

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 Due Process Hearing Officer

Final Decision and Order

Closed Hearing

ODR File Number 23642-1920KE

Child's Name

E.M.

Date of Birth

[redacted]

Parent

[redacted]

Counsel for Parent

Jennifer P. Grobe, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Local Educational Agency

School District of Philadelphia
440 N. Broad Street
Philadelphia, PA 19124

Counsel for LEA

Lee C. Durivage, Esquire
2000 Market Street, Suite 2300
Philadelphia, PA 19103

Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

09/08/2020

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Parent claims that, for a period of time, the District breached its Child Find duty to the Student. Described in greater detail below, Child Find is an obligation imposed by the IDEA to identify and offer evaluations to children who potentially have learning disabilities.¹ This includes a significant period of time during which the District's response to a parental request for an evaluation was inconsistent with IDEA mandates.

Eventually, the District evaluated the Student and determined that the Student did not have a qualifying disability. The Parent disputed this finding and requested an independent educational evaluation (IEE) at the District's expense. The District agreed and the Parent obtained an IEE. According to the IEE, the Student had a qualifying disability and was in need of special education. This prompted the District to reevaluate the Student and issue a reevaluation report. For a second time, the District found that the Student did not have a qualifying disability. The Parent continued to disagree and requested this hearing.

For reasons detailed below, I find mostly in favor of the Parent.

Issues

The issues presented in this matter are:²

¹ With the exception of the cover page, identifying information is omitted to the extent possible.

² Terms appearing in this section are defined below.

1. Are any of the Parent's claims barred by the IDEA's statute of limitations?
2. Is the Student entitled to special education?
3. Did the District violate its Child Find duties?
4. Did the District violate the Parent's right to meaningful participation?

The Parent demands an IEP and compensatory education from the District. The Parent also demands attorneys' fees, which I have no authority to award, but view as a reservation of the Parent's rights to demand the same in an appropriate forum.

Findings of Fact

I considered the record in its entirety. I make findings only as necessary to resolve the issues before me. I find as follows:

1. The Parent has limited English proficiency and primarily speaks and reads Spanish. *Passim*.
2. For context and reference, the Student's history of educational placement is:
 - a. 2015-16 school year – Kindergarten – Parochial School
 - b. 2016-17 school year through 12/12/2016 – 1st Grade – Parochial School
 - c. 2016-17 school year from 12/13/2016 – 1st Grade – District, School 1

- d. 2017-18 school year – 2nd Grade – District, School 1
- e. 2018-19 school year – 3rd Grade – District, School 2
- f. 2019-20 school year – 4th Grade – District, School 2

Kindergarten (2015-16) and 1st Grade (2016-17)

- 3. On February 11, 2015, the Parent gave the District permission to evaluate the Student to determine eligibility for special education by signing a Permission to Evaluate – Consent Form (PTE). The evaluation was to include measures of psychological functioning, measures of achievement in literacy and math, a review of teacher records, and an observation. J-3.
- 4. After signing the PTE, the Parent told the District that the Parent would not enroll the Student in the District. The District did not evaluate the Student for that reason. On April 23, 2015, the District issued a Notice of Recommended Educational Placement (NOREP) saying that it was not evaluating the Student. J-4.
- 5. The Student attended kindergarten and roughly half of 1st grade at a parochial school. During 1st grade, the Parent learned that the Student was being mistreated at the parochial school. The Parent withdrew the Student from the parochial school and enrolled the Student in the District on December 13, 2016. NT 34-39, 134-136.
- 6. Upon enrollment, the District assigned the Student to the family's neighborhood elementary school (School 1). J-26.

7. The Parent credibly testified that the Student had no behavioral issues at School 1 during the remainder of the 2016-17 school year. NT 46. This testimony is consistent with testimony from the Student's 1st grade teacher. NT 176-177.

8. The Student's mid-year transfer resulted in the Student receiving grades in the second, third, and fourth marking period, which the District refers to as cycles. The Student's grades were consistently excellent outside of core academic areas. There was some variability from cycle to cycle within core academic areas – particularly in Writing and Math, where the Student's grades dropped significantly in the fourth marking period. The Student's grades were (J-26):

Subject – Cycle 2 – Cycle 3 – Cycle 4 – **Final Grade**

 - a. Math – C – B – D – **C**
 - b. Reading – C – C – B – **B**
 - c. Science – A – A – A – **A**
 - d. Social Studies – B – A – A – **A**
 - e. Elementary Computer and Technology Skills – A – A – A – **A**
 - f. Music – A – A – B – **A**
 - g. Physical Education – A – A – A – **A**
 - h. Visual Arts – A – A – A – **A**
 - i. Writing – B – B – F – **C**

2nd Grade (2017-18)

9. The Student remained enrolled in School 1 for the 2017-18 school year (2nd grade) and had the same teacher in 1st and 2nd grade. See NT 176-177.

10. The Parent credibly testified that the Student had no issues at School 1 during the first half of the 2017-18 school year, but that other students started bullying the Student in the second half of the school year. After discussing the matter with co-workers, the Parent went to both School 1 and the District's administration building to report the bullying and ask for assistance. NT 46, 139; J-68, J-69.
11. At some time during the 2017-18 school year, the Student started to receive STS services. In the context of this case, STS services are support services provided in school by a third party. Generally, the Student was not receptive to STS services. However, STS personnel communicated with the Parent about the Student's behaviors in school. See NT 50.
12. On April 18, 2018, the District drafted a report of the Parent's concerns. J-69. This report was not the Parent's first report to the School or the administration building. NT 139. The Parent raised concerns about the lack of communication from School 1. The Parent praised the 2nd grade teacher because the Parent believed that the Student was doing well academically. However, the Parent was concerned about the Student's behavior in the classroom, bullying, and exposure to violence and sexual content. J-69.
13. The Parent was concerned that the Student's behavior in class was a function of the overall behavior of children in the Student's classroom. J-69. The Parent's impression is consistent with the 2nd grade teacher's testimony. During the 2017-18 school year, several children in the Student's classroom had behavioral issues that other children emulated. See NT 198-199.

14. The Student was suspended for five day on April 24, 2018, for [engaging in aggressive behavior]. J-66.
15. The Student was suspended for two days on May 7, 2018, for [engaging in disruptive behavior]. J-66.
16. The Student was suspended for two days on June 4, 2018, for [engaging in disruptive behavior]. J-66.
17. The Student received grades in all four marking periods and a final grade during the 2017-18 school year. In general, the Student's grades were more consistent cycle to cycle as compared to the prior year, Social Studies being a notable exception. The Student's grades were (J-26):³

	Subject	–	Cycle 1	–	Cycle 2	–	Cycle 3	–	Cycle 4	–	Final Grade
a.	Math	–	C	–	A	–	B	–	C	–	B
b.	Reading	–	A	–	A	–	A	–	B	–	A
c.	Science	–	A	–	A	–	A	–	N/A	–	A
d.	Social Studies	–	B	–	A	–	D	–	A	–	B
e.	Writing	–	B	–	A	–	B	–	B	–	B

3rd Grade (2018-19)

³ The Student also received an A in Music and Oral Communication, and a B in Spanish, all of which convened only in the first cycle. In Visual Arts, the Student received a B in the first cycle and an A in the third cycle. In Physical Education, the Student received Cs in the first and second cycle. J-26.

18. For 3rd grade, the District transferred the Student to School 2 at the Parent's request. School 2 is another of the District's elementary schools. J-30.
19. On August 7, 2018, the Parent completed a registration form for School 2. The form was written in Spanish. The Parent indicated that the Student had not previously received special education services.⁴ J-30.
20. On August 24, 2018, Parent emailed School 2's Principal and requested an educational evaluation for Student. The Parent also provided consent for an educational evaluation in the same email. A reasonable reading of the document in context yields a finding that this was both a request for, and consent to, a special education evaluation. J-77.
21. The Principal replied the same day. The Principal acknowledged receipt and said that School 2 would conduct a records review to determine whether an evaluation was necessary. The Principal also stated that School 2's Special Education Liaison (SEL) would contact the Parent to set up a meeting. J-77.
22. On August 30, 2018, School 2's Counselor sent an email to the STS provider to ask about transferring STS services from School 1 to School 2. J-31.

⁴ Although there is no direct evidence on this point, in this District, ESOL stands for English for Speakers of Other Languages.

23. On September 9, 2018, the Principal sent an email to the SEL as a reminder to schedule a meeting in response to the Parent's request for an evaluation. J-32.
24. The Student's 3rd grade teacher assessed the Student's reading level at the start of the 2018-19 school year and determined that the Student was reading at level "H" based on the reading curriculum used in School 2. Level H is a 1st grade level. NT 679-680.
25. On October 3, 2018, the District convened an internal RtII meeting in response to the Parent's request for an evaluation.⁵ The Principal, Counselor, and SEL attended along with a school psychologist, a school-based lead teacher, and the 3rd Grade Teacher. The RtII team noted that the Student was new to School 2, was late every Monday because the Student went to therapy Monday mornings, had issues with the prior teacher and was frequently absent the prior year, and had three "angry outbursts" to date in the 2018-19 school year. Despite those outbursts, the team wrote that the Student's behavior was generally good and that the Student was focused. The team listed reading comprehension, writing, and math applications as the Student's weaknesses. J-5.
26. On October 18, 2018, the District convened a meeting with the Parent. The Parent, 3rd Grade Teacher, Lead Teacher, and Counselor attended with a Spanish language interpreter. J-5, J-73; NT 116-117, 380.

⁵ RtII is Response to Instruction and Intervention. Generally, the term refers to an objective assessment of an individual student's response to general education interventions.

27. During the meeting, the Parent shared concerns about bullying at School 1 and peer socialization, particularly with members of the opposite sex. The Parent also reported difficulty in having the third party renew STS services at School 2. Those concerns notwithstanding, the Parent reported that the Student was happier at School 2. The 3rd Grade Teacher reported that the Student would occasionally get upset but, on those infrequent occasions, could be calmed down. J-5.
28. During the meeting the parties also discussed the general education interventions that were already in place. Broadly speaking, those interventions included periodic, objective assessments of the Student's progress. At that time, the Student was participating in the school's Tier 3 reading program, which is the highest level of reading support offered at School 2. See J-73.
29. At the conclusion of the meeting, the parties agreed that the District would monitor the Student and reconvene in six weeks. J-5, J-73.
30. During the meeting, the District's also agreed to issue a Permission to Evaluate (PTE) form. J-5.
31. On October 26, 2018 – 63 days after receiving a written request from the Parent for an evaluation – the District issued a PTE. J-6, J-77. The PTE indicated that the District would evaluate the Student's psychological, literacy, math, academic, and social-emotional abilities and needs. J-6.

32. On October 30, 2018, the Parent signed and returned the PTE, providing consent for the evaluation. J-6.
33. As part of the evaluation, the District sent a Parent/Guardian Input Form to the Parent. The form was written in English and consisted of several questions about the Parent's concerns and the Parent's impressions of the Student's learning and behaviors. The Parent responded to the questions in Spanish and returned the form to the District on November 14, 2018. J-43.
34. On November 14, 2018, the Parent also signed a release so that the District could get information from the Student's private therapist. The agency from which the Student received private therapy was not responsive to the District's requests. J-44.
35. As part of the evaluation, the Psychologist reviewed the Student's educational records, observed the Student in class and at recess on separate days, interviewed the Student, obtained input from teachers, and administered standardized tests of the Student's cognitive ability (KABC-II) and academic achievement (KTEA-3 and selected sub-tests of the WIAT-III). The Psychologist also analyzed behavior rating scales completed by the 3rd Grade Teacher and the Parent (BASC-III). J-7.
36. During the classroom observation, the Psychologist observed that the Student was focused, responded to the teacher by raising a hand, and transitioned from activity to activity. The Student's behavior was also appropriate during the recess observation. J-7.

37. The cognitive testing was variable across sub-tests, with some sub-tests in the average range, some in the below average range, and one (visual processing) in the "lower extreme" range. A combination of those sub-tests placed the Student in the "below average" range of cognitive ability.⁶ J-7.
38. The academic achievement testing focused on literacy. On the KTEA-3, the Student's letter and word recognition, word recognition fluency, and reading comprehension abilities were all scored in the average range. The Student's nonsense word decoding was scored in the below average range.⁷ On the WIAT-III, the Student's oral reading fluency and spelling were also scored in the average range. J-7.
39. Regarding math, the Student scored in the average range in both math concepts and math calculation on WIAT-III sub-tests. J-7.
40. The BASC-III asks individuals who know the Student to answer questions that rate the Student's behavior on a scale. Those ratings are then compiled to assess the Student's behaviors across several domains. In each domain, each rater's responses may place the student in the average, at-risk, or clinically significant range. As described by the Psychologist, a clinically significant score suggests a high level of maladjustment and an at-risk score indicates either a significant problem or the potential for developing a problem that should be monitored. J-7.

⁶ It can be misleading to reduce any Student's intellectual potential to a single number.

⁷ Nonsense words are made up, meaningless words that are presented to assess a student's ability to sound out a word that the student has not seen before.

41. Of the 14 domains assessed on the Parent form of the BASC-III, the Parent's ratings placed the Student in the average range in all but four: aggression, anxiety, depression, and withdrawal. The Parent's ratings placed the student in the at-risk range in each of those four. J-7.
42. Of the 15 domains assessed on the Teacher form of the BASC-III, the 3rd Grade Teacher placed the student in the average range in all but five: aggression, conduct problems, withdrawal, social skills, and leadership. The Teacher's ratings placed the Student in the at-risk range in each of those five. J-7.
43. The Psychologist noted that the Teacher's ratings were statistically valid but should be interpreted with caution because the Teacher gave divergent answers to questions that are usually answered similarly. This note of caution did not invalidate the Teacher's responses. J-7.
44. The Psychologist ultimately concluded that the Student did not have a disability and, therefore, was not eligible for special education. The Psychologist specifically considered and rejected Specific Learning Disability (SLD), given the Student's demonstrated reading and math abilities on standardized tests. The Psychologist also specifically considered and rejected Other Health Impairment (OHI) because the Student did not exhibit difficulties with attention, impulsivity, and hyperactivity, and the Student's behaviors were improving in comparison to the prior year. The Psychologist recommended continuation of Tier 3 reading interventions and continued screening for ESOL services. J-7; NT 605.

45. The Psychologist compiled all of her testing and analysis into a Psycho Educational Report dated January 15, 2019. The District used that report to draft an Evaluation Report (ER) that was finalized and presented to the Parent during a meeting on February 11, 2019 – 171 days after the Parent requested an evaluation in writing and 104 days after the Parent signed the PTE. J-7, J-8.
46. The Parent, and ESOL teacher, the 3rd Grade Teacher, the Principal, and an interpreter attended the meeting on February 11, 2019. See J-10. At the meeting, the District gave the Parent a copy of the ER in English (J-8), a Notice of Recommended Educational Placement (NOREP) in English (J-10), and a Notice of Parent Rights at a Glance in Spanish (J-87). The English documents were interpreted and discussed during the meeting. NT 618, 758-760.
47. As used in this case, the NOREP was the District's official notice of its ineligibility determination to the Parent. The NOREP recommended continued monitoring through RtII. The record does not include a signed NOREP, but there is no dispute the Parent disagreed with the District's conclusions. J-10, See NT 81.
48. The Parent, via counsel, requested an Independent Educational Evaluation (IEE) at the District's expense. The District agreed to fund the IEE. The Parent retained an independent evaluator, who started the IEE at the end of May, 2019. See J-75.
49. The Independent Evaluator contacted the District on May 29, 2019, requesting to observe the Student the next day. The District expressed reservations because end-of-year activities were not typical but

permitted the observation. The Independent Evaluator shared these concerns during the hearing, but not contemporaneously. NT 436-437, J-33, J-75.

50. The observation was conducted by one of the Independent Evaluator's colleagues. The person who conducted the observation did not testify. NT 432-433, *passim*.
51. The Independent Evaluator had two teachers complete the BASC-3 (see above for a description of that rating scale) and the Conners rating scale, which is often used to assess ADHD symptoms. The Independent Evaluator also asked the Parent to complete the Conners but not the BASC-3 because the Independent Evaluator did not have the BASC-3 in Spanish. J-34, J-35, J-36, J-37, J-38; NT 533-534.
52. The Independent Evaluator did not complete the IEE before the end of the 2018-19 school year.
53. In Math, the District administered diagnostic assessments on September 20, 2018, December 10, 2018, and May 6, 2019. In September, the Student scored in the kindergarten level for numbers and operations and in the 1st grade level for algebra and algebraic thinking, measurements and data, and geometry. By May, the Student scored in the 2nd grade level in all assessed math domains except for algebra and algebraic thinking. The Student scored in the early 3rd grade level in algebra and algebraic thinking.
54. In reading, the District administered diagnostic testing on September 18, 2018, December 12, 2018, and May 1, 2019. Reports of the

testing state that the Student “tested out” of phonological awareness assessments but testimony reveals that means that particular sub-test was not administered. In September, the Student scored in the kindergarten level in phonics, the 1st grade level in high-frequency words and vocabulary, and the 2nd grade level in reading comprehension for both literature and informational text. By May, both of the Students reading comprehension scores decreased to a 1st grade level, the phonics score improved to a 1st grade level, vocabulary improved to a 2nd grade level, and high-frequency words were not assessed. J-17.

55. With the exception of vocabulary, the Student’s reading scores in May 2019 were the same as in December 2018, suggesting that the regression was not the result of a single poor test score. See J-17.
56. The Student’s reading score report presents an overall placement score in addition to the domain scores. The Student’s overall score remained at the 1st grade level in all three test administrations. J-17.
57. The Student showed greater reading improvement as measured by curricular progress. The Student moved from level H to level L (both independent reading levels), signaling a bit more than a year’s worth of progress over the course of the 2018-19 school year. Measured this way, the Student moved from a mid-1st grade to late 2nd grade independent reading level over the school year. The 3rd grade level objective for the end of the year was level O. J-12, NT 717.
58. With an exception noted below, the Student’s grades throughout the 2018-19 school year were fairly consistent from marking period to

marking period. In year-long academic courses, the Student finished the year with a C in Reading; Bs in Writing and Math; and As in Oral Communications, Social Studies, and Science. J-12.

59. The Student's term-to-term grades were most variable in Reading. The Student scored Ds in the first two marking periods, a C in the third marking period, and an A in the fourth marking period to end the year with a C.
60. The Student accrued two, minor disciplinary infractions over the entirety of the 2018-19 school year. J-47. The Student was not suspended during the 2018-19 school year. NT 140, 379.

Summer 2019

61. On June 5, 2019, the District mailed the completed teacher rating scales back to the Independent Evaluator. J-38.
62. The Independent Evaluator reviewed many documents from the Student's educational history. The February 2019 ER was the only document generated during the 2018-19 school year that the Independent Evaluator reviewed. J-75; NT 524-525.
63. The Independent Evaluator administered many tests over two days of testing on July 11 and 12, 2019. These included, among many others, a full administration of the WISC-V (an assessment of cognitive ability) and a full administration of the WIAT-III (see above for a description).

64. Consistent with the District's evaluation, the Student tested into the Low Average range of cognitive ability. The Student scored in the Average range across most sub-tests, but in the Very Low range for the Working Memory Index, which includes a visual component. The low working memory score depressed the Student's total IQ score. The Independent Evaluator noted the impact of this index score on the full-scale IQ, and the potential impact of working memory problems in school, within the IEE. J-75.
65. On the WIAT-III, the Student scored in the average range across all academic sub-domains except for math facts fluency (3 points away from the average range) and pseudoword decoding (well below average). The test of pseudoword decoding was terminated when the Student fell below testing limits. Combined into composite scores, the Student scored below average in Basic Reading (76) and in the average for Mathematics (103). J-75.⁸
66. Consistent with the WIAT-III, the Student scored below average in the CTOPP-2, which is a phonological test. The Student scored in ranges described by the test publisher as Poor or Very Poor in CTOPP-2 composite scores, with somewhat greater variability among subtests. J-75.
67. The Student also scored four points below the average range on the GORT-5, which is an assessment of oral reading. J-75.
68. Other testing, including the PPVT-4, EVT-4, NEPSY-II, WRAML-2, CVLT-C, Grooved Pegboard, D-KEFS, WCST, and CDI-2 (total score)

⁸ On the WIAT-III, the average range for standard scores is 85 to 115 (100+/-15). J-75.

were all scored in the average range. The Beery VMI assessment composite score was two points below average. J-75.⁹

69. The 3rd Grade Teacher's BASC-3 ratings were fairly consistent with ratings prior in the school year. The 3rd Grade Teacher rated the Student at-risk in Aggression, Conduct Problems, and Social Skills. The 3rd Grade Teacher's ratings did not indicate problems in other domains including hyperactivity. Complied into composite scores, the 3rd Grade Teacher rated the Student at-risk for externalizing problems, and within the average range for all other composites. J-75.
70. The Student's 3rd grade STEAM teacher also completed a BASC-3 and rated the Student at-risk in Aggression, Depression, Adaptability, Leadership, Study Skills, and Functional Communication. The STEAM Teacher rated the Student in the clinically significant range for Withdrawal and Social Skills. J-75. Complied into composite scores, the STEAM Teacher rated the Student in the clinically significant range for adaptive skills, and within the average range for all other composites. J-75.
71. The Independent Evaluator scored Conners-3 ratings from the same two teachers and the Parent. All three rated the Student in the "Very Elevated" range for "Defiance/Aggression." However, the primary purpose of the Conners, as used in the IEE, was to assess ADHD symptoms. None of the three ratings yielded ADHD Index scores that show a significant probability of ADHD. J-75.

⁹ See J-75 for a description of these assessments.

72. The Independent Evaluator reached conclusions from the assessments, finding that the Student met medical (as opposed to IDEA) criteria for SLD in reading with impairment in writing. J-75.

73. The Independent Evaluator also reported that (J-75 at 13)

findings indicative of significant problems with attention, and with [Student's] ability to regulate [] behavior and emotions. In addition, [Student] demonstrated significant difficulty with working memory, as well as poor functioning on tasks of attention and inhibitory control. In conjunction with review of school records, these findings support [Student's] previous [medical] diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD), Combined Presentation.

74. Based on the above passage and the Independent Evaluator's testimony, I find that the Independent Evaluator's ADHD diagnosis was a carryover of a previous medical diagnosis, as opposed to something supported by the IEE itself. *See, e.g.* NT 557.

75. The Independent Evaluator did not recommend that the District qualify the Student for special education on the basis of OHI resulting from ADHD. J-75.

76. The Independent Evaluator did recommend that the District qualify the Student for special education to address reading, social/behavioral, and memory problems. J-75.

77. More specifically, the Independent Evaluator recommended that the Student receive direct, phonics-based reading instruction using an Orton-Gillingham methodology (the Wilson reading program is explicitly referenced in the IEE), direct instruction to improve reading fluency, direct instruction in reading comprehension, and writing support. J-75.
78. The Independent Evaluator also recommended that the District complete a functional behavioral assessment (FBA) to better understand what triggers problem behaviors and then draft a positive behavioral support plan (PBSP) to mitigate those behaviors. J-75.
79. The Independent Evaluator also recommended a comprehensive speech and language assessment. Despite the Student's English fluency, the Evaluator was concerned about the Mother's report that the Student tends to take things literally. J-75
80. The Independent Evaluator also recommended mental health support in school at least weekly. J-75.
81. The Independent Evaluator also recommended several classroom accommodations, mostly targeting the Student's working memory problems. J-75.

4th Grade (2019-20)

82. The Student had a different teacher for 4th grade. *Passim*.

83. The Parent and 4th Grade Teacher used a school-approved app to communicate with each other during the 2019-20 school year. See, e.g. NT 101, J-28.
84. Throughout the entirety of the 2019-20 school year, the Parent and 4th Grade Teacher discussed two minor behavioral incidents using the app. J-28.
85. On October 14, 2019, the Parent signed and returned a permission slip allowing the Student to participate in small group sessions with the Counselor. The permission slip was written in Spanish. J-91.
86. After October 14, 2019, the Student participated in a small group with the Counselor and worked on social skills using a curriculum for the same, goal setting, and self-regulation. The Student took a leadership role in that group. NT 398-413.
87. The IEE includes the dates of the evaluation but not the dates of the report itself. J-75. In the complaint, the Parent claims that the Parent's attorney sent a copy of the IEE to the District's attorney via email on October 15, 2019. The District does not deny this.
88. On December 6, 2019, – 52 days after receiving the IEE – the District issued a permission to re-evaluate (PTRE) form. J-82. Although not entirely consistent with the literal language printed on the PTRE, there is no dispute that the PTRE was issued in response to the IEE as a way of initiating the reevaluation recommended in the IEE.

89. On December 10, 2019, the Parent signed and returned the PTRE to the District. J-82.
90. The District's Psychologist consulted with the Student's teachers. The teachers reported no academic or behavioral concerns in 4th grade, and so the Psychologist determined that an additional observation was not necessary. NT 654-655.
91. The District's Psychologist reviewed the ER, the IEE, and the Student's academic progress in 4th grade to date and determined that additional testing was not necessary. *Id.*
92. At the time of the reevaluation, the Student was earning As and Bs in all subjects. J-13, J-90.
93. According to diagnostic math assessments, the Student started the 2019-20 school year at the 3rd grade level in all domains. By the time of the evaluation, a January 7, 2020 diagnostic assessment found that the Student was still at the 3rd grade level in geometry but had progressed to an early 4th grade level in numbers and operations, algebra and algebraic thinking, and a mid 4th grade level in measurement and data. J-15.¹⁰
94. According to diagnostic reading assessments, the Student started the 2019-20 school year as the 1st grade level in phonics and vocabulary, the 2nd grade level in comprehension of informational text, and the 3rd grade level in comprehension of literature. Phonological awareness and

¹⁰ Expressed as composite scores, the Student remained at the 3rd grade level across tests. That is misleading because the Student was squarely in the 3rd grade level at the start of 4th grade and was just shy of the 4th grade level at in January 2020. See J-15 at page 1.

high-frequency words were not assessed. By the time of the evaluation, a January 3, 2020, the Student improved to the early 4th grade level in comprehension of literature and vocabulary, and to the 3rd grade level in comprehension of informational text. Phonological awareness, phonics, and high-frequency words were not assessed in the January 2020 administration. J-18.¹¹

95. On or about March 16, 2020, the District closed as part of city and state-wide COVID-19 mitigation efforts. At that time, the Student was capable of reading work at the 3.8 to 4.0 grade level when working in small groups with the 4th Grade Teacher. NT 282-283. No documentation was presented to support this testimony and, while I found it credible, it does not indicate the Student's independent reading level as measured by the probes detailed above.
96. The District shifted to online instruction after the shutdown. The Student participated in class remotely and turned in assignments. J-48 through J-62.¹²
97. On April 7, 2020, the District's attorney sent the District's reevaluation report (RR) to the Parent's attorney. The RR is dated February 21, 2020. There is no record of the District providing the RR to the Parent at any time before the attorney-to-attorney transmission on April 7, 2020. J-11; NT 363.

¹¹ Expressed as a percentage score the Student made 330% growth between the first and second reading test. That is misleading because the same domains were not assessed in each test. The fact that the domains shifted is not surprising, given the change in the function of reading instruction that typically occurs in 3rd and 4th grade. Moreover, the Student made progress across all of the domains that were assessed in both administrations.

¹² The parties make different arguments as to whether the Student's work samples indicate meaningful progress.

98. The RR included a review of the IEE's recommendations. The District concluded that some of the recommendations were appropriate and stated agreement with those recommendations. Specifically, the District agreed that the Student should have (J-11 at 13-14):
- a. Mental health support on a regular basis,
 - b. Programming to promote social skills and conflict resolution skills,
 - c. ESL monitoring,
 - d. Preferential seating,
 - e. Opportunities for movement breaks,
 - f. Vocabulary previews,
 - g. An opportunity to have tests that do not assess reading read aloud,
 - h. Certain methods to gain the Student's attention and confirm understanding,
 - i. Experiential learning,
 - j. Extended time on tests,
 - k. Instruction in assignment/project management, and
 - l. Access to a laptop computer.
99. While agreeing to provide the above accommodations (and noting that several were already in place), the District maintained its position that the Student does not have a disability and therefore does not qualify for special education.
100. On April 20, 2020, the Parent filed a due process complaint initiating these proceedings.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must 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). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *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).

I find no issue with any witnesses’ credibility as all witnesses testified honestly and to the best of his or her ability. To the extent any witnesses’ testimony conflicts with another’s, those witness either recall events differently or have different opinions. To the extent that my findings of fact depend on accepting one witnesses testimony over another’s, I have accorded more weight to the witness based on the witnesses’ testimony and the other evidence presented.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the

substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Before *Endrew*, the Third Circuit interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit must be relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the holding in *Endrew F.* is no different.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “*de minimus*” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimus*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student’s circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a 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). 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. The first method is called the “hour-for-hour” method. Under this method, students receive one hour of compensatory

education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the child would have occupied but for the school district’s violations of the IDEA.”).

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is

stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Child Find

The IDEA's Child Find provision requires states to ensure that “all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated.” 20 U.S.C. 1412(a)(3). This provision places upon school districts the “continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.” *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3). The evaluation of children who are suspected to be learning disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely

evaluate a child who it should reasonably suspect of having a learning disability constitutes a violation of the IDEA, and a denial of FAPE. 20 U.S.C. § 1400.

Discussion

The Parent's Complaint is Timely

The record includes evidence going back to the 2015-16 school year. The Parent demands compensatory education from the beginning of the 2017-18 school year through the present until such time as the District develops an appropriate IEP for the Student. The District argues that all claims prior to April 20, 2018 are time-barred, excluding most of the 2017-18 school year.

The IDEA includes a two-year statute of limitations that runs from the date that the Parent knew or should have known about the action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C). That date is referred to as the KOSHK (knew or should have known) date.

Under current case law, the IDEA's statute of limitations does not limit the remedies that the Parent may obtain if the Parent requested this hearing within two years of the KOSHK date. The case from which this analysis is derived is *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

Courts have interpreted what it is that the Parent knew or should have known about. The IDEA references the "action" forming the basis of the complaint. Courts have interpreted the word "action" to include knowledge of the alleged violation. See *E.G. v. Great Valley Sch. Dist.*, No. 16-5456, 2017 U.S. Dist. LEXIS 77920 *21-22 (E.D. Pa. May 23, 2017). Knowledge of the

action and knowledge of the violation can occur at the same time or at different times. *Id.*

Hearing officers are required to make a fine-grained analysis to determine the KOSHK date on an issue-by-issue basis. *Id.* at 22-23. To do this, courts have also explained how to determine when the Parent knew or should have known of each alleged violation. Knowledge of the violation occurs when the District makes a clear action or inaction sufficient to alert a reasonable parent that the Student was not appropriately accommodated.¹³

The “reasonable parent” standard highlights the potential delay between a school’s clear action or inaction and the parents’ understanding that the child would not be appropriately accommodated. *E.G. v. Great Valley* at *22-23. The inquiry calls for consideration of what conclusions about the child’s education a reasonable parent could draw from the information at hand. The “reasonable parent” standard also does not require parents to be educators or lawyers. The clock does not run when parents first come to understand their legal rights. Instead, the clock runs from when a reasonable parent is able to conclude that the child’s needs are unmet.

The Parent’s alleges that the KOSHK date for this matter is October 15, 2019. I agree. The record of this case illustrate that the Parent was concerned about the Student at all times. This was particularly so when the Student attended School 1. The Parent expressed those concerns both at the building and administration levels. At every turn, the Parent was assured

¹³ *Brady P. v. Cent. York Sch. Dist.*, No. 1:16-CV-2395, 2018 U.S. Dist. LEXIS 43230, at *19-20 (M.D. Pa. Mar. 16, 2018) citing *B.B. by & through Catherine B. v. Del. Coll. Preparatory Acad.*, No. 16-806, 2017 U.S. Dist. LEXIS 70245, 2017 WL 1862478, at *3 (D. Del. May 8, 2017); *Solanco Sch. Dist. v. C.H.B.*, No. 5:15-CV-02659, 2016 U.S. Dist. LEXIS 104559, 2016 WL 4204129, at *7 & n. 10 (E.D. Pa. Aug. 9, 2016); *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 600 (M.D. Pa. 2014).

that the Student did not have a disability and was not in need of special education. That, in conjunction with the reports that the District sent to the Parent concerning the Student's academic progress, left the Parent with no reason to believe that the Student's needs were unmet.

That changed, of course, when the Parent received the IEE. At that point, the Parent had every reason to know of the alleged violations. October 15, 2019 is the KOSHK date and, therefore, the entirety of the Parent's complaint is timely.

Child Find: 2017-18 School Year

The District argues that there is no preponderant evidence in the record of a Child Find violation during the 2017-18 school year. This is consistent with the District's overarching argument that the Student did not and does not have a qualifying disability.¹⁴ In contrast, the Parent highlights that the Parent reported concerns about the Student's behavior and overall classroom management, and that the District imposed discipline including multiple suspensions. The Parent also highlights that the Student was placed into Tier 3 reading interventions at the end of the prior school year, but there is no documentation of what the Student received or the interventions upon the Student's education.

The Parent's points are compelling. It is striking that both the Parent and Teacher attribute the Student's negative behaviors to emulating classmates. Even so, it is impossible to overlook the severity of the Student's particular

¹⁴ District did not emphasize its statute of limitations argument relative to its other arguments. This is logical because the District's overarching argument is that the Student does not qualify for special education and that there were no Child Find "red flags." If so, then there was nothing that the Parent knew or should have known about. It is easy to see how prevailing on the KOSHK claim could have harmed the District's case on the merits.

behaviors in the second half of the school year, or write them off as a symptom of class-wide behavioral problems.¹⁵ At the same time, the Student was supposed to be receiving intensive, general education reading instruction with objective progress monitoring. That type of instruction necessary leaves a paper trail that is absent in this case.¹⁶ Further, the Student's grades from the 2017-18 school year are questionable. For example, in reading, the Student received As in the first three marking periods and a B in the fourth, resulting in an A as the final grade in 2nd grade. Then, at the start of 3rd grade, the Student was assessed and found to be on the 1st grade level in reading.

In sum, the District had knowledge that the Student had behavioral issues and reading difficulties. Regarding behavior, the context of behaviorally challenging class is important but does not adequately explain the Student's particular behaviors. Regarding reading, the District knew that the Student was not making progress in unsupported general education, believed that the Student required its most intensive reading support, and had at least constructive knowledge about the lack of evidence of support. At the same time, the report of the Student's curricular advancement in reading does not bear scrutiny. As a result, the District was aware of academic and behavioral problems that are consistent with IDEA-recognized disabilities and had nothing reliable to suggest that those problems were being addressed through regular education interventions. This is proof of a Child Find violation yielding substantive educational harm during the second half of the 2017-18 school year.

¹⁵ This is not intended in any way to be a criticism of the 1st and 2nd grade teacher. I have no doubt that the Teacher faced a difficult challenge, and there is no record in this case about what resources and options were available to her. Rather, I hold that the behavior of other children is not an effective shield for the District in this case.

¹⁶ The District has noted on multiple occasions that, given the timing of this hearing, it was unable to access its physical documents. I appreciate the predicament but must resolve this case on the record before me.

Without evidence to perform a *Reid* analysis, I must determine the amount of time that FAPE was denied in the 2017-18 school year. Minimally, the Student should have received intensive reading intervention. In fact, both parties agree about that point. The District simply calls that reading intervention general, not special education. In addition, I find that the District was aware of the Student's reading needs by the end of the prior school year. Broadly, the IEE indicates a need for daily reading intervention, and so I award one hour of compensatory education to the Student for each day that the District was in session for the 2017-18 school year.

Further, starting in the third marking period (roughly half way through the year – when both parties agree there were behavioral issues), the Student should have received behavioral interventions. Without better evidence, I find that it would have been appropriate for the District to provide the interventions that it ultimately started in October 2019. Therefore, I award another hour (2 hours total) of compensatory education for each day that the District was in session from the third marking period until the end 2017-18 school year.

Child Find: 2018-19 School Year through October 25, 2018

Some, but not all, of the Child Find violation that started in the 2017-18 school year continued into the 2018-19 school year. The initial reading evaluation was another red flag; another signal that an evaluation was warranted. At the same time, the Student's behavior improved. At this point, it was not clear that the Student had behavioral issues that impeded the Student's learning or, of equal importance, that those behaviors were not adequately managed through regular education interventions. I find, therefore, that only the portion of the Child Find violation related to the

Student's reading continued into the 2018-19 school year. Continuing the analysis above, I award one (1) hour of compensatory education for each day that the District was in session from the start of the 2018-19 school year through October 25, 2018.

The last day of the Child Find violation was October 25, 2018 because the District proposed an evaluation on October 26, 2018.

***Evaluation Timeline Violation and Parental Participation: 2018-19
School Year through October 25, 2018***

Just before the start of the 2018-19 school year, the Parent requested an evaluation. The August 24, 2018 email from the Parent to School 2's Principal can only be read as a request for a special education evaluation. That request also explicitly provides consent for an evaluation. From that moment, the District had 60 days to *complete* an evaluation. In this case, the District did not *start* its evaluation until 63 days passed.

The IDEA gives parents a near absolute right to request an evaluation at least annually. *See, e.g.* 34 C.F.R. § 300.301. Nothing in Federal or Pennsylvania laws or regulations specify the form by which parents may request or provide consent to an evaluation. This is why the District's clock started running on the first day of the 2018-19 school year.¹⁷

In Pennsylvania, evaluation requests must be in writing but, if the request is oral, the District must give a written request form to the parent within 10 days so that the Parent can make the request in writing. 22 Pa. Code §

¹⁷ Pennsylvania regulations pause the evaluation timeline when school is out of session in the summer. 22 Pa Code. § 14.123(b). I assume that the 2018-19 school year started after August 24, 2018. The calendar was not entered into evidence.

14.123(c). As a result, schools in Pennsylvania use PTE Request forms and PTE Consent forms. The Request form is used by parents to request evaluations. The Consent form is used by schools to obtain consent after receiving a request or when proposing an evaluation. In this context, it is understandable that the District did not immediately recognize the Parent's email for what it was – both a request for and consent to an evaluation. In fact, it was appropriate for the District to issue a consent form despite the Parent's email so that the Parent could more explicitly consent to particular assessments. The District's 63-day inaction, however, was completely inconsistent with legal mandates.

The Student's participation in RtII, and the October 18, 2018 RtII meeting do not alter the analysis. A parental request for an evaluation does not create an absolute duty for the District to evaluate. When a parent requests an evaluation, there is nothing that prohibits parents and schools from agreeing to not evaluate while RtII is pending. When that happens, the school must notify the parent that it is denying the evaluation request. The District did exactly that when it declined to evaluate the Student before 1st grade (J-4). No such notice was provided in response to the Parent's evaluation request. Instead, the District purposefully engaged in the RtII process in lieu of a special education evaluation without ever declining the Parent's evaluation request. This is a violation of well-established law.

The District's obligations were clear: at a very minimum, the District was obligated to either decline the Parent's request to evaluate (again, see J-4) or issue a PTE Consent form very shortly after receiving the Parent's request.¹⁸ The District did neither for 63 days, during which time a Child Find

¹⁸ This is an analysis of the District's minimal obligations viewed in the light most favorable to the District. In fact, the District was obligated to either decline the evaluation or start it

violation was continuing to accrue. The District ignored the Parent. This is a denial of meaningful parental participation.

A core principle of the IDEA is that of procedural FAPE, which includes parental participation in educational decisions. *Schaffer*, supra, 546 U.S. at 53. 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); 34 C.F.R. § 300.513(a)(2). I find that that ignoring the Parent’s written request and consent for an evaluation for 63 days while pursuing a course of action that is contrary to clear legal obligations is a significant impediment for which a remedy is owed. I award an additional hour of compensatory education to the Student for each day that school was in session from August 24, 2018 through October 25, 2018.

Evaluation Timeline Violation: October 30, 2018 through February 11, 2019

The District issued the PTE on October 26 and the Parent provided consent (again) on October 30, 2018. Completely ignoring that the District had consent before the school year started, the District had a new 60 days to complete its evaluation. The deadline was December 29, 2018. The District gave the ER to the Parent 44 days late on February 11, 2019. Under the totality of the record of this case, I find that those 44 days are a continuation of the District’s denial of the Parent’s right to meaningfully participate in the development of the Student’s education. The primary cause of the evaluation delays, as a whole, was that the District took action in response to the request that is inconstant with legal mandates and tantamount to ignoring the Parent. I award the Student an additional hour of

on the first day of the 2018-19 school year. Again, the form of the Parent’s request and consent is not dictated by law or regulation, and the District had both on August 24, 2018.

compensatory education for each day that school was in session between December 29, 2019 and February 11, 2019.¹⁹

Eligibility

The Parent's right to meaningfully participate in IEP development is predicated on the Student's eligibility. The parents of children who do not have a disability are, by necessity, not entitled to participate in IEP development. The remainder of the Parents claims are also predicated on the Student's eligibly. I find that the Parent presented preponderant evidence that the Student has a learning disability and is in need of special education.

Eligibility determinations require a two-part analysis that flows from the IDEA's definition of a child with a disability. 20 U.S.C. § 1401(3). First, the analysis requires a determination as to whether the Student has a qualifying disability. Second, the analysis requires a determination as to whether the Student, by reason of the disability, requires special education.

Regarding the Student's disability, I find that the Parent presented preponderant evidence that the Student has a Specific Learning Disability (SLD) as a result of the Student's reading and writing deficits. Pennsylvania has its own regulations for SLD determinations at 22 Pa. Code § 14.125. Under those regulations, schools may use one of two methods to determine if children who do not meet age or grade level standards in particular domains (including reading and writing) qualify with SDL. The first method is

¹⁹ I acknowledge that the Parent's request and consent may not have come on the first day of the 2018-19 school year, and that the District's evaluation timeline did not start to run until the first day of the 2018-19 school year. I cannot resolve that discrepancy in the absence of the District's 2018-19 calendar, but I am confident that any discrepancy, counted in days, is small.

an examination of the Student's response to intervention. The second is an examination of the discrepancy between the Student's cognitive ability and academic performance.

In this case, the District failed to meet regulatory standards that would enable it to use an RTI model to make an SLD determination. The regulations contemplate a child who is regularly monitored while receiving high-quality, research-based, general education instruction. There is no evidence that the Student's instruction was anything but high-quality and research based. However, the instruction was not general education. It was special education. To the extent that the Student made progress with the District's interventions, it was because the District provided special education in the absence of an IEP.

The District, by edict, declares that none of the services that the Student received are special education. I disagree. The IDEA defines "special education" as "specially designed instruction ... to meet the unique needs of a child with a disability" 20 U.S.C. § 1401(29). In turn, the IDEA's regulations at 34 C.F.R. § 300.39 define specially designed instruction as

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) 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.

The record paints a picture of the District providing specially designed instruction (SDI) to the Student. By the time that the evaluations started, the District was producing documentation of the Student's progress in Tier 3 reading intervention. Through that intervention – which the District describes as intensive – the District adapted instruction to the Student's needs so that the Student could gain reading skills and moved closer to meeting the District's grade-level standards. This is consistent with the definition of SDI.

The District also adapted instruction to the Student's needs so that the Student could access the general curriculum by providing many of the behavioral and pro-social recommendations detailed in the IEE. As with the reading interventions, these IEE-recommended services are consistent with the definition of SDI.

Consequently, the District cannot claim that the Student's response to regular education interventions precludes an SLD determination. The opposite is true: The Student's response to special education interventions preclude the District's RTI defense.²⁰

In contrast, the Parent's evidence of a significant discrepancy between the Student's intellectual ability and academic performance is preponderant. The intellectual ability assessments conducted by the District and the Independent Evaluator were reasonably consistent. But for short-term memory issues, which included a visual component, the Student's intellectual ability was in the average range across many domains. And yet,

²⁰ The line between MTSS programs, including RtII, and special education is fine and sometimes blurred. This is why Pennsylvania requires LEAs to obtain special approval from the Pennsylvania Department of Education before using RTI as a means of SDI eligibility determinations. *See, e.g.* J-78. No evidence was presented concerning the District's approval or lack thereof from PDE.

according to the District's own measures, the Student was consistently a year or more below grade level in reading as measured by the District's most objective evidence. I find, therefore, that the Student is a child with SLD.

Beyond SLD, I agree with the District that the IEE's conclusion about ADHD is flawed. Those flaws make the behavioral rating scales even more concerning. The rating scales, particularly from the STEAM teacher, stand in contrast to the absence of behavioral reports from School 2. I find it more likely than not that the Student exhibited a pattern of behavioral issues seen in the rating scales that did not rise to the level of disciplinary infractions. This also explains the District's offer to place the Student in a small social skills group, and the testimony about how that group benefited the Student.

In the end, there is no preponderant evidence that, for educational purposes, the Student had a behavioral or emotional disability that squares with the IDEA's definition of Other Health Impairment (OHI).²¹ At the same time, the District has explicitly accepted recommendations in the IEE concerning the Student's behavioral and social needs. This is important because the IDEA's eligibility categories have little use outside of eligibility determinations.²² Once a child qualifies for special education, the LEA is obligated to address all areas of need regardless of any particular diagnoses. Therefore, the District is obligated to address the Student's social and behavioral needs even though SLD is the bases of the Student's eligibility.

²¹ Neither party argues that the Student satisfies the IDEA's definition of Emotional Disturbance, despite undisputed evidence of trauma in the Student's past.

²² Particular protections for children with intellectual disabilities notwithstanding.

Entitlement to an IEP

Having found that the Student not only qualifies for, but has actually received special education, it is clear that the Student must have an IEP. Described above, the IEP is the blueprint for the Student's special education.

I make no determination as to whether the amount of progress that the Student made with the special education that the District provided was meaningful under the *Andrew* standard. There is insufficient evidence for me to make that determination. The Student was receiving special education and was making progress. Nothing in the record indicates the quantum of progress that the Student should have made, given the Student's circumstances. Instead, I find that the Student was moving in the right direction. Therefore, unless the parties agree otherwise, the Student's IEP must capture the specially designed instruction that the Student was already receiving and provide regular, objective progress monitoring.

To the extent that current or future COVID-19 school closures make such an IEP impossible to implement, the parties are directed to PDE resources on that topic.

Compensatory Education: Lack of an IEP

The compensatory education awarded above remedies the District's Child Find failure and denial of meaningful parental participation, both of which caused substantive educational harm. The Child Find failure ended when the District issued the PTE. The denial of meaningful parental participation, however, continues to this day.

Until February 11, 2019, the denial of meaningful parental participation was seen in the District's evaluation delays. During some of that time, the Student received special education in the absence of an IEP. The remedy awarded through February 11, 2019, is sufficient to remedy any harm caused by the denial. I do not examine the issue of providing services in the absence of an IEP during the same period of time for that reason.

After February 11, 2019, the provision of special education to the Student in the absence of an IEP (which had started before) continued the denial of the Parent's right to meaningfully participate. Meaningful parental participation is primarily guaranteed through the statutory IEP development process. As part of that process, parents are mandatory members of IEP teams. In this case, there was no IEP team meeting and there was no IEP. Rather, the District decreed that special education was general education and unilaterally determined what services the Student should receive. The District did obtain the Parent's permission before starting small group work with the Counselor, but that was not true of any other interventions. Even if the Parent knew exactly what interventions the Student received, the Parent had no real voice in the decision-making process.

This harm continues, and will continue, every day until the District invites the Parent to an IEP team meeting. Until the District sends such an invitation in Spanish, compensatory education will continue to accrue at the rate of one hour for each day that the District is in session.

Finally, I conclude that the District's provision of special education to the Student in the absence of an IEP was a procedural violation, but the Parent did not present preponderant evidence that this procedural violation resulted in substantive educational harm. The Student received special education

without an IEP. That obviously constitutes a procedural error. However, as discussed above, there is no preponderant evidence in the record for me to make a determination as to the substantive appropriateness of the special education that the Student received under the *Endrew* standard. I award no additional compensatory education.

ORDER

Now, September 8, 2020, consistent with the foregoing decision, it is hereby **ORDERED** as follows:

1. The Student is a child with a specific learning disability who, by reason thereof, requires special education.
2. The District violated its Child Find obligation during the 2017-18 school year, resulting in substantive educational harm to the Student. The Student is awarded one (1) hour of compensatory education for each day that the District was in session during cycles 1 and 2 of the 2017-18 school year and two (2) hours of compensatory education for each day that the District was in session during cycles 3 and 4 of the 2017-18 school year.
3. The District violated its Child Find obligation during the 2018-19 school year from the start of the school year through October 25, 2018, resulting in substantive educational harm to the Student. The Student is awarded one (1) hours of compensatory education for each day that the District was in session during that time.
4. The District violated the Parent's right to meaningful participation, resulting in the substantive harm in a delay of the Student's evaluation from August 24, 2018 through October 25, 2018 and again from December 29, 2018 through February 11, 2019. I award an additional hour of compensatory education for each day that the District was in session during these periods of time.
5. The District is in violation of the Parent's right to meaningfully participate from February 12, 2019 through the present, ongoing. I award an additional hour of compensatory education for each day that the District was or is in session from and including February 12, 2019, until such time as the District sends a Spanish language IEP team meeting invitation to the Parent.

6. The District provided special education to the Student in the absence of an IEP. This is a violation of the IDEA's procedural safeguards.
7. Unless the parties agree otherwise, the District must develop an IEP for the Student that captures the special education that the Student had been receiving before the District moved to online instruction.
8. The Parent may decide how all compensatory education awarded herein is spent within the following limitations:
 - a. Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device, purchased at or below prevailing market rates in the District's geographical area.
 - b. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP.
 - c. Compensatory education shall not be used to purchase products or services that are primarily recreational in nature, or products and services that are used by persons other than the Student except for group or family therapies.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is DENIED and DISMISSED.

/s/ Brian Jason Ford
HEARING OFFICER