

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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 Due Process Hearing Officer**

### **Final Decision And Order**

#### **Closed Hearing**

**ODR No. 27610-22-23 & 28354-23-24**

**Child's Name:**

V.D.

**Date of Birth:**

[redacted]

**Mother (*pro se*):**

[redacted]

**Father (*pro se*):**

[redacted]

**Local Education Agency:**

Philadelphia City School District  
440 North Broad Street, Suite 313  
Philadelphia, PA 19130

**Counsel for LEA:**

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

December 21, 2023

## **INTRODUCTION**

V.D. (hereafter “Student”),<sup>1</sup> transitions between the Father’s home within the School District of Philadelphia (hereafter “District”) and the Mother’s home which is located in a different school district. The Student received Early Intervention Services (EI) prior to the 2022-2023 school year with medical diagnoses of Autism Spectrum Disorder, Mixed Receptive/Expressive Language Disorder, and Selective Mutism. [Redacted]. Based on the Student’s academic performance, the District determined that the Student was not eligible for special education services.

The Mother filed a Complaint on February 10, 2023 alleging that the District was inappropriately exiting the Student from special education services. On March 13, 2023, the Father requested that the District conduct an Independent Educational Evaluation (IEE) at public expense. On July 27, 2023, the District filed a Complaint denying Father’s request for the IEE. The Complaints were consolidated for the purpose of the due process hearing.

The parties mediated, participated in the Hearing Officer Settlement Conference (HOSC) process, and requested that the due process hearing date be continued four times between March and August of this year, until the Hearing Officer refused the fifth continuance request. In August, *Pro Se* Mother obtained legal counsel<sup>2</sup> who made additional continuance requests, all of which were refused by the Hearing Officer.

On September 20, 2023, the Hearing Officer received an undated Amended Complaint that had been discussed in theory at the Pre-Hearing Conference Call on September 12, 2023, which the Hearing Officer denied

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<sup>1</sup> In the interest of confidentiality and privacy, Student’s name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision’s 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> Mother’s legal counsel withdrew her appearance sometime between the second and third hearing dates.

because the due process hearing had already commenced (IDEA 300.508 (d) (3)).

On Friday, September 22, 2023, the Hearing Officer received an undated "Emergency Motion for an Order Determining Student's Pendent Educational Placement" from the Mother requesting that the Hearing Officer issue an order determining the Student's pendent educational placement pending the issuance of a final order in these proceedings, defining what obligations the District has to the Student under the IDEA, Section 504, and the Pennsylvania School Code Chapters 14, 15 and [redacted], and if appropriate, issue an order clarifying what services, goals, and procedural protections are required by the "comparable NOREP." That Order, dated September 25, 2023, denied the Parent's request for an IEP meeting to change the pendent placement.

The consolidated complaints proceeded to a due process hearing convened via video conference on August 30, 2023, September 26, 2023, and November 6, 2023.<sup>3</sup> Parents acted as separate parties throughout the due process hearing.

All evidence, including the exhibits admitted to the record and transcripts of the testimony, was considered by the Hearing Officer. The only findings of fact cited herein are those needed to explain the ruling. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

For the reasons set forth below, the Parent's claims are denied.

## **ISSUES**

1. Was the District's 2022 Evaluation of the Student appropriate? If not, is an IEE at public expense warranted?

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<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number.

2. Did the District fail to offer a Free Appropriate Public Education (FAPE) for the 2022-2023 and 2023-2024 school years to date? And, if so, should compensatory education be awarded?

## **FINDINGS OF FACT**

1. The District is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. The Student began attending [redacted] in the District at the start of the 2022-2023 school year (NT, at p. 557) [redacted].
3. The District conducted a comprehensive psychoeducational evaluation conducted by the School Psychologist that included: (1) parent input; (2) teacher input; (3) classroom observations; (4) a review of records including medical information; (5) cognitive assessments using the Kaufman Assessment Battery for Children, Second Edition Normative Update (KABC-II NU); (6) academic achievement using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3); (7) social, emotional and behavior functioning using the Behavior Assessment System for Children, Third Edition (BASC-3), the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), and the Autism Spectrum Rating Scales (ASRS); (8) language using the Pragmatic Language Scales Inventory (PLSI), Preschool Language Scales 5, the Goldman-Fristoe Test of Articulation-3<sup>rd</sup> Edition, and informal language assessments, and a speech and language records review; (10) an Occupational Therapy evaluation using the Wide Range Assessment of Visual Motor Abilities (WRAVMA) which visual motor, visual spatial, and fine motor areas; and (11) a Physical Therapy Functional Assessment (S-19).
4. [Redacted].

5. The District agreed to adopt the services identified in the Student's latest EI-IEP (S-9) for several months while the Student transitioned to [redacted] services. These services were documented in a signed NOREP on August 19, 2022 (S-11). The NOREP provided: (1) itinerant autistic support; (2) speech therapy for 540 minutes per month; (3) occupational services 360 minutes per month; (4) physical therapy for 180 minutes a month; (5) a one-to-one assistant for the duration of the school day; and (6) curb-to-curb transportation. After the Mother's due process complaint was filed in February 2023, it became the Student's pendent placement, as required by the IDEA.
6. The District proposed a Section 504 Service Plan accommodations to address the Student's medical diagnoses (S-25). The Plan was not adopted.
7. The Mother and the Father hired educational consultants to observe the Student in school. They both conducted their observations on October 27, 2022. Neither consultant administered any assessments.
8. The Father's Educational Consultant, after observing the Student for two hours, determined that social interaction, communication and postural instability/sensory input appear to be the Student's needs (F-2, at p. 2). She recommended replacing the 1:1 aide with a class-wide paraprofessional or teaching assistant who is aware of the Student's needs. She also recommended conducting a behavioral assessment and creating a behavior plan to address the Student's needs (F-2, at p.2). The Educational Consultant observed unsafe play during recess and recommended that the students required more than one person to supervise during that time and offer more structure (F-2, at 2-3). The Educational Consultant observed the Student to be academically above average and suggested [redacted] activities (F-2, at 3). To address the Student's social skill deficits, the Educational Consultant recommended

social prompts to encourage more interaction and social overtures (F-2, at p. 3-4). Finally, the Educational Consultant recommended that the Student be prompted to take out lunch items at the beginning of the lunch period (F-2, at p. 4).

9. The Mother's Educational Consultant found the Student to be fidgety and distractable, unable to read nonverbal cues, self-advocate, or self regulate. While she observed some peer engagement, she did not see the Student using expressive language. She recommended adding social coaching to redirect unexpected behaviors and promote social behavior, and speech goals to develop conversational skills (M-9, at p. 5, 6). Academically, the Student completed work easily, but did not always respond verbally when asked to participate. The Mother's Educational Consultant was also concerned about unsafe play during recess (M-9, at p. 4-5). She concurred with the Father's Educational Consultant regarding the 1:1 aide not being needed during classroom time; however, she recommended that 1:1 support be considered during lunch and recess (M-9, at p.7).
10. The Teacher testified that the Student was able to access the regular education curricula and did not need the 1:1 currently provided (NT, at p. 525, 527).
11. The OT who assessed the Student testified that the Student did not have any OT needs that interfered with learning and that an IEP was not necessary at this time (NT, at p. 366-367). The OT testified that the Student's OT needs could be addressed with Section 504 Plan accommodations (NT, at p. 384).
12. The Speech and Language Pathologist assessed the Student by conducting a review of records, and using formal and informal rating scales, observations, and formal assessment tools. In general, the Student scored in the Average and Below Average range, except for

expressive and receptive language scores, which fell in the Superior range. The Pathologist pointed out that the Student speaks comfortably with parents, teachers, and the therapist. The Student is mute around peers and in uncomfortable situations (S-19, at p. 36-47). The Pathologist opined that the Student's mild weaknesses don't appear to be impacting the Student's ability to fully access the curriculum (NT, at p. 204), recommended that Speech and Language services be discontinued, and that areas of concern be addressed through Section 504 Service Plan accommodations (S-19, at p. 69).

### **Mother's Claims**

The Mother claims that the Student has multiple disabilities, is in need of specially designed instruction, and that the District is inappropriately exiting the Student from special education services under IDEA, PA School Code Chapter 14, and [redacted].

She contends that the District's evaluation of the Student was not appropriate and that the District should have conducted a Reevaluation rather than an Evaluation. [redacted].

The Mother argues that the Section 504 Plan the District offered to address the Student's medical diagnoses was not reasonably calculated to provide the Student with appropriate programming.

The Mother alleges that the Parents' concerns were dismissed or minimized thereby failing to permit them to meaningfully participate in their child's education.

The Mother contends that the District has not offered FAPE since the Student entered [redacted] in the Fall of 2022, therefore compensatory education is an appropriate remedy.

## **Father's Claims**

The Father claims that the District's evaluation of the Student was inappropriate and that an Independent Educational Evaluation (IEE) should be conducted at public expense. [Redacted].

The Father argues that the District's evaluation did not assess all areas of the Student's disability, particularly selective mutism and its impact on the Student's ability to access the general education curriculum and social and emotional environments. The Father also contends that the evaluation did not comprehensively assess the Student's OT and SLT needs.

Therefore, the Father requests that the Hearing Officer order an IEE to comprehensively evaluate the Student's needs.

## **District's Claims**

The District claims that its 2022 Evaluation of the Student was appropriate under the IDEA because it comprehensively assessed all areas of suspected disability and used a variety of assessment tools and strategies.

The District maintains that its evaluation demonstrated that the Student is performing on grade level, not below (for IDEA purposes) and [redacted]. The District argues, that while the Student does have a disability, the Student does not need an IEP with measurable goals and specially designed instruction [redacted].

The District recommends that a Section 504 Plan be developed that would address the Student's medical diagnosis. In conclusion, the District claims that the Parents failed to meet their burden of proof and their claims must be denied.



## **GENERAL LEGAL PRINCIPLES**

### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parent. *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 burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipoise.” On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In regard to the Mother’s complaint, the burden of persuasion rests on her to prove by a preponderance of the evidence that the Student is eligible for special education services under IDEA.

In regard to the District’s complaint, the burden of persuasion is on the District to prove by a preponderance of the evidence that its November 22, 2022 Evaluation is appropriate and that neither an IEE or a [redacted] is warranted at this time.

## **Credibility Determinations**

Special education hearing officers, in the role of factfinders, are 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).

During the three days of testimony, the Hearing Officer finds that the witnesses testified credibly and in a forthright manner. The general education, special education teachers, therapist, and school psychologist testified to the best of their ability based on their knowledge of the Student. The Educational Consultants' testimony and observation reports were clear, unambiguous, and offered comparable conclusions. The Father chose not to testify and did his best as a *pro se* parent. The Mother's "testimony," which was mainly in the form of a prepared statement, demonstrated that she was concerned that her child's needs could not be addressed without an IEP. Her testimony clearly demonstrated that her perception of her child's needs in the home differed from that of the District educators and the school psychologist who work with her child in a classroom setting. All of the witnesses responded credibly based on their perception of the Student in their respective environments.

## **FAPE under IDEA**

The Individuals with Disabilities Education Act (IDEA)<sup>4</sup> requires the provision of a "free appropriate public education" (FAPE) to children who are

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<sup>4</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).

eligible 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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

### **The Individualized Education Plan (IEP)**

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's IEP Team, which includes teachers, school officials, the local education agency (LEA) representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services

"required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D)

To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

### **Specially Designed Instruction**

In general, IDEA defines special education as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability" 34 C.F.R. § 300.39 (a)(1).

IDEA defines Specially Designed Instruction as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children 34 C.F.R. § 300.39 (b) (3).

[Redacted].

### **FAPE under Section 504**

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1). Section 504 and Chapter

15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1. The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

## **Evaluations**

The IEP is based on an evaluation *or* a reevaluation. The IDEA establishes requirements for evaluations that are *substantively the same* for initial evaluations and reevaluations. 20 U.S.C. § 1414.

The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1).

IDEA and its implementing regulations sets out procedural requirements designed to ensure that all of the child's individual educational needs are examined: (1) the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; (2) 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 (3) 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); see also 34 C.F.R. §§ 300.303(a), 304(b).

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

And, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation at public expense. IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); *PP by Michael P and Rita P v. Westchester Area School District*, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009).

## **Independent Educational Evaluation**

An Independent Educational Evaluation (IEE) is an evaluation of a student conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. 34 C.F.R. § 300.502 (a)(3)(i). Parents have the right to obtain an IEE at any time. 34 C.F.R. § 300.502 (a)(1).

When parents request a publicly funded IEE, the District must, “without unnecessary delay,” either: (i) File a due process complaint requesting a hearing to show that its evaluation is appropriate; or (ii) Ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to §300.507 through 300.513 that the evaluation

obtained by the parent did not meet agency criteria. (34 C.F.R. §300.502(b)(2)(i)-(ii); 22 PA Code §14.102(a)(2)(xxix)).

If the LEA denies the parents' request for an IEE, the parents have the right to secure an IEE at their own expense for consideration by the student's multidisciplinary team. Furthermore, if the LEA files a due process complaint notice to request a hearing and the final decision is that the (school district's) evaluation is appropriate, the parent "still has the right to an independent educational evaluation, but not at public expense." 34 C.F.R. §300.502(b)(3); 22 PA Code §14.102(a)(2)(xxix)).

## **Pendency**

The law is clear regarding pendent placement.

Sec. 300.518 Child's status during proceedings.

(a) Except as provided in [§300.533](#), during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under [§300.507](#), unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

And, "during the pendency of any ...due process hearing...unless...[the school district or charter school] and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." (34 C.F.R. §300.518(a); *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir.1996)).

## **Meaningful Participation**

IDEA requires that parents of a student with a disability be afforded meaningful participation in the IEP process and in the education of the student. *DS & AS ex rel DS v. Bayonne Bd of Educ*, 602 F.3d 553, 54 IDELR 141 (3d Cir 4/22/10); *Fuhrmann ex rel Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036, 19 IDELR 1065 (3d Cir. 1993); *MP by VC v Parkland Sch Dist.*, 79 IDELR 126 (ED Penna 2021); 34 C.F.R. § 300.501. See, *Deal v. Hamilton County Bd of Educ.*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); *JD v. Kanawha County Bd of Educ*, 48 IDELR 159 (S.D. WV. 2007).

For a procedural violation to be actionable under IDEA, the parent must show that the violation resulted in a loss of educational opportunity for the student, seriously deprived the parents of their participation rights, or caused a deprivation of educational benefit. *Ridley School District v. MR and JR ex rel. ER*, supra; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

## **Compensatory Relief**

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).



## **DISCUSSION**

The Hearing Officer's authority in this matter does not extend to determining if the Student meets the disability criteria for special education. The Hearing Officer is limited to determining if the District's evaluation is timely and whether or not it is appropriate under the law.

### **Is an IEE warranted?**

Based on the regulatory language cited above, three conditions are required for an IEE to be publicly funded: (1) the parents must disagree with the district's evaluation; (2) the district must file for due process without unnecessary delay; (3) the district must demonstrate that its evaluation is appropriate.

The Hearing Officer finds that the evidence proves that the first condition has been met: the Parents clearly disagree with the District's evaluation. However, whether or not the District filed a timely Complaint seeking a due process hearing after the Father filed a request for an IEE is not so clear. The Father submitted a written request for an IEE on March 13, 2023. The District did not file its Complaint until July 27, 2023, 136 days later. The regulatory language demanding that the District act "without unnecessary delay" is ambiguous leading any interpretation to be subjective. The District argues that because the parties were already in litigation, it tried to resolve this issue without filing a complaint but were unable to do so. The District claims that it decided to file the Complaint only after a Pre-hearing Conference Call held in July 2023. It appears to the Hearing Officer that the District was attempting to resolve the issue rather than adding to an already complicated litigation process that was fraught with multiple delays and requests for continuances. Therefore, in light of the multiple requests for continuances, the District filing sooner would not have expedited this process in any way. Therefore, the Hearing Officer does not find that the

length of time the District took before filing the IEE due process complaint constituted an unnecessary delay and it caused no harm.

### **Was the evaluation appropriate?**

In order to satisfy the third condition warranting an IEE, the District must prove that its evaluation was appropriate. IDEA and the related regulatory language do not clearly define “appropriateness” and the courts have interpreted it broadly<sup>5</sup> giving hearing officers discretion to determine appropriateness.

Mother’s argument that the District should have conducted a “reevaluation” rather than an “evaluation” falls flat because IDEA establishes requirements for evaluations that are substantively the same for initial evaluations and reevaluations. See 20 U.S.C. § 1414.

IDEA requires that three conditions be met for an evaluation to be appropriate and in this case, all three were met: (1) the District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; (2) the District did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability or determining an appropriate educational program for the child; and (3) the District used technically sound, standard instruments to assess the Student’s cognitive, academic and behavioral needs.

Contrary to the Father’s assertions, the District’s evaluation did assess all areas of the Student’s disability, including selective mutism and its impact on the Student’s ability to access the general education curriculum and social and emotional environments, as well as the Student’s OT and speech and language needs. The testimony of the OT and the Speech Pathologist, as

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<sup>5</sup> See Zirkel, Perry A., “Independent Evaluations at District Expense under the Individuals with Disabilities Education Act,” in 38 *Journal of Law & Education* 2, p. 223-244.

well as the Parents' educational consultants was consistent in regard to the Student being able to access the curriculum and, in fact, not needing the 1:1 assistant in the classroom.

Based on the above, the District's November 2022 evaluation of the Student is appropriate and the Father's claim for an IEE is denied.

### **Should an IEP be developed?**

The Evaluation, which was appropriate, found that while the Student does meet the requirements of one or more of the disability categories identified in the regulation, the Student does not require specially designed instruction. The Student does not need the content, methodology, or delivery of instruction to be adapted for the Student to be able to access the general education curriculum. The evaluation demonstrated that the Student is performing at or above grade level.

None of the witnesses testified that the Student needed specially designed instruction to access the curriculum. In fact, both of the Parents' Educational Consultants' recommendations could be addressed in a Section 504 Plan. The School Psychologist recommended that a Section 504 Plan be developed to provide the Student with appropriate accommodations to support educational growth. And the Student's Teacher testified that the Student was able to access the curriculum. Therefore, the Parents' claims for special education services in the form of an IEP are denied.<sup>6</sup>

### **Meaningful Participation**

The Mother failed to substantiate her claim that the Parents were not provided with an opportunity to meaningfully participate in their child's

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<sup>6</sup> Parents sometime discount the value of a Section 504 Plan as compared to an IEP. However, when a student is able to access the curriculum without an IEP, a robust Section 504 plan with individualized (not cookie cutter) accommodations is invaluable in helping a student overcome weaknesses and more successfully participate in academic, nonacademic and extracurricular activities.

education. The District provided the Parents with copies of the Procedural Safeguards outlining parental rights, informed and invited them to all meetings, asked them to provide input into the Student's evaluation, and the District was responsive to their input. While the District did not always agree with the Parents' input, there was no evidence demonstrating that it was not taken into consideration in making educational decisions. There being no evidence that the Parents were deprived of their rights or that there was a loss of educational opportunity or benefit to the Student, Mother's assertion must be denied.

**[Redacted].**

### **Is compensatory education an appropriate remedy here?**

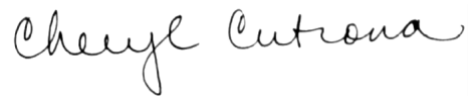
The Mother's request for compensatory education was not included in her Complaint and was presented at the due process hearing for the first time, so it cannot be granted. In any case, the District was implementing the EI-IEP as the pendent program during the entire time in question. Because there was no denial of FAPE and no substantive harm to the Student, compensatory education is not warranted. Therefore, Mother's claim for compensatory education is denied.

## **CONCLUSION**

1. The District's 2022 Evaluation of the Student is appropriate, therefore the Father's request for an IEE at public expense is denied.
2. The District did not fail to offer FAPE for the 2022-2023 and 2023-2024 school years to date, therefore, the Mother's request for compensatory education is denied.

## **ORDER**

AND NOW, this 21st day of December 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are DENIED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.



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**Cheryl Cutrona, J.D.**  
**Hearing Officer**

**Date of Decision:**

December 21, 2023

**ODR 27610-22-23- and**

**ODR 28354-23-24-**