

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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 No. 28203-22-23

Student's Name

R.L.

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parent

Mark Voigt, Esquire
Plymouth Meeting Executive Campus
600 West Germantown Pike – Suite 400
Plymouth Meeting, PA 19462

Local Educational Agency

Eastern Lancaster County School District
669 East Main Street
New Holland, PA 17557

Counsel for LEA

Andrea Cola, Esquire
Sweet Stevens Katz & Williams
331 East Butler Avenue
New Britain, PA 18901

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

11/21/2023

Introduction

This special education due process hearing concerns R.L. ("student"), a student who resides in the Eastern Lancaster County School District ("District").¹ For the student's entire educational history, from enrollment in [redacted] in the 2019-2020 school year through [redacted] grade, in the 2022-2023 school year, the student attended District schools. In the current 2023-2024 school year, the student's [redacted] grade year, March 2022, the student has attended private school.

The parties disagree over the student's identification under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")². Parents feel the student qualifies for services under the IDEA as a student with specific learning disabilities in reading, spelling, and math reasoning. The District does not feel that the student qualifies for special education services as a student with specific learning disabilities but has identified the student as a student with an emotional disturbance; parents disagree with this identification.

Therefore, parents claim that the District denied the student a free appropriate public education ("FAPE") for failure to identify the student appropriately and, consequently, a failure to program for the student

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818, as adopted in Pennsylvania at 22 PA Code §§14.101-14.162 ("Chapter 14").

appropriately. At the outset of the current 2023-2024 school year, the parents undertook a unilateral private placement for the student.

Parents seek compensatory education for alleged denial of FAPE while the student was attending the District in the 2021-2022 and 2022-2023 school years, including summers 2022 and 2023, and tuition reimbursement for the private placement in the current 2022-2023 school year. Parents also seek reimbursement for a private evaluation process and report.

The District counters that its eligibility and identification processes were appropriate: The student does not qualify under IDEA as a student with specific learning disabilities but does qualify as a student with an emotional disturbance. The District asserts that its programming for the student in a series of revised individualized education programs ("IEPs") over the period May 2022 through June 2023 are appropriate. Accordingly, the District argues that it met its obligations to the student, and the parents are not entitled to any remedy.

For reasons set forth below, I find in favor of the parent in part and the District in part.

Issues

1. What is the appropriate identification for the student under the IDEA?

2. Regardless of the identification status of the student, did the District meet its child-find obligation to identify the student?
3. Did the District offer appropriate IEPs to meet the student's needs?
4. Is the student entitled to compensatory education?
5. Are parents entitled to reimbursement for a unilateral placement for the 2023-2024 school year?
6. Are parents entitled to reimbursement for a private evaluation?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

December 2021 Evaluation Report

1. In December 2021, in the midst of the student's [redacted] grade year, the District issued an evaluation report ("ER") as a result of parents' request for an evaluation. (Parents Exhibit ["P"]-2; School District Exhibit ["S"]-1).

2. Parent input in the December 2021 ER indicated concerns in reading and mathematics, including a family history of dyslexia. The parents also noted concerns in emotional regulation (disrespectful/unkind interactions with teacher and peers, becoming upset, negative self-image) including reports of [redacted] at a summer program. (P-2 at pages 1-2).³
3. The December 2021 ER contained teacher input, with two teachers indicating occasional difficulty following directions. One teacher reported some instances of disrespect with peers. (P-2 at page 3).
4. The December 2021 ER contains the results of academic curriculum-based assessment. Because this academic assessment is the basis for the District's identification of students with specific learning disabilities, the District's process will be considered in depth at this point in the fact-finding. (P-2 at pages 4-12).

Multi-Tiered System of Supports

5. The District is one of a handful of school districts in the Commonwealth that is approved to use a response-to-intervention process (in current nomenclature referred to as multi-tiered systems of support ["MTSS"]) to work with students who are not making academic progress, with a

³ P-2 and S-1 are the same document. For ease in citation, only P-2 is cited.

view to a potential identification of specific learning disabilities. (S-16, S-22; NT at 436-617, 620-715).

6. MTSS utilizes regular education interventions, in gradually increasing levels of intensity and focus, where students are not making academic progress at expected levels. (NT at 436-617, 620-715).
7. Tier I in the MTSS is the District's core curriculum, delivered to every student with progress gauged through thrice-yearly assessment (fall, winter, spring). (NT at 436-617, 620-715).
8. Where a student is receiving the District core curriculum at Tier I and falls below the 25th percentile on any measure, the student receives Tier II intervention, which is additional small-group instruction 30 minutes per day in the area(s) of deficit. Assessment data is collected and analyzed every two weeks to gauge the student's response to Tier II intervention. (NT at 436-617, 620-715).
9. Where a student is receiving Tier II intervention and falls below the 10th percentile on any measure, the student receives Tier III intervention, which is targeted, individualized instruction 15 minutes per day in the area(s) of deficit. Assessment data is collected and analyzed weekly to gauge the student's response to Tier III intervention. (NT at 436-617, 620-715).

10. The instruction at each tier is cumulative: Every student receives the core curriculum at Tier I; a student in Tier II continues to receive the core curriculum in addition to the 30 minutes daily of small-group Tier II intervention; a student in Tier III receives the core curriculum, 30 minutes daily of small-group Tier II intervention, and 15 minutes daily of individualized Tier III intervention. (NT at 436-617, 620-715).
11. Identifying a student with a specific learning disability through MTSS involves a further three factor process. (NT at 436-617, 620-715).
12. First, a student must be receiving, at least, Tier II intervention. (NT at 436-617, 620-715).
13. Second, for a student receiving Tier II (or Tier III) intervention, who might be considered for identification as a student with a specific learning disability, additional assessments are administered—standardized achievement testing (Wechsler Individual Achievement Test, or Woodcock-Johnson Test of Achievement) and specialized testing (e.g., Comprehensive Test of Phonological Processing, or Gray Oral Reading Test, or specialized mathematics assessment). Two of these three assessment pieces (MTSS data gathering, standardized achievement testing, specialized testing) must yield results below the

10th percentile of performance/achievement. (NT at 436-617, 620-715).

14. Third, the student must be failing to maintain a rate of improvement in the area(s) of deficit through one of the following:

- Not maintaining a rate-of-improvement over a 12-week span to place the student on a trajectory for the student to reach the 15th percentile of academic performance, or
- Not maintaining a rate-of-improvement over a 12-week span to place the student on a trajectory to reach the 25th percentile of academic performance for regular education students, or
- Not maintaining a rate-of-improvement to reach either of these two percentile levels by the end-of-school-year.

(NT at 436-617, 620-715).

15. All assessments throughout Tiers I – III, and those used for consideration of a potential specific learning disability, are on grade-level material. (NT at 436-617, 620-715).

16. In sum, then, MTSS involves layers of intervention, data-gathering, and standardized assessments. For a student to be

identified with a specific learning disability, then, tiered interventions are not yielding the levels of performance and achievement one would expect, and targeted instruction is not yielding adequate rates-of-improvement in deficit areas, such that a student should then be identified as a student requiring special education. (S-16, S-22; NT at 436-617, 620-715).

17. The District academic assessment results in reading in the December 2021 ER showed that the student's fall-winter-spring scores from the 2020-2021 school year were at the 29th, 23rd, and 19th percentiles. The results for the student's fall and winter scores from the 2021-2022 school year, at the time of the evaluation, were at the 28th and 14th percentiles. (P-2 at page 5).
18. The District academic assessment results in mathematics in the December 2021 ER showed that the student's fall-winter-spring scores from the 2020-2021 school year were at the 4th, 37th, and 24th percentiles. The results for the student's fall and winter scores from the 2021-2022 school year, at the time of the evaluation, were at the 22nd and 21st percentiles. (P-2 at page 5).
19. The December 2021 ER contained standardized achievement testing. (P-2 at pages 9-11).

20. In the December 2021 ER, the student scored 85 on the broad reading cluster (16th percentile), including 86 on letter-word identification (17th percentile), 91 on passage comprehension (26th percentile), and 84 on sentence reading fluency (14th percentile) subtests. The student scored 88 on the basic reading skills cluster (22nd percentile), which includes the letter-word identification subtest, 95 on word attack (36th percentile), and 91 on the oral reading subtests (27th percentile). (P-2 at pages 9-10).
21. In December 2021 ER, the student scored 93 on the broad mathematics cluster (32nd percentile), including 97 on applied problems (42nd percentile), 93 on calculation (31st percentile), and 92 on math facts fluency (31st percentile) subtests. (P-2 at pages 10-11).
22. In December 2021 ER, the student scored 98 on the written language cluster (44th percentile), including 89 on spelling (23rd percentile), and 108 on writing samples (71st percentile) subtests. (P-2 at page 11).
23. The December 2021 ER included curriculum-based assessment in oral reading fluency, with three separate probes at the 8th, 11th, and 10th percentiles. (P-2 at pages 11-12).
24. The December 2021 ER included behavior rating scales. (P-2 at pages 12-14).

25. The student's [redacted] grade teacher rated the student with a clinically significant rating in the externalizing problems composite, including the aggression and conduct problems subtests. The teacher rated the student as at-risk in the adaptive skills composite, including clinically significant ratings in the adaptability and social skills subtests, and at-risk ratings for the leadership, social skills, and functional communications subtests. (P-2 at pages 12-13).
26. The student's mother rated the student as average in every subtest and composite. (P-2 at pages 12-13).
27. The December 2021 ER utilized its response-to-intervention analysis utilizing the MTSS process and data, determining that the student did not qualify for identification as a student with a specific learning disability. The District recommended that the student continue to receive Tier III intervention in reading in the MTSS process. (P-2 at pages 21-25).
28. The December 2021 ER also considered whether the student should be identified as a student with a health impairment, or a hearing impairment, ruling out both of those potential areas of eligibility.
29. The December 2021 ER also considered whether the student should be identified as a student with an emotional disturbance,

concluding that the student “does not display one or more of the...characteristics [inability to learn that cannot be explained by other factors, inability to build/maintain satisfactory relationships with peers/teachers, inappropriate behavior/feelings under normal circumstances, general pervasive mood of depression/unhappiness, or a tendency to develop physical symptoms or fears related to personal/school problems] for a long period of time or to a marked degree that would adversely affect (the student’s) educational performance”. (P-2 at page 25; parenthetical material edited, bracketed material added for clarity).

30. The December 2021 ER concluded that the student does not have any disability and therefore does not qualify for special education. (P-2 at page 24).

April 2022 Independent Education Evaluation

31. In January 2022, the parents requested an independent educational evaluation (“IEE”), a request which the District granted. (P-41, P-42).
32. In April 2022, the independent evaluator issued the IEE. (P-4; NT at 236-356).

33. As part of the April 2022 IEE, the independent evaluator performed cognitive testing, yielding the student's full-scale IQ of 88, and a general ability index (accounting for processing speed and executive functioning) of 94. The evaluator opined in the report that the general ability index score is "the best estimate of (the student's) overall intellectual potential". (P-4 at pages 4, 9-13).

Severe Discrepancy

34. The more commonly employed process for determining specific learning disabilities is to compare cognitive ability (IQ scoring) with the results of academic achievement testing, looking for areas where a severe discrepancies may exist (normally, a difference greater than a 1.5 standard deviation).⁴
35. Singular severely discrepant achievement scores do not, by themselves, support a finding that a student has a specific learning disability. But it is normally a foundational consideration in light of other factors—additional standardized assessments, curriculum-based assessments, input, observation, grades— that provide insight into a student's academic strengths and needs.

⁴ More concretely, with 100 being a precisely average IQ score, a standard deviation of 1.5 or more would indicate a severe discrepancy for academic achievement scores below 85 (100 less 15, a 1.5 standard deviation below the student's cognitive ability as reflected in the IQ score). With an IQ score of 90, severely discrepant academic achievement scores would be those below 76.5 (90 less 13.5, a 1.5 standard deviation below the student's cognitive ability as reflected in the IQ score).

36. The April 2022 IEE included achievement testing. Utilizing the general ability index IQ result of 94, severely discrepant academic achievement scores would be any score below 79.9 (94 less 14.1, a 1.5 standard deviation below the student's cognitive ability as reflected in the general ability index). (P-4 at pages 3, 17-22).
37. Academic achievement testing in the April 2022 IEE yielded severely discrepant scores in the reading fluency (72), reading (79), and written expression (72) composites, along with the oral reading fluency (65), sentence composition (68), sentence building (77), and sentence combining (62) subtests. (P-4 at pages 3, 17-22).
38. Two achievement scores were ostensibly severely discrepant, being scored just above the 1.5 standard deviation, the listening comprehension composite (80) and reading comprehension subtest (80). (P-4 at pages 3, 17-22).
39. The student's overall achievement composite was severely discrepant (79). (P-4 at pages 3, 17-22).
40. Composite scores in standardized orthographic assessment of writing processes yielded scores below the 10th percentile in spelling speed (9th percentile), spelling accuracy (3rd percentile), and overall orthographic ability (8th percentile). (P-4 at pages 4, 15-16).
41. Composite scores in standardized phonological processing to assess written language skills yielded scores below the 10th percentile

in phonological awareness (6th percentile) and rapid symbolic naming (8th percentile). (P-4 at pages 4, 13-15).

42. On an assessment of executive functioning, the student's [redacted] grade teacher rated the student as 'moderately atypical' in the sub-areas of focus and action, and the total score. (P-4 at pages 5, 22-23).
43. On an assessment of attention skills, the student's [redacted] grade teacher rated the student as very elevated in almost every sub-test and in all three indices (restless-impulsive, emotional lability, global). (P-4 at pages 5, 22-23).
44. In written input for the April 2022 IEE, the student's [redacted] grade teacher reported that on "good days", the student is pleasant, cooperative, and social with peers. On "bad days", the student has called peers 'stupid', and engaged in negative nonverbal signaling to peers, including giving classmates the middle finger, yelling at peers and pushing them; with the teacher, the student has been argumentative and refused to comply with teacher directives. (P-4 at page 8, P-43).
45. In the April 2022 IEE, the independent evaluator identified the student with specific learning disabilities in basic reading skills, reading fluency, and written expression. (P-4 at pages 25-26; NT at 236-356).

46. In the April 2022 IEE, the independent evaluator opined that the student showed symptoms of attention-deficit hyperactivity disorder (“ADHD”), but did not recommend identifying the student, under the terms of IDEA, with the health impairment ADHD. (P-4 at pages 30-31).

April 2022 ER

47. As a result of parents’ disagreement with the December 2022 ER and their specific concerns, the District issued a revised evaluation report in April 2022. (P-5; S-2).⁵
48. The April 2022 ER contained updated teacher input from the student’s [redacted] grade teacher. The teacher indicated that the student was, at times, “a joy to have in class”. The teacher mentioned affable aspects of the student’s participation in class and friendships with certain peers. With other peers, however, the teacher indicated that the student can be unkind to peers, sometimes calling them names or pushing them. The student often denied responsibility for problematic behavior, refusing to acknowledge it or apologize, causing some peers to avoid the student. The teacher reported that the

⁵ P-5 and S-2 are the same document. For ease in citation, only S-2 is cited.

student refused to stop following around a peer at recess, causing the student to become fearful. (S-2 at page 7).

49. The student's art teacher shared input that, at times, she had to instruct the student to make verbal, or provide written, apologies to peers for the student's problematic behaviors. (S-2 at page 8).

50. The April 2022 ER documented specific instances of problematic behavior involving peers and responses to teacher directives. (S-2 at pages 10-11).

51. The District academic assessment results in reading in the April 2021 ER included updated the student's fall-winter-spring scores from the 2021-2022 school year, with scores at the 28th, 14th, and 38th percentiles. (S-2 at page 16).

52. The District academic assessment results in mathematics in the April 2021 ER included updated the student's fall-winter-spring scores from the 2021-2022 school year, with scores at the 22nd, 21st, and 25th percentiles. (S-2 at page 16).

53. The April 2022 ER included curriculum-based assessment in oral reading fluency, with three separate probes at the 14th, 10th, and 8th percentiles (with a mean at the 10th percentile). (S-2 at pages 19-20).

54. The April 2022 ER included curriculum-based assessment in math computation, with a probe at the 14th percentile. (S-2 at page 20).

55. The April 2022 ER contained a cognitive assessment, with an IQ score of 92. (S-2 at pages 20-22).
56. The April 2022 ER contained an assessment of attention skills, the same instrument which the independent evaluator used in her IEE. The student's [redacted] grade teacher rated the student consistently as very elevated in almost every sub-test reported in the ER. (S-2 at pages 22-23).
57. The April 2022 ER contained an assessment of potential emotional disturbance. The student's [redacted] grade teacher rated the student as "indicative" at the 91st percentile for inappropriate behaviors. The student's mother rated the student as "indicative" at the 91st percentile for learning problems. (S-2 at pages 23-25).
58. The April 2022 ER contained an assessment of executive functioning skills, the same instrument which the independent evaluator used in her IEE. The ratings of the student's [redacted] grade teacher were consistently more elevated than in the instrument reported in the IEE. The teacher rated the student consistently as 'moderately atypical' in almost every sub-area, and 'markedly atypical' in the focus sub-area and the total composite rating. (S-2 at pages 25-26).

59. The April 2022 ER contained a speech and language assessment that revealed scores uniformly in the average range. (S-2 at pages 27-29).
60. The April 2022 ER utilized its response-to-intervention analysis utilizing the MTSS process and data, determining that the student did not qualify for identification as a student with a specific learning disability in reading or mathematics. The District recommended that the student continue to receive Tier III intervention in reading in the MTSS process. (S-2 at pages 41-42).
61. The District is not approved by the Pennsylvania Department of Education to utilize response-to-intervention and the MTSS process for identification of specific learning disabilities for written expression. Therefore, the District utilized a severe discrepancy process to assess whether or not the student should be identified as a student with specific learning disabilities in those areas. (S-2 at page 42-44).
62. The April 2022 ER found that, using the cognitive testing from the ER and the written expression achievement testing from the December 2021 ER, the student did not qualify as a student with a specific learning disability in written expression. (S-2 at pages 42-44).
63. Based on the deepened assessments of the student's behavior and the additional teacher input, as well as documented incidents

involving peers and teachers, the April 2022 ER recommended that the student be identified as a student with an emotional disturbance who required special education. Specifically, the student was found to exhibit an inability to learn that cannot be explained by intellectual, sensory, or health factors, and inappropriate types of behavior/feelings under normal circumstances, over a long period of time and to a marked degree that adversely affects the student's educational performance. (S-2 at page 46).

64. The April 2022 ER, however, indicated as a special consideration for the IEP team that the student's behavior did not impede the student's learning or that of others. (S-2 at pages 47-48).

65. The District did not convene the student's multi-disciplinary team to consider the April 2022 IEE.

May 2022 IEP

66. In May 2022, the student's IEP met to consider the student's IEP. (P-6, S-3).⁶

⁶ P-6 and S-3 are the same document. For ease in citation, only P-6 is cited.

67. Mirroring the April 2022 ER, the May 2022 IEP indicated that the student did not exhibit behaviors which impeded the student's learning or that of others. (P-6 at pages 6-7).
68. The May 2022 IEP contained present levels of academic and functional performance drawn from the December 2021 and April 2022 ERs; input, data, and impressions from the April 2022 IEE were not included in the present levels. Parental concerns were made part of the May 2022 IEP. (P-6 at pages 8-24).
69. The May 2022 IEP identified the student's needs as following adult directions, observing personal boundaries, and social skills with peers. (P-6 at pages 23-24).
70. The May 2022 IEP contained two goals, one in following adult directions, and one in social skills. (P-6 at pages 31-32).
71. The May 2022 IEP contained specially-designed instruction, including multiple accommodations to address the student's problematic behaviors. The May IEP provided 60 minutes of instruction per month in social skills with a school counselor. (P-6 at pages 33-34; NT at 717-820).
72. Given the point in the school year and considerations of recoupment and regression in the student's educational data, the May

2022 IEP indicated that the student did not qualify for extended school year (“ESY”) services in the summer of 2022. (P-6 at page 35).

73. The May 2022 IEP recommended that the student be educated in the regular education environment for 99% of the school day (accounting for the 60 minutes per month of social skills instruction outside the regular education environment). (P-6 at pages 36-38).

74. The parents did not approve implementation of the May 2022 IEP, instead requesting a meeting (to be attended by counsel) to discuss the IEP. (S-3 at pages 43-50).

75. In July 2022, the student’s IEP team met to consider the student’s IEP. Consideration of the April 2022 IEE was part of this meeting. (P-8; S-4).⁷

76. The student’s IEP team revised the student’s IEP in certain aspects. (S-4).

77. The student’s IEP team decided to cease Tier III interventions and to implement a reading goal (oral reading fluency) and specially-designed instruction in the July 2022 IEP revision. The goal was

⁷ P-8 and S-4 are the same document. For ease in citation, only S-4 is cited.

written for implementation at the [redacted] grade level. (S-4 at pages 13-14, 37, 41).

78. Parental concerns were updated in the July 2022 IEP revision.

Those concerns largely mirrored the concerns from the May 2022 IEP, requesting a specific reading curriculum for use with the student. (S-4 at page 30).

79. The updated reading goal was made part of the July 2022 IEP revision, as well as specially-designed instruction in the form of a reading curriculum utilizing explicit, systematic, multisensory instruction using a synthetic, phonetic, code-emphasis structured-literacy program. (S-4 at page 41).

80. The student's placement outlined in the July 2022 IEP revision did not change. The reading instruction would be delivered in the regular education setting, and the social skills instruction would continue to be delivered outside that setting. (S-4 at 43-45).

81. In mid-August 2022, the parents disapproved the District's notice of recommended educational placement ("NOREP"), rejecting implementation of the July 2022 IEP. (S-5).

82. In late August 2022, the parents reversed themselves and approved the NOREP, indicating that the July 2022 IEP could be implemented. (P-9).
83. Counsel for the parties communicated with each other sharing emails about the exchange of the two NOREPs. As of late August 2022, the parents felt they had submitted a NOREP indicating that the July 2022 IEP would be implemented; the District never received from its counsel the updated NOREP from late August. (P-9, P-30; S-6; NT at 70-232, 620-715).
84. The July 2022 IEP was not implemented until October 2022. (P-30; NT at 70-232, 620-715).
85. The District's reading curriculum for the student utilizes explicit, systematic, multisensory instruction based on structured literacy approaches using scripted lessons and a consistent sequence of instructional steps for each lesson "to address the characteristics of struggling readers and students with dyslexia". The program addresses phonological awareness, phonics, spelling, fluency, vocabulary, and comprehension. (S-19; P-32; NT at 620-715, 717-820, 934-1022).
86. In the fall of 2022, at the beginning of the student's [redacted] grade year, the student's behavior was not markedly more problematic than in [redacted] grade, although in October – December 2022, the

student engaged in documented incidents of unprovoked incident of aggression, argumentative/defiance of teacher directives, and disruption during lunch. While some incidents involved teachers, most incidents involved issues with peers. (S-14 at pages 3-5, 11-13; NT at 620-715, 826-932).

87. In January and February of 2023, the student's problematic behaviors began to escalate in number and intensify in nature, occurring on a near-daily basis and involving both teachers by interrupting instruction and the instruction of others and, mostly, peers by violating personal space, inappropriate touching, and some name-calling/aggression. (S-14 at pages 14-15; P-45 at pages 1-2; NT at 70-232, 649-660, 749-755, 849-880).

88. One educator, who was involved with the student in the spring of 2022 during the MTSS process, became involved with the student over the period January and February of 2023 as a substitute delivering reading instruction while the regularly-assigned teacher was on leave. The educator testified that she was shocked at the behavior being exhibited by the student in the winter of 2023, compared with her experience with the student in the spring of 2022. (NT at 717-820).

89. The [redacted] grade teacher provided very detailed, poignant, and authentic testimony on the effect of the student's behavior on her

and the student's peers, as well as the detrimental effect on the student's peer relations. (NT at 849-880).

90. In February and March 2023, three incidents of physical aggression (two toward adults, one toward a peer) resulted in two half-day in-school suspensions; the third resulted in a half-day out-of-school suspension. (S-14 at pages 6-8).

February 2023 IEP

91. In February 2023, the student's special education teacher and the student's mother met to revise the student's IEP. (P-15, S-7).⁸
92. The February 2023 IEP revision did not include an indication that the student's behavior impeded the student's learning or that of others—the IEP continued to indicate that there was no such impact. (P-15 at pages 6-7).
93. The February 2023 IEP indicated parental concerns that the student's specially-designed reading instruction should be delivered outside of the regular education classroom. (P-15 at page 8).

⁸ P-15 and S-7 are the same document. For ease in citation, only P-15 is cited.

94. The February 2023 IEP was revised accordingly, with the student's placement in the regular education setting reduced to 92% of the school day. (P-15 at pages 35, 37-39).
95. Parents approved the NOREP for the changes reflected in the February 2023 IEP revisions. (S-7 at pages 41-48).

April 2023 Re-Evaluation Report

96. In February 2023, given the increase in the number and intensity of problematic behaviors and contemporaneously with the February 2023 IEP revisions, the District requested permission to undertake a re-evaluation of the student to develop a functional behavior assessment ("FBA"). Parents granted permission for the FBA. (S-8 at pages 1-4).
97. In April 2023, the District issued a re-evaluation report ("RR"), incorporating the FBA. (P-19, P-20; S-8).⁹
98. The April 2023 RR included an update of the student's documented behavior incidents. (S-8 at pages 7-10).

⁹ P-19 and S-8 are the same document. For ease in citation, only S-8 is cited.

99. The April 2023 RR included cumulative progress monitoring on the student's IEP goals, as of March 2023. (S-8 at pages 16-17).
100. The April 2023 RR included updated input from the student's [redacted] grade teacher, special education teacher, a general education teacher, and the school counselor providing social skills instruction to the student. The input of the educators was consistent—at times, the student is very pleasant, affable, and easy to work with, showing no difficulty with adults or peers; at other times, the problematic behaviors involving defiance with adults, and inappropriate peer interactions, overwhelmed the ability of the student and peers to access instruction. (S-8 at pages 17-19).
101. The April 2023 RR included the results of the FBA. (S-8 at pages 21-30, 40-54; P-20).
102. The April 2023 FBA included antecedent behaviors where the student was asked to engage in a non-preferred task, or to transition from a preferred task to a non-preferred task. The behaviors of concern were calling out/disruption, leaving the instructional space, and engaging with peers in non-instructional ways, sometimes including aggression in order to gain attention or to avoid the task request. (S-8 at page 30; P-20 at page 15).

103. The April 2023 RR continued to recommend that the student be identified as a student with an emotional disturbance, with needs to follow adult directions, avoid unkind words/actions directed at peers, observe personal boundaries, and improve social skills. (S-8 at page 31).
104. The April 2023 RR indicated that the student's behavior impeded the student's learning or that of others and recommended the development of a positive behavior support plan. (S-8 at pages 36-37).
105. Parents did not agree with the conclusions and recommendations of the April 2023 RR. (S-8 at page 39; NT at 70-232).

April 2023 Private Evaluation

106. In March 2023, the independent evaluator issued a private evaluation at the request of the parents. (P-18).
107. The March 2023 private evaluation updated the student's achievement testing and solicited updated parent and teacher input. (P-18).

108. Again utilizing the IQ result from the April 2022 IEE, the student exhibited severely discrepant achievement scores in the math problem-solving (79) and spelling (77) subtests. (P-18 at page 2).
109. Two achievement scores were ostensibly severely discrepant, being scored just above the 1.5 standard deviation (79.9), the sentence writing fluency subtest (80), and the written expression composite (80). The total achievement composite was also ostensibly discrepant (80). (P-18 at page 2).
110. The April 2023 private evaluation contained comparison of achievement testing between the April 2022 IEE and April 2023 private evaluation. While some areas showed improvement in scores, and some areas showed decline in scores, only the math problem-solving, spelling, and sentence writing fluency subtests declined into the range of severe discrepancy. (P-18 at page 11).
111. Some measures which were severely discrepant, or ostensibly so, in the April 2022 IEE improved to a point where those areas were no longer severely discrepant (listening comprehension, reading fluency, and reading skills composites, as well as the reading comprehension, sentence composition, sentence building, sentence combining subtests). (P-18 at page 11).

112. The parent and [redacted] grade educators provided written input which largely reflected the problematic behaviors evidenced elsewhere in the record (including the observations of each reporter that the student also engages in appropriate, healthy, enjoyable interactions with adults and peers). (P-18 at pages 8-9).
113. The evaluator reviewed the results of the April 2023 RR and FBA. The April 2023 private evaluation did not include the myriad details of the student's problematic behaviors in the 2022-2023 school year (to that point). (P-18 at pages 7-8).
114. The evaluator opined in the April 2023 private evaluation that the student should be identified as a student with specific learning disabilities in basic reading, reading fluency, reading comprehension, spelling, and math reasoning. The evaluator did not agree with the identification of the student as a student with an emotional disturbance. (P-18 at page 18).

May 2023 IEP

115. In May 2023, the student's IEP team met to revise the student's IEP in light of the April 2023 RR. (P-21; S-9).¹⁰
116. The May 2023 IEP included an indication that the student's behaviors impeded the student's learning or that of others. As a result, the IEP included a positive behavior support plan based on the April 2023 FBA. (P-21).
117. The May 2023 IEP included updated present levels of educational and functional performance from the April 2023 RR. (P-21 at pages 8-17).
118. The May 2023 IEP included parental concerns shared at the IEP meeting, including continued concerns about academics and their disagreement that the student has an emotional disturbance. (P-21 at pages 17-18).
119. The May 2023 IEP adopted the recommendations as to areas of need from the April 2023 RR. (P-21 at pages 18-19).
120. The May 2023 IEP removed the student's reading goal based on goal progress. (P-21; S-11 at page 1).

¹⁰ P-21 and S-9 are the same document. For ease in citation, only P-21 is cited.

121. The May 2023 IEP included four behavior goals: following adult directives, utilizing kind words/actions toward others, respecting personal space by keeping hands and feet to self, and social skills through perspective-taking. (p-21 at pages 26-28).
122. The May 2023 IEP included extensive specially-designed instruction geared toward the student's behavior. (P-21 at pages 29-30).
123. The student would continue to receive social skills instruction outside of the regular education environment. (P-21 at pages 32-34).
124. The May 2023 IEP included a positive behavior support plan. (P-21 at pages 36-42).
125. Parents rejected the NOREP accompanying the May 2023 IEP. (P-21 at pages 51-56).

June 2023 IEP

126. In mid-June 2023, the student's IEP team met to revise the student's IEP given the end of the school year and the April 2023 private evaluation. (P-24; S-10).¹¹

¹¹ P-24 and S-10 are the same document. For ease in citation, only S-10 is cited.

127. The District updated the student's present levels of performance. (S-10 at pages 12-15).
128. The June 2023 IEP included additional goals in mathematics reasoning and spelling. (S-10 at pages 34, 37).
129. The June 2023 IEP included additional specially-designed instruction to support the mathematics and spelling goals. Specially-designed instruction was also added to continue monitoring the student's progress in oral reading fluency. (S-10 at page 39).
130. The placement data in the June 2023 IEP indicates that the student would continue to receive social skills instruction 15 minutes per week, outside the regular education setting. The student would receive spelling and mathematics instruction 15 minutes daily in each area, outside the regular education setting. (S-10 at page 41).
131. Parents shared their view that they felt the student's problematic behaviors were the result of frustrations related to learning challenges. This view was shared at the hearing. (S-10 at pages 13-14; P-50, P-51, P-52; NT at 70-232).
132. The parents disapproved the June 2023 NOREP. (P-24; S-10 at pages 54-59).

133. In mid-June 2023, after returning the June 2023 NOREP, the parents filed the special education due process complaint which led to these proceedings. The District filed a response to the complaint.(P-25; S-18).

Private Placement

134. At the May 2023 IEP meeting, the parents voiced that they were interested in a private placement for the student. (P-21 at page 12).

135. Over the summer of 2023, parents undertook to enroll the student in the private placement. (P-38, P-49; S-24).

136. The private placement specializes in individualized approaches to student learning where students have diverse learning needs, especially those rooted in the need for supports in reading and literacy. (P-49; NT at 361-425).

137. The private placement did not review the District's evaluations, instead relying on the April 2022 IEE and April 2023 private evaluation. (NT at 361-425).

138. During a three-day visit at the private placement in the summer of 2023, the student exhibited certain "defensive" behaviors, in the

word used by the private school witness, that intimidated behaviors seen at the District (interruptions, calling out, not taking turns, seeking to be first in an order). As of the time the witness testified in September 2023, however, the private placement had not experienced any outsized problematic behaviors. (NT at 361-425).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The testimony of the teachers who worked with the student during direct instruction were all found to be highly credible, especially as they testified about the student's problematic behaviors in school and its effect on interactions with the student, peer interactions, and/or instruction (NT at 649-660, 749-755, 849-880). This testimony was accorded heavy weight. This is especially the case for the student's [redacted] grade teacher, whose testimony was found to be deeply authentic and persuasive (NT at 849-880).

Legal Framework

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162).

Child-find. To assure that an eligible child receives FAPE (34 C.F.R. §300.17), local education agencies are under a “child find” obligation, requiring states, through local education agencies, 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.” (34 C.F.R. §300.111(a)(i); see 22 PA Code §14.121). This provision places upon local education agencies 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 School District, 585 F.3d 727, 738 (3d Cir. 2009). See *also* 22 PA Code §14.122(a). The evaluation of children who are suspected of having disabilities must take place within a reasonable period of time after the local education agency is on notice that an evaluation for a disability may be warranted. Ridgewood Board of Education v. N.E., 172 F.3d 238, 250 (3d Cir. 1999).

Evaluation. Where a local education agency conducts an evaluation under its child-find obligation, that evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the student is a child with a disability and, if so, what must be provided through the student’s IEP in order for that student to receive FAPE. (34 C.F.R. §300.304(b); 22 PA

Code §14.102(a)(2)(xxv)). The evaluation must assess “all areas related to the suspected disability”, must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”, and must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and (34 C.F.R. §300.304, generally, and specifically at §§300.304(b)(2-3),(c)(4); 22 PA Code §14.102(a)(2)(xxv)).

Identification/Specific Learning Disability. Identifying a student with a specific learning disability in Pennsylvania requires a finding that “the child does not achieve adequately for the child’s age or meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and scientifically based instruction appropriate for the child’s age or State-approved grade-level standards....”. (22 PA Code §14.125(1)). The “following area” in the regulation outline the areas for qualification for specific learning disabilities; as placed at issue in this matter those areas include written expression, basic reading, reading fluency, reading comprehension, and mathematics problem solving . (22 PA Code §14.125(1)(iii-vi, viii)).

Identifying a student as a student with a specific learning disability may be made utilizing one of two methods. The first method, the severe discrepancy method, is “a process that 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.” (22 PA Code §14.125(2)(ii)).

Alternatively, the second method, commonly referred to as the response-to-intervention method or, in its current nomenclature as MTSS, is “a process based on the child’s response to scientific, research-based intervention,” with high quality instruction and interventions and regular data-collection/progress-monitoring. (22 PA Code §14.125(2)(i)).

Identification/Emotional Disturbance. Identifying a student with an emotional disturbance involves a situation where the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- Inappropriate types of behavior or feelings under normal circumstances.
- A general pervasive mood of unhappiness or depression, or
- A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. §300.8(c)(4); 22 PA Code §14.102(a)(2)(ii)).

FAPE. To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis*, or minimal, or ‘some’, education progress. The IEP must outline programming that is appropriately ambitious in light of the student’s current levels of programming, needs, and goals. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Discussion & Conclusions

Substantive Claims

Evaluation. The District’s evaluations (December 2021, April 2022, and April 2023) are all appropriate. Each employed comprehensive parent and teacher input, curriculum-based assessments, and standardized assessments. Each of the evaluations adapted to new information obtained by the District to address its understanding of the student’s needs.

Accordingly, the District met its obligations to the student in terms of its evaluation processes and reports.

Identification. The question of the student's identification status under IDEA is the most complicated on this record. Initially, there is no doubt that the District's identification of the student as a student with an emotional disturbance is appropriate. Interestingly, on this record, the student's behaviors were not deeply problematic when that identification was made in April 2023, nor were the behaviors numerous or intense. Still, there is no denying that the behaviors were present and, with multiple educators experiencing those behaviors and their nature (invasion of personal space, unkind peer interactions, occasional aggression) along with the results of behavior assessments, identifying the student with an emotional disturbance was appropriate. And this identification clearly was appropriate given the increasing frequency and intensity of the student's behaviors in the 2022-2023 school year.

Identification of the student as a student with a specific learning disability is more complicated. The District's MTSS process did not support this identification and, on balance, this record supports the District's conclusions in that regard. The student needed supports and was receiving those supports through the MTSS process. The student was responding to

the Tier III interventions in reading and so the District's conclusion that the student did not have a specific learning disability is supported.

The April 2022 IEE, with its severe discrepancy analysis, provided a different perspective on the student's needs. Solely utilizing a severe discrepancy analysis, the student might have qualified as a student with specific learning disabilities in reading with the results of the IEE. But the response-to-intervention provides a countervailing analysis. Additionally, the student might be seen as having a specific learning disability in written expression as a result of the IEE. Yet the District's own severe discrepancy analysis again provided a countervailing analysis. The student struggles to learn, no doubt. But consideration of all the multiple data points across the record does not authoritatively establish a sense that the student has a concrete need that compels the provision of special education (unlike the identification with emotional disturbance).

Taking the record as a whole, the evidence does not weigh definitively in the parents' favor that the District failed to identify the student appropriately in terms of a specific learning disability. As seen below, however, a strong aspect of this analysis rests on the question 'to what end?' because regardless of a formal identification, the dispositive issue is whether the student was provided with FAPE. Again, this will be explored immediately below.

Accordingly, the District did not err in failing to identify the student with a specific learning disability. And the District's identification of the student with an emotional disturbance is supported by the record.

FAPE. The District's FAPE obligation breaks down into providing for the student's academic needs and behavior needs. In terms of the academic needs, the District has met its FAPE obligations, outside of the period September – October 2022.

The student made progress through the response-to-intervention process in the 2021-2022 school year. The District proposed an appropriate IEP in May 2022 for implementation in the 2022-2023 school year. Due to the administrative error involving communication between counsel, the District did not know that the parents were willing (after a delay) to have the May 2022 IEP implemented at the outset of the 2022-2023 school year. Thus, for approximately two months (September and October 2022), the student was without the goal-driven instruction in the May 2022 IEP. Here, the District did not act in bad faith—the miscommunication simply meant that it did not know that it had FAPE obligations through deliver of the IEP. But that miscommunication and error cannot redound to the student. Thus, compensatory education will be awarded for that period.

Once the IEP began to be implemented, however, the student made progress through delivery of the specially-designed instruction in reading. By

the end of the year, the District was revising the student's IEP in May and June 2023 to reflect progress and to address the parents' concerns for further goal-driven instruction in other areas (spelling and mathematics). In sum, outside the period September and October 2022, the District met its obligations in the academic programming it delivered to the student and in the academic programming it proposed in the June 2023 IEP.

In terms of the student's behavior needs, the District has met its FAPE obligations. As indicated above, the District accurately and appropriately identified the student with an emotional disturbance. Beginning with the May 2022 IEP, the District included social skills instruction and behavior monitoring. When the student's behaviors changed dramatically in the period of January-February 2023, the District responded appropriately by seeking to perform a FBA and develop a positive behavior support plan. All of this is appropriate and provided appropriate behavior programming in the proposed IEPs of May 2023 and June 2023.

Accordingly, outside the period of September and October 2022, the District provided FAPE to the student through the delivery of its programming for the student, and in the programming it proposed in the June 2023 IEP.

Remedy - Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The evidentiary scope of claims and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015).

In terms of the nature of the compensatory education, the G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective.

Here, in their complaint and through counsel in their opening statement, the parents sought a quantitative compensatory education remedy. (P-25; NT at 54). During the midst of the hearing, however, parents' counsel suddenly offered that parents were seeking a qualitative compensatory education remedy. (NT at 286-296). Because parents did not meet their burden to prove how qualitative compensatory education might be understood and awarded, as a matter of equity for the student, a quantitative compensatory education remedy will be awarded.

In this case, as set forth above, the District denied the student FAPE by not having the May 2022 IEP in place to guide the student's instruction in September and October 2022. The student was provided FAPE in the 2021-2022 school year, and implementation of the May 2022 IEP after October 2022 provided FAPE to the student. In the two month period at the outset of

the school year, however, the student went without the social skills instruction and specially-designed reading curriculum under the terms of the IEP. As a matter of equity, the student is awarded fifty hours of compensatory education for this denial of FAPE.

Remedy – Reimbursement

Parents claim that they should be reimbursed for (1) their unilateral placement of the student in a private placement for the 2023-2024 school year, and (2) the April 2023 private evaluation.

Long-standing case law and the IDEA provide a framework for the potential tuition reimbursement if a school district has failed in its obligation to provide FAPE to a student with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). This framework involves the three-step Burlington-Carter analysis. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)). The Burlington-Carter analysis will be utilized to examine the parents' claims for not only for reimbursement for the unilateral private placement as well as for the private evaluation as well.

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's FAPE obligations to see whether the school district has met those obligations. If the school district has failed in those obligations, step two of the Burlington-Carter analysis involves

assessing the appropriateness of the placement or services undertaken by the parents as a result of the school district's denial of FAPE. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties to see if the equities might, or should, impact any reimbursement remedy.

2023-2024 School Year. At step one of the Burlington-Carter analysis, as outlined above, the June 2023 IEP, which was the last-proposed IEP to guide the student's education prior to the enrollment in the private placement, was an appropriate IEP. Therefore, the District proposed an IEP that was reasonably calculated to yield meaningful education benefit that affords the student the opportunity for significant learning in light of the student's individual needs. Therefore, there is no basis for tuition reimbursement for the private placement.

Private Evaluation. At step one of the Burlington-Carter analysis, as outlined above, the District's evaluation processes and reports, including the April 2023 RR which is the evaluation issued previous to the issuance of the private evaluation later that month, were all appropriate. Therefore, there is no basis for reimbursement for the April 2023 private evaluation.

Accordingly, there will be no order for reimbursement for the private placement or the April 2023 private evaluation.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is a student appropriately identified with an emotional disturbance under the terms of the IDEA. The student is awarded 50 hours of compensatory education.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

11/21/2022