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: 25522-21-22

Child's Name:
S.J.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Cheryl Cutrona, J.D.

Date of Decision: February 4, 2022

INTRODUCTION

On September 29, 2021, the Parents of S.J. (hereinafter "Student")[1] filed a due process complaint claiming that the School District of Philadelphia (hereinafter "District") denied the Student a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")[2], and intentionally, purposefully, and with deliberate indifference, violated the Student's rights secured by Section 504 of the Rehabilitation Act of 1973 ("Section 504")[3] and Chapters 14 and 15 of the Pennsylvania Public School Code, and the Americans with Disabilities Act of 1990("ADA")[4].

The case proceeded to a closed, due process hearing held in four sessions: November 5, 2021, November 30, 2021, December 10, 2021 and December 20, 2021. The sessions were convened remotely on the Zoom virtual platform due to the COVID-19 pandemic.

ISSUES

1. Did the District fail to provide a FAPE under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act ("Section 504") to the Student?
2. If so, are the Parents entitled to compensatory relief, prospective placement at a private school?

[1] In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).
[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).
[3] 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).
[4] 42 U.S.C. § 12101

3. Does the District's delay in evaluating the Student constitute a discriminatory act under Section 504?

STIPULATIONS OF FACT

The parties submitted the following Stipulations of Fact, which in the interest of confidentiality and privacy, have been redacted to eliminate potentially identifiable information.

1. The Student is a [teenage] child.
2. The [redacted] Parents who filed the Complaint are the Parents of the Student as defined by 34 C.F.R. §300.30.
3. At all times relevant to the claims and defenses in this matter, the Student was a resident of the District.
4. At all times relevant to the claims and defenses in this matter, the District was the Local Education Agency for the Student.
5. The Student enrolled in the District with a start date of November 17, 2020.
6. The Student attended a District high school for the 2020-2021 school year, where the Student continues to attend.
7. A meeting took place with the Mother, the Special Education Compliance Manager and the School Psychologist on December 21, 2020.
8. A meeting took place with the Mother, the Special Education Compliance Manager, the Special Education Director and the School Psychologist on February 1, 2021.
9. The Center For Autism conducted a Psychological Evaluation, which was sent to the Special Education Compliance Manager and the School Psychologist by Parent on May 6, 2021.

10. The District approved an Independent Education Evaluation (IEE) on May 27, 2021. A NOREP was sent to Parents dated June 10, 2021. Parent signed NOREP on June 10, 2021.
11. An independent Licensed Clinical Psychologist conducted an IEE and sent it to Parents and the District on August 31, 2021.
12. The District issued a NOREP (Notice of Recommended Placement) on August 31, 2021, proposing supplemental Autistic Support and curb-to-curb transportation.
13. On September 3, 2021, Parent signed the August 31, 2021 NOREP, both approving and disapproving the action/recommendation of the District.
14. On September 15, 2021, the District issued a Permission to Reevaluate (PTE), requesting consent for additional evaluations to take place. Parent consented to the request on September 23, 2021.
15. Parent consented to Speech-Language, Motor and Academic evaluations, by signing a PTE – dated May 27, 2021 – on September 24, 2021.
16. The District completed its initial Evaluation Report (ER) on October 28, 2021, determining the Student's primary disability was Emotional Disturbance and secondary disability Autism.
17. A meeting to review the District's ER and proposed IEP was held on October 28, 2021.
18. The District's initial IEP (Individualized Educational Plan) was completed on October 29, 2021.

FINDINGS OF FACT

All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' written closing statements was considered. The only findings of fact cited in this Decision are those needed to address

the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student moved to the United States in October of 2020 from [out of the country]. (P-2 at 3; J-4 at 2; J-27; NT at 784)[5] and lives with the [redacted] Parents. The Student speaks [a language other than English] and English (J-4 at 2; J-14 at 1). The Student has an extensive history of trauma (J-1 at 1, 3-5; J-4 at 2; J-14 at 5, 7, 15). Despite multiple concerns reported by the Student's teachers between December 10, 2020 and February 4, 2021 (P-3 at 1; P-4 at 2; P-5 at 1; P-4 at 1; P-7 at 1; P-8; s-11 at 17; P-12 at 2; S-11 at 27; P-15 at 2; S-11 at 36; P-2 at 2; S-11 at 36; P-21 at 1; S-11 at 58; S-11 at 67), the Student did not receive special education services for more than a year after enrolling in the District.
2. Between November 16, 2020 and February 1, 2021, the Parents requested that the District evaluate the Student eight times (P-2 at 1, 3; P-15 at 4; P-4 at 2; P-6 at 1; P-13; P-17 at 4; J-27 at 2; NT at 24; NT at 70; NT at 73; NT at 206). According to the District's own Screening and Evaluation Procedures, each request triggered the District's obligation to provide the Parents with a NOREP, outlining the reason for the denial, along with Procedural Safeguards (P-1 at 3). Parents did not receive Procedural Safeguards until August 31, 2021 (P-39 at 4-44).
3. Not understanding their rights, the Parents sought an independent evaluation after being told by the School Psychologist that having documentation of the Student's mental health history would speed up the evaluation process (NT at 216-217; 823). Frustrated

[5] References to the record throughout this decision will be to the Notes of Testimony (NT) followed by the page number in the hearing transcript, School District Exhibits (SD-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number and Joint Exhibits (J-) followed by the exhibit number. Where necessary, the page number has been included after the Exhibit number.

because the process of obtaining an IEP was taking so long and the Student was not receiving the supports needed to be successful in school and knowing that it was impossible to obtain medical documentation from [the other country] at that time, and the Parents hired an Education Advocate in May 2021 (NT at 829).

4. The District's allegation that it sent the Parent a PTRE on June 21, 2021 (S-1 at 1; NT at 831-834) is unsubstantiated. The June 21, 2021 email indicates that the PTRE was attached, but there is no proof that it was attached or received by the Parent (S-1 at 2). In contrast, other emails with attachments entered into evidence clearly showed the attachments (P-26 and P-39).
5. A Permission to Reevaluate (PTRE) was finally received by the Parents on September 15, 2021 (J-18 at 1), ten months after their initial request. The Parent signed the PTRE and sent it to the District on September 23, 2021 (J-7 at 3).
6. The School Psychologist's reasons for not evaluating the Student sooner are varied: (1) The Student had recently moved here from another country (P-18 at 2; NT at 280); (2) The Student was taking a new medication (NT at 289-290, 295, 347-349); (3) The Student had only been in the school for one marking period and the teachers needed to get to know the Student (P-18 at 2; NT at 286, 300); (4) The Student needed to acclimate to the culture and the program (P-18 at 2; NT at 212-213, 282, 294); (5) The Student's English language acquisition and proficiency in an academic setting (NT at 209-210, 221, 222, 283-285, 317-318); (6) The Student's trauma issues need to be addressed first (P-18 at 2; NT 214-215, 319); (7) Conducting an evaluation would be premature without documentation about the Student's mental health, past academic records and physical health status (P-18 at 2-3; NT at 215, 280,

285, 286) and (8) The Student's background story indicated inconsistent school attendance (NT at 282).

7. In a telephone conversation with the Bilingual Teacher on December 16, 2020, the Parent reported that the Student began therapy at a local, private mental health institution in November 2020 and that the Student might be on the Autism spectrum (P-4 at 2). The Parent also discussed this with the School Counselor in a follow-up conversation on December 17, 2020 (P-4 at 1).
8. At Parent Meetings held on December 21, 2020 and February 1, 2021, the School Psychologist told the Parent that if she brought documentation of the Student's mental health diagnosis, it would help speed the evaluation process for an evaluation (NT at 216-217, 813; J-27 at 1-2). The Student had been evaluated for mental health treatment needs on November 20, 2020 (J-5). The Parent did not provide that report to the District at the December 2020 meeting (NT at 149-150).
9. The Parent sought private psychological evaluations that took much longer to be completed than the Parent expected (S-11 at 233). The District was provided with the IEE, dated August 20, 2021 (J-4; P-37); an IEE Addendum dated November 2, 2021 (P-51); an undated external Psychological Evaluation was provided on May 6, 2021 (J-1; J-27 at 2); and a follow-up letter from the Psychological Evaluation institute (J-5).
10. The School's Final Evaluation Report was provided to the Parent on October 28, 2021 (J-15).
11. The initial IEP, discussed at the Team Meeting held on October 28, 2022, includes no research-based programming specifically designed for students with autism. The IEP indicates that, for this Student, differentiating between the symptoms of ED and those of

Autism Spectrum Disorder (ASD) is challenging (J-18 at 12). The IEP repeatedly reports that the Student appears in a "dazed state." The only ASD service provided in the IEP is a monthly 30-minute consult with the Autistic Support teacher (J-18 at 47).

12. The Special Education Compliance Manager (SECM) is also an Emotional Support teacher at the High School and formerly served as an Autistic Support Teacher (NT at 51-54). The SECM, in the role of the Student's Emotional Support teacher, proposed using the WhyTry program, which was created to offer "solutions for dropout prevention, violence prevention, truancy reduction, and increased academic success" (P-51 at 2). There is no evidence demonstrating that the Student's profile includes any of these factors. The WhyTry program is commonly used for maladaptive students with behavioral issues (NT at 116; 117; P-51). Specific program modules can be used to address specific needs (NT at 117). There was no evidence demonstrating the curriculum's effective use for students with Autism. The SECM intended to include the Student in a class of six students with emotional support needs and use the 36-week, relationship-building WhyTry module (NT at 131-136; S-12 at 1-9).

Parents' Claim

The Parents contend that the District's procedural violations caused substantive harm to the Student and the Parents during the 2020-2021 school year by: (1) failing to meet its Child Find obligation resulting in a denial of FAPE; (2) failing to provide the Parents with a NOREP and Procedural Safeguards resulting in a denial of their right to meaningfully participate in the Student's education; and (3) failing to evaluate the Student for more than a year violated IDEA and deprived the Student of educational benefits. Furthermore, the District should not have required the

Parents to obtain their own evaluation in order to receive services through the District.

The Parents claim that denial of FAPE was discriminatory under Section 504 and therefore, they are entitled to compensatory relief.

The IEP offered by the District does not offer an appropriate program to the Student. The District failed to prove a basis for disregarding the IEE conclusion that the Student's primary disability is Autism. Its decision to establish Emotional Disturbance (ED) as the primary disability was not based on the definition of ED in IDEA but rather, on the School Psychologist's "speculation." Furthermore, the Emotional Support programming offered by the District is inappropriate.

The District's speech and language evaluation was inappropriate leading to a denial of services. This was premised primarily on the fact that the District evaluator did not obtain parental input which led to an erroneous assumption that the Student's primary language was [a language other than English], not English.

Furthermore, the Parents allege that the District failed to develop appropriate transition goals for the Student.

The Parents argue that the inappropriateness of the current IEP warrants an Order of Prospective Placement so that the Student can be placed in a private school that will provide individualized, appropriate programming.

And, finally, the Parents request reimbursement for the costs of the expert IEE Psychologist's IEP Addendum and testimony through Section 504.

District's Claim

The District argues that the Parents did not meet their burden of proving that the District did not fulfill its Child Find obligations under Section 504 and IDEA. The District claims that it acted reasonably when it waited to

evaluate the Student and that there was no substantive harm to the Student. Further, the District contends that the IEE and the ASD evaluation are not defensible. Therefore, because the IEP offered in December 2021 provides FAPE, the Parent's claims for prospective placement with tuition, and compensatory education for the 2020-2021 school year should be denied.

The District contends that the ER completed by the School Psychologist is comprehensive, addresses all areas of need with goals and Specially Designed Instruction (SDI). The District alleges that a reviewing hearing officer must give deference to an IEP developed by educational professionals and that parents do not have the right to compel a school district to provide a specific program or employ a specific methodology in educating a student. The District alleges that the Parents failed to prove that the WhyTry program, that aligns with the definition of Social Emotional Learning (SEL), does not meet the Student's needs.

The District argues that the Parents failed to prove that the prospective placement requested is warranted or appropriate, and the equities weigh against an award of prospective placement.

And, finally, the Parents' allegation that the District discriminated against Student on the basis of a disability must fail because there was no evidence of deliberate indifference by failing to plead a statement and proof of each instance of alleged intentional discrimination against Student and Parents. Because it was improperly pled, the District argues that the Hearing Officer must dismiss the discrimination issue pursuant to 34 C.F.R. §300.511(d). ODR 24658-20-21 at 15-16. The District further argues, assuming *arguendo*, that discrimination is properly before the Hearing Officer the claim should be dismissed because (1) the District was not on notice of a possible disability during the 2020-2021 school year; (2) the

District did not violate its child find obligation; and (3) the Student did not have a qualifying disability during the 2020-2021 school year.

DISCUSSION AND CONCLUSIONS OF LAW

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 "equipoise." When the evidence is in "equipoise," the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

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, based upon the above rules, the burden of persuasion rests upon the Parents, who filed the complaint initiating the due process hearing.

Credibility Determinations

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); 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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented.

FAPE 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).

FAPE under Section 504

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1).9

Section 504 and Chapter 15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1

The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

FAPE: Child Find and Evaluation 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 verbally requests an evaluation, the LEA must respond with a Permission to Evaluate (PTE) within ten calendar days. 22 Pa. Code § 14.123(c).

Furthermore, the IDEA directs that an impartial hearing officer's decision must be made on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). If a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2).

In this case, the District failed to meet its child find obligation within a reasonable time.

Following each of Parent's eight requests for an evaluation between November 2020 and February 2021, the District should have done one of two things: (1) agree to evaluate the Student and issue a PTE or (2) decline the evaluation by issuing a NOREP describing the reason for refusal, along with Procedural Safeguards, outlining Parents' rights and how to respond. 34 § C.F.R. 300.504(a)(1). 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).

During the 2020-2021 school year, the District failed to follow either of these requirements thereby denying the Parents' right to participate

meaningfully in the Student's education. With no previous experience in the special education realm, the Parents lacked a reasonable degree of understanding of their procedural rights until they hired an Education Advocate in May 2021. For example, as per the School Psychologist's advice and frustrated with how long the process was taking to develop and IEP, the Parents sought a private evaluation to speed up the District's process of developing an IEP for the Student based on advice from the School Psychologist in December 2020.

In this case, the delay between the Parent's first request for an evaluation in November 2020 and when the District's ER was completed December 2021 is not reasonable. There is no "bright line" clearly defining what constitutes a "reasonable" time to consider an evaluation for special education services "after notice of behavior that suggests a disability." The District proffers a panoply of reasons to justify the year-long delay. None of those reasons consider the eleven documented faculty reports between December 10, 2020 and February 4, 2021 (the same time frame during which the Parent was requesting an evaluation). These reports indicating that the Student was struggling, put the School on notice that something was amiss. Yet these documented concerns failed to convince the School Psychologist and the Special Education Compliance Manager that an evaluation was of the essence.

The delay in evaluating the Student constitutes a procedural error that caused substantive harm by impeding the Student's rights to FAPE and depriving the Student of educational benefits. In light of the fact that ultimately the District ER found the Student eligible for special education and related services and developed an IEP that offers Emotional and Learning Supports totaling 1,070 minutes per week during the regular school year and 720 minutes per week during Extended School Year demonstrates the depth of the deprivation.

Discrimination under Section 504

Procedural Determination

The Parents complain that the District discriminated against the Student on the basis of disability. The District argues that this claim was not properly pled and should, therefore, be dismissed by the Hearing Officer pursuant to 34 C.F.R. §300.511(d). ODR 24658-20-21 at 17-18.

The Hearing Officer finds that this Section 504 discrimination issue was properly pled. Specific facts are included in the Complaint (J-12 at 5). Furthermore, the District was clearly on notice of a possible disability during the 2020-2021 school year from the first conversation the District had with the Parent and who went on to request an evaluation at least eight times between November 2020 and February 2021. The Hearing Officer has ruled that the District violated its child find obligation by waiting so long before conducting its own evaluation and offering an IEP. And, finally, the logical conclusion is that the Student did have a qualifying disability during the 2020-2021 school year in light of the fact that the IEP issued late in December 2021 offers over a thousand minutes a week of services. The needs justifying that amount of services could not have arisen during the first few months of the 2021-2022 school year, although they may have been exacerbated by not providing them during the 2020-2021 school year.

Therefore, the Section 504 discrimination claim is procedurally sound and properly before the Hearing Officer.

Substantive Determination

Section 504 bars school districts that receive federal funding from discriminating against a student on the basis of disability. 34 C.F.R. §104.4. A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise

discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; *S.H. v. Lower Merion School District*, 729 F. 3d 248 (3d Cir. 2013)).

The Third Circuit has found that a Section 504 discriminatory act need not be intentional, however, a student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions (*S.H.*, id. at 263). Deliberate indifference is met by establishing that the District (1) had knowledge that a federally protected right is substantially likely to be violated and (2) failed to act despite that knowledge (Id. at 265). These acts must be a deliberate choice, rather than negligent or bureaucratic inaction (Id. at 263).

Here, the District acted with deliberate indifference by not conducting an evaluation for nearly a year which resulted in substantive harm to the Student. The District met both prongs of the deliberate indifference test cited above.

First, it would be incredible to believe that the District was unaware of its responsibilities under IDEA and Section 504. The actors involved here – the School Psychologist with 30 years' experience and the Special Education Compliance Manager, an educator with more than 20 years of experience – are aware of their responsibilities under IDEA and Section 504. Yet they refused to evaluate the Student even after receiving eight requests from the Parents and eleven faculty reports indicating that the Student needed supports, and knowing that the Parent was seeking private evaluations when the District was unresponsive to their concerns. In these circumstances, it would be unreasonable to conclude that the District did not have knowledge that a federally protected right was substantially likely to be violated.

Secondly, it is clear from the record that the District deliberately chose not to act until nearly a year later despite that knowledge.

Accordingly, as set forth above, the District discriminated against the student on the basis of the student's disabilities by treating the student with deliberate indifference.

COMPENSATORY RELIEF

The same remedies available under the IDEA are generally available under Section 504. Therefore, hearing officers may award compensatory relief and reimbursement of expenses as remedies for alleged IDEA and Section 504 violations.

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School Distri*ct, 81 F.3d 389, 397 (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*, Page 23 of 28 401 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.

In this matter, the denial of FAPE resulted in substantive harm, and in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default.

In this case, the award will be calculated using the hour-for-hour approach to match – as closely as possible – the quantity of services improperly withheld during the time-period in question.

The Parent first requested an evaluation on November 16, 2020 and the final ER was completed on December 28, 2021. If the District had reacted swiftly to the Parent's request, the ER would have been completed sometime in March. Therefore, the compensatory award will be calculated by using the number of hours offered in the resultant IEP which was issued on December 28, 2021 (1,070 minutes of support per week[6]) multiplied by 26, the approximate number of weeks in the regular education school year between mid-March-June and from September through December (inclusive of virtual and in person school days) for a total of 32,100 minutes or approximately 535 hours.[7]

The IEP issued on December 28, 2021 also indicates that the Student is eligible for Extended School Year so those hours missed during the summer of 2021 must also be included in the compensatory education calculation. The IEP requires 720 minutes of support per week during the

[6] Emotional Support in class 60 minutes/week; Emotional Support outside the classroom 80 minutes per week; Learning Support in class 30 minutes/week; and Learning Support outside the classroom 900 minutes per week = 1,070 minutes per week (J-18 at 5).

[7] 30 weeks X 1,070 per week = 32,100 divided by 60 = 535 hours

five-week ESY[8]. Therefore, to make up for the hours missed during the summer of 2021, the Student is entitled 60 hours of compensatory education.

Therefore, the total compensatory relief award is the monetary equivalent of 595 hours, which will be subject to the following conditions and limitations. The Parent may decide how the compensatory relief is applied. It 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 award 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.

The IEP

An IEP follows and is based on an evaluation. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist*. RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special

[8] Learning support 690 minutes/week; and Emotional Support 30 minutes/week (J-18 at 49) = 720 minutes per week X 5 weeks = 3,600 minutes divided by 60 minutes = 60 hours.

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).

Although the IEP must provide the student with a "basic floor of opportunity," it does not have to provide "the optimal level of services," or incorporate every program requested by the child's parents. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010). It has been established that an eligible student is not entitled to the *best possible program*, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District,* 2011 WL 601621 (E.D. Pa. 2011). The statute guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

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.

In this matter, the IEP finds the Student eligible for special education services with the primary disability identified as Emotional Disturbance (ED) and the secondary disability as Autism (ASD).

Emotional Disturbance

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).

Autism

The IDEA defines Autism as the following: Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section. (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied. 34 C.F.R. §300.8(c)(4).

The parties may not agree on whether ED or ASD should be the primary disability, but there is no dispute over the fact that the Student meets the criteria for both classifications. And while there is evidence that

differentiating between ED and ASD for this individual Student is challenging, the IEP must still provide a "comprehensive" program. 20 U.S.C. § 1414(d)(1)(B).

IEP Supports and Interventions in the IEP

The Parents provided a preponderance of the evidence that the IEP, as it stands, does not provide FAPE for the following reasons: (1) it lacks ASD supports; (2) it lacks speech and language services; and (3) the Transition Plan is not appropriate.

While the August 31, 2021 NOREP proposed supplemental Autistic Support services (S-2 at 1), and the IEE and the School Psychologist's ER classify the Student as being on the ASD, the IEP does not include ASD support. The Student's IEP only includes emotional and learning supports, and disregards the IEE recommendations regarding ASD supports and interventions, other than offering a 30-minute monthly consult with an Autism teacher for issues relating to social awareness and interactions with others. The IEE recommended (1) that a behavioral or autism specialist oversee the Student's program; (2) using evidentiary-based treatments and interventions specific to students with ASD; and (3) stressed the importance that "like-minded peers" surround the Student during evidence-based social skills curriculum. None of those recommendations were incorporated into the IEP. Therefore, the IEP offered by the District does not comprehensively address the Student's individual needs.

Furthermore, the emotional support/social skills program, offered for 80 minutes a week, was not designed for specifically for ASD students, but rather the WhyTry program was created to offer "solutions for dropout prevention, violence prevention, truancy reduction, and increased academic success." There was no evidence to disprove the SECM/emotional support teacher's assertion that WhyTry was designed for all students with social-

emotional needs, including students with a ASD. The SECM admitted that he typically uses the program with a small group of students with behavior issues and that the Student does not demonstrate any of these maladaptive behaviors. This is contrary to the IEE recommendation that the Student be grouped with like-minded peers while in evidence-based social skills programs.

Similarly, the IEP offers an inappropriate computer-based program that the Student has been struggling with because it requires 90 minutes per day of virtual learning even when the Student is in school. Even with breaks, the computer-based programming teacher and parent reports demonstrate that the Student is not effectively accessing online educational instruction.

The District correctly points out that the Parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 813-14 (E.D. Pa. 2011). In this matter, the Parents are not requesting specific programs, they are merely contending that the placement of the Student in the WhyTry program and sitting in front of a computer-based program for 90 minutes a day are inappropriate.

As the result of a Speech and Language Evaluation conducted by the District's Speech Pathologist, the IEP does not include any speech and language services. The record includes teacher input that the Student speaks very softly and struggles to interact effectively with peers. This evaluation included no parental input other than what was evident in the Speech Pathologist's review of records.

Furthermore, on the CELF-5, the Student scored low to very low in Word Classes, Understanding Spoken Paragraphs, and Sentence Assembly (J-15 at 17) and the Student's Receptive Language Index fell in the one-percentile, which is very low/severe (J-15 at 19). The Parents contend that

without parental input, the Speech Pathologist erroneously relied on an error in the District's information system that lists the Student's primary language as [a language other than English], rather than English (NT at 927) leading her to assume that the Student was an English Language Learner (ELL) which the Student is not. This mistake adversely influenced the Speech Pathologist's interpretation of the CELF-5, influenced the decision not to administer further tests, and contributed to the determination that speech and language services are unnecessary.

The Transition Plan offered in the IEP is inappropriate because it does not include an independent living goal and relies on the Naviance program which is not individually designed for special needs students.

Therefore, the IEP is not comprehensive, does not provide a FAPE that meets the unique needs of this Student and is not reasonably calculated to assist a child to meaningfully benefit educationally from instruction.

Awarding Prospective Placement

Prospective placements are permissible under Third Circuit precedent. *D.S. v. Bayonne Bd. Of Educ*., 602 F.3d 553 (3d Cir. 2010). Hearing officers have relied upon the three-prong *Burlington-Carter* test when determining whether to affirm a request for a prospective placement. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Florence County School District v. Carter*, 510 U.S. 7 (1993).

Long-standing case law and the IDEA provide the potential for private school placement with tuition if a school district has failed in its obligation to provide FAPE to a child with a disability (*Florence County District Four v. Carter,* 510 U.S. 7 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

The Parents must establish all three prongs of the Burlington–Carter Test to prove their case: (1) the District's proposed IEP is inappropriate for the child; (2) the placement chosen by the Parents for the child is appropriate; and (3) the equities weigh on the side of the Parents for full tuition. *Lauren v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). Only if it is determined that the district failed to offer FAPE, does the hearing officer need to decide whether the private school placement is appropriate for the child. And then, only if the first two prongs are met, is an examination of the equitable considerations required.

Denial of FAPE

Step one requires the hearing officer to examine whether the District's proposed, or last operative, educational program, offers a FAPE. As discussed above, the District failed to offer FAPE by providing an IEP that is reasonably calculated to enable the Student to receive *meaningful* educational benefit.

The District argues that if the hearing officer finds that the District's October 2021 offer of FAPE is deficient, then the correct remedy for those deficiencies would be to order amendments to the IEP. Based on the fact that it took over a year to get an initial IEP from the District, it appears unlikely that the time it would take for the District to modify the IEP and provide a FAPE would "compound the harm in a way that requires unique relief." *M.S. v. Upper Darby School District*, 23355-19-20 at 34-35 (June 15, 2020).

Therefore, prospective placement is justified.

Appropriateness of the Private School

Step two requires an assessment of the private school selected by the Parents. A private school is considered appropriate if it provides significant learning and confers meaningful benefit. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3rd Cir. 2009); *Deflaminis*, 480 F.3d at

276. The chosen private school may still be considered appropriate even if it does not implement an IEP or even meet state educational standards. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 14-15 (1993).

In this case, the private school selected by the Parents has the capacity to provide all of the recommended ASD support services instructionally, programmatically, and environmentally. The school is designed to meet the needs of ASD students and offers small classes of like-minded peers at the same level as the Student. Furthermore, the private school's research-based programming in literacy and math will be conducted via direct instruction, not online.

As a private school there are no IEP requirements as there are in a public school setting. As an alternative, this private school develops individualized goals and objectives and offers progress monitoring at least three times per year. Because the students are grouped by level rather than age or grade, it also regularly assesses if the Student is still in an appropriate class or should be moved to another level more fitting to the Student's current capabilities.

And, because of the small class size, the Student will not need a one-on-one aide – as prescribed in the District's IEP – encouraging independence as a student and inspiring life-long learning (NT 741).

Therefore, the private school is appropriate and able to meet the unique needs of the Student.

Weighing the Equities

Step three requires weighing the equities to determine how the private school tuition will be paid.

There are no equities that would weigh against an award of full tuition and related services. At all times the Parents were transparent and cooperative with the District.

Therefore, the District will prospectively place the Student in the private school selected by the Parents and provide related services. This transition may commence as soon as it is feasible for the Parents and the private school and placement will continue through the 2022-2023 school year.

EXPERT WITNESS FEES

A final issue raised by the Parents is a request for reimbursement for the fees incurred by them for their expert witness to testify at the hearing and the supplemental report the witness prepared. The basis for this requested remedy is Section 504, which provides in relevant part that, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k). Similar language in the IDEA has been construed as not applying to administrative hearing officers. B. ex rel. *M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006) (concluding that an attorney fee award "is a district court function" under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party"). For these reasons, this Hearing Officer declines to order expert witness fees.

ORDER

Except for the claim for an award of expert witness fees, the Parent's Complaint is granted.

Cheryl Cutrona

Cheryl Cutrona, J.D.
Special Education Hearing Officer
February 4, 2022
ODR 25522-21-22