

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer Final Decision and Order

CLOSED HEARING

ODR File Number:

25032-20-21

Child's Name:

S.H.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

05/13/2022

STATEMENT OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The Parent contends that under either Act, the District failed to locate, identify, evaluate and educate the Student in a timely fashion. Parents seek multiple forms of relief, including a series of independent educational evaluations, reimbursement for independent assessments, and an award of hour-for-hour prospective and retrospective compensatory education.

The District now seeks a declaratory ruling that it procedurally and substantively complied with each Act during each school year. They also request an Order overriding the Parents' refusal to consent to their request to complete multiple assessments.

Applying the preponderance of evidence standard, I now find the Parents have established, and the administrative record as a whole supports a Decision in their favor in part and against the District.

PARENTS' STATEMENT OF THE ISSUES

1. Whether the District, in a timely fashion, during the [2019-2020 school] year, located, identified, and evaluated the Student within the meaning of the IDEA? If not, is the Student entitled to compensatory education?
2. Whether the District, in a timely fashion during the [2019-2020] year, failed to locate, identify, and evaluate the Student within the meaning of Section 504? If not, is the Student entitled to compensatory education?
3. Whether the District in [the 2020-2021 school year] completed a comprehensive evaluation in all areas of unique need? If not, is the Student entitled to additional independent educational evaluations at public expense?

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

4. Whether the District failed to provide an appropriate individualized educational program during the 2020-2021 school year? Assuming a violation occurred, what appropriate relief, if any, will make the Student whole?
5. Whether the District failed to provide an appropriate individualized educational program to the Student during the 2021-2022 school year? Assuming a violation occurred, what appropriate relief will make the Student whole?
6. Whether the District's 2021 evaluation was appropriate? If not, is the Student entitled to additional related service evaluations? If yes, whether the assessments should be provided by independent evaluators, at public expense, or by District staff?

FINDINGS OF FACT

THE STUDENT ENROLLED IN THE DISTRICT WITH A ONE-ON-ONE THERAPEUTIC STAFF PERSON WITH 32.5 HOURS A WEEK OF SUPPORT

1. [redacted]
2. [redacted] (NT p.493). The [redacted] Mother testified that she provided the District with information about the Student's significant history of trauma and the reasons for the Post Traumatic Stress Disorder (PTSD) and Attention Deficit Hyperactivity Disorder diagnoses during the [initial] enrollment process. (NT pp.509-514). Consequently, the Student received counseling services outside of school, which continued throughout the dispute. The building principal, the guidance counselor, and the teacher were aware of the counseling, the behavioral health diagnoses, and the Student's ongoing treatments. (P-6, NT pp.501-502, pp. 509-514).
3. The Student began preschool at the age of 2.5 months. Due to aggression and stereotypic behaviors, the Student was referred for an evaluation at Head Start. (P-43). In September 2019, at the time of enrollment, in the District, the Student was authorized to receive 10 hours per month of behavioral specialist consultant (B.S.C.) services and 32.5 hours per week of therapeutic staff support (TSS) school.² (S-4, p. 5, NT. p.84).

² Therapeutic Staff Support is a one-on-one service provided to the children/adolescents that require behavioral interventions provided by a professional to support the transfer of skills to the adults that are naturally part of the child's life like parents, extended family, and teachers. Staff work under the

4. The Mother, the therapeutic staff support (TSS) worker, and the Student went to the school building to enroll the Student. The Mother informed the building principal about the Student's [redacted] struggles, multiple disabilities, and the [redacted] family's involvement with community-based behavioral health services. (S-4, p. 5, NT p.84). The Principal described the [redacted] Mother's statement about the Student's early childhood as "raw." (NT pp.645).
5. The Student went to the school nurse's office during the 2019-2020 school year and from 2020-2021 until January 28, 2021, to take prescribed medication for Attention Deficit Hyperactivity Disorder (ADHD). (NT p.736).
6. During [the first two school years], the Student had bowel and bladder accidents during the school day. The staff reported that during [the 2019-2020 school year], the Student reacted negatively after hearing the sound of a flushing toilet in a room adjacent to the classroom. The team opined that the bowel and bladder accidents occurred when the Student became hyper-focused. (NT pp.896-897). The District asked, and the Parents agreed to provide a change of clothing at the beginning of the school year and after each bowel or bladder accident. (NT p.912). When accidents occurred, the Student would go to the nurse to change. (NT p.913).
7. The Parent and the teachers agree the Student engaged in repetitive finger flicking and touching motions, often called stereotypic behaviors, or when transitioning to do another activity. (NT p.897). However, the staff did not view the finger flicking and tapping as a problem. The TSS, as directed, collected data and redirected the Student. *Id.*
8. The District's Director of Special Education testified that BSC and TSS services are allowed in a school setting when students are diagnosed by the community behavioral agency as demonstrating behavioral needs. (NT p.348). The Director confirmed that it is the District's protocol that BSC and TSS services could be

supervision of a master's level clinician (typically the BSC). Documentation for TSS services must include a review of "psychiatric and psychological evaluation is expected to outline specific elements of medical necessity and absence of need for psychiatric hospitalization. The evaluation includes a description of the child and the behavioral health problems he or she is experiencing, diagnoses in all five axes, current services being received, and a specific recommendation for TSS services, as well as a complete description of the child in relation to his family and community." BEHAVIORAL HEALTH REHABILITATION SERVICES PROVIDER HANDBOOK <https://www.dhs.pa.gov/contact/DHS-Offices/Documents/Behavioral%20Health%20Rehabilitation%20Providers%20Handbook.pdf>

operated in the District with the District's agreement and collaboration. (NT p.349). The Principal testified that over the years, for this Student, the District did not always follow the Student's Community Based Treatment Plan. (NT p.753).

9. The BSC regularly observed the Student during school. The BSC's 30-day review sheets included a review of the TSS daily datasheets. The BSC reviewed data for self-regulation issues, social skills deficits, decision-making, and executive functioning deficits that came up throughout the day. (P-42, P-46, P-42, NT p.220).
10. The BSC and TSS data indicate that the Student displayed various troubling behaviors during [the first two years of school] (P-42, NT p.221, pp.223-224, and pp.226-227 P-43, P-46). The TSS using the behavioral plans rubric reported off-task behaviors averaged between 21.1 per day to 32.7 instances per day. (P-42; N.T. p.222).
11. The November 30, 2019, [redacted] data states: "[redacted] reportedly has become aggressive in the school setting, and the school is concerned about [redacted] safety and the safety of those around [redacted]. [Redacted] is non-compliant, defiant, is poor with emotional regulation and lacks age-appropriate peer interactions." (P-8, P-9). Based on the data, the BSC "suggested that the TSS continue to sit in close proximity [redacted]." (P-42; NT p.225).
12. During [2019-2020 school year], the Mother recalled meetings when she discussed the Student's behaviors with the TSS, BSC, and the District's Guidance Counselor. The Mother recalls, and the District staff denied the Mother request for an evaluation, an IEP, or a 504 Plan. (NT pp.513-514). The [redacted] teacher recalled that the BSC and TSS also went over the Treatment Plan with her. (NT 922 (Vol 6). The District's Principal further testified that she was familiar with the Student's BSC and remained until November 2019. (NT p.922, NT p.263).
13. The Student District discipline record, found in the District's Office Discipline Referrals ("ODRs"), during the [2019-2020] school year, reveals the Student received seven (7) disciplinary referrals. TSS data notes the following off-task

behaviors and disruptive behavior/noncompliance episodes occurred frequently. Typical noncompliance included calling out, getting out of the seat, rolling around on the floor, and attending to other things. BSC and TSS data indicate disruptive/inattentive behavior like calling out, getting out of seat, rolling around on the floor, attending to other things, and scripting. Noncompliance was noted to occur 40 times per 5-hour observation. Noncompliance included telling others no, arguing, ignoring directives, and running from adults. (P-12, P-42, P-43, HO #2, P-12, P-42, P-43, HO #2).

THE STUDENT'S [2019-2020] ACADEMIC RECORD

14. The District's quarterly academic marking period assessments indicate the Student was not meeting District benchmarks for letter identification, letter/sound correspondence, Reading Fluency, and Writing. The District's academic records show that the [redacted] teacher reported the Student had not met District benchmarks in any reading area, including identifying upper case letters, lower case letters, consonant sounds, and vowel sounds. (S-20, NT pp.924-925).
15. Due to the SARS-COVID-19 shutdown on March 13, 2020, the Student was not meeting District benchmarks in attention to the task. The District academic records indicate that the [redacted] teacher reported by the third marking period, which was the last marking period graded. (S-20, NT pp.923-924). The District's academic records further indicate, and the [redacted] teacher reported that in the last marking period before the shutdown: "[redacted] can get easily distracted and needs reminders to stay on focus to do work." (S-20).
16. The District's academic records indicate that the [redacted] teacher's ratings for attention issues, Autism related concerns, and performance are an honest and accurate description of the Student's [2019-2020] school year. (NT p.930, p.933).
17. The District academic records indicate that the [redacted] teacher observed and reported that the Student had atypical preoccupations and fixated on certain interests. (P-43, NT p.932). The [redacted] teacher also noted that "[redacted]

has limited social smile and eye contact" and the Student experiences distress with change and transition. (P-43, NT p.932).

18. The District academic records indicate that the [redacted] teacher reported and witnessed the Student engage in a repetitive stereotypical finger-touching/flicking motion similar to others she observed in other children with Autism or developmental disabilities. In particular, the teacher stated, "I can – say honestly say that the...repetitive motions...would be similar to some of the Students who have been identified." (NT p.934, p.938). However, she did not even discuss [redacted] 's stimming behaviors with the District's School Psychologist. (NT p.935).
19. During the school shutdown, the [redacted] teacher provided and the Student attended class and received virtual direct instruction during the fourth quarter shutdown. (NT pp.908-909). "To keep [redacted] on task to stay focused on what [redacted] was supposed to be doing," the Mother would sit next to the Student. (NT p.523). The TSS services were provided virtually when the Student was not in school due to COVID-19 shutdowns. (NT pp.232-234, P-12).

THE [2020-2021] IDEA EVALUATION

20. On September 20, 2020, the District issued a permission to evaluate, and the Parents agreed. (S-3).
21. As part of the District's initial evaluation, the psychologist administered ten subtests from the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). The WISC-V is an individually administered, comprehensive clinical instrument for assessing children's intelligence ages 6:0-16:11. The Student's score fell in the Average range compared to other children who are 6 years and 7 months old (FSIQ = 93). (S-4 pp.11-12). Relative weaknesses in mental control and speed of visual scanning were noted. These weaknesses can affect how the Student engages in more complex cognitive processes, such as learning new material or applying logical thinking skills. (S-4 pp.11-12)
22. To further understand the Student's overall achievement, the District

psychologist administered the Wechsler Individual Achievement Test-III (WIAT-III). The WIAT percentile scores range from the 2nd percentile to the 70th percentile. [8 out of 12 of the scores ranged from the 2nd to 23rd percentile; while one fell at the 39th percentile, one at the 45th percentile, and one at the 70th percentile] the Student's standard scores (SS) ranged from a low of 68 to a score of 108 in the Average range. (S-4 pp.11-12). (S-11).

23. Using a predictive ability-achievement discrepancy analysis, the District psychologist gauged the difference between the Student's overall ability and achievement. A review of the Student's standard scores uncovered a 22-point drop between the WIAT FSIQ of 93 compared to the WIAT-Achievement scores. The Student's Early Reading Skills, Reading Comprehension, Word Reading, Pseudoword Decoding, Spelling subtests, and Total Reading and Basic Reading Composites were significantly discrepant from cognitive full-scale ability scores. There were no discrepancies noted between Student's cognitive FSIQ ability measurement and - standard scores on the Listening Comprehension, Oral Expression, Math Problem Solving, Numerical Operations, or Spelling subtests on the WIAT-III. (S-4 p.30).
24. The psychologist used the Behavior Assessment Scale for Children-3rd Edition (BASC-3) to assess social and behavioral skills. The classroom teacher and the Mother participated in the assessment by completing the respective rating scales. (S-4).
25. The Student's Mother rated Externalizing Problems within the "Clinically Significant Range and "Internalizing Problems within the "Normal" range (Anxiety-Normal, Depression-At Risk, Somatization-Normal). The Student's Behavior Symptoms Index was rated within the "Clinically Significant "range. The Adaptive Skills Composite was rated within the "At-Risk" range. The Student's Overall Executive Functioning Index score was 54. This Student's score falls in the "Extremely Elevated "classification range. The Mother reports that the Student has difficulty in the following areas of executive function:

Problem Solving, Attentional Control, and Behavioral/Emotional Control. (S-4). Using the Behavior Assessment System for Children, Third Edition (BASC-3) Teacher Rating Scales, and the teacher-rated all subtests in the "normal" range. The Student's Overall Executive Functioning Index score was 28 in the "not elevated" range. The teacher also rated all areas of executive function within a Not Elevated range. (S-4).

26. When reviewing the assessment data, the team considered if the Student was IDEA eligible under three different disabilities. First, the team considered if the Student was a person with a Specific Learning Disability. Second, the team considered if the Student was a person with an Other Health Impairment (OHI). Third, the team considered if the Student was a person with Autism. (S-4).

27. Based on the information gathered, relying on the outside agency-provided diagnosis of ADHD, the team determined that the Student meets the IDEA eligibility criteria as a person with an "Other Health impairment." (S-4).

28. The evaluation team, while acknowledging the discrepancy between the Student's FSIQ of 93 and the achievement scores the psychologist suggested, and the District members of the group agreed to delay a finding of a Specific Learning Disability identification. (S-4).

29. The team initially rejected an Autism eligibility finding. However, the team left open further consideration of eligibility based on reports that the Parents were pursuing a private Autism Spectrum evaluation at a University-Based Autism Clinic in Hershey. (S-4). The District's initial evaluation did not include a functional behavioral assessment, verbal or nonverbal speech measures, stereotypical behaviors, sensory needs or fine motor skills, occupational therapy, or auditory perception skills. (S-4)

30. The District's examiner also stated that the Student was not currently exhibiting behaviors that interfere with learning or the learning of [Student's] peers and does not demonstrate a need for an individualized positive behavior support. (S-4).

THE [2020-2021 SCHOOL] YEAR AND THE DECEMBER 2020 MEETING

31. In [the 2020-2021 school year], the Student received a second dose of small group reading instruction each day. Students take a placement test at the beginning of the year and then are placed on a learning pathway. The Student received pre-teaching intervention following the English/language arts lesson. On days 2, 4, and 6 the staff provided additional support within a small group support for 15 minutes. The Student worked daily on Imagine Learning, an online program geared to each child's English Language Arts (ELA) learning needs. (P-17 p.7).
32. For two weeks beginning on November 2, 2020, the District moved to remote learning due to the increase in COVID-19 numbers. Instruction and intervention groups are continuing to meet virtually during this time. (P-17).
33. During [the 2020-2021 school year], the Student continued to receive BCS and TSS support. The Student began the year with 10 hours of Behavior Specialist consultation per month and 32.5 hours per week of TSS services. (P-17).

THE [2020-2021 School Year] IEP

34. On December 9, 2020, the team, including the Parents, the District, the special education teacher, and the Student's BSC, met, by Zoom, to review the evaluation report and develop the first IEP (P-17 p.21).
35. The IEP present levels repeat findings from the evaluation report noting that the Student's "standard score on the WIAT-Achievement testing for Total Reading fell in the "low range." (P-17 p.6).
36. The [redacted] teacher's updated IEP input states that the pace of instruction in the regular [redacted] classroom in Language Arts was difficult for the Student. The teacher reported that the Student did not have a working understanding of English Language Arts concepts at grade level and had not yet mastered previously learned concepts at lower grade levels. The IEP team

concluded that the Student needed repeated exposure to new concepts in order to learn them, and the regular education classroom does not allow for this." The team recognized that the Student's cognitive ability falls within the "Average" range. (P-17 p. 11).

37. According to the IEP present levels [redacted] "Aimsweb [classroom based assessment] data, states the Student [scores] falls [sic] into the "high-risk category." The Student needs to improve the ability to read irregular words with automaticity. At the same time, the Student continues to practice blending sounds together to read decodable words. (P-17 p.11).
38. During Math instruction, when counting by 10's, the Student used teen numbers in place of the 10's (for example, 13, 14 instead of 30, 40...). Entering [the 2020-2021 school year], the Student could not identify or distinguish between different shapes. (P-17 pp.6-11). The IEP did not include a Math Goal statement. (P-17).
39. The writing present levels state the Student continues to practice using capital letters, spacing between words, and punctuation to end a sentence. The student is also working on writing a complete sentence that focuses on one idea in the writing domain. (P-17 pp.6-11). Despite low WIAT scores, the IEP did not include a Writing or Spelling goal statement. *Id.*
40. A review of Math, Writing, and English Language Arts work samples from October 2021, November 2021, and January 2022, indicates poor letter formation, random letter placement, misspelled words, nonsense answers, letters and words/letter placement were not on the line, demonstrating overall trouble with basic handwriting, spelling, and number copying skills. (P-57, P-64, P-71, P-69, P-64, N.T. pp.278-1279, N.T. pp.1281-1281, P-64, P-69, N.T. pp.1286-1290).
41. During [the 2020-2021 school year], the Student was assessed with the Dynamic Indicators of Basic Early Literacy Skills (DIBELS- PSF). This assessment measures a student's ability to fluently segment 3 and 4 phoneme words into their individual phonemes (Phonological awareness). The Student earned a score of 5. The expected DIBELS beginning of the year [redacted]

benchmark score is 40. (S-8 pp.5-9).

42. The DIBELS- NWF/CLS is an individually administered test. Students are presented with vowel constant (VC) and VCV nonsense words and are measured on how many correct letters sounds they can produce in one minute. In September, the Student earned a score of 0. The End of the Year Benchmark is 58. The January and May test scores are not reported in the record. (S-8 pp.5-9 and S-6 p.5).

43. The Student's Fall [redacted] September 2020 AimsWeb reading benchmark assessment data states:

- a. Letter Word Sounds Fluency shows a well-below average ability to make letter and syllable sounds and to read consonant-vowel-consonant words earning a score of 8, at the 1st percentile (pctl.). (S-6 pp.5-6).
- b. Phoneme Segmentation shows a well-below average ability to say the phonemes of words earning a Score of 5 at the 1st pctl. (S-6 p.6).
- c. Word Reading Fluency shows a well-below average ability to read high-frequency words aloud, earning a score of at the 2nd pctl. (S-6 pp.5-6).
- d. Oral Reading Fluency shows a well-below average ability to read stories aloud, earning a score of 3 at the 1st pctl. *This score should be interpreted with caution because the test session was interrupted or repeated. (S-6 p.6).
- e. Nonsense Word Fluency shows a well-below average ability to make individual letter sounds and make letter sounds in groups of 2 or 3, earning a score of 0 at the 1st pctl.*This score should be interpreted with caution because the test session was interrupted or repeated. (S-6 p.6).
- f. The composite score of 3, and the national percentile score is 1, which is well below average. This score is below the 50% line. Students with scores in this range have a less than 50% chance of achieving spring performance goals. The Student's risk level is high. (S-6 p.6).

44. AimsWeb mathematics benchmark assessment [redacted] assesses students in three main areas, then calculates an overall Math composite score. These areas are Number Comparison Fluency-Pairs (NCF), Math Facts Fluency-1 Digit (MFF-1D), and Concepts & Applications (CA). The Student earned the following scores:

- a. Number Comparison Fluency-Pairs show a well-below average ability to identify the larger of two numbers in a pair (Score=4, 2nd pctl). (S-6 p.6).
- b. Math Facts Fluency-1 Digit shows a well-below average ability to mentally add and subtract one-digit numbers (Score=2, 5th pctl). (S-6 p6.)
- c. Concepts & Applications shows a well-below average understanding of essential math concepts and ability to solve problems (Score=3, 2nd pctl). (S-6 p.6).
- d. The Student's Early Numeracy Composite score is 9, and the national percentile score is 1, which is well below average. This score is below the 50% line. Students with scores in this range have a less than 50% chance of achieving spring performance goals. The Student's risk level is high. (P-17 p.6).
- e. These scores conflict with the WIAT testing profile. (S-4).

45. The first IEP goal calls for the Student to read 45 sight words from the [redacted] sight word list when presented in isolation and recognize them in printed material with 90% accuracy on 3 consecutive bi-weekly probes. The second goal calls for the Student to write all upper and lowercase letters of the alphabet. The third target identifies the letters and sounds with 90% accuracy on 3 consecutive bi-weekly probes. (P-11 pp.1-13). The progress monitoring data from mid-December to mid-January notes the Student learned one new word. (P-23).

46. The IEP included six (6) forms of specially-designed instruction (SDIs) like 10-minute Social Skills Instruction Check-in and Check-out support and small group testing. (P-17 p.6).

47. On January 25, 2021, the District received the NOREP approved by the Parent that included the following message "But we have a lot of concerns." (S-7).

THE AUTISM EVALUATION

48. On or about February 8, 2021, [redacted], the Student was evaluated at a University-Based Behavioral Health Autism Assessment Clinic in coordination with the Pediatric Neurology Department. The evaluation included assessing possible symptoms of Autism Spectrum Disorder (ASD). The evaluation included a review of available records and Clinical Interviews with the Student and the Mother. The Mother reported that the Student's history

noted the presence of stereotypical movements, behavioral dysregulation, and social difficulties. At the time of the evaluation, the Student had a record of the following diagnoses: Attention-Deficit/Hyperactivity Disorder (ADHD) and Posttraumatic Stress Disorder (PTSD). The Mother completed the Autism Spectrum Disorder Assessment Social Responsiveness Scale – Second Edition (SRS 2), a Checklist for Autism Spectrum Disorder (CASD), Autism Diagnostic Interview-Revised (ADI-R), and an Emotional and Behavioral Assessment ASEBA Child Behavior Checklist. (P-43 pp.5-8).

49. This comprehensive assessment found that the Student displayed a variety of social and behavioral characteristics that are consistent with a diagnosis of Autism Spectrum Disorder (ASD). After reviewing multiple measures, the examiner concluded the Student exhibited difficulty with social reciprocal interaction skills and nonverbal social communication. In addition, the Student displayed perseverative behaviors and somatosensory disturbance. (P-43 pp.5-8).

50. The overall scores of the ADI-R and SRS 2, completed by the Parents and TSS, indicate that the Student displayed social, communication, and behavioral symptoms associated with a diagnosis of ASD. The private examiner concluded the Student continued to meet the criteria for Attention-Deficit/Hyperactivity Disorder (ADHD) and Posttraumatic Stress Disorder by history. The evaluator noted that the Student was currently receiving treatment for these ADHD and PTSD diagnoses, which was somewhat helpful. The examiner requested that the mental health professionals working with the Student continue to monitor these diagnoses to determine if additional treatment is needed. (P-43 pp.5-8).

51. The examiner's overall diagnostic impressions found the Student met the criteria for Autism Spectrum Disorder Criteria with Persistent deficits in social communication and social interaction: Requiring support (Level 1) Criteria B Restricted, repetitive patterns of behavior, interests, or activities: Requiring support (Level 1). The examiner further concluded that the Student did not meet the criteria without an accompanying intellectual impairment and

without accompanying language impairment and did meet the criteria for Attention-Deficit/Hyperactivity Disorder (by history) and Post-traumatic Stress Disorder (by history). (P-43 pp.5-8).

52. The examiner provided multiple recommendations for interventions and strategies to address social, academic, behavioral, and community strategies. (P-43 pp.8-13).
53. On February 12, 2020, in response to the Parents' request, the District issued a Notice of Recommended Educational Placement (NOREP) agreeing to provide extended school year (ESY) services. (P-24, NT. p.367, p.387, pp.717-718). The NOREP notes after reviewing the records, the Student had regressed. *Id.*

THE DISTRICT'S REVIEW OF THE PRIVATE AUTISM SPECTRUM EVALUATION

54. On March 24, 2021, the IEP team met again to review the results of a Parent funded private educational evaluation. During the meeting, the team made adjustments to the following IEP sections: "II. Present Levels; II. Needs; IV. Participation in State and Local Assessments; V. Goals and Objectives; VI. A. Program Modification and Specially Designed Instruction; VI. E Extended School Year." The IEP reflects Minor changes to the SDIs included small group testing in the resource room for Math, increased response time (time and ½), and Parent communication and support. The IEP noted the following changes: the Student exhibited signs of Attention Deficit Disorder (ADHD) and Post Traumatic Stress Disorder (PTSD). The IEP team has determined that the Student does meet the requirements to be eligible for Extended School Year Services. The team added a new goal for letter word identification. The IEP had two extended school year (ESY) goal statements. The first ESY goal repeated the "45 sight words from the [redacted] sight word list when presented in isolation and recognized in printed material with 90% accuracy on 3 consecutive bi-weekly." The second goal focused on letter words identification. (S-8 pp.16-19).

THE MAY 2021 PRIVATE INDEPENDENT EDUCATIONAL EVALUATION

55. On or around July 9, 2021, the Parents provided the District with a copy of a private speech and language evaluation. The IEE included a battery of 18 different assessments, including a measure of overall intelligence, achievement, perceptual skills, auditory processing skills, nonverbal intelligence, behavioral, Autism, attention and social checklists, word reading, phonological processing, executive skills, and measures of emotional disturbance. (P-26).
56. Per Mother, on the Child Behavior Checklist (CBCL), the Student's Externalizing Problems scale score was in the "Clinical" range above the 90th percentile, and the Total Problems scale score was in the "Clinical" range above the 90th percentile. Scores on the Attention Problems and Aggressive Behavior syndromes were in the borderline "Clinical" range (93rd to 97th percentile). These results indicate that Mother reported more problems than are typically reported for children of this age, particularly problems of Attention Problems and Aggressive Behavior nature. (P-36 pp.5-6).
57. In the area of cognitive functioning, the Student's general cognitive functioning was in the lower end of the "Low Average" range, scoring an 81. The updated testing showed a 12-point decrease in FSIQ. However, this score cannot be interpreted meaningfully because the Student displayed variability in performance across the standard scores, indicating general cognitive functioning should be viewed with caution and suggests individual cognitive processes must be explored. The global composite may have limited utility.
58. The Student was administered the CTONI-2 to measure particular abilities independent of language that increase a person's ability to function intelligently. The Student obtained an overall non-verbal general problem solving and reasoning in the "Borderline" range. The Student's cognitive functioning on the pictorial index is in the "Low Average" range, and cognitive functioning on the geometric index is in the lower end of the "Borderline" range. However, these scores should be interpreted with caution due to subtest variability. (P-36).

59. Based on the BASC-3 attention and executive functioning scales, there is variability between raters and settings. The Mother rated the Student in the "At-Risk" range and the "Clinically Significant" range in the areas of attention problems. The Student's Overall Executive Functioning Index score was rated in the "Elevated" range. The Student's Problem-Solving Index score was rated in the "Elevated" range. *Id.* Mother reports the Student has some difficulty in one or more areas of executive functioning.
60. The Student's Attentional Control Index score was rated in the "Extremely Elevated" range. Mother reports the Student is often distracted, has trouble following directions, and is unable to focus attention on any single task for an extended period of time. *Id.* The Student's Emotional Control Index score was rated in the "Elevated" range. Mother reports the Student may display outbursts, sudden/frequent mood changes, and/or periods of emotional instability. The [redacted] teacher did not rate the Student in the "At-Risk" range or the "Clinically Significant" range in any areas. *Id.*
61. Based on the BRIEF-2, the examiner noted variability between raters and settings. Mother rated the Student in the "Elevated" range in the areas of inhibit, self-monitor, emotional control, initiate, and working memory. The special education teacher did not rate the Student in the "Elevated" range in any areas. Based on the Conners 3, there is variability between raters and settings. The Mother rated the Student in the "Very Elevated" range in the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems, and Peer Relations. The Student's overall T-score was "Elevated" or "Very Elevated" for the following DSM-5 Symptom scale: ADHD Predominantly Hyperactive-Impulsive Presentation. The Student's T-score was rated in the "Elevated" or "Very Elevated" range for the following DSM-5 Symptom scale classification: ADHD Predominantly Inattentive Presentation. *Id.*
62. Mother reports the Student's problems seriously affect functioning "Often" in the academic, social, and home settings. The [redacted] teacher rated the Student in the "Very Elevated" range in the areas of Learning Problems and Peer Relations. She also rated the Student in the "Elevated" range in the area of Learning Problems/Executive Functioning. *Id.* Mother then reports the

Student's problems seriously affect functioning "Very Frequently" in the social setting and "Often" in the academic setting. The special education teacher did not rate the Student in the "Elevated" range or the "Very Elevated" range in any areas. The special education teacher reports the Student's problems seriously affect functioning "Occasionally" in the academic setting. *Id.*

63. In the areas of academic achievement, the Student demonstrated relative academic weaknesses in the areas of listening comprehension skills (oral comprehension and understanding directions), basic reading skills (letter-word identification), reading comprehension skills (passage comprehension and reading recall), reading fluency skills (oral reading and sentence reading fluency), reading rate skills (sentence reading fluency and word reading fluency), word efficiency skills (sight word efficiency and phonemic decoding efficiency), math calculation skills (math facts fluency), math problem-solving skills (applied problems), and written expression skills (spelling, writing samples, and sentence writing fluency). *Id.*
64. In the areas of social-emotional functioning, the Mother rated the Student in the "At-Risk" range in the areas of developmental social disorders, executive functioning, ADHD probability, functional impairment, adaptability, social skills, functional communication, and resiliency. Mother also rated the Student in the "Clinically Significant" range in the areas of attention problems and leadership. The [redacted] teacher rated the Student in the "At-Risk" range in the areas of withdrawal, learning problems, Autism probability, functional impairment, social skills, and functional communication. The [redacted] teacher did not rate the Student in the "Clinically Significant" range in any areas. The special education teacher did not rate the Student in the "At-Risk" range or the "Clinically Significant" range in any areas. *Id.* Stress Disorder (PTSD), and an Autism Spectrum Disorder (ASD).
65. On the Functional Communication Profile-Revised, a test of phonological processing, auditory memory, and listening comprehension, the Student earned an overall score of 98 at the 45 percentile. The Phonological Processing Index was used to assess word discrimination, phonological deletion, and phonological blending, and one supplemental subtest of Syllabic

Blending. The Student earned a score of 104, earning a percentile rank of 61. The Student earned an Auditory Memory Index score of 102 with a percentile rank of 55. The Student's earned a Listening Comprehension score of 83, with a percentile rank of 13. Based on the percentile rankings and scores, the evaluator recommended speech therapy for 60-minutes of services one time a week. (S-13).

66. The evaluation included the Child Sensory Profile 2 Caregiver Form scores and the Childhood ADHD symptoms scale self-report. The assessments mentioned above were completed based on caregiver reports and clinic observations. (S-13).

THE DISTRICT'S MULTIPLE REQUESTS TO REEVALUATE

67. After receiving the private psychological evaluation, the District issued the first of many, Prior Written Notice(s) (PWN) requesting permission to reevaluate the Student. (N.T. p.393, S-11 (NT p.148, p.200, 371-372, p.474, pp.1192, pp.1209-1205-1207, S-18, pp.30-31, S-11, S-27, p.45, S-14, pp.32-33, S-15, S-30, S-37 p.6).

68. On July 14, 2021, the District issued a draft reevaluation report after reviewing the psychological IEE (NT p.394, S-14). On September 7, 2021, the District issued a final reevaluation report rejecting the IEE examiner's results. (NT p.396, p.475). The District disagreed with IEE results and did not follow up on his recommendations. (NT. 377).

69. On or about August 10, 2021, the Student was referred for an initial auditory processing evaluation. The examination was completed, and the results were provided to the District sometime after August 14, 2021. After administering a variety of assessments, the examiner diagnosed the Student with a diagnosis of a Central Auditory Processing Disorder, Mixed Receptive-Expressive Language Disorder, and a Social Pragmatic Communication Disorder. (S-16 p.4).

70. On September 7, 2021, the District issued a permission to evaluate for a speech and language evaluation. (NT p.374, 396, S-17, P-37). (NT p.376, p.393, p.395, p.470, S-13, P-13).

71. On or about December 21, 2021, the Parents and the staff met to revise the IEP. A reading goal, an Oral Reading Fluency, and a behavioral goal were included. The sight-reading and letter identification goals were dropped. The specially-designed instruction was changed to allow someone to read the Math tests to the Student, and the Student was given time and a half to respond to requests. The IEP does not describe how long the staff should wait to allow the Student to respond, and the IEP does not state how the Student's low reading skillset affected Math. (S-37).

GENERAL LEGAL PRINIPLES

WITNESS CREDIBILITY

During a due process hearing, the hearing officer is charged with judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."³ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one factor is controlling, a combination of factors causes me to pause and comment on certain testimony.⁴ On multiple instances, the District's witnesses' testimony was inconsistent when contrasted with the positions taken by the witnesses in the written evaluation/reevaluation reports and the IEPs. At other times the testimony was overly focused on shifting the Student's disability-related circumstances onto the Mother, the BSC, the TSS, the outside evaluators, or the community-based behavioral health agency. Based on my observation, recollection, and notes, the testimony of certain witnesses was delivered in a rapid fashion, with hesitations, and evidenced topic shifting changes that affected the degree of directness. At other times certain witnesses provided filler information on topics not asked for. Therefore, based on this record, I now find the testimony of the District's witnesses was not always clear or cogent.

Although the teachers worked with the Student, based on their lack of familiarity with the IDEA and Section 504 eligibility standards and their conflicting testimony, I will give

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁴ A fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affect the credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. How the testimony was at times not delivered in a persuasive fashion factors like body language, eye contact, and whether the responses are direct or appear to be evasive, unresponsive or incomplete are important.

their testimony less weight on the topics of the Student's circumstances, strengths, weaknesses, IDEA/Section 504 eligibility, and overall progress-monitoring standards. At times I found the testimony either preplanned or not responsive to the call of the question.

The Student's independent psychological evaluator's testimony gave clear and cogent reasons for his conclusions, why he selected each assessment tool, and how his findings were linked to the test results and recommendations. Hence, I will give his testimony more significant weight on these topics than the District staff. On the IDEA disability topic and the conjoined topic, does the Student needs SDI I will also give the IEE evaluator's testimony more weight than the District psychologist and staff. The IEE detailed testing cleared up the unanswered ADHD eligibility, learning disability eligibility, and need for special education.

I will give the testimony of the District's psychologist medium weight, provided that her testing comports with the expected assessment, data collection, test selection, and observation requirements otherwise expected in an evaluation or reevaluation report. However, findings of procedural and substantive defects in her evaluations will cause me to give the psychologist's testimony about the development of the initial assessment and reevaluation reports reduced to no weight.⁵

The two TSS witnesses and the BSC provided clear, cogent, and consistent testimony. I found these witnesses had little to no reason to be biased or evasive. They showed little to no reason to hide the truth or omit facts even when it went against their conduct or the Parent. The testimony from these individuals was responsive to the questions and linked up logically to what they observed, heard, and recorded in the data.

Finally, I found the Mother's testimony credible, compelling, and straightforward.

IDEA FAPE PRINCIPLES

The IDEA requires each state to provide a "free appropriate public education" (FAPE) to eligible children for special education services.⁶ FAPE consists of both special education

⁵ 22 Pa Code Chapter §§ 14.124, 14.131, 14.132, and 34 CFR §300.320. *et. seq.*

⁶ 20 U.S.C. § 1412

and related services.⁷ In *Board of Education v. Rowley*, 458 US 176 (1982), the Supreme Court held that the FAPE mandates are met when IEP services provide personalized instruction and comply with the Act's procedural obligations. The district meets its FAPE obligation by providing an IEP which is "reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential.'"⁸ IEPs are "... constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."⁹ Individualization is, thus, the central consideration for purposes of the IDEA.

Nevertheless, a district is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents."¹⁰ Instead, the law demands reasonable and appropriate services in light of a child's unique circumstances, not necessarily those their "loving parents" might desire. *Andrew F.*, supra.¹¹ A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made," otherwise known as the "snapshot rule." "The IEP must aim to enable the child to make progress," but progress is not measured by what may be ideal.¹²

IDEA EVALUATION REQUIREMENTS

The IDEA itself sets forth two purposes of the required evaluation or reevaluation requirements. First, the evaluation should determine whether or not a child is a child with a disability as defined in the law, and second, the reevaluation must "determine the educational needs of such child."¹³ The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific disability classifications and who, "by reason thereof, needs special education and related services."¹⁴ An appropriate evaluation or a reevaluation includes a "[r]eview of existing

⁷ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

⁸ *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted).

⁹ *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

¹⁰ *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012).

¹¹ *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

¹² *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original).

¹³ 20 U.S.C. §1414(a)(1)(C)(i).

¹⁴ 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).

evaluation data."¹⁵ The review of the existing data must include all existing "evaluations and information provided by the parents," "current classroom-based, local, or State assessments, and classroom-based observations," and "observations by teachers and related services providers." *Id.* "Upon completion of the administration of assessments and other evaluation measures[,], the determination of whether the child is a child with a disability . . . and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child."¹⁶ Districts must (1) use a variety of assessment tools and strategies [34 CFR § 300.8]; and (2) the assessment tools should assist the team in developing the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.¹⁷ The evaluation team should not use any single measure or assessment tool as the sole criterion for determining whether a child is a child with a disability.¹⁸

In Pennsylvania, LEAs must provide a reevaluation report to the parents describing the reevaluation results within sixty (60) calendar days of receipt of the Parent's consent, excluding summers.¹⁹ Once the report is completed, "[a] group of qualified professionals and the child's parent determines whether the child is a child with a disability ... and the child's educational needs."²⁰

Although the evaluation team should strive to reach a consensus, under 34 CFR §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are encouraged to work together in making the eligibility determination.²¹ Parental disagreement with the conclusions of an LEA's reevaluation does not, in and of itself, establish that the District's reevaluation is inappropriate.

¹⁵ 20 U.S.C. § 1414(c)(1)

¹⁶ 20 U.S.C. § 1414(b)(4).

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

¹⁸ 34 C.F.R. §§ 300.304(b); 34 C.F.R. § 303(a).

¹⁹ 22 Pa Code §§ 14.123(b), 14.124(b)

²⁰ 34 C.F.R. § 300.306(a)(1)

²¹ 71 Fed. Reg. 156 at 46661 (August 14, 2006).

The usual remedy when an evaluation does not meet the requisite criteria is either a reevaluation or an IEE²² When an evaluation is conducted per 34 CFR 300.304 through 34 CFR 300.311, and a parent disagrees with the evaluation because a child was not assessed in a particular area, the Parent has the right to request an IEE.²³ I now find that the District's evaluation does not comport with 34 CFR 300.304 through 34 CFR 300.311. According to OSEP, when a parent seeks an IEE to make up for a missing assessment, the district may not avoid promptly filing for due process or funding the IEE. ²⁴

SECTION 504 AND CHILD FIND

Section 504 and Chapter 15 contain their own child find requirements that appear similar to but are much broader in scope than the IDEA. Section 504 requires districts to evaluate students who, because of handicap/impairment, need or are believed to need special education or related services.²⁵ Rather than list a defined set of disabilities, Section 504 requires districts to locate, evaluate and educate individuals whose "physical or mental impairments" "substantially limit" a "major life function." While both statutes require individual assessments, the scope, type, and eligibility requirements are distinct. Unlike the IDEA, a Section 504 assessment generally won't require a great deal of scientific, medical, or statistical evidence.²⁶ The 2016 amendments to the Americans with Disabilities Act (ADA.) Title II regulations require districts to construe Section 504 and the ADA definitions broadly in favor of expansive coverage "to the maximum extent permitted by the terms of the ADA" *Id.* The regulations define a "physical or mental impairment" as a : (i) Any psychological disorder or condition, cosmetic disfigurement, . . . ; or (ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and a specific learning disability.²⁷ The Title II and the Section 504 regulations then provide examples of major life activities.²⁸

²² 34 C.F.R. § 300.502, 34 C.F.R. § 300.502(d), 34 C.F.R. §300.502(b)(1), (2)(ii). (34 C.F.R. § 300.502(a)(2); *Letter to Blum*, 211 IDELR 2237 (OSEP 1980).

²³ *Letter to Baus*, 65 IDELR 81 (OSEP 2015).

²⁴ *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

²⁵ 34 C.F.R. §104.35 (a) See 22, Pa. Code § 15.2.

²⁶ 28 CFR 35.108 (d)(v), 35 CFR 34.136.

²⁷ 28 CFR §35.108 (b) (1).

²⁸ 28 CFR §35.108 (c)(1)(i); 28 CFR §35.108 (c)(1)(ii), Dear Colleague Letter, 58 IDELR 79 (OCR 2012) (stating that districts must interpret the definition of "disability" liberally when evaluating students' eligibility for Section 504 services). Like the IDEA, a Section 504 team's determination, whether an

To assist districts in determining when an impairment substantially limits a major life activity, the applicable regulations adopted nine interactive rules of construction. The 2016 Title II regulations list the following impairments as conditions that substantially limit major life functions: major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), traumatic brain injury, obsessive-compulsive disorder, and schizophrenia are recognized conditions that substantially limit brain function.²⁹ Districts should not rely on grades alone or subjective observations when weighing if a student's condition substantially limits a student's educational performance. Furthermore, a district may not consider the ameliorative effects of "mitigating measures" when determining whether an impairment substantially limits a major life activity. Mitigating measures include medications, auxiliary aids, or services like learned behavioral or adaptive modifications, psychotherapy, or behavioral therapy. ³⁰

SECTION 504 FAPE REQUIREMENTS

Once a student is identified, Section 504 requires that districts comply with specific procedures in providing services to students with disabilities. Section 504 requires adherence to the FAPE provisions found at 104.33, the evaluation and placement standards at 34 CFR § 104.35, the educational settings requirements at 34 CFR 104.34, and the procedural safeguards at 34 CFR 104.36. In particular, Section 504 FAPE requires the provision of regular or special education, including related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 CFR §104.33 (b)(1)(i). Section 504's FAPE standard supports and reinforces the nondiscrimination directive at 34 CFR §104.4. Section 504 regulations at 34 CFR §104.33 (b)(2) state that one way of meeting the Section

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impairment is substantially limiting, requires an individualized assessment. 28 CFR §35.108 (d)(1)(vi), 34 CFR §104.36.

²⁹ 28 CFR § 35.108 (d)(2)(iii).

³⁰ Kennett Consol. Sch. Dist., 118 LRP 27976 (SEA PA 05/10/18), 34 CFR § 104.35, and 34 CFR § 104.36. 34 CFR §104.33 (b)(1), 28 CFR § 35.108 (d)(4),

In this instance, both Parties seek appropriate relief within the meaning of the IDEA.³¹ Here the Parent seeks compensatory education, a prospective placement, and a reevaluation.³² At the same time, the District desires a declaratory finding that its program and offer of FAPE were appropriate.

DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW

The Parties competing analysis, the exhibits, the testimony, and briefs were studied in reaching the following Conclusions of Law.³³

THE IDEA CLAIM

I agree with the District that a reasonable suspicion did not otherwise exist at the time of enrollment that would otherwise trigger an IDEA child find evaluation. Case law and the IDEA give the District a reasonable amount of time to observe, assess, and gauge a student's circumstances before formal eligibility testing occurs. Not all children who are struggling require an assessment. Based on the whole record, I now find that by late February or early March 2020, a reasonable person would have suspected a disability. Grades were low, the behavior was variable, and the Student's self-regulation warning signs were clear. The SARS-COVID shutdown and the switch to virtual learning delayed the identification and evaluation. Therefore, I now find that the District's actions in early September 2020, and subsequent November 2020 evaluation, were completed in a timely fashion. While these actions satisfied the District's identification and timeliness obligations, I also find that the first assessment was insufficient, incomplete, and otherwise inappropriate for all the reasons that follow. Accordingly, an **ORDER** granting reimbursement and further assessments follows as appropriate relief.

THE [redacted] CHILD FIND CLAIM

The triggering event for a Section 504 child find claim occurs either when the Parent provides a written request for an evaluation or when a district suspects an

³¹ *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)).

³² *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (comparing the make-whole versus the hour-for-hour approach).

³³ Generally, the burden of proof 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. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

underlying disability.³⁴ I find for the Parents and against the District on the Section 504 child find claim for all of the following reasons.

First, the Parents disclosed the otherwise classic Section 504/ADA disabilities of ADHD and PTSD at the time of enrollment. (S-26). Second, the Mother requested, and the Principal agreed to allow the Student to attend school with the TSS. Third, the record is preponderant that the District was on notice that a group of knowledgeable professionals determined that it was "medically necessary" for the Student to access BSC and TSS services during the school day. Actual notice of the Student's disability triggered the District's obligation to modify its policies to allow the TSS to complete an evaluation or file for a hearing. Fourth, the oral agreement to allow the TSS created either an acceptance of a qualifying disability or the grant of the TSS accommodation based on a perceived disability required the District to create a Chapter 15 Agreement. Fifth, once the Agreement is finalized or if the accommodation is refused, the District must provide the Parent with a copy of their Section 504 Procedural Safeguards. Seventh, although PTSD is one of the recognized disabilities that trigger Section 504 protections, the District did not issue procedural safeguards. Black letter law requirements calling for a written agreement or procedural safeguards - were not satisfied.³⁵

Although the violations here are a mixed bag of quasi-substantive and procedural violations, I now find that the record does not establish a matching harm. The TSS was present; the [redacted] teacher collaborated with the TSS and the Mother. The TSS was allowed to do her job, and the record does not establish a failure to access the regular education classroom. Further, the evidence does not prove that the Student needed substantive curriculum modifications or specially designed instruction; therefore, while I will **ORDER** procedural relief, I will not award substantive compensatory education relief.

THE RETURN TO SCHOOL AND THE FIRST EVALUATION

When the Student returned to school, the District issued, and the Parents agreed

³⁴ 34 CFR §§104.32 (generally describing the recipient's child find location duty and notification of recipient's Section 504 duties).

³⁵

to an initial IDEA evaluation. The evaluation sought to determine if the Student was a person with either an "Other Health Impairment," a Specific Learning Disability, or a person with Autism. A child with an "Other Health Impairment" has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in either limited alertness with respect to the educational environment, that a) is due to chronic or acute health problems and b) adversely affects a child's educational performance. The evaluation report does not explain what scores or how the team concluded the Student who, for the most part, was described as "Average" and whose scores were "Not Elevated" otherwise met the ADHD disability criteria. Next, the evaluation does not explain how the team decided the ADHD disability adversely affected the Student's education. Absent clarity, the team, and the Parents cannot prioritize needs, identify specially-designed instruction or prepare progress monitor strategies. These omissions occurred because the District did not use various assessment tools, did not collect or review the Student's behavioral health records, and otherwise relied on single measures to conclude. Fortunately, in this instance, these omissions were corrected by the scope of the private academic IEE. Therefore, I now find the Student is a person with ADHD. Based on the IEE data, I also find that the Student requires specially-designed instruction. The IEP team should consider, adopt and apply the recommendations found in the IEE that they see fit to address this disability. These foundational substantive errors had a knock-on effect.

THE SPECIFIC LEARNING DISABILITY ASSESSMENT WAS INSUFFICIENT

The Pennsylvania Department of Education (PDE) describes a four-step process to identify a specific learning disability. The first step requires determining whether the child does not achieve adequately for the child's age or meets state-approved grade-level standards. 22 Pa Code §14.125(a)(1). The regulations then require an assessment in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem-solving. *Id.* Next, the regulations provide districts with a choice between a Response to Intervention model or an analysis of the "Strengths and Weaknesses" model. This "Strengths and Weakness" model examines whether a child exhibits a

pattern of strengths and weaknesses relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade." (§14.125(a)(2)(ii)). The third step requires the evaluation team to decide if the findings are not the result of other disabilities, lack of instruction, or environmental factors (§14.125(a)). Finally, PDE suggests that the student test scores fall below the 10th percentile as a rule of thumb to demonstrate a significant discrepancy.³⁶ These rules were not followed.

Using a strengths and weaknesses model, applying the sole predictive achievement rubric, the psychologist, using one method, concluded, and the team followed her lead that the Student did not meet the eligibility criteria for a Specific Learning Disability. While the test maker categorizes a 22.5 point difference between IQ and achievement- a significantly discrepant score - the psychologist rejected IDEA eligibility and recommended another year of close monitoring. Rather than apply the regulations and make decisions using various assessment techniques, the team relied on one score - the predictive difference achievement rubric - to rule out a specific learning disability. Applying the PDE, 10th percentile scoring rubric, the Student's WIAT standard scores on the Early Reading Skills at the 2nd percentile, the Reading Comprehension at the 2nd percentile, the Word Reading at the 2nd percentile, the Pseudoword Decoding at the 4th percentile and the Spelling at the 5th percentile all indicate an otherwise qualifying significant strengths and weakness discrepancy. Furthermore, the Student's Composites scores for Total Reading at the 1st percentile and Basic Reading, at the 3rd percentile also satisfy the PDE guidance. Therefore, based on the failure to follow Chapter 14 requirements, I now find the District failed to evaluate the Student in all areas of suggested disability properly. These omissions interfered with the team's decision-making and denied the Student the benefit of a comprehensive evaluation.

³⁶ Pennsylvania Department of Education, PA Guidelines for Identifying Students with Specific Learning Disabilities (SLD) (2008) <https://www.pattan.net/getmedia/0aba0321-6a8e-48eb-839e-1351acd80d56/SLD-Guidelines080508>

THE DISTRICT'S AUTISM EVALUATION FELL SHORT

Chapter 14 follows the IDEA definition of Autism as meaning ". . . a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance." 34 CFR 300.8(c)(1)(a).

The District's eligibility rubric misstates the IDEA standard. Rather than use the published IDEA/Chapter 14 definition, the District's evaluation team determined the Student's eligibility using the following rubric "Autism refers to a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." (S-4 p.25). The District's definition omits assessment of verbal/nonverbal communication, social interaction, engagement in repetitive activities, stereotyped movements, resistance to environmental change, and unusual responses to sensory experience. Using an incomplete definition and without adequate data, the District improperly concluded that "There is no evidence to support an educational diagnosis of autism at this time. However, this exceptionality can be reconsidered if [redacted] receives a diagnosis of autism following [redacted] evaluation at [redacted] Medical Center." This fundamental assessment error all but forced the Parents to secure the third party evaluation.

As a matter of law, once I find the initial evaluation was inappropriate, I must now find in favor of the Parents' IEE request. Applying OSEP guidance subject to the restrictions set out below, the Parent may now seek out, and the District must pay for the requested additional assessment to make up for missing data. The District may not avoid or delay its FAPE duties.³⁷ To ensure the Student does not miss

³⁷ Letter to Carroll, [68 IDELR 279](#) (OSEP 2016).

another year of support, I set out a specific timeline for completing the IEEs. Therefore, I now find the initial evaluation was fundamentally flawed for all of the above reasons.

THE [2020-2021] IEPs WERE FLAWED, AND THE PROGRESS REPORTS DID NOT MATCH UP WITH THE GOAL STATEMENTS

The [2020-2021] reading goal statement calls for the Student to read 45 sight words from a kindergarten and 45 words from the [grade level] word list, with 90% accuracy, on 3 consecutive bi-weekly probes. (S-6 p.14). While this standalone goal seems measurable, applying the *Endrew* circumstance test, I now find this IEP goal statement and the others are not otherwise ambitious, challenging, or appropriate. Putting aside the finding that the evaluation was flawed, the District could write challenging goals in all areas of unique need. This IEP team did not.

Sight vocabulary is not reading. Sight vocabulary is not the same as Early Reading Skills, Reading Comprehension, Word Reading, Pseudoword Decoding, or Spelling, which fell well below the 10th percentile. Yet, without baseline data, or a cogent explanation, the IEP team drafted a sight word list over goal statements for reading skills. Absent direct instruction in these discrepant core skill sets, the Student cannot access or participate effectively in the regular education curriculum.

Rowley and Endrew tell me to review IEP goal statements compared to the child's potential; for this Student, both Parties agree the Student is "Average." Yet when I check the present levels and the goals, I am told the Student is functioning well below "Average." The failure to include challenging and ambitious reading goals and specially-designed instruction is problematic. Let me explain.

The Student's [grade level] Aimsweb reading data states that the Student earned an Early Literacy Composite score of 3, at the 1st percentile, in the "well below average" range. Applying the Aimsweb rubric stated in the IEP, the Student had less than a 50% chance of achieving spring performance goals. This scoring ratio places the Student in the "high" risk category, and

the IEP lacks a Literacy goal statement. (S-6 p. 6 vs. S-36 p.7). Yet the IEP lacks a goal.

While the goal calls for instruction on two different word lists, the progress report does not state which word list is being worked on. Neither the Parent nor this hearing officer has access to the promised progress data reflecting the Student's performance on both word lists, at 90% mastery, on 3 consecutive probes. Applying *Endrew*, I now find the [2020-2021] I.E.P. lacked a tangible starting point describing the circumstance from which I can gauge progress. The IEP also failed to address the Student's reading, writing, math, attention, and behavioral weaknesses. Applying *Rowley*, absent specially-designed instruction, I now find the IEP was not reasonably calculated to provide meaningful benefit when offered. The same flaws are found in the [next year's] I.E.P.

The [2021-2022] I.E.P. reports the Student's Aimsweb Oral Reading Fluency score at the 1st percentile, a two-point drop from the 3rd percentile in [previous] grade, and the IEP lacks a Reading Fluency goal statement. (S-6 p. vs. S-37 p.7). The record includes a February 2020 NOREP indicating overall sight word reading and letter identification regression. The WIAT scores and the Aimsweb data corroborate a little to no progress finding. All of the above factors indicate a denial of a FAPE and an overall lack of progress.

Absent a clear statement why the [2021-2022] I.E.P. goal statements drop the sight-reading goal and then switch over to "Cloze Reading" skills. "Cloze Reading" skill development is a technique where the reading passage omits words from a passage so that the reader is forced to use background experience, knowledge of syntax, vocabulary, interest, and, generally, higher-order thinking skills to fill in the blank and complete the thought. The Student's [2020-2021] and [2021-2022] Aimsweb and WIAT scores do not indicate that the Student's skill set includes higher-order syntax, passage reading, or vocabulary reading skills sets that would make the goal statement appropriate, challenging or ambitious.

These statements indicate little to no progress when contrasted to the "Average" full-scale IQ and the WIAT-achievement scores. The Student's Fall 2021 Second Aimsweb data indicates the opposite. The Student's Oral Reading score declined, and the Student's report card statement reflects the opposite. The Student's Vocabulary- sight words and Oral Reading score fell at the 3rd percentile. Reading Comprehension fell at the 1st percentile; based on these scores, [redacted], the Student's Oral Reading Fluency skills are monitored at the [redacted] Grade level.

While on the WIAT, the Student scored "Average" in Math, the [2021-2022] present levels report an overall Aimsweb Composite score of 127 at the 8th percentile. Comparing this score to the WIAT-Achievement Math Problem Solving ranking at the 16th percentile, the Numerical Operations ranking at the 39th percentile, the Math Fluency-Addition ranking at the 23 percentile, and a Math Fluency-subtraction ranking at the 23rd percentile, the Student, is moving backward and not forward. This conclusion is further supported when comparing the Student's WIAT-Achievement test Composite score at the 23rd percentile in Mathematics and the 21st percentile in Math Fluency to the Aimsweb Composite score at the 8th percentile. Furthermore, when the Aimsweb scores are compared to the WIAT predictive scores, the Student is not moving forward. (S-37 p.17). After reviewing these data sets, I now find that the goals are either vague or inappropriate given the Student's potential. The Student is not making progress, and the progressed [2021-2022] Reading and Math Goal Statements are not appropriate, challenging, or ambitious.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.

The Parents now seek compensatory education, reimbursement for out-of-pocket costs, and **ORDER** for additional testing. While the Parents did not meet her burden of proof for an award of compensatory on their Section 504 "child find" [redacted] Claim, they did meet their burden that the Student is due procedural relief. Therefore, to remedy the [redacted] "child find" violation, the District is **ORDERED** to provide Act 48 credit-worthy training for all staff who testified in this matter. At a minimum, the Act 48

training should include the teachers and the District's obligation to provide a Section 504 FAPE, including but not limited to "child find," evaluation, placement, and procedural safeguard professional development.

The Parent did meet her burden of proof regarding an award of reimbursement for the educational and Autism identification IEE and educational IEE. The Parents are directed to provide the District with a list of costs for the educational evaluation, including out-of-pocket transportation costs to secure each evaluation. The District is now **ORDERED** to reimburse the Parents for all costs within 30-days of receipt of the expense list.

Applying *GL* and *MC*, once the denial of FAPE is established, the hearing officer must determine when the district either knew or should have known of the denial of a FAPE. After reviewing the record, the testimony, and the exhibits, I now find that the District either knew or should have known of the FAPE denial in November 2020. I now find the errors in creating the initial evaluation placed the District on notice of follow-along assessment, evaluation, and denial of FAPE violations.

Second, the hearing officer must determine whether a qualitative or quantitative analysis will make the Student whole. In this instance, I now find a modified quantitative hour-for-hour approach will create an equitable bank of compensatory education time that will make the Student whole.

Third, the hearing officer must calculate the value of the reasonable rectification period. Case law describes the reasonable rectification period as an affirmative defense. The District here neither asserted the rectification defense nor did it put any evidence about that calculation. As the rectification period is a fact-specific defense, I now find the defense was waived.

Fourth, once the reasonable rectification period is set, the hearing officer must then equitably reduce the total award of the compensatory education by the length of the reasonable rectification period. Absent evidence, the fourth step is inapplicable and is either waived or not subject to calculation due to lack of proof.

Fifth, in crafting "appropriate relief," the hearing officer must follow the overarching principle that "appropriate relief" must make the student "whole." Appropriate relief, in this instance, includes compensatory education for past violations and prospective

ongoing day-to-day compensatory education. The prospective compensatory education will end when the District offers a new NOREP and makes a new offer of a FAPE after completing the **ORDERED** assessments, and a new IEP and NOREP are offered. I will now calculate the value of the compensatory education relief.

THE COMPENSATORY EDUCATION CALCULATION

The records note the Student is expected to attend school for 6.5 hours a week. Therefore, on the circumstances, including the scope and the magnitude of the loss of a chance to make meaningful academic, social, and behavioral progress, the Student is now awarded 3.5 hours a day for each day of school for the 2020-2021 and the 2021-2022 school year. To complete the calculation, as the record does not include a school calendar, I will now **ORDER** the following: (1) the District is directed to provide the Parents with a school calendar identifying the number of weeks and the days the District was in session each year. (2). The Parents should then reduce the number of school days or minutes the Student was absent due to illness or days the school was closed for all other students for the total days. (3) To calculate the total award of compensatory education for each year, the Parties should multiply the number of weeks the District was in session by 1545 minutes. Compensatory education will continue to accrue until the District offers a new IEP and a NOREP.

AWARD OF COMPENSATORY EDUCATION FOR LOST ESY SERVICES

Although the Student was an otherwise eligible person with a disability, within the meaning of Section 504, the record is incomplete as to if the Student was eligible for ESY services between the [2019-2020 school year] and [2020-2021 school year]; therefore, the Parents' claim is denied.

To remedy the ESY denial of a FAPE for the 2020-2021 school year, [redacted], the Student is awarded 3.5 hours a day, for a five (5) day a week program, for a total of six (6) weeks. I now find an award of 105-hours of compensatory education is an equitable make-whole remedy.

To remedy the ESY denial of a FAPE for the 2021-2022 school year, [redacted], the Student is awarded 3.5 hours a day, for a five (5) day a week program, for a total of six (6) weeks. I now find an award of 105-hours of compensatory education is an equitable

make-whole remedy. The District is **ORDERED** to fund 210-hours of compensatory education. This total ESY award represents an equitable make-whole remedy.

SELECTION AND PAYMENT FOR COMPENSATORY SERVICES

The Student may use the compensatory education bank of time for any developmental, corrective, remedial, or specially-designed instruction, including related services, transition services, supplemental or auxiliary aids, as defined in the IDEA or Section 504. The Parent can select the compensatory education service provider at her sole discretion. The District should reimburse the Parent selected compensatory education provider at the rate regularly charged for each service by each provider. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the District's rate for travel reimbursement. Each year, in January, the District should report any unused hours to the Student and the Parent. Any unused compensatory hours remaining by age 23 will revert to the District and are otherwise forfeited.

FINAL ORDER

AND NOW, this May 13, 2022, the District is now **ORDERED** as follows:

1. The Parent's claim that the District failed to complete a full comprehensive evaluation of the Student's needs is **GRANTED**. To remedy the above failure to conduct an individualized and comprehensive evaluation, the District is directed to fund the following independent evaluations: (1) speech, (2) OT, (3) central auditory processing evaluation and (4) a functional behavioral assessment. The selection of the provider and the reevaluation timeline is subject to the following restrictions:
 - a. Within two school days of receipt of this **ORDER**, the District is directed to provide the Parents with the names and qualifications of persons from the local intermediate unit who are credentialed to perform all **ORDERED** evaluations.
 - b. The Parents on receipt of the list have two school days to select the evaluators.
 - c. If the intermediate unit staff are unable or unwilling, the Parents can select the persons to complete the **ORDERED** evaluations in their sole discretion.
 - d. All IEE examiners must agree to complete the assessment within 30-days and provide a written report within 10-days.

- e. Once the District and the Parents receive the independent evaluation reports, the District is directed to complete a written reevaluation report within 5-days.
- f. Within five days of receiving the report, the Parties are then directed to participate in an IEP meeting, review the reevaluation report, and incorporate the agreed-on results/recommendations into the IEP.
- g. Once the IEP is offered, the District is directed to issue an updated NOREP describing any proposed or refused actions.

2. The Parent's IDEA child find claim for the 2019-2020 school year is **DENIED**.
3. The Parent's Section 504 child find claim for the 2019-2020 school year is granted on procedural grounds and denied on substantive grounds. Consistent with the reasons above, the District is **ORDERED** to provide professional development for all staff who testified in this hearing.
4. The Parent's claim that the District failed to provide either IDEA or Section 504 free appropriate public education for the 2019-2020 school years is **DENIED**.
5. The Parent's claim the District failed to provide a free appropriate public education for the 2020-2021 and 2021-2022 school years is **GRANTED** in full.
6. To remedy the two-year FAPE violation, the District is now **ORDERED** to fund a bank of compensatory education as described above.
7. To remedy the failure to provide ESY services for the 2020-2021 the 2021-2022 school year, the District is **ORDERED** to fund a bank of 210 hours of compensatory education. The Parent's claim for ESY services between [2019-2020 school year and 2020-2021 school year] is **DENIED**.
8. The District is **ORDERED** to pay the total costs for all billed compensatory education services at the rate charged by the service provider selected by the Parent, at the rate charged for each service(s). All invoices for compensatory education services or travel should be paid within 45-days of receipt.
9. The Parent is authorized to select the individual(s) or the provider for all make whole compensatory education services.

10. All other claims for appropriate relief, causes of action, Motions to Reconsider the Evidence, or affirmative defenses are now dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
ODR FILE #25032-20-21
May 13, 2022