

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.*

**Pennsylvania Special Education Hearing Officer**

**Final Decision and Order**

**CLOSED HEARING**

**ODR File Numbers:**

22754-19-20

22835-19-20

**Child's Name:**

A.G.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Local Education Agency:**

Pennsbury School District  
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**Counsel for the LEA:**

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**Hearing Officer:**

Cathy A. Skidmore, Esquire

**Date of Decision:**

1/1/2020

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (Student)<sup>1</sup> is a secondary elementary school-aged student in the Pennsbury School District (District). In September 2019, after obtaining an independent educational evaluation (IEE), Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> and [redacted]. The District filed its own Complaint after the Parents declined to provide consent for its own special education evaluation of Student, and the Parents thereafter filed an Amended Complaint. The two matters were consolidated on joint request.

The cases proceeded to an efficient hearing<sup>4</sup> at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to appropriately identify Student as eligible under the IDEA and [redacted], and sought compensatory education as well as reimbursement for the private evaluation. The District countered with its contention that it had not failed to so identify Student, and sought to override the Parents' lack of consent for an initial IDEA evaluation.

For the reasons set forth below, the claims of the Parents will be granted in part and denied in part, and the District's claim will be granted.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citation to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

## **ISSUES**

1. [redacted]
2. Whether Student is eligible for special education under the IDEA and Chapter 14 and/or for accommodations under Section 504 and Chapter 15;
3. Whether the District should be ordered to implement certain programming for Student;
4. Whether Student is entitled to compensatory education;
5. Whether the District should be permitted to conduct an initial evaluation of Student under the IDEA and Chapter 14;
6. Whether the Parents should be reimbursed for the costs associated with the IEE they obtained?

## **FINDINGS OF FACT**

1. Student is an early secondary elementary school-aged child who is a resident of the District. Student is currently provided regular education programming. (N.T. 35; P-8; S-1.)
2. Student is an avid reader and enjoys solving difficult problems, including in mathematics. Student taught self to play a stringed musical instrument. (N.T. 38-39, 42, 83-84.)
3. As a young child through approximately the kindergarten year, Student was diagnosed with strep throat on a number of occasions. The District was not made aware of this history. (N.T. 174-76.)
4. [redacted]

5. In its elementary schools, the District convenes monthly meetings to review its Multi-Tiered System of Support (MTSS) and any concerns with or questions about an individual child’s program, including potentially unmet needs. These meetings are attended by classroom teachers, a school psychologist, the school counselor, the reading specialist, the mathematics specialist, the building principal, and at times related service providers. (N.T. 183-85, 257-58, 284-85, 290-91, 296-97.)
6. In its elementary schools, the District also convenes regular meetings of the Child Study Team (comprised of the same professionals as for MTSS) that discusses plans for specific interventions for an individual child. The possibility of referral for an evaluation may be made through this process. (N.T. 183-85, 157, 284-85, 296.)

7. [redacted]
8. [redacted]

**2017-18 School Year (Second Grade)**

9. [redacted]
10. Student’s scores on one of the screening instruments ranged from the 71<sup>st</sup> to 94<sup>th</sup> percentile (nationally) with a composite at the 88<sup>th</sup> percentile (nationally), in the above average range; and the composite score on the other instrument was at the 73<sup>rd</sup> percentile (age-based) and at the 85<sup>th</sup> percentile (grade-based), overall in the average range. (S-4; S-26.)
11. Student’s second grade teacher provided differentiated instruction in reading in daily small groups in second grade. Student was reading above grade level and was grouped with peers at a similar level. (N.T. 259-60, 263, 265.)
12. At the Parents’ request, the second grade teacher provided resources for enrichment activities as part of Student’s homework in

mathematics. Those activities were at the second grade level based on the District curriculum. (N.T. 261-62, 266-68, 278, 284; S-25.)

13. [redacted]
14. Student did not exhibit concerning behaviors or difficulty with peers during second grade. (N.T. 260, 267, 270.)
15. Grades on the second grade report card reflect all available data based on the applicable standards, and not merely the comments. (NT. 265-66.)
16. Student's report card for second grade reflects proficient to commendable progress across subject areas, with Student meeting expectations in mathematics (including in Geometry introduced in the fourth quarter). (S-18.)
17. [redacted]

### **2018-19 School Year (Third Grade)**

18. Student's third grade teacher provided enrichment and remediation activities and instruction as needed for individual students one day a week. The students were grouped according to individual strengths and needs for this purpose. (N.T. 189-92, 208.)
19. Students were provided differentiated instruction in reading in small groups in third grade. Student was reading at a fourth grade level, and was provided with materials at that level in reading. (N.T. 208-09, 211-12, 250-51; S-9.)
20. Student was provided enrichment activities in third grade in mathematics. (N.T. 189-90.)
21. When Student was in third grade, all students took a computerized test to measure academic progress in reading and mathematics. Student's reading scores on this measure were consistently in the high average range; and mathematics scores were consistently near the 90<sup>th</sup> percentile. (N.T. 217, 220-21; S-12.)

22. Student did not exhibit concerning behaviors or difficulty with peers during third grade. (N.T. 191-92, 201.)
23. [redacted]
24. Student's third grade teacher did not consider Student to exhibit needs that would prompt a special education evaluation or intervention outside of the regular classroom. (N.T. 195-96, 198, 201-02.)
25. [redacted]
26. [redacted]
27. [redacted]
28. Student's report card for third grade reflects proficient to commendable progress across subject areas, with Student meeting expectations in mathematics. (S-19.)
29. Grades on the third grade report card reflect all available data, not merely the comments. (N.T 237-38.)

**[redacted]**

30. [redacted]
31. [redacted]
32. [redacted]
33. [redacted]
34. [redacted]
35. [redacted]
36. [redacted]
37. The District administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) [redacted]. The WISC-V Full Scale IQ and General Ability Index scores were the same (118, high average range), indicating that Student's working memory and processing

speed did not adversely impact the Full Scale IQ score. (N.T. 314-15, 368; S-13 at 2-4.)

38. [redacted]

39. [redacted]

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

44. [redacted]

45. [redacted]

46. At the Parents' request, the parties participated in mediation through the Office for Dispute Resolution in early May 2019.<sup>5</sup> (P-31.)

### **The Independent Educational Evaluation**

47. The Parents obtained an IEE in the summer of 2019. The express referral was [redacted] and also to determine whether Student was eligible for special education as a child with a disability under the IDEA and Pennsylvania Chapter 14. (N.T. 94-95; S-23 at 5.)

48. The assessments administered for the IEE were determined to be valid and reliable based on Student's presentation and manner of completing the assessments. (S-23 at 5.)

49. Student completed several optional subtests of the WISC-V for the IEE to supplement the standard battery conducted by the District. The results of the additional subtests were not discrepant from the standard battery, except that Student's score on the optional Information subtest was a relative weakness, measuring long term

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<sup>5</sup> This hearing officer ruled that any discussions at the mediation session could not be presented as evidence pursuant to the express language in 20 U.S.C. § 1415(e)(2)(G) and 34 C.F.R. § 300.506(b)(7). (N.T. 11-13; HO-3.) [redacted] Moreover, to the extent the Parents attempted to introduce a statement of the mediator at the hearing (N.T. 416-17), his or her role was to facilitate discussions by the parties, not to order them to do anything in particular.

memory for facts that are generally known through education and experience. Student's cognitive ability was estimated to be in the range of 112-123 (high average range). (N.T. 96-97; S-23 at 2, 8-10, 24.)

50. On an administration of the Wechsler Individual Achievement Test – Third Edition (WITAT-III) for the IEE, Student scored in the average range across Composites and subtests, with the only exceptions of above average scores on two written expression subtests. (S-23 at 3, 14-17.)
51. Student's receptive and expressive language skills assessed for the IEE revealed no areas of concern; however, assessment of phonological processing skills reflected relative (but mild) weaknesses with phonological processing and phonological memory that could impact reading decoding skills and encoding skills despite overall average range scores (Comprehensive Test of Phonological Processing – Second Edition (CTOPP 2). (S-23 at 4, 10-12.)
52. The IEE concluded that Student exhibited "mild language-based learning problems in the areas of phonological awareness, phoneme isolation, and non-word repetition skills," possibly due to ear infections at an early age. (S-23 at 19.)
53. [redacted]
54. The IEE [redacted]. It also made a number of other recommendations for beneficial educational interventions and practices at school and in the home. (S-23 at 20.)
55. [redacted]
56. In early September 2019, the Parents provided the IEE to the District. The District immediately issued a Permission to Evaluate form to the Parents for IDEA and/or Section 504 eligibility. (N.T. 393, 397; S-22; S-24.)
57. The District did not convene a meeting to review the IEE. (N.T. 79.)

58. The District school psychologist who issued the Permission to Evaluate form in the fall of 2019 did so because the IEE did not include input from teachers or other available District records, or a classroom observation. (N.T. 397-98.)
59. The Parents did not provide consent for the District to conduct an initial special education evaluation because they were concerned that doing so would further delay Student in receiving appropriate educational services. (N.T. 80-81, 161, 162-63.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of this discussion, it should be recognized that 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); [redacted] Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses who testified to be credible, and the minor differences are attributed to disparity in recall rather than any intention to deceive. Not all witness testimony was accorded the same weight, however; that of the District witnesses who

regularly observed Student at school was overall more persuasive on how Student presents in that setting than those who had not. Nevertheless, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

### **General IDEA Principles: Substantive FAPE**

The IDEA requires that the states to provide a "free appropriate public education" (FAPE) to children who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed.

Local educational agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP) which is "'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); *see also Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

### **IDEA Eligibility Principles**

The IDEA and its implementing state and federal regulations require LEAs to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as "child find." Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696

F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

A “child with a disability” is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and “by reason thereof” needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are “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.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child needs special education because of that disability. And, “special education” refers to specially designed instruction which is devised to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

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

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

There is a critical requirement before an LEA may proceed with an evaluation for special education eligibility. Specifically, the LEA must obtain informed consent of the child's parents prior to conducting a special education evaluation. 20 U.S.C. § 1414(a)(1)(D)(i)(I); 34 C.F.R. § 300.300(a)(1). The requisite "consent" requires that the parents be fully advised of all information pertinent to the request, including a description of the matter for which the consent is sought. 34 C.F.R. § 300.9. If the child's parents do not provide consent to the evaluation, the LEA is permitted to request a due process hearing and ask a hearing officer to grant permission to conduct the evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3). The District in this matter has elected to pursue an order through due process in order to proceed with an evaluation of Student.

The IDEA's implementing regulations further provide that, when parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Ordinarily, following a parental request for an IEE, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, however, the Parents did not make any such request of the District, but rather obtained the private evaluation and sought reimbursement after the fact.

### **General IDEA Principles: Procedural FAPE**

From a procedural standpoint, the family including parents have "a significant role in the IEP process." *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010). It merits mention, however, that even where a Student meets IDEA eligibility criteria, the LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*,

680 F.3d 260, 269 (3d Cir. 2012). In other words, educational programming in this context must be appropriate, not ideal.

### **General Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The above-described obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

**[redacted]**

### **The Parents’ Claims**

**[redacted]**

### **IDEA – Section 504 Eligibility**

The next issue is whether Student is eligible for special education on the basis of a disability. The IEE reached the conclusion that Student had “mild language-based learning problems” (S-23 at 19) that impacted Student’s performance at school. The test for IDEA eligibility, however, is two pronged: a qualifying disability, and “by reason thereof” a need for specially designed instruction. The test under Section 504 requires a mental or physical impairment limiting a major life activity, in this case learning. The IEE did not have the benefit of input from any District professionals beyond that contained in records provided by the Parents and, therefore, could not confidently reach the second prong under the IDEA or determine educational needs under Section 504. Moreover, the private psychologist acknowledged that Student might not meet the District’s IDEA eligibility criteria (N.T. 103), something the District (and this hearing officer) cannot possibly determine

without a comprehensive evaluation with significant District input. The District will be permitted to proceed with that evaluation even without the Parents' consent, in order to make an informed determination under the IDEA and Section 504.

### **Remedies**

Having found no substantive denial of FAPE, or grounds for conferring eligibility under the IDEA/Chapter 14 [redacted] at this time, there is no basis for awarding compensatory education. The Parents have, however, also sought reimbursement for the IEE. As noted above, parents may request an IEE at public expense. Central to this right, however, is an evaluation by the LEA with which the parents do not agree. There is no District special education evaluation in this case, nor is there any evidence suggesting that it had reason to suspect a disability prior to the fall of 2019. Here, while the Parents may have had legitimate concerns about potential delays given the District's initial failure in 2018 to respond to their initial request for an evaluation, there is no justification for ordering reimbursement of an IEE that wholly lacks meaningful input from the District professionals who have had experience with Student in the educational environment.<sup>6</sup> In addition, their request for reimbursement for expert witness fees is based on Section 504, which provides in relevant part that, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, \*6 (2d Cir. 2006)(concluding that an attorney fee award "is a district court function" under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing

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<sup>6</sup> The District must, of course, consider the IEE that does contain valuable information about Student. 34 C.F.R. § 300.502(c).

party"). Accordingly, this hearing officer declines to consider ordering that remedy.

Following timely completion of the initial evaluation, the District will be required to convene a meeting with the Parents and other members of the team. The team will be directed to discuss IDEA eligibility [redacted], and to consider the IEE, in order to make programming and placement decisions. [redacted]

## **CONCLUSIONS**

[redacted] The Student's eligibility for special education under the IDEA and/or Section 504 must await a comprehensive District evaluation. Student is not entitled to compensatory education, and the Parents are not awarded any reimbursement in connection with the IEE. The District may proceed with an initial special education evaluation consistent with the Permission to Evaluate form issued in September 2019, and thereafter convene a meeting with the Parents as outlined below.

## **ORDER**

AND NOW, this 1<sup>st</sup> day of January, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. [redacted]
2. Student's IDEA/Chapter 14 eligibility cannot be determined prior to a District evaluation.

3. The District shall proceed with an evaluation of Student consistent with that proposed in September 2019 (S-24). Any additional assessments the District school psychologist determines to be necessary in the course of that evaluation may also be administered without consent of the Parents.
4. The evaluation shall be completed with a report provided to the Parents within sixty calendar days of the date of this order.
5. The District shall convene a meeting with the Parents and other relevant professionals within ten calendar days of the completion of the evaluation report to discuss that evaluation, [redacted], and the IEE in order to make program and placement decisions for Student, [redacted].
6. [redacted]
7. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.<sup>7</sup>

*Cathy A. Skidmore*

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Cathy A. Skidmore, M.Ed., J.D.  
HEARING OFFICER  
ODR File Nos. 22754-1920  
22835-1920

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<sup>7</sup> Copy sent electronically to counsel named on the first page on 1/1/20.