

*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:**

24742-20-21

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

B.S-M.

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

[redacted]

#### **Parent:**

[redacted]

#### **Counsel for Parent:**

Michael J. Connolly, Esquire  
McAndrews, Mehalick, Connolly, Hulse, Ryan and Marone P.C.  
30 Cassatt Avenue  
Berwyn, PA 19312

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

Upper Darby School District  
4611 Bond Avenue  
Drexel Hill, PA 19026

#### **Counsel for LEA:**

Michelle Mintz, Esquire  
Fox, Rothschild LLP  
10 Sentry Parkway, Suite 200  
P.O. Box 3001  
Blue Bell, PA 19422-3001

#### **Hearing Officer:**

Cheryl Cutrona, J.D.

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

August 27, 2021

## **Introduction and Procedural History**

The Student,<sup>1</sup> [an upper elementary aged student] residing in the Upper Darby School District (hereinafter "District"), has attended school in the District since Kindergarten. The Student received special education services for a Speech or Language therapy until [Student] exited special education services after achieving the Individualized Education Plan (IEP) goals. The Parent is seeking special education services under the Specific Learning Disability category or, in the alternative, an appropriate Section 504 Plan.

On March 31, 2021, the Parent filed a due process complaint against the District contending that the Student has been denied a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")<sup>2</sup>, Section 504 of the Rehabilitation Act of 1973 ("Section 504")<sup>3</sup>, and their corresponding regulations of the Pennsylvania Public School Code.

The case proceeded to a closed, multi-session, due process hearing convening virtually due to the COVID-19 pandemic. The Parent sought to establish that the District failed its Child Find obligations by not timely and appropriately evaluating the Student under both IDEA and Section 504, incorrectly determined that the Student was not eligible under IDEA thereby failing to provide the Student with an appropriate program and placement

---

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

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

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

under IDEA, and failed to develop an appropriate Section 504 Plan despite finding the Student eligible, years later, under Section 504. The District maintained that it timely met its Child Find obligations and that its educational programming was appropriate as offered, and that no remedy is due.

For the reasons set forth below, following a review of the record as a whole, the Parent's claims are denied in part and sustained in part.

### **Issues**

1. Did the District violate its Child Find Obligations under both IDEA and Section 504 by not timely evaluating and identifying the Student as eligible for special education?
2. Did the District inappropriately fail to identify the Student as eligible under the IDEA classifications of Specific Learning Disability (SLD) or Emotional Disturbance (ED) resulting in a denial of FAPE?
3. Is the Section 504 Plan offered by the District appropriate?
4. If not, is the Student entitled to compensatory education from March 31, 2019 through the present and until such time as an appropriate IEP or, in the alternative, an appropriate Section 504 Plan is developed?

### **Findings of Fact**

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

1. The Student, [redacted], has attended school in the District since Kindergarten during the 2016-2017 school year (N.T. at 31).<sup>4</sup> The Parent requested that the District conduct a full psychoeducational evaluation of the Student, including a speech and language evaluation and testing for any learning differences. The District sent the Parent a Permission to Evaluate (PTE) on February 3, 2017 indicating that it would conduct a Speech and Language Evaluation and denying the request for a full psychoeducational evaluation based on the Student's satisfactory academic records, classroom performance, and DIBELS (Dynamic Indicators of Basic Early Literacy Skills) scores. The Parent consented to the Speech and Language evaluation (P-1; S-1).
2. The April 17, 2017 Evaluation Report (ER) concluded that the Student was eligible for specially designed instruction (SDI) under the IDEA disability category of Speech or Language Impairment (S-2 at 10). An Individualized Education Plan (IEP) was developed and the Student received speech and language therapy once a week for 30 minutes (P-3 at 27) to address articulation needs. Speech and language therapy continued through the Student's first grade school year and most of second grade (P-4 IEP).
3. On February 18, 2019, the Student was evaluated by a behavioral health provider following a referral from the family physician due to suicidal ideation expressed by the Student during an annual checkup (P-10 at 3). The Student received a medical diagnosis of "Other Specified Depressive Disorder." The Student participated in about three months of therapy before it was discontinued on July 16, 2019, at the family's request, due to scheduling conflicts between the Student's extracurricular activities

---

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

and the therapist's limited availability (P-16 at 2; N.T. at 51; 57-58). The Parent sought a different service provider and the Student was put on a waiting list to receive therapy from another behavioral health service approved by their medical insurance provider (N.T. at 58).

4. A speech and language reevaluation was conducted in the Spring of 2019 when the Student mastered the IEP goals. The March 19, 2019 Reevaluation Report (RR) (P-5; S-19) concluded that the Student achieved the IEP goals with minimal or no clinician support (P-5 at 10), and was no longer demonstrating a speech or language impairment (P-5 at 12). The reevaluation team recommended that the Student exit special education and the Parent approved the recommendation/action (P-5 at 23).
5. As part of the March 29, 2019 RR, the Mother's input form noted "reading, art and math" as the Student's strengths. The Father noted "reading, writing and art" as strengths, and "mathematics" as a need. Both Parents noted the Student's enjoyment of [redacted] and other extracurricular activities (S-19 at 1). Outside of being concerned that the Student was switching letters (N.T. at 80), it appears as though the Parents' concerns were not brought to the District's attention until third grade. The Parent is requesting compensatory education from as far back as March 31, 2019.
6. At the Parent's request, in October 2020, a community-based program conducted a Comprehensive Child Biopsychosocial Evaluation (P-7) of the Student which resulted in a diagnosis of "Disruptive Mood Dysregulation Disorder" (P-6 at 2; P-7 at 6). An Intensive Behavioral Health Written Order Letter, dated October 5, 2020, recommended 10 hours of mobile therapy monthly (S-26 at 4; P-6 at 5). The Student resumed weekly mobile therapy in November 2020 (N.T. at 91).

7. In the Fall of 2020, the Parent asked the District for a Section 504 Plan for the Student based on social and emotional concerns. Following the request, the District agreed to conduct a comprehensive special education evaluation (P-9). The Evaluation assessed the Student's cognitive, academic and social-emotional functioning to determine the Student's strengths and needs, and eligibility requirements for special education and related services.
8. The December 2020 Evaluation Report (ER) cognitive assessment results show that the Student functions in the Low Average range as compared to other children of the same age, while demonstrating a strength in speed processing tasks (P-10 at 25; S-33 at 2). Academically, the Student's reading ability performance was Average. The assessment highlighted weaknesses in math problem-solving as compared to the Student's third-grade chapter test results which, with the exception of one chapter test, fell in the Proficient and Advanced range (P-10 at 25; P-16 at 3; S-33 at 2). The District School Psychologist (DSP), who is also a Board Certified Behavior Analyst (BCBA), concluded that the Student's performance is commensurate with the Student's ability. While there is some test scatter, there is no discrepancy between ability and performance. The SDP concluded that the student is not eligible for an IEP based on the Specific Learning Disability (SLD) (N.T. at 154).
9. The DSP also concluded that the Student is not eligible for an IEP based on the Emotional Disturbance (ED) category (N.T. at 126; 165-166). A BASC was also conducted. The Student self-reported depression and anxiety. The ER postulated that some of the Student's social and emotional struggles could be the result of a recent death in the family; and the impact of the pandemic which has necessitated social isolation and curtailing of the extracurricular activities that serve as an outlet for the Student (P-10 at 25; S-33 at 2).

10. In conclusion, the 2020 ER recommended that the Student's math problem-solving weakness be addressed through the Multi-tiered Support System (MTSS) and referrals to the Student Assistance Program (SAP) (P-10 at 26; S-33 at 2-3) and that a Section 504 Plan (P-10 at 26) be implemented to address the Student's social and emotional needs through accommodations and services. Based on the ER, a Section 504 Plan was developed and revised in January 2021 (P-14; S-39).
11. Socially and emotionally, the Student presents differently at school than at home. The Parents hired a self-employed Certified School Psychologist (CSP) with more than 30 years of experience to independently review the ER and the conclusions reached by the District (P-17; N.T. at 271). The CSP conducted a records review and FaceTime interviews with the Mother and the Student. No additional testing was administered and neither the teachers (N.T. at 333-334) nor the Father were interviewed (N.T. 311-312). The June 8, 2021 CSP Report concluded that the Student meets the requirements for a student with a Specific Learning Disability (SLD) because the Student's very low higher-order reasoning skills impact comprehension skills across the curriculum and result in frustration and confusion due to limited understanding (P-16 at 6; N.T. at 298). The CSP notes that there was "significant" test scatter and that as academic demands have increased, the Student's challenges are more evident (P-16 at 4). The CSP was concerned about "inconsistencies" in the educational history because the test scores went from Basic to Advanced, then "swap up" (N.T. at 283). The CSP concluded the Student's cognitive performance reflected weaknesses in the areas of higher-order thinking that impact higher-order academic skills of comprehension, math concepts, and applications. The CSP postulated that academic frustration may cause the Student to keep behavior in check during the school day, then decompensate at home (P-

16 at 5; N.T. at 285; 286; 307-308). This would explain why the Student presents differently to [Student's] teachers than to the Parent. Although the pandemic may be a contributing factor to the social-emotional struggles, the CSP argues that it should not be the reason the Student does not receive needed special education (P-16 at 5).

12. During her testimony, the CSP reported that the suicidal ideation expressed by the Student was the "biggest red flag," noting that it should be taken seriously (N.T. at 291). However, the CSP did not conclude that the Student was eligible for an IEP under the Emotional Disturbance (ED) category (N.T. at 317), and pointed out that could change if the suicidal ideation and depression do not abate (P-16 at 6). The CSP expressed the belief that the social and emotional issues will abate if the academic needs are addressed (N.T. at 317; 338-339); therefore, she recommended that an updated Functional Behavioral Assessment (FBA) be conducted (N.T. at 318-319) to better understand the Student's emotional behavior.
13. The CSP, who has many years developing and evaluating special education programs, testified that in her opinion the Section 504 Plan was not sufficient and recommended (1) placing the Student in a weekly girls' social skills group to reduce feelings of isolation by seeing other students who feel frustrated, and learning how to develop coping skills (N.T. 327); and (3) including more specificity surrounding the Student's access to the social worker (N.T. 326-327).
14. On November 5, 2019, the third-grade teacher, who spent eleven years as a special education teacher prior to switching to regular education (N.T. at 456), referred the Student to the School Social Worker after the Student had a particularly difficult morning. The teacher decided to submit the referral (P-8) after speaking with the Student's Mother who indicated that the Student had seen the social worker the year before and



the Mother would like that to happen again (N.T. 464-465). The third-grade teacher recalled that, after the initial referral, the Student went to see the social worker at least once a week (N.T. at 482).

15. The School Social Worker recalls only meeting with the Student once during the third grade and that the only concern the Student expressed was in regard to a family situation. At the initial meeting, the social worker gave the Student check-in cards, which could be used by students to see the social worker, as needed, and explained how they work. The social worker does not recall the Student using the check-in cards (N.T. 406-410).
16. When the 504 Plan was implemented, the social worker recalled seeing the Student once a week for a "cross-age peer tutoring program" that was set up as a result of the Section 504 Plan. Basically, the Student was assigned to "tutor" a first-grade student using flash cards. The intent was to build the Student's confidence in math. The social worker recalls no discussions about social and emotional issues (N.T. at 410-413).
17. The Student was referred to the social worker once during fourth grade after the Section 504 Plan started. The concern expressed was again in relation to a family issue. Nothing was discussed concerning academics, relationships or other social and emotional issues. The SST also set up a Google forum for the Student to use to check in with the social worker. (N.T. at 420-422).
18. The Student's fourth grade general education math teacher, who has 24 years' experience as a special education teacher before switching to regular education, testified that the Student demonstrated growth between the Fall and Spring semester MAPs assessment tests (N.T. at 373) and that the Student tested as "Basic" and "Proficient" on the end of the semester Chapter Tests (N.T. at 379). She pointed out that if the Student were struggling or needed to be evaluated for an IEP, she would

have referred the Student to the SST for support (N.T. at 365-366). In her opinion, the Student did not need that.

### **Parent's Claims**

The Parent contends that the District should have conducted a comprehensive psychoeducational evaluation as requested by the Parent during the middle of the Student's Kindergarten year because some DIBELS scores indicated academic performance that was not proficient, below basic, and basic in Reading and Math (P-1 at 6-7). The Parent alleges that in light of the Student's academic, social and emotional struggles throughout first, second and third grades, the District failed to meet its Child Find obligation by not timely and comprehensively evaluating the Student under both IDEA and Section 504 and thereby failing to offer the Student a FAPE. The Parent also argues that the District incorrectly determined that the Student is not eligible for an IEP under the SLD category; and the Section 504 Plan that was ultimately developed was not appropriate to meet the Student's academic, social and emotional needs. Therefore, the Parents seek compensatory education from March 31, 2019 until such time as the District develops and implements an appropriate IEP.

### **District's Claims**

The District argues that it did not violate its Child Find obligation, the Student is not eligible for an IEP, and that it developed a Section 504 Plan which is appropriate based on the results of a comprehensive evaluation. Therefore, the District claims that the Student is not entitled to compensatory education.

## **Discussion and Conclusions of Law**

### **Legal Principles**

#### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. 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).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

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

In the present matter, the burden of persuasion rests on the Parent who filed the complaint that initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipose," the Parent cannot prevail.

In this case, the Parents did not meet their burden of persuasion by a preponderance of the evidence in regard to the Student's eligibility for an

IEP under the category of SLD. However, it did meet the burden of proving that the Section 504 Plan is not appropriate.

## **Credibility Determinations**

Special education hearing officers, in the role of fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This Hearing Officer found each of the witnesses to be generally credible, testifying to the best of their ability and recollection concerning facts necessary to resolve the issues presented. Any conflicting testimony between the witnesses can be attributed to poor recall and differing perspectives.

## **FAPE: Child Find Requirements**

The IDEA and state and federal regulations obligate school districts 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.” Local Educational Agencies (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.” *Id.* (citation omitted). However, when a parent requests an evaluation, the LEA must respond with a Permission to Evaluate form within ten calendar days. 22 Pa. Code § 14.123(c).

In this case, when the Parent requested an evaluation during the Student’s Kindergarten year, the District responded by issuing a PTE, evaluating the Student’s speech and language needs and offering an IEP to address those needs. Based on the Student’s educational records, the District determined that, at that time, a full psychoeducational evaluation was not necessary. Four years later it is difficult to refute the soundness of that conclusion in light of the fact that when the District did conduct a full comprehensive evaluation in 2020, the Student was not found to be eligible for an IEP under the IDEA category of SLD. Therefore, the Parents failed to establish that the District violated its child find obligation.

## **Evaluation**

In September 2020, the Parent requested the District to conduct a comprehensive psychoeducational evaluation based on the Student’s social and emotional challenges. Shortly thereafter, the Student received a medical diagnosis of “Disruptive Mood Dysregulation Disorder” (P-6 at 2; P-7 at 6). Based on the Student’s social and emotional history, the District conducted a full assessment.

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).

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).

### **Eligibility under IDEA**

The IDEA requires the provision of 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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a

child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D)

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

The Parent argues that the Student meets both prongs of the eligibility requirements. The District disagrees. The specific IDEA classifications looked at were ED and SLD.

### **Emotional Disturbance (ED)**

The IDEA defines Emotional Disturbance (ED) as “a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.” 34 C.F.R. 300.8(c)4(i).

Despite the Student’s behavioral health diagnoses of “depression” and “disruptive mood dysregulation disorder,” both the SDP and the CSP concluded that the Student was not eligible for an IEP under the Emotional Disturbance (ED) category at this time (N.T. at 165-166; 317). This appears to be based on the facts that the emotional dysregulation is not pervasive, particularly in the school setting, and the Student forms satisfactory relationships with teachers and peers. The experts do, however, hold divergent perspectives regarding the Student’s eligibility under the SLD category.

### **Specific Learning Disability (“SLD”)**

The Parents argue that the Student meets the requirements of the IDEA SLD classification and is, therefore, eligible for an IEP. The District disagrees.



IDEA defines SLD as “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, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 *C.F.R.* §300.8(c)(10).

The criteria for determining the presence of an SLD is as follows: “The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:

- i. Oral expression.
- ii. Listening comprehension.
- iii. Written expression.
- iv. Basic reading skill.
- v. Reading fluency skills.
- vi. Reading comprehension.
- vii. Mathematics calculation.
- viii. Mathematics problem solving.” 34 *C.F.R.* §300.309(a)(1).

### **Specially Designed Instruction (“SDI”)**

IDEA defines SDI as “(3) 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)

Both presented credible testimony, yet came to different conclusions after evaluating the Student's educational record. While the CSP testified that she thought the District's evaluation was comprehensive, the two experts disagree about the interpretation of the data (N.T. at 331-332; 335-336). Contrary to the CSP's opinion, the DSP concluded that the Student is not eligible for SDI under the SLD category because there was no significant discrepancy between the Student's cognitive ability and academic achievement (N.T. at 177-178). Furthermore, the Student's test scores on the local assessments were beyond the Student's cognitive ability, which does not correlate with an SLD classification (N.T. at 179).

The assessment tools used by the District are technically sound instruments that provided relevant information in determining Student's educational needs and social-emotional needs. No single procedure was used as the sole criterion for determining an appropriate educational program for the child.

The third and fourth grade teachers, who both have extensive experience teaching special education, concur that the Student does not need learning support for math problem-solving. The Hearing Officer weighs their opinions more heavily than that of the CSP who only reviewed records and met with the Parent and Student for less than an hour, because the teachers each had the Student in their classroom for a school year.

Therefore, after weighing all the evidence, the Hearing Officer finds that the Parent did not meet the burden of proving that the Student is eligible for an IEP under IDEA. In conclusion, the evidence is insufficient to conclude that Student requires adaptations of the content, methodology, or delivery of instruction because of a disability. IDEA eligibility is a two-part test, and the existence of a disability standing alone does not satisfy both prongs. The Hearing Officer finds that the Student does not meet the second prong because the preponderance of the evidence fails to prove that the

Student needs specially designed instruction to benefit from education. As such, the Student does not meet the SLD eligibility criteria under the IDEA.

### **Section 504 FAPE Claim**

Ruling out eligibility under IDEA, the Hearing Officer turns to the Student's eligibility under Section 504. Unlike IDEA, which requires schools to provide an IEP including SDI to qualifying students with disabilities, Section 504 requires schools to provide a 504 Service Agreement that outlines the accommodations that a Student needs to receive equitable benefit from their regular education.

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

In Pennsylvania, 22 Pa. Code § 15 (Chapter 15) governs the implementation of Section 504 in schools. Chapter 15 prohibits discrimination against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who: (1) is of an age at which public education is offered in that school district; and (2) has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and (3) is not IDEA eligible. See 22 Pa. Code §15.2. Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a).

Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa. Code § 15.7(a).

Section 504 Service Agreements or "504 Plans" are how school districts "shall provide each protected handicapped student enrolled in the

district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa. Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The District Evaluation included a variety of assessment tools for gathering relevant data about the child's developmental, and academic strengths and weaknesses; was sufficiently comprehensive to assess the Student; and provided sufficient and relevant information to assist the 504 Team in determining the accommodations necessary for the Student to access and benefit from regular education. Furthermore, the 504 Team met as required to present, explain and discuss the 504 Plan to the Parent.

There is no question as to whether the Student is a person with a disability, or that the Student's education was "free," or that the District receives federal financial aid. Therefore, the only question before this Hearing Officer is whether the District's Section 504 Plan offer reasonably accommodated the Student's needs by providing the related aids, services or accommodations needed to afford the Student an equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities. The Parents did not make any specific Section 504 claims of discrimination; therefore, the discrimination issue is moot.

The District does not dispute that the Student has a disability and is entitled to a 504 Plan. In its written closing statement, the District admits that the Student has mild educational needs in math problem solving, is

sometimes emotional in class, and presents as experiencing feelings of inadequacy, sadness and nervousness. The District argues that the 504 Plan addresses those needs. However, the Parent alleges, the 504 Plan offered by the District was neither timely nor appropriate.

The Hearing Officer finds that, based on the preponderance of the evidence, the Section 504 Plan offered by District as requested by the Parent in September 2020 is timely, but not appropriate to meet the Student's social and emotional needs. The Hearing Officer agrees with the Parents that the accommodations listed in the 504 Plan are too general to adequately address the Student's emotional-regulation challenges. Therefore, the 504 Plan must be modified to ensure the Student is not excluded from meaningful participation in educational activities due to unmet social and emotional needs caused by the disability.

Within 30 days of the date of this Decision, the 504 Team will meet and determine how to strengthen the 504 Service Agreement Accommodations and Services designed to address the Student's individual social and emotional challenges and support the Student's ability to meaningfully participate in and benefit from educational activities.

The 504 Service Agreement lists nine Accommodations/Services: (1) regular positive praise; (2) offer visuals to provide learning opportunities in varied modalities (e.g., math facts; multiplication); (3) frequent check-ins for understanding; (4) regular communication/collaboration between school, home, and outside providers to complement the development and implementation of coping strategies; (5) access to the school social worker/guidance counselor on an as needed basis; (6) capitalize on instructional activities in which Student is successful; (7) weekly emails from the teachers to Parent to recommend Math and ELA office hours; (8) small-group testing within the classroom environment; (9) creating a visual coping

skills menu the teacher can nonverbally prompt the Student to use a strategy when the Student presents as shutting down (S-46 at 5; P-14 at 2).

Based on the CSP's testimony, there are several places for the 504 Team to begin reexamining the sufficiency of the 504 Plan.<sup>5</sup>

The 504 accommodation "Access to the school social worker/guidance counselor on an as needed basis," lacks specificity. The record is devoid of evidence showing that the "as needed" access currently being provided has been anything more than a "trivial benefit" to the Student, so there is no reason to conclude that it will be sufficient to address the Student's social and emotional needs moving forward. The Student with a history of emotional dysfunction, suicidal ideation, medical diagnoses of "depression" and "disruptive mood dysregulation disorder," and who, according to the record, has not used the "passes" received by the Student to access the social worker to address those emotional issues, might not have the capacity to rise to the challenge of self-advocating for social and emotional services. Furthermore, because the Student internalizes feelings and tries so hard not to decompensate in the school setting, emotional concerns might not always be readily apparent to the teachers. The 504 Team will meet and to clarify how this service will work, and how it can be implemented on a more regular basis than "as needed."

Based on the CSP's testimony and the teachers' observations of the Student's pattern of shutting down and crying when frustrated, it appears as

---

<sup>5</sup> The CSP also recommended conducting an updated FBA to see if the accommodations and supports are working because the Student is at risk of needing an ED classification if the social and emotional needs do not abate. While it is not mandated by law, this Student's 504 Plan is worthy of monitoring more frequently than waiting three years to reevaluate as the 504 Plan currently indicates. Using an abundance of caution, the 504 Team should consider a shorter time frame to assess whether the strengthened 504 Plan is sufficiently addressing the Student's lack of confidence and feelings of inadequacy, sadness, nervousness and frustration trigger emotional dysregulation causing the Student to shutdown or cry.

if the Student needs more than just a teacher pointing to a coping skills menu to internalize coping strategies. Accommodation #4 is far less proactive than the CSP's recommendation that the Student be placed in a social skills group to reduce feeling isolated by seeing that other students also become frustrated, and learn coping skills to address social and emotional challenges. The 504 Team will meet and create more proactive emotional supports like the social skills group described by the CSP to bolster accommodations #4 and #9, which requires the School to communicate with the Parents and outside therapists.

### **Compensatory Education**

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990) that is appropriate remedy where a District knows, or should know, that a child's educational program is not appropriate or that the student is receiving only a trivial educational benefit, and the District fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996).

Traditionally, Pennsylvania courts have recognized two distinct methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the "hour-for-hour" method, embraced by *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996), a student would receive one hour of compensatory education for each hour that FAPE was denied. 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) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). In *Reid*, the court concludes that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method. The more nuanced *Reid* method was endorsed by the *Pennsylvania Commonwealth Court* in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the child would have occupied but for the school district’s violations of the IDEA.”).

Despite the preference for the *Reid* method, that analysis poses significant practical problems when, in administrative due process hearings, evidence is not presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented: “... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 36- 37.

An award of compensatory education must reflect consideration of all circumstances, and on this record it is not possible to calculate a qualitative make whole remedy. Thus, the quantitative approach will be used.

Compensatory education is an available remedy under Section 504 of the Rehabilitation Act of 1973 when a school district does not offer an appropriate plan. *Horton v. Boone County Sch. Dist.*, 62 IDELR 25 (E.D. Ky. 2013). Parents can obtain “prospective” relief in situations where the school district is ordered to immediately develop and offer an appropriate program.

In this matter, the Parent’s claim for compensatory education is for two years prior to the filing of the Complaint is not supported by a preponderance of the evidence. The District met its obligation to timely and appropriately evaluate the student when the Parent requested a 504 Plan in September 2020.

The remedy must be equitable under the circumstances. In this situation, the Hearing Officer must consider that the Student’s needs cannot be adequately addressed *solely* through school-based accommodations and services. Compensatory education hours are calculated based on an estimate of the number of hours per week of services needed to offer the Student a FAPE within the meaning of Section 504 of the Rehabilitation Act, (e.g., in this case time with the school social worker, time in a social skills group).

The Hearing Officer finds that the Student is entitled to one hour of compensatory education per week during the weeks that school was in session, whether full time or hybrid and excluding summer break, from January 11, 2021, the date of the Section 504 Plan eligibility meeting, until an appropriate 504 Service Agreement is implemented.

## **CONCLUSION**

1. The District did not violate its Child Find obligations under IDEA and Section 504 by not timely evaluating and identifying the Student as eligible for special education.
2. The District appropriately found that the Student was not eligible under the IDEA classifications of Specific Learning Disability (SLD) or Emotional Disturbance (ED) resulting in a denial of FAPE.
3. The Section 504 Service Agreement offered by the District is insufficient. Within 30 days of the date of this Decision, the 504 Team shall reconvene to remediate the insufficiencies in the 504 Plan, as outlined above.
4. The Student is entitled to compensatory education from January 11, 2021, the date of the Section 504 Plan eligibility meeting, until an appropriate 504 plan is implemented, as outlined above. The award of compensatory education is subject to the following conditions and limitations. The Parent may decide how the compensatory education is provided. The compensatory education may be used to provide any appropriate developmental, remedial, or enriching educational service, product, device or related service that furthers the Student's educational, social and emotional needs. The compensatory education may not be used for services, products, or devices that are primarily for extracurricular activities, leisure or recreation. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for the Student and the Parents.

## **ORDER**

AND NOW, this 27th day of August, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the

Parent's claims are DENIED in part and SUSTAINED in part. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.

*Cheryl Cutrona*

---

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

**Date of Decision**  
**August 27, 2021**  
**ODR 24742-20-21**