

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:

26932-22-23

Child's Name:

A.V.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/05/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.V. (Student),¹ is a mid-elementary school-aged student who previously resided in and attended school in the West Chester Area School District (District). Prior to leaving the District, Student was identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).²

Student first entered the District in [an early elementary grade] during the 2019-20 school year and remained there through the spring of 2021. Student's mother filed a Due Process Complaint against the District in the spring of 2022 under the IDEA and Section 504 of the Rehabilitation Act of 1973, contending that the District failed to comply with its special education obligations to Student.³ That matter proceeded to a hearing before this hearing officer, but was ultimately dismissed after the mother no longer had educational decision-making authority. Student's Father, the Parent who filed the instant Complaint, thereafter elected to pursue the claims. This case then proceeded to an efficient hearing that incorporated the earlier record.⁴

¹ In the interest of confidentiality and privacy, Student's name, gender, and mother 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.

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. The Parent's exhibits were submitted jointly but were marked with a "P" designation. HO-2 is the first transcript in the prior action, and HO-3 is the second transcript in the prior action. The term "Parent" refers to the father, and the term "mother" will be used to differentiate between the two, with occasional references to "Parents" in the plural where applicable to both.

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted in part and denied in part.

ISSUES

1. Whether the District failed to timely identify Student as eligible for special education;
2. Whether the Individualized Education Program (IEP) developed for Student in the spring of 2021 was appropriate for Student's needs;
3. Whether the Parent is able to pursue claims that are beyond the two-year time period in the IDEA; and
4. If the District denied Student a free, appropriate public education, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is mid-elementary school-aged child who resided in the geographic area served by the District and attended school there over the 2019-20 school year and continuing through early May 2021. Student was identified by the District as eligible under the IDEA based on Other Health Impairment and Emotional Disturbance. (HO-2 at 36-37; P-5; P-7.)
2. The Parents shared custody of Student pursuant to a court order beginning in approximately the fall of 2019, and had a similar but informal arrangement before that. (N.T. 12, 22.)

3. The Parent had very limited communication with the District over the 2019-20 and 2020-21 school years, relying on Student's mother to provide information. The mother generally did not report any problems or concerns with Student's education, and the Parent was unaware of any until the spring of 2021. (N.T. 14-15, 18, 39, 43, 46, 59-61.)
4. Student attended a childcare program for some period of time prior to enrollment in school-age programming. (N.T. 23; HO-2 at 46, 96; P-1 at 8.)

2019-20 School Year

5. Student first enrolled in the District in [early elementary] in the fall of 2019. Student's childcare attendance was included on the District's parent survey form and on a questionnaire. (N.T. 70, 73; HO-2 at 48; P-1; P-2.)
6. At the time of registration in the District, the mother observed that, at home, Student exhibited stubbornness, as well as noncompliance with adult directives and difficulty managing emotions. Those concerns were reported on a survey form for the District. (HO-2 at 46-48.)
7. Student's teacher for the 2019-20 school year has the education and qualifications for the position, and had over six years' teaching experience in the fall of 2019. (N.T. 69-70.)
8. The mother did not report to the [redacted] teacher that Student had attended formal preschool. The mother did indicate that the Parent had little interaction with Student at the time. (N.T. 114, 133-34, 142.)
9. The mother asked early in the 2019-20 school year about additional assistance for Student at school, and agreed with the District's

intention to provide services through its Multi-Tiered System of Support (MTSS) process. (HO-2 at 53-54, 61-62.)

10. During the 2019-20 school year, Student was one of approximately twenty-five students in the classroom with one teacher and sometimes a classroom aide. (N.T. 74-75.)
11. All students in the District receive Tier 1 MTSS services. Student was referred for Tier 2 MTSS behavioral interventions in approximately September 2019 followed by Tier 3 support that October. (N.T. 77-79, 93-94, 236-40, 242-43; P-7 at 25-26.)
12. The MTSS classroom interventions addressed the two behaviors that Student exhibited that interfered with Student's learning: transitioning to a non-preferred activity, and making disruptive noises. Student's progress toward those goals was somewhat variable as of early December 2019. (N.T. 118; P-7 at 25-26.)
13. Student did make some progress overall with the Tier 2 and 3 MTSS interventions over the fall of 2019. However, there were a few incidents of a new behavior, and the school's mental health therapist began meeting with Student. (N.T. 90, 112-13, 257-58; P-13 at 8-9, 11-18.)
14. The mother and teacher communicated occasionally, at times with others in the District, over the 2019-20 school year. Those communications essentially involved infrequent behaviors such as Student invading another child's personal space and mild physical aggression, as well as task refusal. (HO-2 at 121-22, 143-44; P-13 at 1-31.)
15. Student's teacher did not have concerns in the 2019-20 school year about Student's academic, social, or behavioral presentation in light of Student's young age and lack of experience with a structured routine.

The teacher believed that providing Student with supports to learn skills such as transitioning between activities was appropriate. (N.T. 75-76, 80-87, 90-91, 106-07, 110, 124, 126.)

16. Student's teacher observed Student to gain appropriate skills over the course of the 2019-20 school year with behaviors diminishing to non-existent by the spring of 2020. (119-20, 126, 139.)
17. Student's 2019-20 report card for the first and second trimesters reflected progress or significant progress toward meeting grade level expectations in reading/language arts and mathematics, with a few areas of proficiency. Behavior expectations were all in the needs improvement to progressing ranges, two of three subjective choices. (P-3 at 1-3.)
18. The District closed its schools in March 2020 due to the pandemic.⁵ After the closure, students were provided access to assignments and convened remote learning sessions. Assignments and remote sessions were kept short for Student's grade level and attendance was not required. (N.T. 96-97, 123.)
19. Student struggled with remote instruction in the spring of 2020, and typically did not attend the sessions with the teacher. (N.T. 121; HO-2 at 67.)
20. MTSS did not continue into remote instruction because the interventions were classroom-based. (N.T. 123, 243-44, 254-55.)

⁵ The closures continued through the end of the 2019-20 school year, and notice is taken of the orders of the Governor of the Commonwealth of Pennsylvania, see <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited December 28, 2022).

2020-21 School Year

21. Student began [redacted] grade at the start of the 2020-21 school year. Student was in a class of no more than twenty-five students. There was also a student teacher in the classroom. (N.T. 150, 180, 190.)
22. Student's teacher for the 2020-21 school year has the education and qualifications for the position, and had over twenty years' teaching experience in the fall of 2020. (N.T. 149-50.)
23. Student continued to receive MTSS interventions in person beginning in October of the 2020-21 school year, with classroom support. (N.T. 158-59, 166-67, 256; P-7 at 29-30.)
24. Shortly after the beginning of the 2020-21 school year, the District provided a hybrid program for its students, wherein students attended school two days per week and were remotely instructed two days per week. Student's class was reduced to twenty students at that time. (N.T. 152-53.)
25. Later in the fall of the 2020-21 school year, the District offered four days per week of in-person instruction for students with that need. Student attended four days each week beginning in mid-December 2020. (N.T. 154, 166.)
26. Student's teacher in the 2020-21 school year did not have academic concerns about Student, but Student did fail to complete assignments when participating remotely and had more difficulty than peers with that format. Student exhibited problematic behaviors in both environments but less so in person. The teacher did not consider Student's behaviors to be atypical of children of Student's age, particularly with the pandemic, and attributed the difficulties with remote instruction to a lack of adult support at home, which children

of that age needed in that format. (N.T. 154-55, 157, 165-66, 189-92; P-7 at 28-29; P-13 at 32-34, 41-42.)

27. The District school psychologist agreed that the pandemic school interruption along with remote instruction impacted Student's performance in the 2019-20 and 2020-21 school years. (N.T. 248-50.)
28. When Student was attending school in person, additional interventions were implemented in the classroom. (N.T. 166-67; P-7 at 29-30.)
29. In late November 2020, the mother notified the District that [Student] had a new ADHD diagnosis. (P-13 at 35.)
30. In early December 2020, the mother requested a special education evaluation. The District responded with a Prior Written Notice (PWN) for consent to conduct the evaluation, to which the mother agreed. (HO-2 at 73-74, 168; P-6; P-13.)
31. Student exhibited progress both academically and behaviorally over the first half of the 2020-21 school year with regular education interventions. However, by the beginning of 2021, as the evaluation was underway, Student's behaviors were noticeably impacting academic progress. (N.T. 181-82, 202-03, 260-61; P-7.)
32. The Evaluation Report (ER) was issued in February 2021. (P-7.)
33. Input into the ER by the mother input was extensive. Areas of strength and weakness were noted, as well as challenging behaviors at home. Specific concerns related to school were for academic performance, attention/focus, impulsivity, managing emotions, and compliance with directives. (P-7 at 2-11.)
34. A summary of a November 2020 psychiatric evaluation was also included in the ER, providing diagnoses of Attention-deficit

Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder, with a rule out of Disruptive Mood Dysregulation Disorder. The psychiatrist recommended therapy and behavioral health services. (P-7 at 11-12.)

35. Teacher input into the ER noted below grade-level expectations because of behaviors, which included mild self-injurious behaviors, licking the desk and eating substances such as grass, and . Needs included frequent redirection, being compliant with directives, preparing for class and tests, and making appropriate transitions between activities. The teacher made some classroom recommendations such as preferential seating, organizational strategies, praise, and individual support. (P-7 at 12-14, 19-20.)
36. Input from the mental health therapist into the ER noted Student's development of coping skills and managing emotions. Additional needs noted were for organizational support and prompts to remain on task, and the therapist recommended a consistent daily routine. (P-7 at 15-16.)
37. The ER included results of benchmark assessments and MTSS services. Student was reportedly slightly below the expected benchmark in early reading skills in September 2020 on one assessment, but overall was not meeting grade level expectations in reading/language arts. Several additional concerning behaviors were noted: distractibility, failing to remain on task, physical aggression (hitting and spitting), screaming and crying, inappropriate physical activity during instruction, exhibiting difficulty with peer relationships, and impeding others' personal space. (P-7 at 21-25, 27-30.)
38. The District school psychologist who conducted the evaluation observed Student in the classroom on multiple occasions that included

both in person and remote instruction. Comprehensive summaries of those observations were included in the ER. (P-7 at 16-20.)

39. Cognitive assessment for the ER (Wechsler Intelligence Scale for Children – Fifth Edition) yielded a Full Scale IQ in the high average range and a General Ability Index score in the very high range. Composite scores were somewhat variable, with Working Memory and Processing Speed relative weaknesses in the low end of the average range. (P-7 at 31-33.)
40. Assessment of academic achievement for the ER (Wechsler Individual Achievement Test – Third Edition) generally reflected average range Composite scores with the exception of the Oral Language Composite (Above Average range). Student exhibited relative strengths on a number of subtests. (P-7 at 33-36.)
41. The mother and the teacher completed rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3). The teacher endorsed clinically significant concerns with anxiety, depression, attention problems, atypicality, adaptability, and study skills; as well as at-risk concerns with hyperactivity, aggression, conduct problems, learning problems, leadership, and functional communication. The Parent endorsed clinically significant concerns with hyperactivity, aggression, and attention problems; and no at-risk concerns. (P-7 at 36-38.)
42. The mother and teacher also completed the Conners-3 rating scales, with both reflecting very elevated concerns in almost all content scale and overall for ADHD. (P-7 at 39-40.)
43. The ER determined that Student was eligible for special education based on Other Health Impairment (for ADHD) and Emotional Disturbance. Recommendations included small group social skills

support, mental health support, frequent checks for understanding, small group instruction for independent work in reading and mathematics, support for attention and focus, verbal praise, organizational assistance, movement breaks and preferential seating. Test and assignment accommodations were also suggested. (P-7 at 45-47.)

44. Both Parents were provided with copies of the ER. (N.T. 18-19, 45
45. The District school psychologist discussed and reviewed the ER with the mother Parent at length. (N.T. 262; HO-2 at 123; P-13 at 57-59.)
46. A Functional Behavior Assessment (FBA) was conducted after the ER was completed. The FBA identified four behaviors of concern: non-compliance, disruptive behavior, crying, and self-injury. Based on informal review and direct observation, the hypothesized functions of the behaviors were determined to be as follows: (a) for noncompliance, to gain access to preferred items or activities; (b) for both noncompliance and disruptive behavior, to gain adult attention; (c) for crying, to delay or avoid a task; and (d) for self-injury, to access sensory input. A number of recommendations were provided in the FBA for antecedent strategies, teaching and reinforcing replacement behaviors, and responding to challenging behaviors. (S-11.)
47. An Individualized Education Program (IEP) was developed for Student following completion of the ER. Identified needs were for coping skills, emotional regulation, problem-solving skills, and improving attention and on-task behavior. (P-9.)
48. Two annual goals in the IEP addressed increasing the use of coping skills and decreasing self-injury to none, both in relation to baselines. Two others addressed non-compliance and on-task behaviors, but the

goal created for each of these was lower than or equivalent to the baseline established in the FBA. (P-9 at 26-29; HO-3 at 229.)

49. A Positive Behavior Support Plan (PBSP) comprised of a number of antecedent strategies, replacement behaviors, and consequences for replacement and problem behavior, was included in the IEP. All of those were drawn from the FBA based on Student's needs and the hypothetical functions of the behaviors. Antecedent strategies included support for transitions with a visual schedule, offering choices, clear and consistent routines and expectations, movement breaks, prompts and cues, practice with coping strategies, and assignment accommodations. Explicit teaching of replacement behavior was also part of the PSBP. Consequences of both replacement behavior (a reward system, specific praise) and problem behavior (re-presenting demands, prompts and redirection, use of time to calm, removal of dangerous materials, blocking) were set forth. (P-9 at 30-32.)
50. Program modifications and items of specially designed instruction were for social skills group; small group independent work completion; organizational support; use of prompts and visual cues; daily check-ins morning, midday, and afternoon; checks for understanding; and the PBSP; as well as preferential seating and test and assignment accommodations. Weekly mental health services were identified as a related service. (P-9 at 33-37.)
51. The IEP provided for emotional and learning support at an itinerant level, with Student in general education except for social skills group. Student was determined to be eligible for extended school year services. (P-9 at 38-41; P-10.)

52. An IEP meeting convened attended by the mother, who did not raise any concerns about the IEP other than Student's diet. (N.T. 176; HO-2 at 81; HO-3 at 204-05; S-1 at 1.)
53. The mother signed the Notice of Recommended Educational Placement (NOREP) on March 28, 2021 and did not indicate any concerns with the IEP at that time. (HO-3 at 208; S-1 at 10-15.)
54. Student was in the learning support classroom or similar small environment for completing independent work in mathematics and language arts, but not for direct instruction. Student also attended a social skills group. (N.T. 215; HO-3 at 185-89, 200, 222-23.)
55. Student had a daily behavior chart after the IEP was implemented, but progress on goals was not formally gathered because the special education teacher need to get to know Student. (N.T. 205-06; HO-3 at 195-98.)
56. Student's learning support teacher met with the regular education teacher to review Student's PBSP including the behavior chart. (HO-3 at 199, 227-28.)
57. The behavior chart was broken down based on the [redacted] grade schedule. The regular education teacher completed the chart throughout the school day, and sent a copy of the chart to the mother each day. (HO-3 at 213-15; S-3.)
58. After the IEP was implemented, Student checked in with the learning support teacher three times each day: following morning arrival, at mid-day, and just prior to afternoon dismissal. Student and the special education teacher worked on the goals during those times, in which Student and the teacher reviewed expectations and discussed Student's performance in light of those expectations, earning rewards

when expectations were met. Practice and role-modeling were part of these check-ins. (HO-3 at 195-98, 214-15.)

59. The learning support teacher also worked with Student on learning coping skill strategies, as did the social skills teacher and mental health specialist. (HO-3 at 219, 225.)
60. The mother removed Student from the District in May 2021, with Student's last day of attendance May 10, 2021. (HO-2 at 36-37, 92-93; P-3 at 5; P-5 at 2.)
61. Student's 2020-21 report card generally reflected progress or significant progress toward meeting grade level expectations in reading/language arts and mathematics, with a few areas of basic skills or proficiency. Behavior expectations after the first trimester were all in the needs improvement to progressing ranges. (P-3 at 4-6.)
62. The mother filed a due process complaint in January 2022 that was dismissed on July 1, 2022. (HO-1; P-12.)
63. The Parent obtained full legal and physical custody of Student in January 2022, and subsequently filed a new complaint in late August. (N.T. 20; P-14.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, the burden of persuasion in this case must rest with the Parent who filed the instant administrative complaint. 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, who assume the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to testify consistent with their recollections, although there were understandably instances of lapse in memory that did not amount to any intention to mislead. The weight accorded the evidence, however, was not equally placed.

The testimony of Student's teachers was quite compelling in light of their experience with early elementary school students, and their familiarity with Student. The conclusion of teacher during the 2019-20 school year about Student's maturity and lack of structured preschool experience was cogent and quite credible (*e.g.*, N.T. 143). The teacher for the 2020-21 school year and the District school psychologist provided similar, also persuasive, testimony. By contrast, the testimony of Student's mother was rather equivocal as it related to the issues, and lacked persuasive value. For example, she admitted to lack of recall on many events, repeatedly stating that she asked for an evaluation of Student for special education services, but then conceding that she did not actually recall mentioning such an evaluation before December 2020 or even understanding what such a request meant before that time (HO-2 at 53-54, 117). The mother's testimony was therefore of very limited value.

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: Substantive FAPE

The IDEA requires 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. Many years ago, 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 state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students 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 observed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is clearly 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). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). 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 duty to ensure a student's right to FAPE lies with the LEA, and not with parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)(explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]").

Substantive FAPE: Child Find and Evaluation

The IDEA and state and federal regulations further 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 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 obligation to identify students suspected as 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, 249 (3d Cir. 2012). School districts are not, however, required to identify a

disability “at the earliest possible moment” or to evaluate “every struggling student.” *Id.*

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). 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.

Evaluation Requirements

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

- (i) whether the child is a child with a disability; and
- (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). 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). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

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).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *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 may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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); 34 C.F.R. § 104.33(a). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA and shall be addressed together where they overlap. *Ridgewood, supra*, 172 F.3d at 253.

The IDEA Statute of Limitations

The IDEA ensures that parties have the opportunity to “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). However, a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C. § 1415(f)(3)(C); *see also* 34 C.F.R. § 300.511(e). In this context, the precise language of the IDEA (quoted above at 20 U.S.C. § 1415(f)(3)(C)) references the time period following the “action” on which a due process complaint is based.

“The IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint.” *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, * 28-29, 2008 WL 2798306 (W.D. Pa. July 18, 2008). In examining such a question, the Third Circuit in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 614 (3d Cir. 2015), instructs that the focus is on the accrual of a cause of action “once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation.” 802 F.3d at 614.

The Parent’s Claims

The first issue to be decided is whether any of the Parent’s claims are barred by the statute of limitations. The evidence here, however, is more than preponderant that the Parent did not know, and had no reason to know or even suspect, that there was a basis for a complaint against the District. Rather, the Parent’s involvement with Student’s education prior to the spring of 2021 is tangential at best, but this fact does not mean that the Parent lacked reasonable diligence with the mother taking on this role. All of the Parent’s claims in this case must be deemed to be timely filed.

The next issue is whether the District violated its child find obligation to Student in failing to conduct an evaluation prior to the request made in December 2020. The unique circumstances presented here do not support such a conclusion.

Student enrolled in the District in the fall of 2019 and was a very young age for school-age programming; and, the experienced teacher for the 2019-20 school year concluded that Student had not been provided with any structured preschool programming prior to enrollment. The teacher recognized that these two factors combined to impact Student’s presentation at the start of the school year, and this convincing testimony and opinion

point directly away from, and not toward, a child find violation. Student began MTSS interventions and, despite some early variability in goal progress, Student did respond well to those services and problematic behavior effectively diminished by March of 2020. The pandemic, of course, proved to be a major obstacle that impacted all students in the District as its staff worked to continue providing educational services during the mandatory closures but without requiring remote attendance. The District did not gain any knowledge in the spring of 2020 after the closures that should have led to an evaluation, nor can it be charged with such knowledge, in this case.

The Parent describes Student's problematic behavior over the 2019-20 school year as much more frequent than the record supports. Although some of the behaviors appear to be rather unusual, the majority were rather isolated rather than recurring or increasingly concerning. And, it must be recalled, Student was in the first year of formal school services. As the District points out, and consistent with *D.K., supra*, "The School District was not required to jump to the conclusion that [a student's] misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years," particularly where there is credible witness testimony that Student's behaviors were not unusual for that age and did not inhibit Student's academic growth. 696 F.3d at 251 (citations omitted). It is true that the Office for Special Education Programs has cautioned that a special education evaluation may not be delayed by implementation of a response to intervention system, such as MTSS.⁶ Here, however, Student was making progress over the 2019-20 school year with regular education interventions into the spring of 2020.

⁶ Memorandum, State Directors of Special Education, 56 IDELR 50 (OSEP 2011).

Student returned to remote then hybrid instruction in the fall of 2020 with MTSS services resuming. The teacher for the 2020-21 school year and the District school psychologist both concluded that Student's young age for the grade together with the pandemic interruptions and difficulties with remote instruction were considerations in evaluating Student's performance, particularly with MTSS interrupted in the previous spring. This testimony was persuasive on this point. It was also not until late November 2020 that the District was provided with the psychiatric diagnoses. This hearing officer concludes that, as of early December 2020, the District had no reason to suspect that Student had a disability requiring a special education evaluation, and it was at that time the mother expressly requested one. Had she not and the District not acted, this issue might be resolved differently. Under these facts, however, the Parent has not established a denial of FAPE on the child find claim.

It is, however, also clear that, once school resumed in the fall of 2020 and Student's lack of assignment completion and attendance for remote instruction was very apparent, the District should have recognized a need for additional support. The Parent correctly observes that the responsibility for FAPE belongs to the LEA, not a parent. However, the teacher noted that children of that age required some adult supervision in order to be successful remotely. In addition, Student was presenting in the school environment with fewer struggles behaviorally and academically, with MTSS services continuing to provide support. These facts do not establish that a disability-related need for support in the home during remote instruction should have been suspected before early December 2020.

The Parent also points to the input of the teacher for the 2020-21 school year as providing evidence of a disability prior to the ER's issuance. However, the record establishes that it was soon after the start of the calendar year 2021 that Student's academic performance was impacted by

behaviors. The input of this teacher is entirely consistent with the overall record evidence as to Student's presentation in the spring of 2021, but does not necessarily or preponderantly relate back to the fall of 2020 or earlier.

Having found no denial of FAPE regarding child find, the next issue is whether the IEP developed and implemented in the spring of 2021 was appropriate. The Parent does not directly challenge the District's evaluation, but review of the ER reflects utilization of a variety of assessment tools, strategies, and instruments for gathering relevant functional, developmental, and academic information about Student in all areas of suspected disability. The ER incorporated parental input as well as information from the teacher and psychiatric diagnoses. The District school psychologist conducted several classroom observations of Student, and administered cognitive and achievement testing in addition to obtaining rating scales for behavior and ADHD. The ER determined eligibility and made programming recommendations to address needs, and provided the information necessary to develop an IEP. The FBA that followed similarly provided useful data for programming decisions.

The IEP itself addressed all needs identified through the ER and FBA processes, with annual goals and specially designed instruction. Student's behaviors were a major target of the IEP. However, two of those goals are somewhat puzzling in that the expectation is no higher than the baseline, suggesting that they were not at all ambitious; and, there was no data taken for progress monitoring in order to assess whether Student's behavioral skills for those two goals were improving. Although the mother removed Student from the District at a time when progress monitoring data could still have been taken through the end of the school year, these two goals did not expect any growth to achieve mastery and are therefore inappropriate. The general reports of progress over the spring of 2021 cannot substitute for the objective data monitoring goals that the IDEA requires. Furthermore, even

if the District had an opportunity to review Student's performance and consider goal and other IEP revisions later in the spring of 2021, an absence of a way to determine any progress on them is more than a minor procedural flaw, and amounts to a substantive denial of FAPE.

In all other respects, however, the IEP is directly responsive to the needs identified based on information known, and included all of the recommendations in the ER and FBA. There is also no assertion, nor evidence, that the District missed any IDEA timelines. The Parent has not otherwise established any denial of FAPE in the development or implementation of Student's IEP.

The substantive denial of FAPE regarding the two goals discussed above merit an award of compensatory education. Student attended school for approximately six weeks between the signed NOREP and the last day attended in May 2021. Student's compliant and on-task behaviors in relation to the goals cannot be assessed, and there is no objective data to inform this award. Because these two specific behaviors almost certainly impacted Student's performance each and every school day to some extent, but balancing the flaw with the short time period that Student attended school after IEP implementation without an opportunity for review and potential rectification, the award must be modest. Student shall be awarded thirty minutes per day of compensatory education for each day that school was in session during that period (from March 28, 2021 through May 10, 2021).

This award is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs as determined by a qualified professional. The compensatory

education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress if Student re-enrolls. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twelve (12). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSIONS OF LAW

1. The Parent's claims are not barred by the statute of limitations.
2. The District did not violate its child find obligation.
3. The District's IEP in the spring of 2021 contained substantive flaws with respect to two goals but was otherwise appropriate.
4. Student is entitled to compensatory education.

ORDER

AND NOW, this 5th day of January, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate its child find obligation to Student.
2. The District's spring 2021 IEP was procedurally and substantively inappropriate in certain respects but otherwise was appropriate.
3. The Student is entitled to thirty minutes per day of compensatory education for each day that school was in session from March 28, 2021 through May 10, 2021 in order to remedy the denial of FAPE. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 26932-22-23