evaluation, but also when "the parent fails to express disagreement with the District's evaluations prior to obtaining their own" evaluation. Unless the regulation is so applied, "the regulation [would be] pointless because the object of parents' obtaining their own evaluation is to determine whether grounds

exist to challenge the District." *Warren G. ex rel. Tom G. v. Cumberland Cnty Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999).

Section 504/Chapter 15 – Denial of FAPE

Section 504 and Chapter 15 also require that children with disabilities be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis under the IDEA is adopted here for purposes of considering the claim under Section 504/Chapter 15.

Compensatory Education

The substantive standards for determining liability under the Rehabilitation Act and the IDEA for a denial of a FAPE are the same." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 275 (3d Cir. 2014) (quoting *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 283 (3d Cir. 2012)). The denial of FAPE generally violates Section 504 "because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free appropriate public education" C.G. 734 F.3d at 235. Courts within this circuit have rejected the argument that a Plaintiff asserting a violation of Section 504 must establish more than a denial of a FAPE. *See Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 488, 489 n.10 (E.D. Pa. 2011) (rejecting the argument that, to prevail under Section 504 a plaintiff must prove not only a denial of a FAPE but also that the denial was "solely on the basis of disability"); *Neena S. ex rel. Robert S. v. Sch. Dist. of Philadelphia*, 2008 U.S. Dist. LEXIS 102841, 2008

WL 5273546, at *14 (E.D. Pa. Dec. 19, 2008). The "substantive law governing Section 504 for educational matters is functionally identical to that applied in the context of a claim under IDEA, which entitles every student to a FAPE. See also *Centennial Sch. Dist.*, 799 F.Supp. 2d at 489. Importantly, the Third Circuit has held that " 504's negative prohibition is similar to the IDEA's affirmative duty"--in other words, a finding that a student received a FAPE under the IDEA "is equally dispositive" of a plaintiff's § 504 claim. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 253 n.8 (3d Cir. 2012) (internal quotation marks omitted).

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Given the District's lassitude in securing appropriate nursing services once the need became known, compounded by the District's initial disavowal of any responsibility for providing this service, I am not calculating a rectification period and compensatory education will begin on July 10, 2018.

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District*

of Columbia, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir.

2014); .see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Although the Director of Teaching and Learning gave credible testimony describing both Student's formally-tested academic functioning and the behaviors he observed working with Student in a small group, I cannot give any weight to his opinions on why or why not Student's behaviors were similar to 5 or 6 year old students he knew in the past who were emotionally disturbed. His credentials do not support the ability to weigh in on this issue in contradiction of the expert findings of the private psychologist. [NT 260-262] Likewise although I accept the classroom teacher's description of Student's behaviors, I cannot assign any weight to her disagreement with the expert psychologist's findings regarding a possible classification of emotional disturbance. [NT 290-291]

Deciding this matter required me to weigh the competing testimony and evaluation reports of the two psychologists who appeared for the hearing. The school psychologist contracted to conduct the School's second evaluation received a B.A. in English & Textual Studies and Journalism in May 2003, an M.S. in Clinical and Counseling Psychology in May 2007, School Psychology Certification in June 2012, and a Psy.D. in Psychology in August 2013. She has a Pennsylvania Psychology License. Throughout her testimony, this witness tended strongly toward minimizing Student's behaviors and their effect on Student's education and that of others [NT 83 through 160]. Although this tendency ran throughout her testimony, a few salient examples are: She observed Student out of Student's seat, and thought Student was "so cute...so happy to be at school it seemed in a lot of

ways. Like [Student] was disruptive in a way that was, just, like [Student] was so excited to be there...so [Student] couldn't keep [Student's] behind in [Student's] seat. [NT 131] She voiced a strong opposition to classifying a young child as having emotional disturbance because it is "stigmatizing", an opinion which in this hearing officer's opinion unfortunately contributes toward the continuing societal stigmatization of mental illness. [NT 126]¹³ She revealed a possible bias toward not finding eligibility for IDEA services by referencing a family member with significant issues who has a 504 Plan instead of an IEP [NT 122-123]

The private evaluator received a B.A. in Psychology in December 1974, an M.S in Psychology in April 1977, his Pennsylvania School Psychology Certification in June 1982, his Principal's Certification for K-12 in July 2002, and his Ph.D. in School Psychology in May 2009. He has a Pennsylvania Psychology License. He was employed as a school psychologist in the School District of Philadelphia from 1979 until June 2019. He has extensive experience making eligibility determinations for children including evaluating young children transitioning from preschool to Kindergarten. [NT 163-164]

On the grounds of their respective experience in public education and their testimony during the hearing I give greater weight to the evaluation findings and the expert opinion of the private evaluator.

DISCUSSION

The School committed procedural and substantive errors that denied Student FAPE from the beginning of Kindergarten to the present.

¹³ Beyond reaching the question of eligibility, this hearing officer will not reach the question of which classifications are appropriate for Student, but is simply pointing out that emotional disturbance should not be considered, at least by professionals, to be any more 'stigmatizing' than other classifications under the IDEA.

Procedural Errors

As a preliminary matter, the School committed a procedural violation when it failed to implement the Elwyn IEP or to provide comparable services while evaluating Student after Kindergarten entry. This procedural violation deprived Student of the educational benefits of an IEP and therefore entitles Student to compensatory education. Subsequently the Parent challenged the conclusions of the first School evaluator that her child did not have a disability and therefore was not eligible for either a Section 504 Plan or special education under the IDEA. At that time the IEP from Elwyn remained the pendent but non-implemented IEP and comparable services were not provided. The School conducted another evaluation, this time finding that Student had a disability and therefore was eligible for a Section 504 Service Plan but did not require specially designed instruction and was not eligible for services under the IDEA. The Parent again challenged the School's conclusions, and again the Elwyn IEP remained unimplemented and comparable services were not provided. For these reasons alone, since the School's procedural violation deprived Student of educational benefit, Student is entitled to compensatory education services from the beginning of Kindergarten to the date of this decision.

The School committed another procedural violation when it failed to produce its second evaluation report within the mandated 60 calendar day timelines. Although this is partially not the School's fault, a prudently alert LEA should have checked on the status of the permission to evaluate given that the evaluation was part of an agreement to help resolve the dispute. This procedural violation, although depriving Student of FAPE, will not be consequenced by an award of compensatory education because it is subsumed by the ongoing FAPE violation described above.

Substantive Errors

The regulations promulgated by the Pennsylvania Department of Education for public education require local education agencies to “prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.” 22 Pa. Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa. Code § 4.11(c).

This case is a crystal clear illustration of an unfortunate mistake that staff of LEAs and occasionally evaluators make: Failing to recognize that good grades are not necessarily an indication that a child does not require specially designed instruction under the IDEA. It is well accepted that education must address basic developmental needs in the emotional, behavioral and social domains. See generally, *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral, social and emotional.)

The School’s first evaluation was wholly inadequate in and of itself, and unsurprisingly came to an incorrect conclusion. Starting from the very beginning of the evaluation, the purported reason for referral was incorrect, citing only parental concerns about Student’s behaviors in the school setting that were being reported to [the school psychologist]. Moreover, there is no

evidence of the evaluator's even having reviewed the previous Elwyn information including the June 2018 Elwyn evaluation report, the August 2018 IEP, or any of the recommendations or provisions that flowed from Elwyn's assessment. In fact, the evaluation does not mention that Student was already found in need of specialized instruction and occupational therapy. The evaluation consisted of a single 15-minute class observation, on which the evaluator relied, seemingly discounting or minimizing teacher reports that "all day" in all classes Student was unable to stay seated, bothered other children, and was always doing something to garner the adult's attention. Even the evaluator's use of formal data was flawed, as she utilized scored teacher data that indicated a "high probability that the obtained ratings across BASC-3 scales might not be sufficiently reliable to interpret." Because Student's strengths included the ability to read and write, the evaluator concluded that problems were prevalent only at home and the classroom behaviors were likely to be more related to the slower pace of the class than to an inherent behavior problem. She reasoned that because Student's behaviors did not impede Student's academics, Student was not eligible for school-age services pursuant to IDEA criteria and as a result, Student lost the eligibility for special education under the IDEA that had been conferred just three months previously.

The School's second psychologist utilized the BRIEF-2 to gather data regarding executive functioning that yielded the finding that Student's behaviors were Clinically Significant for Inhibit, Self-Monitor, and Emotional Control. She also utilized the Conners-3rd Edition to gather behavioral data and on that instrument Student was "Very Elevated" in the categories of Inattention, Hyperactivity/Impulsivity, Defiance/Aggression, and Peer Relations. The DSM-5 symptom scales indicated 'Very Elevated' for ADHD Inattentive Type, ADHD Hyperactive/Impulsive Type, and Oppositional Defiant Disorder, and they were 'Elevated' for Conduct Disorder.

The second psychologist clearly minimized the seriousness of Student's inappropriate behaviors and over-emphasized Student's good academic abilities. She concluded that the latter strengths (resulting in finishing work ahead of peers) were responsible for the former deficits (acting out behaviors because of boredom). However, in fact, the School BCBA's six-hour observation roundly contradicted this conclusion, because when Student left the seat 51 times, destroyed property 5 times, inappropriately socialized 19 times, and called out 101 times, in none of these observations did the behavior result from Student's completing work early. She also attempted to dilute the seriousness of Student's behaviors, noting that Student was a Kindergartner with a few substitute teachers and disorganization in the class. Aside from implying that the School was unable to procure teachers who could maintain instructional control, the second psychologist did not back up her reasoning with observations about the behavior of the other children in the class as compared with Student's behaviors.

Participating in the School's reevaluation, the BCBA concluded based on the FBA that Student required a Positive Behavior Support Plan (PBSP) and recommended "functional communication training". The occupational therapist concluded as part of her contribution to the School's reevaluation that Student "scored as 'definite difference -- more than others' in multiple Sensory Profile sections and recommended consultative OT services.

At the School, eligibility for special education services or a 504 Plan is determined solely by the school psychologist and not as an outcome of a multidisciplinary evaluation team (MDT) meeting. The school psychologist concluded that Student met the classification for Other Health Impairment (OHI) based on ADHD but did not qualify for special education services. She came to this conclusion because Student is "a bright child who achieves within or above grade level academically... [Student] is one of the first to

complete a task and then may become disruptive." She noted that Student only had two disciplinary referrals in the academic file.¹⁴ She opined that a Section 504 Plan was appropriate instead of an IEP because the supports Student needed were "accommodations" and "modifications" to address Student's focus, self-regulation and other inappropriate behaviors but were not specially designed instruction.

Nevertheless, in addition to some accommodations (frequent attention checks by teachers, sensory breaks at least every 15 minutes, preferential seating, offering jobs to improve self-esteem) the school psychologist's recommendations for the 504 Plan included a Positive Behavior Support Plan, skilled occupational therapy, social skills training, and teaching of language to help Student express needs and coping skills for frustration, anger, sadness and anxiety. She maintains that these services are not specially designed instruction and when asked to explain she testified, "I mean, there's a bit of a gray area sometimes with modifications and specially designed instruction, but again, these all seem like -- to me, they present as things -- ways the teacher can sort of just slightly modify what he or she is doing in the typical routine in order to offer support instead of offering an explicit different, you know, means for instruction." [NT 101] The school psychologist's response to the direct question highlights the School's misunderstanding of specially designed instruction as the core feature of an IEP which clearly defines a disabled child's needs, and contains measurable annual goals addressing these needs, in the context of a well thought out and tightly constructed legally enforceable program. A Section 504 Plan is not an IEP-Lite.

¹⁴There were also emails to the Parent as well as numerous phone calls from the Dean to the Parent.

After a detailed review of the second psychologist's testimony in conjunction with related exhibits, I must concur with the Parent as put forth in her counsel's closing brief: "At every corner, the School wants us to conclude that Student is the same behaviorally as every other child, despite having multiple diagnoses, and copious data showing persistent behavior issues, and no evidence to show that these behaviors are a result of [Student's] being too smart or the classroom being mismanaged."

In contrast, the private school psychologist's extensive experience in making eligibility determinations for young children in the same community as Student's community demands considerable deference and the assignment of significant weight. The private evaluator found that Student's cognitive ability and level of academic achievement were consistent with previous evaluations. However, rather than minimizing and rationalizing away Student's behaviors as described by the Parent and the teachers, as observed by the School's BCBA, and as viewed with the lens of normative data, the private evaluator found that data from current and prior evaluation results indicate that Student is manifesting a number of clinically significant behaviors, all of which are of a long-standing nature and continue to prove problematic in terms of ability to remain focused on task, appropriately interact with peers and adults, and establish positive interpersonal relationships. The private evaluator opined, and I so find, that behavioral and social/emotional deficits are far more significant and problematic than the conclusions of both prior School evaluators suggested and meet eligibility criteria under the IDEA. A 504 Plan is not sufficient to meet Student's complex learning needs.

Classification

Services are not categorical under the IDEA; the IDEA does not concern itself with labels, rather, the IEP of a child with a disability must be

tailored to the unique needs of that particular child. 34 C.F.R. § 300.106(a)(3)(i); *Sch. Dist. of Philadelphia v. Post, et al.*, 262 F. Supp.3d 178, 70 IDELR 96 (E.D. Penna. 2017)

The IDEA's eligibility classifications are exactly that: they are the categories of disabilities under which children may qualify for special education. Once a child is found eligible for special education, programming must be based on the child's unique needs and not the child's diagnosis or classification, for example, a child with emotional disturbance has identical rights to a child with other health impairment.¹⁵ This is not intended to undermine the value of correctly classifying children with disabilities for IDEA purposes. Some categories carry enhanced social and emotional significance for some families, and LEAs should be sensitive to that. This sensitivity, however, does not alter any LEA's legal obligations.

Accordingly, although I decline to reach a conclusion about Student's eligibility classifications, I do register my concern about the School's and its second evaluator's aversion to conferring the classification of emotional disturbance on a young child. Aside from denying a child an accurate appropriate classification, failing to acknowledge emotional disturbance if it is present perpetuates the stigmatization of mental/behavioral illness. A school psychologist should help instruct educational professionals and the public in general about mental health issues in children of all ages.

Remedies

Compensatory Education:

The School denied Student FAPE starting in Kindergarten when it did not implement the pendent IEP from Elwyn. Allowing the School fifteen

¹⁵ Intellectual Disability is the only exception to this general rule as children with an Intellectual Disability have enhanced rights and protections.

school days to put special education services in place to implement the IEP, compensatory education services will begin to be calculated on the sixteenth school day of Student's Kindergarten year. The School continued denying Student FAPE through the time it took to complete its first evaluation and through the time it took to complete its reevaluation. The denial of FAPE continues through the present.

I decline to award full days of compensatory education as requested by the Parent, because although Student's inappropriate behaviors permeated Student's school day, Student showed some academic gains. Accordingly, taking into account Student's need for specially designed instruction to address inappropriate behaviors, impulsivity, emotional functioning, inadequate social skills, communication, poor executive functioning, and difficulties in sensory integration Student is entitled to compensatory education in the amount of two (2) hours per day for every day Student was present in school from the sixteenth school day of Kindergarten through the date the School offers Student an appropriate IEP.

The compensatory education hours awarded to Student are to be used exclusively for educational, developmental and therapeutic services, products or devices that address Student's identified needs. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the School is located and/or geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student completes 8th grade. The services are meant to supplement, and not be used in place of, services that may be in Student's future IEPs. The Parent will choose how to use the compensatory education hours.

Reimbursement for Private Evaluation:

As part of an attempt to resolve the parties' dispute about Student's having a disability at all, and/or being eligible for services under the IDEA or not, the Parent gave the School a second bite at the apple, agreeing that the School could conduct a reevaluation rather than funding an independent evaluation.¹⁶ Unfortunately the second evaluation by the School was inappropriate through its interpretation and application of available data. The Parent's retaining the private evaluator was necessary in determining Student's eligibility for services. Further the private evaluator's findings as put forth in his report and in his testimony will also be instructive for Student's IEP team in fashioning a program to address Student's needs for specially designed instruction. Accordingly, exercising my broad authority to fashion an equitable remedy, I shall order the School to reimburse the Parent for the cost of the private evaluation.

ORDER

It is hereby ordered that:

1. The School should have implemented Student's pendent IEP from Elwyn.
2. The conclusions of both evaluations conducted by the School were erroneous in finding that Student was not eligible for special education services under the IDEA.
3. Student is eligible for special education services, and not having received them has been denied FAPE.

¹⁶ It has not escaped my attention that the School chose to expend additional resources by having its second evaluator develop rebuttals to the private evaluator's findings.

4. As the School has not provided Student with FAPE, Student is entitled to compensatory education in the amount of 2 hours per day for every day Student was present in school from the sixteenth day of Kindergarten until the School offers Student an appropriate IEP. The compensatory education is to be used in accord with the details above.
5. The Parent is entitled to reimbursement for the private evaluation.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

November 10, 2019

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official