

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

21884-18-19

Child's Name

K.B.

Date of Birth

Redacted

Parents

Redacted

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Hearing Officer

Cathy A. Skidmore, Esquire

Date of Decision

02/27/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a (redacted) student residing in the Avon Grove School District (District) who attends a private school at the Parents' election. In the spring of 2019, after disagreements between the parties, 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)² and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

Specifically, the Parents claimed that the District failed to properly assess and identify Student under the IDEA and/or Section 504 despite Student's disability-related needs and, consequently, did not implement appropriate programming for the prior two school years. They also raised a claim of discrimination under Section 504. As remedies, the Parents demanded compensatory education, reimbursement for certain expenditures, and a prospective offer of programming. The District denied all

¹ 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 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).

² 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).

³ 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).

assertions, maintaining that the educational program was appropriate for Student throughout the time period in question and that no relief was due. Following thorough review of the evidence presented in support of the parties' respective positions,⁴ and for the reasons set forth below, the claims of the Parents will be denied.

Procedural History

- A. The Complaint was originally filed in March 2019 and was closed with a conditional dismissal order in late April 2019 following a reported agreement in principle. The conditional dismissal order was extended in June 2019 for cause. (HO-1 at 2-4.)
- B. The Complaint was reinstated in late August 2019 as permitted by the terms of the conditional dismissal order after the parties reported that the matter had not concluded with a final agreement. (HO-1 at 1.)
- C. The nature of the claims required a written evidentiary ruling in addition to multiple hearing sessions that did not conclude until January 2020. The parties' joint request to file written closing statements was also granted. However, the issues presented did not extend beyond the end of the 2018-19 school year. (N.T. 14-15, 336-37, 1076-77; HO-2; HO-3.)

⁴ 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. HO-3 submitted by the parties via stipulation after the final hearing session is hereby admitted. Citations to duplicative exhibits may not be to all, and references to Parents in the plural will typically be made where it appears that one was acting on behalf of both.

ISSUES

1. Whether the District denied Student a free, appropriate public education in any respect during the 2017-18 and 2018-19 school years, including in failing to identify Student as eligible for special education or disability-related accommodations under the IDEA and/or Section 504;
2. If Student was denied a free, appropriate public education, whether Student should be awarded compensatory education;
3. If Student was denied a free, appropriate public education, whether the Parents are entitled to reimbursement for any privately obtained services for Student;
4. Whether the District should be ordered to develop a program offer for Student;
5. Whether the District engaged in discrimination against Student in violation of Section 504?

FINDINGS OF FACT

1. Student is a (redacted)⁵ student residing in the District who currently attends a private school. (N.T. 31-32, 909.)

⁵ There was a stipulation appearing at N.T. 31 LL 6-16 that is either a typographical error or a misunderstanding by the court reporter of what was said. See, e.g., N.T. 909 at L 13; S-1 at 1. Student's age is not in dispute.

2. Student attended a charter school prior to entry into the District. Student had Section 504 Service Agreements at the charter school during the 2014-15 and 2015-16 school years, with both providing accommodations in the form of preferential seating and checks for understanding for visual-motor weaknesses, extra time to complete assignments, chunking of homework, and support for fine motor skills (reminders for spacing and margins on written assignments) as well as occupational therapy once or twice per month. (N.T. 909; P-1; S-17 at 6.)
3. The District utilizes a Multi-Tiered System of Support (MTSS), a regular education intervention for all students' academic (reading and mathematics) and behavioral performance. There are three levels of MTSS with increasing support beyond the first tier as a student may need determined based on a student's performance on a combination of results: summative assessments (the Pennsylvania System of School Assessment (PSSA)) related to curriculum and school and District-wide performance; diagnostic assessments that are used to guide instruction in the classroom; and classroom assessments (test/quiz scores). The District monitors individual student progress in MTSS and discusses changes to the intervention as needed. (N.T. 42-45, 50-51, 93, 111, 114, 145-46, 180-81, 198-99, 204, 248, 332, 430, 551, 599, 603, 628-29; P-19; P-32; P-33; P-35; P-46; P-48; S-6.)
4. Teachers at the middle school (seventh and eighth grades) hold meetings nearly every day to discuss students of concern. (N.T. 184, 491-93, 547-48, 561, 644, 645, 665.)
5. Student's seventh and eighth grade teachers observed Student to be an overall average student in the District. (N.T. 454-55, 466-67, 474, 488, 495-97, 504, 562, 565, 574-75, 609, 611, 631, 663-64; S-17.)

6. While in the District, Student spent many hours completing homework in the evenings. The home routine was for Student to complete homework assignments, then the Parents or a tutor would check them for accuracy, then Student was required to redo portions of the assignments that were incorrect either alone or with adult help. The Parents at times communicated concerns about Student's difficulty completing homework and how it was counted for grades with District staff. Homework is a small factor in grades in the District. (N.T. 256, 949, 955-57, 974, 1001-03; P-11; P-15; P-21.)

2017-18 School Year (Seventh Grade)

7. Student entered the District in the fall of 2017. A meeting convened to discuss concerns of the Parents and to develop a new Section 504 Service Agreement. The resulting Agreement provided the same occupational therapy services and accommodations as those at the charter school, except that extra time for assignments was limited to one class period. The Parents approved this Service Agreement. (P-3 at 1; P-4; P-5; S-3; S-4; S-5.)
8. Student did not qualify for a higher level of MTSS in reading or mathematics in seventh grade, although Student's prior year PSSA mathematics score met one of the three criteria. (S-6.)
9. In October 2017, the Parents requested a special education evaluation of Student as well as an occupational therapy evaluation. The District through a Notice of Recommended Educational Placement (NOREP) denied the special education evaluation on the basis of Student's successful performance in the District that included classroom observation; however, it did agree to an occupational therapy evaluation. (P-6; P-7; S-7; S-8.)

10. Although the Parents did not approve the denial of a special education evaluation, they did not seek formal dispute resolution at that time. (N.T. 1013-14; P-8; S-8.)
11. The District convened another meeting with the Parents in November 2017, at which they conveyed concerns with the amount of time Student spent completing homework. (N.T. 150; P-10; P-13.)
12. The Parents renewed their request for a special education evaluation in November 2017, indicating their concerns with Student's ability to maintain focus and distractibility, as well as a comparison of homework and assessment scores. The District considered additional information with Student by then attending its middle school for another month including new observations and core subject grades of B- or better, as well as a Qualitative Reading Inventory reflecting grade-appropriate reading fluency and comprehension. The District found no basis for an evaluation due to Student's performance in accessing the regular education curriculum and the absence of any teacher concerns. A new NOREP issued at that time refusing an evaluation. (P-13 at 4-5; P-14; S-9.)
13. The occupational therapy evaluation was completed in December 2017, with Student demonstrating age-appropriate range of motion, fine motor skills, and vision/visual motor skills for the school environment with no attention or sensory processing needs exhibited. The occupational therapist recommended discontinuation of those services, and the District notified the Parents on February 1, 2018 that it would do so if they took no action. Services were then discontinued. (N.T. 84-85; HO-3; S-11; S-12.)

14. The Parents wrote to the District in early March 2018 expressing that they disagreed with the decision to discontinue the cessation of services; they also reiterated their concerns with Student's school performance. (P-18.)
15. The Parents reported during the 2017-2018 school year that Student had one or more tutors at home. (N.T. 57-58; P-10.)
16. Student's final grades at the end of the 2017-18 school year were mostly in the A and B range, with the exception of Science (C-) and a special class. (S-21 at 3-4.)
17. Another meeting convened in June 2018 to discuss the Parents' concerns, which at that time included Student's social and behavioral functioning in addition to school performance. The District agreed to conduct an evaluation after that meeting, which occurred after the end of the school year, to begin over the summer. The Parents provided consent for the evaluation. (N.T. 116-19, 356, 358, 406, 964-65; P-21; P-25; P-26; P-28; P-30; S-14; S-22; S-24.)
18. An evaluation of Student's central auditory processing conducted in the summer of 2018 by the local Intermediate Unit did not reflect any deficits. (S-15.)

2018-19 School Year (Eighth Grade)

19. Student did not qualify for a higher level of MTSS in reading or mathematics in eighth grade, although Student's scores on diagnostic assessments were below expectations in the spring in both subjects. (S-13.)
20. Student had several sessions of reading tutoring over approximately four weeks in the fall of 2018. (N.T. 801-02, 813, 971.)

21. Student had a number of weekly private sessions with a speech/language pathologist beginning in the fall of 2018, which usually included completing homework. Student was not receptive to those sessions. (N.T. 843-45, 847-48, 861.)

Evaluation Report Fall 2018

22. An Evaluation Report (ER) issued on October 2018. (S-17.)
23. Parent input into the ER indicated concerns with Student's ability to process academic materials, retain learned information, and master skills; they were also concerned with Student's scores on diagnostic assessments as "just under" expectations (emphasis in original) and not attaining A and B grades, in addition to mentions of Student's rigid hand and arm movements when frustrated and early history of visual processing difficulties. (S-17 at 2-3.)
24. Multiple teachers from both seventh and eighth grades provided input into the ER through an electronic form that included options for identifying a student's course-specific skills, performance in relation to grade level, behavior, and need for accommodations or modifications. There is also an area where a teacher can but is not required to provide a narrative. No teacher reported a need for accommodations or modifications, or concerns with Student's performance or behavior.⁶ (N.T. 241-42, 479, 579, 583, 636-37, 639; S-17 at 3-5.)

⁶ It is evident from a review of S-17 at 3-5 that no teacher narrative text was made part of the ER. However, this hearing officer cannot accept the suggestion that the use of particular fonts or formatting in the ER renders its content unreliable or suspect in any manner, nor is such an inference drawn from the breadth of the ER.

25. Cognitive assessments for the ER (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) and the Reynolds Intellectual Assessment Scales – Second Edition) yielded very similar scores in the average range across Indices and subtests. Student’s Full Scale IQ (95 on the WISC-V) was determined to be the best estimate of cognitive ability, with evenly developed verbal and nonverbal ability reported. These scores did not reveal any executive functioning deficits. (N.T. 285-86; S-17 at 10-14.)
26. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT III) and the Kaufman Test of Educational Achievement – Third Edition) for the ER resulted in all average-range scores across the Reading Writing, Mathematics, and Oral Language Composites, as well as the majority of subtests with the exception of an above average subtest score on a component of listening comprehension. (S-17 at 16-19.)
27. On the Gray Oral Reading Tests – Fifth Edition for the ER, Student scored in the average range for accuracy, rate, fluency, and comprehension. (S-17 at 19-20.)
28. Because of the Parents’ concerns with Student’s difficulty with processing information, the District school psychologist administered the Test of Visual Processing. The results of that instrument reflected that Student had average skills in both visual and auditory processing; and, consistent with the cognitive assessments, there were no working memory deficits. (N.T. 264, 279-80, 287-88; S-17 at 12-15.)
29. The District school psychologist also administered portions of the NEPSY-II in order to assess attention, executive functioning, and social perception. No deficits were revealed by Student’s performance on this instrument. (S-17 at 15-16.)

30. The Behavior Assessment System for Children – Third Edition (BASC-3) rating scales were completed by the Parents, four teachers, and Student for the ER. One or both Parents indicated at-risk concerns with hyperactivity, anxiety, atypicality, withdrawal, attention problems, developmental social disorders, executive functioning, and resiliency; as well as adaptive functioning, adaptability, leadership, and functional communication. None of the teachers’ or Student’s ratings reflected concerns on the BASC-3. (S-17 at 20-33.)
31. The Parents and Student also completed the Multidimensional Anxiety Scale for Children – Second Edition for the ER. The Parents’ results were in the slightly elevated or elevated range across many of the scales reflecting a high probability of an anxiety disorder, but Student’s results were all in the average range. There is no teacher form for this instrument. (S-17 at 33-37.)
32. The Parents and four teachers completed the Gilliam Autism Rating Scale – Third Edition for the ER. The results of both Parents were in the probable range for Autism Spectrum Disorder, in contrast to the teachers whose results were all in the unlikely range. However, none of the ratings on the Gilliam Asperger’s Disorder Scale showed a probability of Autism. On the Social Responsiveness Scale – Second Edition, both Parents indicated mild concerns but none of the teachers did. No rater indicated concerns on the Social Skills Improvement System with the exception of engagement (one of the Parents). (S-17 at 37-47.)
33. Speech/language assessment for the ER included a variety of measures of receptive and expressive language, pragmatic language, sound production, and auditory processing, revealing no skill deficits. (S-17 at 50-51.)

34. An occupational therapy evaluation conducted as part of the ER reflected no needs in that area. (S-16; S-17 at 52.)
35. A behavior specialist conducted an observation of Student for the ER and did not conclude that Student exhibited behavioral needs. (S-17 at 56-57.)
36. The ER determined that Student did not have a disability. A meeting did convene to review the ER, and a NOREP issued for regular education that was not returned by the Parents. (N.T. 305; S-17; S-18.)

Independent Educational Evaluation

37. The Parents retained a private psychologist to conduct an IEE in the summer of 2018. (N.T. 966-67; S-19.)
38. The private psychologist did not observe Student at school for the IEE or speak with any District professionals beyond confirming the assessments it was using for the ER. (N.T. 699-700, 704-05; S-19.)
39. Cognitive assessment for the IEE (Wechsler Abbreviated Scale of Intelligence) yielded an overall low average range score but was interpreted with caution because of very poor performance on a block design subtest. (S-19 at 5-6)
40. Assessment of Student's learning and memory for the IEE yielded somewhat variable but overall average or expected results. (S-19 at 7-8, 17.)

41. Student's academic achievement was assessed for the IEE (Woodcock-Johnson Tests of Achievement – Fourth Edition), yielding average range scores in all areas with the exception of passage comprehension and oral reading (just below the average range). Additional assessments for reading skills suggested some reading accuracy and phonological memory skill deficits. (S-19 at 10-11.)
42. On assessment of auditory and linguistic processing for the IEE, Student earned average range scores despite some noted weaknesses on particular subtests. (S-19 at 6-7.)
43. With respect to attention and executive functioning, Student experienced some difficulty with one instrument for the IEE that indicated impulsivity to the private psychologist.⁷ The Conners-3 rating scales completed by the Parents, Student, three teachers, and a tutor suggested concerns with inattention in the home environment that the private psychologist concluded supported an ADHD classification. Other concerns were not seen by all raters. (S-19 at 9-11.)

⁷ The private psychologist did not include the T-scores in the IEE for that instrument, the Conners' Continuance Performance Test, and was not able to recollect those precise scores at the hearing (N.T. 712).

44. The private psychologist determined that Student had a specific learning disorder in reading according to the DSM-5⁸ because of some weaknesses exhibited in her assessments; she further noted other language-based difficulties that did not meet diagnostic criteria. She also concluded Student met criteria for ADHD, inattentive type based on the Parents' and tutor's observations in the home combined with her observations over her two-day testing administration. (N.T. 721-25; S-19 at 12-13.)
45. Recommendations in the IEE included Section 504 accommodations for attentional difficulties, checks for understanding, support for organizing information and learning to chunk tasks, preview of concepts, repetition, test adaptations, and multisensory learning. She also suggested direct reading instruction. (S-19 at 13-15.)

⁸ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (American Psychiatric Association, 2013).

46. The District issued an addendum to the ER after receipt and review of the IEE. The District school psychologist reviewed additional information such as the MTSS forms and more recent diagnostic assessments (reflecting that Student was meeting expectations) and asked the teachers if they had any behavioral concerns for Student. She also applied the results of the IEE to the District's model for identifying learning disabilities. The content of email exchanges that provided new input from the Parents and the District response was also included. The District school psychologist considered whether Student had a Specific Learning Disability or Other Health Impairment under the IDEA, or needed accommodations at school under Section 504, and concluded Student did not. (N.T. 270-71, 305-09; P-38; P-42; S-20; S-27.)
47. Student's final grades at the end of the 2018-19 school year were mostly in the A and B range, with the exception of Science (C) and Mathematics (C+). (S021 at 3.)
48. At a School Board Committee meeting in February 2019 during the time for public comment, one of the Parents made statements on a variety of topics. When the comment referenced experiences with the Parents' children, a Committee member suggested that it not be addressed at the public meeting, and the Parent ended the commentary. (N.T. 385-86, 388-89, 419-21, 423, 426-27, 979, 981-82, 1054 LL 1-8.)
49. The Parents spoke briefly to the Superintendent after the Board Committee meeting in the hallway outside the Board room. They had also had discussions and meetings with the Superintendent previously over the years, some about Student and some not, but not recently before the Committee meeting. (N.T. 351, 355-56, 358, 361-62, 386, 392-93, 401, 405, 415, 427-28, 437, 975, 977, 984; P-45.)

50. Student enrolled in a private school for the 2019-20 school year.
(N.T. 986.)

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 the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief, in this case the Parents who filed for this administrative hearing. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). 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 given 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 to be testifying credibly, that is, to the best of his or her recollection and without an intention to deceive; however, as discussed more fully below, some of the testimony was more persuasive and accorded more weight.

The record in this case was concise, which this hearing officer appreciates. 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. However, the evidence in this case is at least as

remarkable for what it does not contain as what it does include.⁹ Notably, there is nothing in the record to suggest that any of Student's seventh or eighth grade teachers had any concerns about Student.

The testimony of the private speech/language pathologist, who holds himself out as an "executive function specialist" (P-17) while conceding that there is no recognition or certification of same (N.T. 858-59), was not persuasive in terms of identifying executive functioning deficits for Student, particularly since those were based in part on an incomplete and likely outdated assessment instrument completed by a single rater (N.T. 316-17, 883-86; P-17) whose actual results were not reported. It is also significant that Student was not receptive to sessions with this person. Finally, this speech/language pathologist's conclusions on Student's executive functioning skill deficits were not supported by a host of other assessment information in both the ER and the IEE.

The testimony of the private psychologist who conducted the IEE, while certainly not incredible, was not fully credited with respect to the specific learning disorder and ADHD diagnoses. With respect to the former, she did not explain why she did not consider IDEA criteria (N.T. 724-26). Her conclusion on the latter was based on Student's presentation in the home combined with her limited observations in a testing situation (N.T. 781), rather than a consideration of various settings including the educational environment. Her rationale that the inattentive type of ADHD may be difficult to observe and detect in the school setting (N.T. 779-80) was simply insufficient to overcome the wealth of contrary information reflected by the broad array of assessment tools compiled for the ER that

⁹ Moreover, there is a vast difference between someone doing or not doing something as compared to a witness not having a recollection on whether something was done.

were designed to, among other things, probe for symptoms of ADHD and deficits with organizational skills for purposes of IDEA evaluation and eligibility.

Finally on the topic of weight accorded testimonial evidence, the limited testimony of the private reading tutor that Student might benefit from a regular education response to intervention approach to address weaknesses related to some vowel sounds was much more persuasive than her previous written recommendation for an "intensive" reading program (P-39 at 2), a position from which she expressly retreated at the hearing (N.T. 803, 810, 816-17).

General IDEA Principles: Substantive FAPE

Evaluations, Eligibility, and Child Find

The IDEA and state and federal regulations obligate local educational 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 itself 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 IDEA further defines a "child with a disability" as a child who has been evaluated and identified with one of 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 which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a).

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).

The obligation to identify eligible students 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 such as school districts are required to consider identifying a student as 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).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained, including a variety of assessment tools for gathering relevant data about the child’s functional, developmental, and academic strengths and weaknesses. 34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). 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). Additionally, 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).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). The U.S. Department of Education has explained that, although “[t]he eligibility group should work toward consensus, [] under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability.” 71 Fed. Reg. 46661 (August 14, 2006).

With respect to IDEA eligibility, as is relevant here, a “specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations[.]” 34 C.F.R. § 300.8(c)(10). The determination of the existence of a specific learning disability requires consideration of whether the child is “achiev[ing] adequately for the child's age or to meet State-approved grade-level standards” in areas of reading, language, written expression, and mathematics. 34 C.F.R. § 300.309(a). “Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

is due to chronic or acute health problems ... and [a]dversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9).

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). However, the ability to request an IEE at public expense must ordinarily follow an LEA evaluation, as the Third Circuit recently observed:

Regulatory interpretations by the United States Department of Education (the "DOE") confirm this reading [that an IEE at public expense follows an LEA evaluation]. For example, the DOE explained "[t]he right of a parent to obtain an IEE is triggered if the parent disagrees with a public initiated evaluation." 64 Fed. Reg. 12,608 (Mar. 12, 1999). So "if a parent refuses to consent to a proposed public evaluation in the first place, then an IEE at public expense would not be available since there would be no public evaluation with which the parent can disagree." Id. (emphasis added); see also 71 Fed. Reg. 46,689 (Aug. 14, 2006) ("If a parent disagrees with the results of a completed evaluation ... the parent has a right to an IEE at public expense The parent, however, would not have the right to obtain an IEE at public expense before the public agency completes its evaluation"). Simply stated, only a disputed public evaluation can trigger a right for a publicly funded IEE.

M.S. v. Hillsborough Township Public School District, ___ Fed. App'x ___, 2019 U.S. App. LEXIS 37382 at *4-5, 2019 WL 6817169 (3d Cir. 2019).

Free Appropriate Public Education

The IDEA further mandates that states 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.

An LEA meets the obligation of providing FAPE to IDEA-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).

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).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, 34 C.F.R. §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that

1. He is “disabled” as defined by the Act;
2. He is “otherwise qualified” to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. He was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

By contrast, intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met only by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower*

Merion School District, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

The Parents’ Claims

The first issue is whether the District neglected its obligations under the IDEA in failing to identify Student as eligible for special education. This question merits brief discussion about the Parents’ perception of the purposes and meaning of diagnostic classroom and state-wide assessments. While the results of any particular student’s performance on such assessments is certainly relevant as a piece of data, the District’s use of this information for regular education MTSS decision-making was wholly appropriate and did not establish a failure to suspect a disability for Student.¹⁰ Similarly, their disagreement over the District’s approach to homework completion in calculating grades likewise does not point to an unidentified disability. The Parents’ obvious and genuine desire for Student to be successful academically, while laudable and certainly understandable, did not require the District to take steps to ensure that Student attained a certain grade point average or achieved better marks. Here, Student was earning average or better grades across subject areas during the relevant time period and was successfully accessing the curriculum as expected of and commensurate with other students in the District with nothing more than regular education supports, of which the Parents can rightfully be

¹⁰ As the District observes, the Pennsylvania Department of Education publishes guidelines for identifying learning disabilities, and expressly endorses multiple sources of data even where a student exhibits statewide assessment scores “significantly below proficiency.” [PA Guidelines for Identifying Students with Specific Learning Disabilities \(SLD\)](#) (Pennsylvania Department of Education, August 2008) (<https://www.pattan.net/Publications/PA-Guidelines-for-Identifying-Students-with-Specif/>) (last visited February 26, 2020).

proud. The fact that the Parents regularly spent time with Student on homework assignments and were very involved in Student's education is a testament to them, but does not negate Student's independent, uniformly average performance across standardized measures of academic achievement. The law simply did not demand more of the District in this regard.

The record also does not establish that the District should have suspected that Student had an unidentified disability or evaluated Student sooner than it did. Following the Parents' fall 2017 requests for an evaluation, the District gathered information and refused to evaluate based on Student's documented performance. This hearing officer cannot fault the District for those decisions on this record. The District's ER completed a year later was comprehensive, using variety of assessment tools in gathering relevant information about Student's functional, developmental, and academic strengths and weaknesses. It assessed in all areas related to suspected disability, including each of the Parents' specific concerns, and was more than adequate to provide a basis for determining whether Student had a qualifying disability. The ER as a whole identified no disability with well supported documentation from numerous assessments in addition to observations, a number of different rating scales, and input from a variety of sources. Significantly, Student was not failing to meet grade-level standards in the areas of reading, language, written expression, or mathematics; and, the attentional difficulties reportedly observed in the home setting were not present in or adversely impacting Student's performance at school. Thus, the evidence is preponderant that the criteria for IDEA eligibility as a child with a specific learning disability or other health impairment were not met. And, without a disability, Student also did not require specially designed instruction under the IDEA.

The conclusions of the private evaluator, including the cautious identification of some relative, discrete academic-related skill deficits, do not rise to the level of IDEA eligibility and thus do not contradict the District's conclusions. Her diagnoses were based on the DSM-5 rather than the explicit criteria that the District was required to follow; in addition, most of her recommendations can easily be construed as suggestions for regular education interventions to address relative weaknesses. The District relied on its model for identifying specific learning disabilities under the IDEA, something that the law permitted it to do.¹¹ Moreover, the private evaluator's conclusion that Student presented with ADHD was not supported by the evidence of Student's functioning at school so as to confer a classification of other health impairment. In short, nothing in the IEE can overcome the clear record evidence that Student performed as an average or better than average student, which is what one would expect of Student given Student's abilities.

The same conclusion must be reached under Section 504. Even if one were to accept that Student's attentional difficulties at home could establish a disability, which this hearing officer does not, the evidence is far from preponderant that such substantially limited Student's learning or other major life activity at the time of the ER.

¹¹ 20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.307; 22 Pa. Code § 14.125.

For all of these reasons, all of the Parents' IDEA and Section 504 claims, including their request for prospective programming, must fail under the applicable law.¹² The Parents are free, of course, to consider re-enrollment in the District and seek programming as may then be appropriate. Finally, to the extent that the Parents are seeking reimbursement for the IEE,¹³ the record is clear that they obtained that private evaluation prior to the District's completion of its own ER. Under these circumstances, public funding of an IEE is not appropriate. Moreover, this hearing officer cannot conclude that the District's evaluation was inappropriate in any respect so as to warrant further consideration of reimbursement of the cost of the IEE.

CONCLUSION

The District did not violate any of its obligations under the IDEA or Section 504, and no relief is warranted.

¹² Because Student does not have a disability, the claims with respect to the alleged discrimination by the District need not be addressed. However, by way of dicta, this hearing officer does offer the observation that the Parents' perceptions of the District's reasons for reacting to their public comments at the Board Committee meeting were likely misapprehended by them in part due to a lack of objectivity stemming from an evident distrust of some District representatives. At the time of the meeting, there was undeniably no pending litigation, and it is much more plausible that the Committee responded in a manner directed toward protecting the confidentiality and privacy of one or more of its former or then-current students (see N.T. 1054 at LL 1-8), rather than for other reasons suggested by the Parents. This hearing officer also does not find anything even remotely questionable in the Superintendent's decision not to be involved in some of the routine, Student-specific concerns or situations in this case, particularly given the responsibilities that he undoubtedly has for the entire District.

¹³ Both parties provided arguments on this contention in their closing statements.

ORDER

AND NOW, this 27th day of February 2020, 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.

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.
HEARING OFFICER
Certified Hearing Official
ODR File No. 21884-18-19