

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

## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number:**

26098-21-22

26266-21-22

#### **Child's Name:**

B.W.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents**

Pro Se

#### **Local Education Agency:**

Bloomsburg Area School District  
728 East Fifth St.  
Bloomsburg, PA 17815

#### **Counsel for LEA**

Christopher Bambach, Esq.  
Sweet Stevens Katz Williams  
331 E. Butler Ave.  
New Britain, PA 18901

#### **Hearing Officer:**

Joy Waters Fleming, Esq.

#### **Date of Decision:**

September 12, 2022

## **INFORMATION AND PROCEDURAL HISTORY**

The Student<sup>1</sup> is currently [redacted] years old and recently completed [an early elementary] grade in the District. The Student is eligible for special education services as a child with a Specific Learning Disability (SLD) and a secondary classification of Speech-Language Impairment. The Parent<sup>2</sup>, an attorney, filed a due process complaint against the District that asserted it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 as well as the federal and state regulations implementing those statutes.<sup>3</sup>

In the Complaint the Parent contended the District failed to offer Student an appropriate educational program; violated child find requirements and engaged in discrimination and retaliation. As a remedy, the Parent sought removal of staff from their positions in the District, a PDE investigation, compensatory education and an evaluation of the Student. In response, the District maintained that its special education program, as offered and implemented, was appropriate for Student, and that it did not engage in any discrimination or retaliation.

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<sup>1</sup>In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifying characteristics, are not used in the body of this decision to the extent possible.

<sup>2</sup> The term "Parent" refers to Student's parent/attorney that filed the Complaint and assumed the lead in this matter. The Student's other parent participated by telephone for most sessions.

<sup>3</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 implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14). The federal regulation 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 et seq. (Chapter 15).

Before the hearing commenced, the District filed a Complaint on the basis that Parent requested an independent educational evaluation (IEE) and requested mediation. The District denied the IEE as well as the request for mediation. As a remedy, the District sought an Order requiring the Student undergo a District evaluation and denying the IEE.<sup>4</sup> Both Complaints were heard concurrently.

The virtual hearing occurred over seven sessions. Neither Parent testified. The Parent offered testimony from various District staff that included the former and current special education supervisor, learning support and regular education teachers, and related service providers.<sup>5</sup> The District offered testimony from the Principal and a security guard assigned to the elementary school.

The parties agreed that closing statements would be submitted in writing. The Parent did not file a closing statement. After the final hearing session and the submission of the closing statement by the District, the Parent requested dismissal of the due process Complaint, without prejudice, or a stay put until substitute representation could be obtained. The Parent also advised that the Student was no longer enrolled in the District. The Hearing Officer denied the Parent's request.<sup>6</sup>

The following Parent exhibits were admitted into the hearing record:  
P-1, P-2 , P-6, P-7.1, P-9, P-14, P-15, P-16, P-19, P-22, P-23, P-24, P-28,

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<sup>5</sup> The Parent's request to present the testimony of the District's current superintendent and the school psychologist was denied. The request to call the school nurse was granted. However, the Parent indicated unavailability beyond the seventh hearing session. At the final hearing session, the Parent objected to the District's request for an extension to the decision due date (DDD). Because of numerous scheduling obstacles, the DDD was extended. (N.T. 565-566, 713)

<sup>6</sup> HO-1

P-29, P-33, and P-38. The following District exhibits were admitted into the hearing record: S-1, S-3 through S-17, S-19 through S-24, S-26 through S-30, S-32 through S-37.

For the reasons set forth below, all claims of the Parent are denied.

## **ISSUES**

- 1) Did the District deny Student a FAPE during the 2021-2022 school year through February 16, 2022, by
  - a) failing to provide specially designed instruction and accommodations
  - b) failing to provide an evaluation
  - c) failing to schedule an IEP meeting when requested by the Parent
  - d) through an improper change in placement that included removal of the Student from the educational setting through February 16, 2022
  - e) through an improper restraint
  - f) violating its child find obligations to the Student
  - g) permitting a non-certified special education supervisor to act as the supervisor of special education?
- 2) Did the District discriminate against the Student by denying access to regular education instruction and placement in the calm room?
- 3) Did the District retaliate against the Student and/or Parent?
- 4) Is the Student entitled to a District funded independent educational evaluation (IEE)?
- 5) If the District denied Student a FAPE, what if any remedy is owed?

## **FINDINGS OF FACTS**

The Student is currently [redacted] years of age and recently completed [an early elementary] grade in the District. (S-14)

### **[Redacted] Grade-Former District**

1. The Student attended [two early elementary grades] outside of the District. (P-1, S-5)
2. During the 2019-2020 school year, the former district conducted a psychoeducational evaluation that concluded that Student needed special education on the basis of a specific learning disability (SLD) (basic reading skills, written expression) and a speech and language impairment. No behaviors that impeded learning were documented. (S-3; N.T. 316)3.
3. During the 2020-2021 school year, the Student was enrolled in [elementary school] and received entirely remote instruction through CAOLA from a third party. (S-5, p. 5)
4. On January 29, 2021, the IEP team met and developed educational programming. The January 2021 IEP indicated the Student needed assistive technology devices and/or services. The IEP offered goals designed to address sight words, decoding, scissor grasp, pencil grasp, and articulation. Specially designed instruction included typing responses, pencil grips, the use of an iPad, a break menu, and individual/small group instruction. Related services offered to the Student included four 30-minute occupational therapy (OT) sessions per month and 45 minutes of speech/language therapy per week. (S-5; N.T. 84, 208)

## **2021-2022 School Year -[redacted] Current District**

5. On June 1, 2019, the Pennsylvania Department of Education (PDE) issued an emergency permit that allowed a District employee to serve as the K-5 Supervisor for Special Education. The permit was renewed each year until it expired on July 31, 2021. (P-29; N.T. 31)
6. From August 1, 2021, through January 2022, the supervisor served the District with a lapsed emergency certification. In January 2022, the former supervisor became a special education teacher in the District elementary school that Student attended. A different special education supervisor assumed responsibility for K-5 students in the District. (P-29; N.T. 112, 116)
7. On August 20, 2021, the Parent enrolled the Student in the [redacted] grade in the District. The Parent opted for the Student to attend the blended virtual option with academic instruction starting on August 31, 2021. (S-14, S-20, S-35, p. 2-4; N.T. 89, 117, 132-133)
8. The blended program required the Parent to serve as the learning coach and receive assistance from the District, as requested. The learning coach was expected to assist with logging in, working through modules, checking for frustration, and submission of completed work to the Student's teacher. (N.T. 399-400, 414, 449)
9. In preparation for educational programming, District staff reviewed the Student's IEP and ER from the previous school district. (N.T. 111, 251)
10. On August 26, 2021, the Parent advised the District of an intention to file a Complaint with the DOE because of denial of a safe in-person learning environment. (S-35, p. 5; N.T. 603)

11. On August 27, 2021, the District issued a NOREP that proposed comparable educational services to the previous district's IEP. The NOREP indicated the Student would receive itinerant learning support for 30 minutes per day, speech and language support for 45 minutes per week and four 30-minute OT sessions a month. (P-1, P-2, S-5, S-7; N.T. 53-54, 206-207)
12. On September 3, 2021, the Parent requested an evaluation of the Student. That day, the Parent provided the District with a patient visit summary of the Student that indicated a diagnosis of pervasive developmental disorder (PDD). The summary recommended the Parent contact a mental health agency for an evaluation to determine the need for school services. The summary provided contact information for three agencies. (P-14, S-24, S-35; N.T. 489)
13. On September 8, 2021, the District proposed a re-evaluation of the Student. The prior written notice (PWN) indicated testing to include standardized achievement assessments, behavior rating scales, parent/teacher input, records review, observation, occupational therapy (OT) standardized/non-standardized assessments, OT structured observation, and skill trials. (S-8, S-35, p. 20; N.T. 58, 92, 111)
14. On September 15, 2021, the Parent consented to the re-evaluation but added information to the PWN that requested speech and language assessments (CELF, test of language development), data review from the previous school attended (evaluation, IEP, progress monitoring, ESY reports, teacher input) and Parent collaboration regarding specific assessments. The District regarded the Parent's request as an invalidation of the PWN. (P-16, S-35, p. 32; N.T. 58-59, 62, 135)

15. On September 21, 2021, the District re-issued the PWN. It proposed the administration of standardized achievement assessments, behavior rating scales, parent/teacher input, OT structured skill trials, speech and language review of records, speech assessments to include social pragmatic communication, as well as a review of records from the last school district attended to include data evaluation, IEP progress monitoring and ESY reports. (S-9; N.T. 94, 108-110)
16. The Student's blended instruction day began at 8:45 a.m., with a fifteen-minute morning meeting, followed by a read-aloud time. For the remainder of the time, the teacher graded work and emailed reminders to parents. The students were expected to work through the blended schedule for online math and reading lessons, recess and lunch. The blended day ended at 3:00. (N.T. 389-393, 442-443)
17. The blended instruction teacher did not observe behaviors of the Student that interfered with learning. (N.T. 416)
18. During the 2021-2022 school year, the learning support teacher provided reading instruction to the Student for thirty minutes each day. Although the majority of reading instruction was provided remotely, the Student received about ten sessions, in person, on the playground. Spelling accommodations provided to the Student included a whiteboard and verbal spelling of words. (S-14, p.5 ; N.T. 114, 117, 133, 210, 307-308, 312)
19. To address the Student's needs, the District purchased a specific Parent requested Orton-Gillingham reading program. (N.T. 256, 266-267, 270, 309, 317-319, 443)
20. Through a zoom meeting, the Student's learning support teacher met with a teacher from the previous district and discussed successful strategies and accommodations. The Student's learning support



teacher did not schedule a co-teaching session with the former teacher as the Parent suggested. (N.T. 257-258, 310)

21. In reading, from September 2021 to May 2022, the Student progressed from level 16 to level 30, with an IEP goal of level 36. Overall, the Student made progress in reading. (N.T. 281, 292, 298, 353)
22. The learning support teacher did not observe behaviors of the Student that impeded learning. (N.T. 286)
23. During the 2021-2022 school year, the Student received speech therapy. Until December 2021, services occurred through an online modality. (S-14, p. 8-9; N.T. 153-154, 208-209)
24. On October 13, 2021, the Parent returned the September 21, 2021, PWN and requested an informal meeting with the District. (S-9; N.T. 58, 95, 110)
25. On October 25, 2021, the Parent requested a meeting with a case manager to develop accommodations for the Student's evaluation. In response, the District invited the Parent to an informal meeting for November 8, 2021, with the speech therapist, school psychologist, and regular and special education teachers. That same day, the District invited the Parent to a meeting on November 19, 2021, with the speech therapist. (S-25, S-26)
26. On October 29, 2021, the supervisor of special education contacted the Parent and referenced two attempts (October 7, October 14) to schedule an informal meeting. After the Parent replied, the District offered dates and times for the case manager meeting. (S-35, p. 33-36)

27. On November 1, 2021, the Parent requested a meeting to discuss the Student's re-evaluation and again requested specific formal and informal assessments. (S-35, p. 39; N.T. 138-139)
28. On November 4, 2021, the District issued a PWN for the re-evaluation of the Student. (S-28)
29. On November 9, 2021, the District's Speech-Language Pathologist (SLP) administered a CELF-5 screening to the Student. On the CELF-5, the Student's score of ten was one point below the criterion score of eleven for chronological age. Because of progress made, the SLP recommended a follow-up discussion with the team to determine the need for revision to Student's IEP goals. The Parent and sibling of the Student remained in the room during the speech screen and did not interfere. The Parent asked the acting special education supervisor and the school psychologist to leave the room during the assessment. The SLP could not complete the diagnostic test because a signed consent from the Parent was not provided. (S-10; N.T. 161, 211, 216-217, 219)
30. On November 23, 2021, the District issued a PWN to reevaluate the Student. (S-11, S-35; N.T. 42, 111)
31. On December 2, 2021, after the speech screening, the District held a meeting to revise Student's IEP. The Parent participated in the meeting. Four new speech-language goals were added to the IEP, SDI from the former school district's IEP was removed, including an iPad. The District provided the Student with an alternate brand of technology for classroom use. (S-12, S-14, p. 22-27; N.T. 64, 118, 158-159, 213-215)
32. The December 2, 2021, NOREP recommended an itinerant level of learning support with reading instruction for 30 minutes a day,

speech-language therapy for 45 minutes a week, OT for 30 minutes a week and a preferred dialogue session for 15 minutes a day. <sup>7</sup> (P-19, S-13, S-14; N.T. 118, 160)

33. Speech services were slated for implementation three times a week for half-hour allotments. Because of scheduling issues, the SLP reorganized her schedule three times to accommodate the needs of the Student. (N.T. 226)
34. During speech services provided to the Student remotely, the SLP had a special education teacher in the room during the session or another witness listening because of litigation threats made by the Parent. (N.T. 166-167)
35. From September 2021 to December 2021, the Student was slated to receive 120 minutes a month of OT in a virtual setting. Between October and January, the Student did not log in for four sessions, two sessions were missed because of absence, and two sessions were missed because of school closure. (S-14, p. 7; N.T. 230)
37. During OT, the Student had difficulty staying on task and the camera was turned off. During OT sessions, the former special education supervisor was present during some virtual services because the staff wanted a witness present during interactions with the Parent. (P-33, S-14, p. 7-8; N.T. 199, 244-246)
38. On December 6, 2021, the Student began in-person instruction in the District. (N.T. 47)
39. The elementary school Student attended had a "calm room." The calm room was outside the academic wing, available to all children to provide a break from overstimulation or relieve stress. The calm room

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<sup>7</sup> It is unclear whether the Parent signed the NOREP.

offered sensory input and was used for emotional/social interactions and transitions from home to school. The calm room was not used for discipline. (N.T. 66, 225, 482-487)

40. From January 10, 2022, through January 25, 2022, the Student was absent from school because of COVID. (N.T. 124-129)
41. During regular education writing instruction, the Student was assisted by an aide that scribed. In the classroom, all students had touch screen tablets, and the Student had access to headphones. (N.T. 113-116, 131)
42. The regular education teacher observed Student as bright and needing guidance with independent work and recommended adult support in the general education classroom to assist with behaviors and scribing. (S-14, p. 29; N.T. 124-129, 136, 140)
43. On January 18, 2022, the IEP team met and proposed educational programming that included full-time participation within general education with the addition of itinerant learning support for reading, OT and speech therapy. Special considerations included communication and assistive technology needs. (S-14, S-15, S-19, S-30)
44. The January 2022 IEP offered goals designed to address reading, OT and speech needs. The January 2022 IEP offered SDI that included 15 minutes of daily informal conversation, noise-blocking headphones, time for self-regulation talks, paraprofessional access, preferential seating, movement breaks, side door entrance to the elementary school, fidgets, pencil grips, break cards, unlined worksheets, oral responses, modified testing, verbal and visual cues. (S-14, S-19; N.T. 29-31 34-35)

45. The January IEP was emailed to the Parent in advance of the meeting. The Parent participated in the IEP meeting. (S-19)
46. On January 18, 2022, a local newspaper, in the District, reported a story with a photo of a recently hired teenage District security guard that dressed in a Nazi-style uniform and posted videos to TikTok. (P-28, p. 7; N.T. 389-395, 408, 648, 654-657)
47. At a January 2022 board meeting, members of the public, including the Parent, made a statement regarding the security guard. After an investigation and a short administrative leave, the District reinstated the guard to his position. (P-28, p. 7; N.T. 389-395, 408, 648, 654-657, 661)
48. The security guard provided services to the District's three elementary schools and had responsibility for securing door entries, walking both inside and outside of the premises. The guard talked with children, monitored the playground, acted as a crossing guard, and sometimes read to the children. The guard was assigned primarily to the elementary school attended by the Student. (N.T. 477)
49. On February 11, 2022, the Student did not get on the bus to attend a class field trip to the movies. After the class left, the Student walked to the calm room, with a special education teacher, the Parent came to the school and took the Student to the movie. (N.T. 70-71)
50. On February 14, 2022, the Parent requested an IEP meeting to address concerns related to non-compliance with the Student's IEP. The Parent also requested that the former special education director not have contact with the Student and the calm room not be used. (S-34, p. 1-2; N.T. 414)

51. On February 16, 2022, the Student eloped from a classroom, followed by an aide, walked down a hallway and removed a tack holding up artwork. The special education teacher was called to assist. After being asked to give the tack back, the special education teacher took the tack from the Student. The Student bit staff on the forearm, a de-escalation tactic was utilized, and the Student ran into a classroom and threw items on the floor. (N.T. 130, 424-430, 494)
52. After the incident, the Student walked with staff to the calm room. In the calm room, the Student pulled items off the walls and counters. The Principal, with a witness present, telephoned the Parent. The Parent threatened litigation and asked for Student to be taken to the Nurse. The Student refused to go to the Nurse. The Parent went to the school and took the Student home. No disciplinary action was imposed by the District. (P-23, P-24, S-32; N.T. 73-79, 120-121, 130, 417, 487, 520, 526, 535-536, 579-582)
53. The February 16, 2022, incident report indicated that the staff member involved in the restraint was safe crisis management trained, described the incident and de-escalation, discussion and direction techniques utilized. The physical intervention was described as an escape using feed the bite, and finger peel because the Student bit the teacher's arm and possessed a weapon (bulletin board tack).<sup>8</sup> The Student refused an injury assessment. The outcome of the incident indicated increased supervision, return to routine and pick-up by the Parent. (P-24, S-32; N.T. 540)

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<sup>8</sup> The staff member that interacted with the Student was the former special education supervisor without current certification now a special education teacher.

54. After the February 2022 incident, the Parent reported the special education teacher to the County Children & Youth (CCY) agency alleging abuse of the Student. CCY contacted the police and reviewed the video of the incident. The Student was not prohibited from returning to in person instruction, but instead blended instruction resumed. (S-17; N.T. 123, 125-126, 165, 421, 521-522, 582)
55. On February 18, 2022, the Parent contacted the District and advised the incident report was inaccurate and incomplete, that Student suffered injuries and that CYS advised the teacher involved could not have contact with children. Through email, the Principal advised the Parent that he spoke with CYS that day and confirmed the teacher involved did not have restrictions in place involving children. (S-35, p. 53, 55)
56. At a February 22, 2022, meeting, no changes were made to the Student's educational program. After the meeting, the Parent contacted the District and requested ten action items, that included that the former special education director have no contact with the Student and notice if she was still in the building, no use of the calm room, allowing fruits and vegetables throughout the day, outside playground breaks, classroom rest, pull in for OT, noise cancelling air pods, a surface pro, and higher level cognitive work. (S-34; N.T. 431, 437-438)
57. On February 23, 2022, the District issued PWN to conduct a re-evaluation of the Student. (S-16, S-33)
58. On February 25, 2022, the Parent requested an IEP meeting to discuss " an illegal restraint resulting in physical and emotional injuries to my

child. Isolation tactics were also used. A false report was signed and written by [ ] including failing to check/identify disabilities and failing to file with the State.” (P-24, S-32)

59. On March 9, 2022, after an investigation, the County Children & Youth Agency determined that the Student child was not the victim of child abuse. The allegation was given the final status of unfounded. (S-17; N.T. 528)
60. During the 2021-2022 school year, during blended instruction, the Student successfully submitted assignments and completed schoolwork. Overall, the Student made progress toward IEP goals. (P-33; N.T. 153-154, 199, 208-209, 222, 244-246)
61. During the 2021-2022 school year, the District experienced staff turnover and shortages. (N.T. 249-250, 398, 406, 592, 595)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

The burden of proof consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case, the hearing officer]. The burden of persuasion lies with the party asking for the hearing. Accordingly, the burden of persuasion, in this case, must rest with the Parent who filed the Complaint.<sup>9</sup> However, the application of this principle determines which

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<sup>9</sup> The District bore the burden of proof with respect to its filed Complaint regarding the denial of an IEE.



party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

During a due process hearing, the hearing officer is responsible for judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. *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 most of the witnesses who testified credible as to the facts based on recollection and perspective. However, because of the contentious relationship between the Parent and school staff, whether attributable to threats of litigation or what may have been perceived as overzealous advocacy, their relationship is negative and sadly not child-centric. For this reason, the testimony of some of the school staff was hesitant and halting. The testimony of the OT, SLP, and teachers was most persuasive. In light of where current events stand at this moment, the security guard's testimony and explanation of his affinity for WWII costuming were the least credible. However, his testimony had the least bearing on the disposition of this matter as he had minimal interaction with the family and no discernable role in the provision of FAPE to this child.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

## **General IDEA Principles**

The IDEA requires each of the states to provide a “free appropriate public education” (FAPE) to children who are 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. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an 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). Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). “The IEP must aim to enable the child to make progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255

(3d Cir. 2018)(emphasis in original). IEP development, of course, must follow and be based on an evaluation as monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

Special education due process hearing officers have authority to decide issues relating to a proposed or refused initiation of or change in the child's identification, evaluation, or educational placement; or the provision of FAPE to a child under the IDEA.<sup>10</sup> In Pennsylvania, they are also granted authority to decide FAPE and related issues under Section 504, including discrimination against a student based upon disability, in accordance with the procedures provided by the IDEA and Pennsylvania's Chapter 14.<sup>11</sup>

## **Child Find and Evaluation**

The IDEA and state and federal regulations obligate local education agencies (LEAs) to locate, identify, and evaluate children with disabilities who need 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. The statute sets forth two purposes of the required 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)(C)(i).

The obligation to identify students suspected of having a disability is commonly referred to as "Child Find." LEAs are required to fulfill the Child Find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation 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,

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<sup>10</sup> 34 C.F.R. §§ 300.503, 300.507, 300.511.

<sup>11</sup> 22 Pa. Code §§ 15.1 - 15.11.

249 (3d Cir. 2012). However, school districts are not required to identify a disability “at the earliest possible moment” or evaluate “every struggling student.” *Id.* The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction that is designed 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 [], the content, methodology or delivery of instruction.” 34 C.F.R. § 300.39(b)(3). The process of identifying children with disabilities is through evaluation.

An LEA must seek to obtain the consent of the child’s parents for the evaluation. The requisite “consent” requires that the parents be fully advised of all information pertinent to the request, including a description of the activity for which the consent is sought. If the child’s parents do not 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.<sup>12</sup>

## **Independent Educational Evaluation at Public Expense**

Parental rights to an 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 its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is

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<sup>12</sup> 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3).

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 they object to the public evaluation. However, the public agency may not require the parent to explain. It 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).

### **Procedural FAPE**

From a procedural standpoint, the family plays a meaningful role in special education. Schaffer, *supra*, 546 U.S. 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). Procedural deficiencies might warrant a remedy if they resulted in a “significant impediment” to parental participation or a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

### **Section 504 Principles**

Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely because of the disability, be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1.

To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student is otherwise qualified to participate in school activities; (3) that the school district receives federal funds and (4) that the student was excluded from participation and/or denied the benefits of or otherwise subjected to discrimination by the school. *Ridley Sch Dist v. MR and JR ex rel. ER*, 680 F.3d 260, 58 IDELR 281 (3d Cir.

2012): *Gwendolynne S by Judy S and Geoff S v. West Chester Area Sch Dist*, 78 IDELR 125 (ED Penna 2021) A parent need not prove deliberate indifference to establish a violation of Section 504. However, to be awarded compensatory damages, i.e., money damages, by a court for a violation of Section 504, a parent must meet the deliberate indifference standard. *SH by Durell v. Lower Merion Sch Dist*, 729 F.3d 248, 61 IDELR 271 (3d. Cir. 2013)

With respect to discriminatory retaliation, the following principles are applicable. The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising their rights, and (3) that there was a causal connection between the protected activity and the retaliatory action. *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted).

A defendant might defeat the retaliation claim by showing that it would have taken the same action even if the plaintiff had not engaged in the protected activity. *Id.* To establish the requisite causal connection, a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted). The discussion below serves as a final determination of all Section 504, as well as the IDEA issues, in this matter.

## **Parent's Claims**

In the Complaint, the Parent asserted several events during the 2021-2022 school year that support claims related to FAPE denial, discrimination and retaliation. In addition to compensatory education, the Parent sought relief that cannot be granted through this a due process hearing that included the removal of the Principal, former special education supervisor,

and a security guard from their positions, as well as a full investigation of the District's special education services, funding allocation, child find notices and IEPs for the past three years. Given the combative tone of the hearing and the volatile nature of some allegations, it is best to address each of the Parent's claims *ad seriatim*.

First, the Parent contended that the Student was denied a FAPE because the District permitted an uncertified individual to act as special education supervisor. Specifically, the Parent asserted the uncertified special education supervisor created compliance, and child find issues that resulted in the District's failure to hold IEP meetings, issue NOREPs, and provide and follow SDIs and accommodations in the child's IEP. These allegations are unsubstantiated by the evidence adduced at the hearing. The Parent has presented no compelling evidence that the failure of this individual to renew or extend the emergency certification in place affected the delivery of education to the Student. Like many school districts, this District has experienced staffing shortages and turnover. From June 1, 2019, through July 31, 2021, through an emergency permit issued by PDE, this employee served as the District's K-5 Supervisor for Special Education. Consequently, the supervisor worked with an expired certification until mid-way through the 2021-2022 school year.

As more fully discussed below, the Parent failed to present sufficient evidence that programming decisions during the entirety of the school year at issue constituted a denial of FAPE to Student.

Next, the Parent contends that the school district denied the student FAPE by failing to provide sufficient specially designed instruction and accommodations. The central issue appears to revolve around an iPad listed as SDI in the previous district's IEP but removed by the current District, although assistive technology needs were documented.<sup>13</sup> When this Student, [redacted] new to the District, enrolled, a decision was made to implement the former district's IEP, to the extent possible, before holding an IEP meeting in the new District. Although the District did not issue an iPad to the Student during the claim period in question, the Student with the Parent successfully accessed blended instruction using either a District-issued or home personal computer and received special education and related services; all delivered remotely. During in-person instruction, instead of the specifically branded iPad, the District provided the Student with a touch screen tablet or laptop and access to a scribe to assist with classroom writing activities. Concerning the other enumerated SDI and accommodations listed in the Student's IEP, the Parent has failed to establish that the listed interventions were either unimplemented or inappropriate and resulted in a denial of FAPE for the Student. The Student's education programming was appropriately delivered during blended and in-person instruction. Related services were offered and accessed, and the Student made progress.

Next, the Parent contends that the District failed in its child find responsibilities and did not evaluate the Student, although requested. Upon entry into the District, this Student was known to be eligible for special

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<sup>13</sup> An assistive technology device is any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device. 34 CFR. 300.5



education and related services as a child with SLD and a speech-language impairment. Early in the school year, the Parent provided a physician's note to the District that indicated a diagnosis of PDD. The physician referred the Parent to several mental health providers so that services could be put in place in school, if needed, after an assessment. The Parent presented no evidence that a follow-up occurred; however, after receipt of this information, this District sought consent to reevaluate the Student on multiple occasions.

The process for identifying children with disabilities is through evaluation, which has been attempted by the District numerous times. The evidence has established that more than three times, the District provided the Parent with the necessary paperwork to commence a comprehensive re-evaluation of the Student. In some instances, the documentation was not returned. In other instances, it was returned; with requests for specific tests and assessments or an informal meeting, which the District held.<sup>14</sup> Even the speech-language pathologist was prevented from thoroughly assessing the Student, relying instead on a screening tool to update the IEP goals.

The District must evaluate the Student in all areas of suspected disability but is under no mandate to perform specific assessments requested by a Parent. A District must consider Parent input and requests but is under no legal obligation to yield to them. Despite the District's multiple attempts to reevaluate this Student, the Parent failed to provide explicit consent frustrating the attempts of the District to determine if additional special education services were needed. No FAPE denial occurred

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<sup>14</sup> The District could have requested a due process hearing to resolve this issue but was not mandated to do. A school district **may** request a hearing to proceed with an initial evaluation or a reevaluation when a parent fails to respond to the district's proposed evaluation or reevaluation. (emphasis added) 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3); 22 Pa. Code § 16.63.

by the District. Because no evaluation occurred, the request for an IEE is denied. After the due process hearing concluded, the Parent withdrew the Student from the District. If re-enrolled, the District will be ordered to issue a PWN to obtain consent for a reevaluation. If parental consent is not obtained within thirty days of issuance of the PWN, the District will be ordered to file a Complaint and request a due process hearing.

Next, the Parent has failed to establish that District denied Student a FAPE by failing to schedule IEP meetings when requested. On the contrary, during the 2021-2022 school year, multiple meetings, including those to address IEP concerns, occurred. In addition to meetings, phone calls, and numerous emails between the District and the Parent, the Supervisor of Special Education met with the Parent on five occasions after the Christmas break. The meetings may not have resulted in the outcome sought by the Parent; however, the District was responsive and addressed the Parent's emails, phone calls, and meeting requests. The Parent was given ample opportunity to participate meaningfully in the Student's education, and no FAPE denial occurred.

Next, the Parent has failed to establish that the Student's placement was improperly changed following what the Complaint has characterized as an unlawful restraint. The February incident when Student ran from the classroom, wielded a bulletin board tack, removed by school staff to prevent injury, was thoroughly and, if not exhaustively, explored by nearly every witness. The hearing record indicated that the District's actions were proper. The Parent failed to introduce preponderant evidence that the incident resulted in disciplinary action or exclusion from the educational setting. After the incident in February, the Parent, after notifying Child Protective Services, chose to keep the Student home, where blended education resumed. In

March, CPS determined the child abuse allegation made by the Parent was unfounded. Shortly after, the Student resumed in-person instruction at the elementary school.

The Parent's allegations that the District engaged in discrimination and retaliation are also unsubstantiated by the evidence in this case. In the due process Complaint and through questions asked of witnesses, the Parent inferred that the District discriminated against the Student and retaliated against the family after the demotion of the former special education supervisor and the Parent's participation in a school board meeting. According to the Parent, these discriminatory and retaliatory actions occurred through the placement of the Student in the calm room for hours a day and the intentional transfer of a controversial security guard to the child's elementary school.

The District maintained the calm room as a measure to soothe any child, not only special education students, in the elementary school that needed a break from instruction or additional sensory input. The Parent presented no evidence that Student was excluded from participation, denied the benefits of the program or subjected to discrimination by the school. Except for a few weeks from December to February, the Student received blended education based in the home. While attending in person, the calm room was used infrequently and usually voluntarily. The Parent has presented no preponderant evidence that the clam room was used as a disciplinary measure or that Student was placed in that setting for educational services.

Last, the Parent contended the District retaliated against the family after the Parent filed a report and commented during a school board meeting about a District security guard that appeared on social media dressed in Nazi

regalia. The Parent appears to contend that the District transferred the controversial guard to the Student's elementary school and targeted the Student in retaliation for the activities undertaken by the Parent. No matter how reprehensible the conduct of the security officer is viewed or the belief of the offered explanations for the costuming, the Parent has presented no preponderant evidence that the District retaliated against the Student or family. Neither Parent testified nor was any preponderant evidence introduced to support the allegations of protected activity, an adverse action, the District's awareness, and the (nexus) between the protected activity and any adverse action. The guard was hired ostensibly to address or prevent safety concerns within the District, and his interaction with the Student and family was minimal, infrequent and not retaliatory.

For the foregoing reasons, the claims of the Parent are denied, and no relief is due.

## **ORDER**

**AND NOW**, 12<sup>th</sup> day of September 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

If the Student re-enrolls in the District, the District is ordered to issue a PWN to the Parent to obtain consent to conduct a comprehensive educational evaluation of the Student. If the Parent refuses to consent or fails to return the PWN within fifteen days of its issuance, the District shall request a due process hearing pursuant to the override procedures as outlined in 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3); 22 Pa. Code § 16.63.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

*Joy Waters Fleming, Esquire*

Joy Waters Fleming, Esquire  
Special Education Hearing Officer

September 12, 2022