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

ODR No.

26839-22-23

CLOSED HEARING

Child's Name:

Z.G.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

01/27/2023

Introduction

This special education due process hearing concerns a child with disabilities (the Student). The Student's parent (the Parent) alleges that the Student's public school district (the District) failed to identify the Student as a child with disabilities and never offered to provide special education to the Student. These failures constitute what is commonly called a "Child Find" violation under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

The Parent alleges that the District's Child Find violation resulted in a substantive violation of the Student's right to a Free Appropriate Public Education (FAPE), in violation of the IDEA. The Parent also alleges that the District's failure to accommodate the Student's disability violated the Student's rights under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. The Parent demands compensatory education to remedy these violations.

The Parent had the Student evaluated privately and alleges that the District adopted the private evaluation as its own. The Parent seeks reimbursement for that evaluation.

The Parent also alleges that the District's failure to offer special education left the Parent with no choice but to seek appropriate private education for the Student. The Parent enrolled the Student in a private school when the District refused to provide special education and seeks tuition reimbursement.

The District denies the Parent's allegations. It argues that the Student has a disability but does not require special education and therefore is not a "child with a disability" as defined by the IDEA. The District argues that it cannot be liable for a Child Find violation, or any other IDEA violation, because the Student has no entitlement to special education. The District also argues that it offered accommodations under Section 504 – or that it tried to do so – but the Parent was not interested. Finally, the District points to the Parent's pursuit of [redacted] for the Student as a (misguided) defense.

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

Issues

While there are minor differences in how the parties parse the issues, these issues were presented for adjudication:

1. Did the District violate the Student right to a FAPE under the IDEA during the 2020-21 school year and, if so, is compensatory education owed as a remedy?

2. Must the District reimburse the Parent for a private evaluation of the Student?

3. Must the District reimburse the Parent for the Student's private school tuition for the 2021-22 school year?

4. Must the District reimburse the Parent for the Student's private school tuition for the 2022-23 school year?

Findings of Fact

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

The 2017-18 School Year [redacted]

1. The Student began attending one of the District's elementary schools at the start of the 2017-18 school year and continued to attend the District's schools through the 2020-21 school year. NT at 50-51.

2. The District did not evaluate the Student for special education eligibility during the 2017-18 school year. *Passim, see e.g.* J-11.

The 2018-19 School Year [redacted]

3. The Student attended the same District elementary school during the 2018-19 school year.

4. The District did not evaluate the Student for special education eligibility during the 2018-19 school year. *Passim, see e.g.* J-11.

The 2019-20 School Year [redacted]

5. The Student attended the same District elementary schools during the 2019-20 school year. *Passim*.

6. The Student' teacher reported that the Student completed assignments and tests quickly, making careless errors in the process. The teacher would send the Student back to the Student's seat to correct those errors. NT at 91-92, J-7.

7. During the first two months of the 2019-20 school year, the Student had some difficult social interactions with peers. District personnel were aware of these difficulties. *See, e.g.* J-7, NT at 133.

8. [redacted] NT 143-144.

9. [redacted] NT 140.

10. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

11. The District provided remote instruction, referred to as virtual instruction, from March 13, 2020, through the end of the 2019-20 school year.

12. During the entirety of the 2019-20 school year, both before and after the school closure, the Student's report card grades were excellent. J-18.

13. The District did not express behavioral or academic concerns to the Parent at any time during the 2019-20 school year. NT at 91-92.

The 2020-21 School Year [redacted]

14. The Student received virtual instruction during the 2020-21 school year. At the start of the 2020-21 school year, the Student was taking karate lessons, and the karate studio opened a program where students could patriciate in remote schooling while parents work. The Parent placed the Student in the karate studio's program. *See, e.g.* NT at 59-60.

15. The Student's participation in the District's programming from the karate studio was not successful. The karate studio environment was not structured and, from within that chaotic environment, the Student had difficulty attending to instruction.

16. In November 2020, the Parent discontinued the Student's participation in the karate studio's day program and hired a nanny/tutor to be with the Student at home while the Student participated in the District's virtual instruction during the school day. NT at 59-60, J-11, J-14.

17. [redacted] NT at 140.

18. [redacted] J-4, NT at 718-720.

19. While the Student participated in the District virtual instruction both in the karate studio and at home, the District observed the Student engaged in interfering behaviors, including deliberately deleting English and writing homework slides, submitting incomplete assignments, and infrequent class participation. *See, e.g.* NT at 61.

20. At the same time, the Student's relationship with peers declined. Peers called the Student names during virtual learning breakout sessions in which the teacher was not able to observe the interactions. *See, e.g.* NT at 95.

21. The Parent was also aware of these behaviors and the Student's declining grades – which were largely a function of incomplete assignments. The Parent requested a meeting with the District to discuss these issues.

22. On March 10, 2021, the Parent and District personnel met to discuss the Parent's concerns. Unsatisfied with the District's response, the Parent began to consider private school for the Student. NT 59, 61, 63, 67-68, 150, 160-162.

23. As part of the Parent's exploration of private schools, the Student sat for admissions testing at a private school. The private school (not the Private School that the Student ultimately went to) administered a diagnostic reading test and found that the Student was reading at the [redacted] level – roughly one year behind the Student's expected grade level. *See, e.g.* J-5.

24. After receiving the results of the private school's diagnostic reading test, the Parent met with District personnel again. During the meeting, the Parent expressed concerns that the Student may have a reading disability, asked for more comprehensive testing, and indicated that the Parent was considering private testing. District personnel stated that the Student's scores on the private school's reading test were not consistent with the Student's performance in school. The District did not offer an evaluation or anything else during or after the meeting. *See, e.g.* NT 67-68, 98, 150.

25. After the District's non-response to the request for more comprehensive testing, the Parent had the Student evaluated by a

private Developmental Neuropsychologist (the Private Evaluator). The Private Evaluator drafted a Neuropsychological Evaluation Report (the Private Report) dated April 27, 2021. J-5.

26. As part of the private evaluation, the Private Evaluator collected information from the Student's teacher from the 2019-20 school year. J-5.

27. The Student's teacher from the 2019-20 school year reported concerns about Student's behaviors that were not previously reported to the Parent. Specifically, the teacher from the 2019-20 school year reported concerns about peer interactions, confrontations with classmates, difficulties with social problem-solving, and negative reactions to constructive criticism that could yield lost instructional time. J-5.

28. The same teacher rated the Student using a standardized, normative behavior rating scale for the Private Evaluation. The teacher rated the Student in the clinically significant range for depression and at-risk for hyperactivity, aggression, conduct problems, anxiety, attention, withdrawal, and atypicality and below average in social skills. J-5.

29. The Private Evaluator also collected information from the Student's teacher from the 2020-21 school year. J-5. This teacher's responses to the Private Evaluator's questions and rating scales were biased by animus towards the Parent. NT at 698-699. That bias notwithstanding, the teacher reported that the Student was "slightly below grade level in reading." This teacher's ratings also produced clinically significant results for aggression and conduct problems in the school setting (the school setting was remote instruction at that time). J-5, J-6.

30. The 2020-21 teacher also reported trouble getting started on tests, projects, or other assigned tasks; finds it hard to sit still and be quiet for a long time; is easily distracted by background noises and other activities happening at the same time; teases, argues, complains or misbehaves even after being told to stop; has trouble organizing thoughts in writing or conversations; and produces inconsistent schoolwork as "Medium Problems" for the Student (again, bias in this teacher's responses notwithstanding). J-6.

31. The Private Evaluator diagnosed with three areas of disability, specifically ADHD, combined presentation, a Specific Learning Disorder, with impairment in reading (comprehension), and a Developmental Language Disorder. J-5.

32. The Private Evaluator's diagnoses were based on assessed deficits in reading comprehension, working memory, processing speed, executive functioning, and language comprehension. The Private Evaluator also found deficits in the Student's fine motor skills and attention issues. J-5.

33. The Private Evaluator concluded that the Student was eligible for special education a child with a disability under the primary disability category of Specific Learning Disability in reading (comprehension) and secondary disability category of Other Health Impairment (OHI). J-5.

34. The Private Evaluator drafted educational recommendations into the Private Report. Specifically, the Private Evaluator recommended that Student receive education in small, highly structured classes and learning support services to improve reading comprehension, attention, and executive functioning skills. J-5.

35. The Parent provided a copy of the Private Report to the District. In response, the District sought the Parent's consent to evaluate the Student and conducted a records review. In this instance, the records review was the mechanism by which the District accepted the Private Report. NT 214.

36. The District reviewed the Private Report and drafted a document titled "Psycho Educational Evaluation Report" dated June 9, 2021 (the 2021 District Report). J-10. A careful reading of J-10 in conjunction with the Private Report reveals that the District did not do any testing of its own. Rather, except as noted herein, the District reformatted the Private Report and reissued the Private Report as its own evaluation. *C/f* J-5, J-10.

37. The 2021 District Report was authored by a District employee who is a Certified School Psychologist (the District's CSP). J-10.

38. In substance, the District adopted the Private Report as its own report almost in its entirety, including the special education eligibility determination and programming recommendations. *C/f* J-5, J-10.

39. While incorporating nearly all of the Private Report into the 2021 District Report, the District's CSP did not agree with all of the Private Evaluator's conclusions. The District's CSP wrote (J-10 at 9):

> Overall, the examiner that reviewed this report agrees with the diagnostic impression of AD/HD given [Student's] low average performance in working memory and processing speed as well as a few low average to borderline areas on the NEPSY-2 and D-KEFS. However, [Student's] grades are As and Bs and [Student] appears to access [Student's] education without special education. [Student] has not received intervention at the tier 2 or tier 3 level and special education should not be considered until the MTSS process has been developed. At this time, [Student] does not show a need for specially designed instruction. Lastly, in order to determine qualification for a language disorder, this report would need to be reviewed by a speech and language pathologist.

40. At the time of the 2021 District Report, the District's CSP was unaware of the Student's reading levels as assessed by the District's own benchmark testing and took no issue with the discrepancy analysis used by the Private Evaluator to reach the Specific Learning Disability diagnosis. The District's CSP's conclusions about the Student's need for reading intervention was based on the Student's grades and lack of prior MTSS support as opposed to any disagreement with the Private Evaluation. *See, e.g.* NT at 393-394, 396, 399-400.

41. The District did not provide a copy of the 2021 District Report to the Parent. NT 261-262.

42. The District issued a different report to the Parent, titled "Evaluation Report," on June 11, 2021 (the 2021 ER). J-11.

43. The conclusions in the 2021 ER are materially different from the conclusions in the 2021 District Report. Strikingly, in the 2021 District Report, the District's Certified School Psychologist concluded that the Student had a disability but did not require specially designed instruction (SDI) and was not entitled to special education on that basis. J-10 at 9. In the 2021 ER, the District concluded that the Student did not have a disability, and was not entitled to special education on that basis. J-11 at 14.

44. In the 2021 ER, the District recommended that Student receive tier 2 RTI reading intervention and consider developing a Section 504 Plan. J-11.

45. The District did not invite the Parent to a meeting to review the 2021 ER or to determine the need for a Section 504 Plan. NT at 73, 161-162, 197. Instead, the District issued a Notice of Recommended Educational Placement (NOREP) to the Parent as a mechanism for the Parent to agree with the District's non-eligibility determination on the basis that the Student did not have a disability. J-12.

46. The District issued the non-eligibility NOREP on June 11, 2021. The Parent rejected the NOREP on July 6, 2021. J-12.

47. Although not part of a special education evaluation, the District administered standardized reading benchmark testing to all students, including the Student in this case. On benchmark testing (called Aimsweb Plus) the Student scored at or below the bottom 10th percentile in Oral Reading Fluency, Literary Composite, and ELA Composite/Overall. J-18. At the same time, however, the Student scored in the Proficient range on PSSA tests. J-18.

48. On July 13, 2021, the Parent completed an application for the Student to attend the Private School during the 2021-22 school year. J-13.

49. On August 1, 2021, the Parent sent what is commonly referred to as a 10-Day Letter to the District. This letter informed the District of the Parent's intent to enroll the Student in the Private School and seek tuition reimbursement. J-16.

50. On August 5, 2021, the District replied to the 10-Day Letter, denying the Parent's request for tuition because of its determination that the Student did not have a disability. J-17. The District refused because the District had determined Student was ineligible

The 2021-22 School Year [redacted]

51. The Student attended the Private School during the 2021-22 school year. *Passim*.

52. At the Private School, the Student received academic intervention throughout the school day from professionals who were knowledgeable and experienced in teaching students with learning profiles similar to the Student's. NT 788-790, 809-816, 824-826, 830-832.

53. The Private School features a low student to teacher ratio. Teachers at the Private School provide instruction targeting the Student's assessed

difficulties with reading comprehension, language processing, and executive functioning. NT at 809-816.

54. At the Private School, the Student received intensive instruction in multiple comprehension skills. NT at 810, 818, 821-822, 858-859.

55. The Private School provided the Student weekly social/emotional instruction from the school counselor. NT at 830-831, 864.

56. The Student's report cards from the Private School during the 2021-22 school year state that the Student demonstrated the skills that the Private School teaches "consistently" or "much of the time." J-24.

57. The Private School administers school-wide standardized assessments. According to those assessments, the Student improved from the 24th to the 65th percentile in reading and from the 28th to the 64th percentile in Language Arts. J-23.

58. The Private School primarily educates students who have Dyslexia, ADHD, auditory processing disorders, and other learning differences. NT at 789-790.

59. During the 2021-22 school year, the Student received a high level of support from the Private School. NT at 795.

60. On June 22, 2022, the Parent asked the District to provide an appropriate special education program for the Student for the 2022-23 school year. The Parent also told the District that, in the absence of an offer from the District, the Student would continue to attend the Private School. The Parent reserved the right to demand tuition reimbursement for the 2022-23 school year. J-26.

61. In response, the District asked the Parent to provide records from the Private School. On July 5, 2022, the Parent complied with the District's request. J-28.

62. On July 15, 2022, with no further response from the District, the Parent sent another 10-Day Letter to the District, notifying the District that the Student would attend the Private School during the 2022-23 school year and demanding tuition reimbursement. J-29.

63. In response to the 2022 Ten-Day Letter, the District wrote to the Parent to deny the request for reimbursement. As in the year before,

the District pointed to its determination that the Student does not have a disability as the basis for its denial. J-30.

64. The District did not offer to reevaluate the Student for IDEA eligibility or for accommodations under Section 504. The District did not invite the Parent to any meeting of any type. The District did not offer an IEP or Section 504 Plan for the 2022-23 school year. J-30.

65. On August 8, 2022, the Parents requested this due process hearing.

The 2022-23 School Year [redacted]

66. The Student continued to attend the Private School for the 2022-23 school year. *Passim*.

67. The Student's progress at the Private School during the 2022-23 school year, as measured by the Private School, is consistent with the Student's progress during the 2021-22 school year. NT 824, 828-831, 833, 882- 883, 903; J-20

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. Nearly all witnesses candidly explained what they could and could not recall, and none sugar-coated negative testimony. To the extent that witnesses recall events differently or

draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

This does not mean that I assign equal weight to every witness. The Student's teacher from the 2020-21 school year was candid about her bias, but was biased nonetheless. Further, the District's CSP was candid about the basis of her disagreement with the Private Evaluator's conclusion about the Student's Specific Learning Disability. However, the fact that any child has not received tier 2 or 3 MTSS support cannot (legally) be a basis to conclude that a child does not have a learning disability. Perhaps such a lack of support may relate to a child's need for specially designed instruction, but the weight of the District's CSP's testimony is diminished by her conflation of disability determinations and the need for special education.

Taken collectively, District personnel overwhelmingly expressed an opinion that a student who performs well academically – [redacted]– cannot be eligible for special education. *See, e.g.* NT 758. That simply is not true. The phenomenon of "twice-exceptional" children is well-understood, as is the concept of "masked" or "hidden" disabilities among that student population. The District's blasé attitude towards the Parent's concerns, both contemporaneously and at the hearing, diminish the weight of District personnel's testimony.

Applicable Laws

The Burden of Proof

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

Child with a Disability

The IDEA's definition of a child with a disability is found at 20 U.S.C. § 1401(3)(A):

> The term "child with a disability" means a child—
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who, by reason thereof, needs special education and related services.

That definition creates a two-part test to determine if a child is entitled to special education. First, the child must have one of the disabilities (or categories of disabilities) recognized by the IDEA. Second, the child must, by reason of that disability, require special education and related services.

Free Appropriate Public Education (FAPE)

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

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

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

Third Circuit consistently interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of*

Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

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

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

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

Child Find

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. § 1412(a)(3). For LEAs, the Child Find duty creates a "continuing obligation . . . to identify and evaluate

all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3). LEAs must evaluate children who are suspected to be children with disabilities within a reasonable period of time after the school is on notice of academics or behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). An LEA's failure to evaluate a child suspect of having a learning disability constitutes a substantive FAPE violation.

Evaluation Criteria

The IDEA establishes requirements for evaluations. In substance, evaluations 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 child is a child with a disability and, if so, what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation 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 must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Independent Educational Evaluation at Public Expense

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

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. S*ee Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a

compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. Reid is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

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

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

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

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

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D.

Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

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

Tuition Reimbursement

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and Florence County School District v. Carter, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are almost always taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

Child Find

The first question presented in this case is whether the District violated its Child Find duty. That question is resolved by determining when the District should have reasonably suspected the Student of having a disability recognized by the IDEA.

Nothing in the record proves that the District should have suspected a disability in the 2017-18 or 2018-19 school years.

During the 2019-20 school year, the Student's teacher had concerns that were not contemporaneously reported to the Parent. Those concerns were reported to the Private Evaluator as part of the Private Evaluation. That teacher reported concerns about Student's peer interactions, confrontations with classmates, difficulties with social problem-solving, and negative reactions to constructive criticism. These subjective impressions, provided a year later as part of an evaluation, may not establish suspicion of a disability alone. However, these subjective impressions also came with objective assessments of the Student's behaviors. The same teacher provided objective ratings for the same period. Those ratings revealed clinically significant levels for depression and at-risk for hyperactivity, aggression, conduct problems, anxiety, attention, withdrawal, and atypicality and below average in social skills.

In this context, it is important to understand what "at-risk" means. The term "at-risk" falls below the "clinically significant" level with *T* Scores between 60 and 70. In general, an "at-risk" score indicates a problem that may not require formal intervention.

Through this lens, the 2019-20 teacher may have suspected depression, but none of the other ratings support a finding that the teacher (or any other District personnel) should have suspected a disability in the 2019-20 school year. I find no Child Find violation in the 2019-20 school year.

The District did, however, violate its Child Find obligation in the 2020-21 school year. The 2020-21 school year started with remote instruction, and the District was aware of problems from the get-go. Under the unique facts of this case, however, the District's attribution of the Student's problems to the overall chaos of the karate studio is well-reasoned. During that time, it was fair for the District to link any decline in the Student's academic performance to the distracting environment in which the Student received instruction.

The Student's environment changed in November 2020. The Parent removed the Student from the karate studio so that the Student could receive the District's virtual instruction at home with a nanny/tutor. The fact that the Student's engagement and academic performance did not change at the same time does not, by itself, trigger Child Find. However, from this point forward, the Student's school environment does not shield the District.

The first Child Find red flag came in February 2021. As part of a [redacted] screening, the District assessed the Student as a year behind in some reading measures. The District's focus [redacted] (shared by the Parent) may have blinded the District to that surprisingly low reading result. This is not to say that one poor reading test should always prompt the District to offer a special education evaluation. Rather, the surprising test result, declining performance (as a result of missing assignments), and increased social problems all together should have prompted the District to take some sort of action. Instead, the District did nothing while the Parent became increasingly concerned.

The Parent's concern grew to the point that the Parent (not the District) requested the meeting that convened on March 10, 2021. The Parent expressed all these concerns at the meeting. The District heard the Parent's request for help but did nothing. Relying on the Student's report card grades and lack of MTSS interventions, the District dismissed the Parent's concerns without any serious consideration. Prompted by the District's inaction, the Parent began to explore private schools. In that process, a private school suggested to the Parent that the Student may have a learning disability. The information that the Parent received from that private school is similar to some of the information that the District collected as part of the [redacted] screening.

Child Find is triggered by what the District suspects, not by what the Parent suspects. I must note, however, that the District had information at the March 10, 2021 meeting similar to what the Parent obtained while investigating private schools.

While the exact date is a close call, I find that the Child Find violation began on March 10, 2021. At that point, the District had sufficient information to suspect a disability but took no action. Yet even if the Child Find violation did not begin exactly on March 10, 2021, it started shortly thereafter. The Parent shared information with the District after the private school's reading test. The Parent told the District that the Student may have a learning disability and asked for an evaluation. The request for an evaluation in and of itself triggered the District's obligations under special education law. *See*

22 Pa. Code § 14.123(c). There can be no question that the District should have suspected a disability after the Parent placed the District on notice of a suspected disability. And, yet again, the District did nothing with this information.

Compensatory education is an equitable remedy for a Child Find violation. In this case, I find that the Child Find violation resulted in substantive harm. Even the District's CSP agreed that the Student required accommodations, albeit under Section 504, to "level the playing field" in school. NT at 393-394. Instead, the district relied upon impermissible factors (report card grades and its own history of *not* supporting the Student through the MTSS process) as a justification for ignoring and dismissing the Parent. As a result, the Student did not actually offer the accommodations that it recommended both during the hearing and in the 2021 District Report. The District's failure is substantive for this reason.

The record does not contain information about how much special education the Student should have received from March 10, 2021, through the end of the 2020-21 school year. The record also does not contain information about what quantity or form of compensatory education would put the Student in the position that the Student would be in but for the denial of FAPE. Also, while compensatory education is an equitable remedy, there is no case law suggesting that a compensatory education award should be enhanced because of a school's dismissiveness of legitimate parental concerns. With this lack of data, I find it equitable to award three hours of compensatory education to the Student for each day that the District was in session between March 10, 2021 and the end of the 2020-21 school year.

The Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average

market rate for private providers of those services in the county where the District is located.

Private Evaluation Reimbursement

This case does not squarely fit into the scenario contemplated by the IDEA for tuition reimbursement. Described above, the IDEA accounts for scenarios in which a parent disagrees with a school's evaluation and then requests an independent evaluation at the school's expense. In this case, the Parent obtained a private evaluation before the District evaluated. In nearly all cases, that sequence of events is disqualifying.

Two factors make this case different: First, the District improperly refused the Parent's request for an evaluation by taking no action in response to the Parent's verbal request. *See* 22 Pa. Code § 14.123(c). Second, the District used the Private Evaluation as its own. The Parent funded the evaluation that the District was obligated to do after the District refused to fulfil its obligation. After the Parent paid for what the District should have done, the District used the Private Report so that it did not have to conduct its own evaluation. At that point, even if the District had offered an Appropriate Public Education to the Student, the APE would not be *free*.

Discussed above, I am empowered to craft unique remedies when doing so is appropriate for the specific circumstances of the violation. I exercise that discretion in this case and order the District to reimburse the Parent for the Private Evaluation.

Tuition Reimbursement

The first part of the *Burlington-Carter* test, described above, calls for me to evaluate the appropriateness of the District's special education offer. In this case, no such offer exists. Therefore, if the Student is a child with a disability as defined by the IDEA, the Parent has satisfied the first part of the test *per se*. The District's special education program cannot be appropriate for the Student because the District did not offer a special education program to the Student. Conversely, if the Student is not a child with a disability as defined by the IDEA, the Parent cannot be entitled to tuition reimbursement.

I find that the Student is, and was, a child with a disability as defined by the IDEA. The only person who has ever evaluated the Student for special education eligibility is the Private Evaluator. In the District's own words, the Private Report was a "very well done report" and "extremely thorough." NT at 199, 269. The District's actions at the time of the report were consistent with this description at the hearing. The Private Report was so well-received

by the District that it concluded that no further evaluation of any kind was necessary.[1] As such, the *only* evaluation of the Student concludes that the Student has two disabilities recognized by the IDEA and, by reason thereof, requires special education.

The District accepted every part of the Private Evaluation except for its conclusions. I the bases upon which the District rejected the Private Evaluation's conclusions are inappropriate. First, the District's CSP rejected the conclusions because the Student's report card grades were good. The record in this case reveals that the Student's report card grades may not be indicative of the Student's actual progress. The teacher entering those grades had significant conflicts with the Parent, and the District's own objective benchmark testing put the Student at below grade level in various reading domains. The District's CSP was unaware of this information both at the time of the 2021 District Report and at the hearing. Second, the District's CSP rejected the conclusions because the Student never received MTSS supports. The absence of MTSS supports, however, only illustrate the District's failures. Unbeknownst to the District's CSP, the District's own benchmark testing placed the Student in the bottom 10th percentile – a level at which MTSS supports should have been provided. The District cannot rely upon its failure to do what should have been done as a defense.

I am compelled to note that the District placed its CSP in an impossible situation. The District told the CSP to complete the 2021 District Report before the CSP's contract term ended. As a result, the only information that the CSP had was the Private Evaluation, the Student's report card, and the absence of MTSS supports. It is pure speculation to imagine what the District's CSP would have done had the District enabled her to work within the IDEA's evaluation timeline. The CSP's understanding that MTSS is a prerequisite to special education eligibility is concerning and not explained by the time crunch, but I do not fault the CSP for not knowing what she did not know. The District gave the CSP no time to gather more information. This is no defense for the District itself, but the context of the 2021 District Report is worth noting.

To make matters worse, the District did not share the CSP's conclusion with the Parent. The CSP concluded that the Student did not qualify for special education because the Student had a disability but did not require special education. The CSP went on to recommend additional evaluations and urged

[1] The District asserts that the timing of the Private Report made it impossible for the District to conduct its own report because the District's evaluators are 10-month employees and litigation was pending. That is no defense under the IDEA, especially considering how evaluation timelines are extended when school is not in session. It is one thing to say that an evaluation cannot be completed quickly, it is something else to say that an evaluation cannot be conducted at all. In this case, the District did not even try to evaluate the Student.

the District and Parent to consider accommodations under Section 504. The District hid this information from the Parent. It never proposed additional evaluations. It never considered eligibility under Section 504. Instead, the District told the Parent that the Student does not have a disability. The District repeatedly relied upon this false statement to deny special education, disability accommodations, and additional evaluations.[2]

For all of these reasons, I reject the District's defenses. The only reliable evidence in the record concerning the Student's eligibly for special education is the Private Evaluation. The Private Evaluation itself constitutes preponderant evidence that the Student has a disability recognized by the IDEA and requires special education. The District offered nothing, and so the Parent passes the first prong of the *Burlington-Carter* test.

The second prong of the *Burlington-Carter* test calls on me to evaluate the appropriateness of the Private School. In this case, this part of the analysis is straightforward. The Private School specializes in educating children with learning profiles similar to the Students. The Parent selected the private school for its alignment with the Student's needs as assessed in the Private Evaluation. As such, the Private School was appropriate at the time it was selected. The Parent passes the second prong of the *Burlington-Carter* test for this reason.

Further, I reject the District's arguments that the Private School was not and is not appropriate for the Student. The District argues that some of the Private School's testing was not completed in accordance with the test publisher's instructions. Even if that is true, it does not negate the match between the Private School's services and the needs identified in the Private Report. Again, the District does not dispute any portion of the Private Report except for the ultimate conclusion that the Student requires special education. Second, the District argues that the Student is now performing at a lower level than the Student's performance while attending the District's programs. I reject this argument because it is predicated on a comparison between the Private School's specialized program and the District's general education curriculum. Those programs are not comparable, and no inference can be drawn from the two. However, comparing the Student's report card grades, objective testing from the District, the Private Report, and the Student's progress in the Private School reveals that the Student's report

[2] The District argues that it offered Section 504 accommodations to be implemented through a Section 504 Plan. I reject this argument because the District never offered a Section 504 plan and told the Parent that the Student does not have a disability. I further reject the argument that any failure to offer a Section 504 plan is attributable to the Parent's lack of cooperation. If the District believed that the Student needed Section 504 accommodations, the District was required to offer Section 504 accommodations. The District's expectation that the Parent would reject accommodations is not a defense.

card progress while attending the District's school is the least reliable measure of the Student's success.

The third part of the *Burlington-Carter* test calls for me to determine if any equitable factors warrant a reduction or elimination of a tuition reimbursement award. Here, the District again points to the Parents lack of cooperation as a mitigating factor. I reject this argument because the record does not establish that lack of cooperation. The District only offered what the District offered. The Parent did not refuse to attend meetings because the District did not invite the Parent to meetings (such invitations require documentation that does not exist). The Parent did not reject a Section 504 plan because the District never offered a Section 504 Plan. The Parent did not withhold the Student from evaluations because the District never sought the Parent's consent to evaluate. The District cannot blame the Parent for its own inaction.

I am not aware of any case holding that equitable considerations can enhance a tuition reimbursement award. Therefore, I do not consider the District's withholding of information from the Parent or its reliance on statements about the Student's disability status that it knew were untrue. To be clear, I am not punishing the District for a paperwork error. There are cases in which schools check the wrong box on a form. That, by itself, should not create significant liability. In this case, the District concluded that the Student had a disability and then told the Parent, repeatedly, that the Student did not have a disability. The District used that false statement to deny services to the Student. The equities in this case unquestionably favor tuition reimbursement.

The *Burlington-Carter* analysis is identical for both school years in question. I award tuition reimbursement for both years.

An appropriate order follows.

ORDER

Now, January 27, 2023, it is hereby **ORDERED** as follows:

1. The Student is awarded three (3) hours of compensatory education for each day that the District was in session from March 10, 2021, through the end of the 2020-21 school year to remediate a Child Find violation occurring during that period. Such compensatory education is awarded with the uses and conditions described above.

2. The Parent is awarded reimbursement for the independent Neuropsychological Evaluation of April 27, 2021 (J-5 in the record and described as the "Private Report" above).

3. The Parent is awarded reimbursement for the Student's tuition at the Private School that the Student attended in the 2021-22 and 2022-23 school years.

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

/s/ Brian Jason Ford
HEARING OFFICER