

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:
22521-19-20

Child's Name:
I.T.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Charles W. Jelley Esq.

Date of Decision:
April 2, 2021

INTRODUCTION AND PROCEDURAL BACKGROUND

The Parents filed the instant due process Complaint alleging the Cyber-Charter School (Cyber-School), the local education agency (LEA), failed to offer the Student a free appropriate public education (FAPE), as defined by Section 504 of the Rehabilitation Act (Section 504 or R.A.) and/or the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1401 *et seq.* To redress the alleged violations, the Parents now seek 495 hours of compensatory education.¹ After taking testimony, reading the record and giving due consideration to all of the arguments, the extrinsic and intrinsic evidence, I now find in favor of the Parents and against the Charter School. All other claims or affirmative defenses, not otherwise proven or addressed herein, are dismissed with prejudice. An appropriate **ORDER** and Notice of Appeal follows.²

FINDINGS OF FACT

THE STUDENT'S ENROLLMENT IN THE CYBER SCHOOL

1. Before enrolling at the charter school, the Student attended public school. (N.T. Vol II, p. 48-49).
2. Until third grade, the Student was identified as a person with an IDEA disability who, because of the disability, needed specially-designed instruction (SDI). During third grade, while in public school, after a comprehensive evaluation, the District proposed and the Parents

¹ The Parents' claims arise under Section 504 of the Rehabilitation Act and 22 Pa. Code Chapter 15. The federal regulations implementing Section 504 are codified at 34 CFR §104.104.1-37. The federal implementing the IDEA are found at 34 CFR §300.1 *et. seq.* and the state regulations are found at 22 Pa Code §711.

² The Decision Due Date was extended for a good cause, upon written motion of the Parties. Initially the case was closed, subject to reinstatement, when the Parties appeared to be moving towards a resolution. When the resolution talks broke down the Parent requested and I granted their request to reinstate the due process Complaint. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

agreed to exit the Student from IDEA special education services and SDI. At or about the same time the Student exited IDEA services, the District offered a Section 504 plan. (N.T. Vol. II, p. 51.)

3. In the Spring of 2018, the public school agreed to fund an Independent Educational Evaluation ("I.E.E."). (N.T. Vol. II. p. 6).
4. Parents were not satisfied with the public school Section 504 Plan; they felt it lacked "accountability" and was "watered down." (N.T. Vol. II, pp. 53-54).
5. On or about October 22, 2018, the Student enrolled and began to attend the Cyber School. (N.T. Vol. V, p. 684).
6. At the time of enrollment, the Parents provided the Cyber School with a copy of the public school Section 504 Agreement. At the same time, the Parents did not inform the Cyber School that they did not consent to the public school Section 504 Agreement. (N.T. Vol. V, p. 640).
7. Once provided with the Section 504 Agreement, the Cyber-School Section 504 Coordinator spoke to the Parents and orally agreed the Cyber-School would begin, as best they could, to implement the public school Section 504 Agreement. The Cyber School Section 504 [Coordinator] also informed the Parents that their request to consider creating an individual education program (IEP) would be directed to the Director of Special Education. (P-6. pp. 1, 8. NT p.365-367)
8. Sometime in Fall 2018, the Cyber School learned that the Parents never agreed to the public school Section 504 plan from the public School (N.T. Vol V, p. 640). When Cyber School learned that the Parents did not consent to the public school Section 504 Agreement, the Section 504 Coordinator informed the Parents that the Cyber-School would no longer provide any accommodations. (N.T. Vol. V, p. 600). Although the Cyber School discontinued implementing the

Section 504 Agreement, they did not issue Section 504 procedural safeguards or Prior Written Notice. *Id.*

THE INDEPENDENT EDUCATION EVALUATION PROMPTED THE CYBER SCHOOL'S IDEA EVALUATION

9. In October 2018, the Parent's received the publicly-funded private I.E.E. report. Several days later, the Parents shared the publically funded private I.E.E. report with the Cyber-School Section 504 [Coordinator] and the Director of Special Education. (N.T. Vol. II p. 64).
10. In November 2018, when the Parents shared the I.E.E. report, they expected the Cyber School to offer the Student specially-designed instruction (SDI), related services and measurable goals set out in an individual education program (IEP). After receiving the I.E.E. report, the Cyber-School Section 504 service coordinator notified the Cyber-School Director of Special Education about the Parent's request for an IEP (N.T. Vol. V, p. 606).
11. On November 14, 2018, the Parents met with the Director of Special Education by phone to discuss the Student's IDEA eligibility for special education services and an IEP. (S-20).
12. On November 16, 2018, the Cyber School issued and the Parents signed and returned a Permission to Reevaluate (PTRE). The Notice stated that the Cyber-School wanted "additional data to determine if the Student was eligible for special education." The PTRE noted that the Cyber-School would review the publically funded I.E.E., review past evaluations, IEPs, review the 504 plan, gather teacher/Parent input and review grades. (S-20). In another place, the PTRE notes the Cyber-School evaluator/examiner would determine if additional data was needed; if needed, the Cyber-School would seek consent. (S-20 Box 2 vs. Box 4).

13. On December 5, 2018, the Section 504 Coordinator notified the parents, by email that based on an internal review of the Cyber School's initial evaluation report (I.E.R.), the Director of Special Education accepted the Cyber-School examiner's determination that the Student was not otherwise eligible for SDI under the IDEA. (P-6, pp. 13-14).

**THE EXPERTS AGREE TO DISAGREE IF THE STUDENT NEEDS
SPECIALLY DESIGNED INSTRUCTION**

14. In 2018, before enrolling at the Cyber-School, a private licensed and certified school psychologist prepared an I.E.E. As part of the I.E.E., the examiner observed the Student in the public school and the home. During the observations, the examiner noted the Student was "fidgety (i.e., moving around in a chair, flipping a pencil, getting up to use the bathroom)" and "did not contribute as much to [redacted] group project as some of [redacted] peers. During French class, the examiner noted the Student required more frequent prompts to continue working and disengaged when required to work independently." The examiner went on to state, "During the office sessions [redacted] was a personable adolescent who was cooperative and appeared to put forth [redacted] best effort. [Redacted] attended well during the individualized testing session; however, [redacted] was similarly fidgety in [redacted] chair. [Redacted] also employed an impulsive response style throughout the evaluation." (P-2 pp11-12).
15. The I.E.E. examiner administered a battery of standardized ability and achievement testing. Overall the Student's I.Q. and achievement scores fell in the "Average" range. (P-2). After administering, scoring and interpreting all of the data, the private I.E.E. examiner concluded that the Student was a person with the disability of an "Other Health

Impairment" (OHI) due to Attention Deficit Hyperactivity Disorder ("ADHD"). The examiner also concluded that the Student should receive special education. (N.T. Vol. III, p. 206, 226, 266, 269, 278, 279, 304, 305, 310, P-2, p. 12).

16. The private I.E.E. examiner noted that she would have expected higher scores given the Student's "Average" testing profile. The examiner concluded that the Student's impulsive nature and the testing weaknesses were evident when completing specific standardized tests of executive functioning. (P-2).
17. The private I.E.E. examiner collected data regarding the Student's social, emotional, behavioral profile. The data confirmed the Student had attention deficits and often reacted more strongly to situations than other children. Sometimes the Student would be stuck on one topic or activity; the Student would become upset with new situations, often the Student had trouble with chores or tasks that have more than one step, often the Student does not plan for school assignments, often the Student-produced sloppy work, the Student's written work was poorly organized and the Student has a poor understanding of strengths and weaknesses. (P-2 pp.9-11).
18. During the testing and the multiple observations, the private I.E.E. evaluator reported that the Student historically struggled with organizational skills, consistent assignment completion, problems with efficient task completion and had difficulty easily recalling previously learned material. The examiner reported that the Student's attention, organization and planning affected the Student's performance testing. (P-2).
19. After concluding the Student's IDEA eligibility and needed special education, the I.E.E. examiner then made a series of recommendations to address how the OHI disability impacted

educational performance. For example, the I.E.E. examiner recommended (1) chunking of materials,(2) the Student would benefit from a course that specifically addresses executive functioning issues like teaching of notetaking skills, organizational skills, time management skills, (3) Parents "may" want to consider an executive functioning coach, (4) extended time to complete tests, (5) use of a computer to assist in writing, and (6) speech-to-text software, (P-2, NT Vol. III, p.452. P-2, p. 13).

20. After a review of the records and updated Cyber-School teacher input, the examiner prepared a report. (S-37).
21. The Cyber-School examiner is a nationally certified school psychologist. (N.T. p.320).
22. The Cyber-School examiner who completed the record review agreed with the I.E.E. examiner's conclusion that the Student's profile fit the IDEA disability category of OHI. At the same time, after reviewing records, the Cyber-School examiner concluded that the Student did not need special education. (N.T. Vol. III, p. 304-305, N.T. Vol. III, p. 310-315, P-2, p. 12).
23. The Cyber-School examiner concluded that the Student did not need S.D.I without interviewing the school staff, observing the Student, asking the Parties to complete updated checklists, talking to the I.E.E. examiner or interviewing the Parents. Rather than ask for updated Parent input, the Cyber-School examiner copied and pasted the I.E.E. examiner's entire 12-page report into the initial evaluation. The Cyber-School's initial evaluation included several updated teacher input describing the Student's performance on tasks like the number of assignments completed, grades, observations, direct interactions with the Student, direct observations of the Student, attendance records,

and overall year-to-date comments. (S-19, N.T pp.298-299, N.T. pp.300-301, N.T. pp.305-306).

24. The Cyber School examiner agreed with the I.E.E. examiner's scoring of the norm-referenced and checklist-based behavioral and executive functioning assessment data. The Cyber School examiner did not challenge the selection of the assessments or if the assessment were otherwise valid. The Cyber School examiner did not challenge if the private I.E.E. was a full individual complete assessment of all areas of suspected disability. Rather than comment on the assessment data, the Cyber-School examiner pointed out the I.E.E. examiner "has latitude" in her conclusions as a private neuropsychologist, more so than he does as a school psychologist in a school setting in making eligibility determinations. (N.T. Cyber-School Examiner Vol. III, p. 305 vs. Private I.E.E. examiner N.T. Vol. III, p. 272, N.T. pp.305-306). The Cyber-School examiner did not mention that the private I.E.E. examiner was also a certified Pennsylvania school psychologist. (P-2, S-19, S-37). The Cyber School examiner did not cogently explain the basis of his "latitude" conclusion affected his professional judgment. P-2, S-19, S-37, N.T. pp. 291-360).
25. The Cyber-School examiner did not explain how he factored in or out the following teacher input, set forth on pages 5-12, of his initial evaluation, in reaching his summative data conclusion that the Student did not need SDI:
 - a. The Student earned 53% in History, 11% in English and Language Arts, a failing grade in Physical Education [24.5 out 128 possible points], 33% in Algebra, and 16% in Science.
 - b. The Cyber-School examiner did not explain how he factored in or out the teachers' direct observations and comments like:

- i. Science teacher "[redacted] would benefit from daily check-ins with [redacted] academic advisor and teachers." (S-19 p.11).
- ii. Math teacher "Reviewing instructions for assignment prior to completing them would be helpful." "Work completion" "6 out 15 assignments," "Math Computation skills Below Average" "Math reasoning and application skills Below Average."
- iii. Physical Education teacher "Getting schedules each morning from [redacted] AA [academic advisor] to stay on track and put more time into each day." (S-19 p.10).
- iv. English Language Arts teacher "Attention to task Below Average," "Need for prompting/redirection Below Average," "Work Completion Below Average," "Academic Needs Help with time management, focus, Completion of work, Self-Advocating."
- v. The E.L.A. teacher noted that she provided and or attempted to use the following regular education interventions "Modified Assignment, Increased Individual Help, Checklist for Routines, Reading Support, and, Other."
- vi. The E.L.A. teacher concluded her comment with "[redacted] dos (sic) well with a schedule and list. [Redacted] moves slowly but does follow [redacted] activities in order."
- vii. When asked to provide additional information, the E.L.A. teacher concluded by say, "Attention to Focus," "Motivational Levels," and "be (sic) sure to check for comprehension skills." (S-19 pp.7-8).

26. The record is not clear if any of the Student's teachers reviewed and/or agreed with the determination that the Student did not need specially-designed instruction. (S-19).

27. The Cyber-School examiner did not cogently explain how or what data he relied on to decide that the Student did not need SDI. The Cyber School examiner did not explain how he concluded that the Student's OHI/ADHD did not adversely affect the Student's educational

performance. (Cyber School examiner N.T. Vol. III, p. 293-360, S-37 vs. Private I.E.E. examiner N.T. pp.181-238, P-2 vs. S-37 vs. S-19).

28. Although the Cyber School examiner concluded that the I.E.E. examiner relied on her "latitude" as a neuropsychologist to reach her eligibility conclusion, the Cyber-School examiner did not talk to or email the private I.E.E. examiner. The Cyber School examiner did not comment on how he factored in or out the I.E.E. examiner's direct observation of the Student in the public school and/or the community. The Cyber-School examiner did not meet or observe the Student. (P-2 vs. S-37, S-19 vs. private I.E.E. examiner N.T. pp.181-238, P-2 vs. S-37, S-19, N.T. Vol. III, p. 367).
29. From October 2018 through September 2019, based on the disagreement over whether the Student needed SDI, IEP goals and progress monitoring, the Parties were not able to reach an agreement on the delivery of the Student's instruction, the essential elements of the Student's Section 504 Agreement, services, accommodations, or supplemental services. (S-7, S-8, S-9, S-10, S-11, S-12, S-13, S-17, S-23, S-24, S-31).
30. On or about September 19, 2019, the Parties reached an agreement and the Parents consented to a Section 504 Agreement. The Section 504 Agreement included the following accommodations:
 - a. The Student's Academic Advisor will be available in the virtual office to work on executive functioning skills.
 - b. The Student's Academic Advisor will meet with the Student weekly to discuss the schedule and academic progress.
 - c. The Student will have a private room in the Virtual Office with a daily schedule of assignments that need to be complete.
 - d. The Student's teacher will provide a writing rubric to evaluate [Student's] own work before turning it in.
 - e. Teachers will be available in the evening virtual office to assist the Student with any assignments completed after the school day has ended.

- f. The Student's teachers will check for understanding during the live class.
- g. The Student's Academic Advisor will meet with the Student in the Virtual Office to check for understanding of lessons and/or assignments.
- h. The Student will actively explain ideas and concepts to the teacher to reinforce in-depth processing of material rather than rote memorization of unrelated facts. The Student will also attempt to relate new ideas to information already known.
- i. The Student's teacher will schedule individual sessions to review assignment feedback and reteach if necessary to re-submit assignments. (S-46).

THE PARTIES AGREED TO A SECOND INDEPENDENT EDUCATIONAL EVALUATION BY THE FIRST IEE EXAMINER

- 31. In the winter of 2019, to break the deadlock over the need for SDI, the Cyber School asked and the Parents agreed to allow the first private I.E.E. examiner to complete a follow-up evaluation, observation, and assessment. (N.T. Vol. III, p. 406-407).
- 32. On January 6, 2020, January 24, 2020, February 2, 2020, February 29, 2020, and March 2, 2020, the I.E.E. examiner evaluated and/or observed the Student. (P-37).
- 33. The second private I.E.E. evaluation included additional assessments like the Wechsler Individual Achievement Test (WIAT) and the Gray Oral Reading Test (GORT), along with a review of records and the multiple observations. (P-37).
- 34. The second I.E.E. included a virtual observation of the Student in a class of 38 other peers, an in-person observation at a private tutoring session and an observation of the Student at home participating in a virtual lesson. (P-37).

35. The chart below highlights the Student's academic achievement test scores from previous and current WIAT assessments administered by the I.E.E. examiner:

WIAT-III subtest	S.S. 2018	S.S. 2020
Reading Comprehension	91	92
Math Problem Solving	112	104
Word Reading	101	100
Essay Composition	115	96
Word Count	135	104
Theme Dev. & Organization	92	86
Grammar & Mechanics	133	107
Numerical Operations	124	109
Math Fluency Addition	126	97
Math Fluency Subtraction	130	120
Math Fluency Multiplication	130	128
Mathematics	96	108
<i>Math Fluency</i>	120	116

(P-37)

31. The I.E.E. examiner explained that the Student's achievement performance profile indicates some variability between past and current testing. Specifically, though still in the average range overall, the Student's scores have declined in Math Computation, Math Problem Solving, and Written Expression. The I.E.E. examiner concluded that the observed inattention, hyperactivity, and physical restlessness were associated with the OHI disability were the likely source of the decline in the Student's scores. The I.E.E. examiner noted that the Student rushed through tasks and did not exhibit the capacity to sustain efforts or carefully check work for accuracy. Given these factors, the examiner concluded that it would not be unexpected for the Student's academic performance to decline or become less consistent or more insecure,

especially now that the Student was a rising high schooler. (P-37 p.9).

32. The I.E.E. examiner observed the Student twice at home, once during online class and once during a tutoring session. In person, it was clear that the Student's ability to sustain attention to the lessons was "insecure." During math class, the Student was intermittently engaged with the lesson, distracted by items in the bedroom, extremely fidgety and restless. The examiner noted the Student would quickly complete a task necessary for class and then shift attention to the phone or iPad. Then the Student would re-engage briefly when necessary to complete another task. When the phone was not available like during the American History lesson, the Student's attention to the lesson was more favorable, though still insecure. (P-37 pp 8-12).
36. During the private tutoring session, the Student was seated with an adult for the entire learning session. The tutor provided support and ensured that the Student continued working, even though the Student frequently complained of boredom and fatigue. Finally, the I.E.E. examiner observed the Student was logged onto for much of the class period and submitted the necessary assignments, albeit to varying degrees of success. The I.E.E. examiner also noted that possibly due to technical issues, the Student did not show up for scheduled tutoring sessions after class. (P-37 pp.8-12).
37. The examiner noted that in studying the Student's presentation across multiple settings, it was apparent to the I.E.E. examiner that the Student's ADHD continues to impact the Student's attentiveness. Without the instructor's accountability in the same room, the Student's attention to the lessons was insecure and did not always produce the level of work commensurate with expected ability and expected achievement. Given that the Student has extreme difficulty regulating attention and activity level at times, it is not surprising that the

Student's grades while passing are inconsistent. The Cyber-School grading rubric does not track executive functioning skills or deficits. (P-37 pp.8-12).

38. The I.E.E. examiner identified the Student's needs as (1) learn skills associated with assignment completion, (2) attention, (3) organization, (4) task initiation, (5) task completion monitoring, and (5) behavioral self-regulation. (N.T. Vol. III p. 230-232). The I.E.E. examiner stated that the Student also needed instruction in developing executive functioning and organizational skills. (P-37, p. 11). When asked about the need for specially-designed instruction, the examiner stated that "progress monitoring of an IEP goal focusing on assignment completion could help quantify how much support [redacted] needed to complete these assignments." (P-37, p.11, N.T. pp.255-256, N.T. pp.276-277, N.T. pp.289-290).

THE DECEMBER 2020 SECTION 504 AGREEMENT AND THE EXECUTIVE FUNCTIONING COACH

39. On September 16, 2020, the 504 team again revised the Student's 504 Plan. (SD-56).
40. The Cyber School proposed and the Parents agreed that the Student should receive the following Section 504 accommodations:
- a. The Student's academic advisor will meet with weekly to discuss, schedule and academic progress;
 - b. The Student will have a separate room in the virtual office with a daily schedule of assignments;
 - c. The Student's teacher will provide a writing rubric so that the Student can self-evaluate work before turning it in;
 - d. The Student's teachers will chunk large assignments into smaller and more manageable units;
 - e. The Student's teachers will be available in the evening virtual office to assist the Student with any assignments completed after the school day has ended;
 - f. The Student's teachers will check for understanding during the live class;
 - g. The Student will actively explain ideas and concepts to the teachers

to reinforce in-depth processing of material rather than rote memorization of unrelated facts. The Student will attempt to relate new ideas to information previously learned;

- h. Teachers will schedule individual sessions with the Student to review assignment feedback; and,
- i. Teachers will be available in the virtual office to work with on executive functioning. (S-56).

41. The Section 504 Agreement now included direct supports from an executive functioning coach three hours per week. One hour per week would be to "address parent requests for executive functioning services for the 2018-2019 and [one hour for the] 2019-2020 school year" for a total of 72 hours of make-up executive functioning recovery services. The Section 504 Agreement called for another one-hour session per week for the 2020-2021 school year until the 504 team decided the coaching service was no longer needed. (SD 56).
42. The Section 504 team also decided to track Student on-camera time. (N.T. Vol. V, p 718).
43. The 504 Agreement provided that teachers track off-task behaviors and how often the Student used tutoring that went beyond the one hour per week already offered to all students. (SD-56).
44. The 504 Plan required the staff to meet every four weeks to track the Student's completion of weekly assignments in all classes. (SD-56).
45. The Cyber-School schedule calls for "every minute of the day [is] planned, including five-minute breaks between classes." The Student's schedule calls for two hours of executive functioning coaching per week and daily time with the Academic Advisor. (N.T. Vol. V, p.727). For each class the Student takes, the Student is provided with at least one hour of one-on-one tutoring with that teacher per week. (N.T. Vol. V, p.729). The Student also receives one hour per week in math tutoring. (N.T. Vol. V, p.720, N.T. Vol. V, p. 740-741).

THE ONE-ON-ONE EXECUTIVE FUNCTIONING COACHING

46. The weekly one-on-one executive functioning coaching session provides the Student with strategies and tools to understand and self-regulate executive functioning and organization needs. (N.T. Vol. VI, p.828-829). The executive functioning coaching services provide the Student with an equal opportunity to receive benefits from participation in, access and benefit from the regular education classroom instruction. (N.T. Vol. VI p. 826).
47. The executive functioning coach provides materials and services like a self-auditor check-in, enabling the Student to access the regular education classroom. (N.T. Vol. VI, p. 831).

THE IEE EXAMINER'S TESTIMONY ABOUT THE NEED FOR DIRECT INSTRUCTION OF EXECUTIVE FUNCTIONING SKILLS

48. When asked at the hearing what an IEP goal would look like for Student [redacted], the I.E.E. examiner stated she "would want to see how many assignments [redacted] completed without the one-on-one support." (N.T. Vol. III, p. 263).
49. The I.E.E. examiner admitted that this task completion goal was the only one she discussed with the team in March 2020. (N.T. Vol. III, p. 264-65.) Initially, the I.E.E. stated that the IEP goal's value would allow the team to measure the interventions' effectiveness. (N.T. Vol. III, p. 266-67).
50. The Parent concedes that since the observation, the Student is no longer permitted to have a cell phone in the bedroom during online school time. (N.T. Vol. IV, p.542).
51. The Cyber-School is a "school of mastery," meaning that every Student has access to open notes for all tests and quizzes. (N.T. Vol. V, pp 625).
52. The I.E.E. examiner believed that the accommodations combined with the executive functioning coaching time in the Section 504 Agreement were

appropriate. (N.T. Vol. III p. 248-254, P-2, SD-17, S-9, S-36, S-48, N.T. Vol. III 248-260, N.T. Vol. III, p. 283).

53. The I.E.E. examiner opined that one hour per week of executive function coaching to address the Parents' previous SDI requests in 2018-19 and 2019-20 school years was appropriate. The examiner opined that one hour a week moving forward for the 2020-2021 school year and into the future was appropriate. (N.T. Vol. III, p. 259, N.T. Vol. III, p. 284).
54. As long the Student is receiving direct instruction in executive functioning skills, the I.E.E. examiner recognized that she does not have an opinion one way or the other whether the Student needs a 504 Agreement or IEP (N.T. Vol. III, p. 285).
55. The examiner suggested that tracking the executive functioning "goal" would involve keeping data on how much support the Student was receiving versus how many assignments they can complete without support. (N.T. Vol. III, p. 267).
56. The I.E.E. examiner does not write IEPs. The examiner is not an expert in curriculum development. (N.T. Vol. III p. 230).
57. The I.E.E. examiner stated the Student is currently getting a lot of support that even a student in a brick and mortar setting would not have unless they had an IEP (N.T. Vol. III, p. 269-70).
58. The I.E.E. examiner stated that the Cyber School was "doing so much for [redacted], let's measure these things to see if they're working." (N.T. Vol. III, p. 270-71).
59. The I.E.E. examiner stated that although she felt an IEP was "more appropriate in evaluating the effectiveness of interventions, it is unclear how much [redacted] day to day would change even with the implementation of an IEP." (P 37, p. 11).
60. The I.E.E. examiner stated that every four-week meeting schedule "feels like progress monitoring." (N.T. Vol. III, p. 278).

61. The I.E.E. examiner stated that she found accommodations suitable and appropriate for the Student when looking at the 504 plan and the accommodations. (N.T. Vol. III, p.283).
62. The I.E.E. examiner stated that the one hour of direct instruction in executive functioning per week is "sufficient" and also "clinically appropriate." (N.T. Vol. III, p.284-285)
63. The I.E.E. examiner described her second round of observations as follows:

What I observed was a lot of difficulties sustaining focus to instruction, especially the first time I was out of there. It improved a bit the second time I was at [redacted] house. You know, a lot of physical activity, getting up out of [redacted] seat, not really engaging with lesson. Really, you know, [redacted] seemed to have just, it was very a lot of disorganization. It was similar types of behaviors across all settings. Even at the [redacted] the Student was having – [redacted] was tired, [redacted] got up a lot, [redacted] had a hard time staying focused. (NT 219-220).

STATEMENT OF THE ISSUES

1. Whether the Charter School violated the Student's right to FAPE by failing to identify the Student as eligible for specially-designed instruction within the meaning of the Individuals with Disabilities Education Act? If yes, should the hearing officer award compensatory education?
2. Whether the Charter School failed to conduct a full complete individual evaluation of the Student within the meaning of the Individuals with Disabilities Education Act? If yes, should the hearing officer award compensatory education?
3. Whether the Charter School violated Student's right to FAPE by failing to identify the Student as eligible for a free appropriate public education within the meaning of Section 504 of the Rehabilitation Act? If yes, is should the hearing officer award compensatory education?

4. Whether the Charter School violated the Parent's and Student's rights to meaningful participation in the IEP process? If yes, should the hearing officer award compensatory education?

APPLICABLE LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is essential to recognize that 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). Accordingly, the burden of persuasion rests with the Parent, who requested this hearing, while the burden of production rests with the District. In IDEA and Section 504 disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

As fact-finders, hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify.³ This hearing officer now finds the Cyber-School and the Parents' witnesses were credible and that their testimony was essentially consistent concerning the actions taken or not taken by the District or the Parents regarding the Student's FAPE. I found the testimony of some witnesses to be more cogent, clear and at times persuasive. Therefore, as explained below, I gave more weight to individuals who otherwise had superior knowledge gained from working with, testing/assessing or in person or virtually observing the Student in the school or the community. At the same time, I gave less weight to the testimony of individuals who did not work with the Student, observe, and test/assess the Student or interview individuals with firsthand knowledge about the Student. The Parties submitted written closing statements. All

³ Cf., *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *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).

exhibits from both Parties were entered into the record and fully considered in the Final Decision.

The above factual statements constitute the written Findings of Fact and Conclusions of Law required by either the IDEA, Section 504, and/or state law/regulations. (20 U.S.C. § 1415(h)(4), and/or Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), 34 C.F.R. §104.36, 22 P.A. Code Chapter § 711. *et.seq.*)

THE SECTION 504 FAPE REQUIREMENTS

While Section 504 of the Rehabilitation Act's plain language does not require a FAPE or robust IDEA like procedural protections like an IEP, like the IDEA, Section 504 implementing regulations requires schools to provide a FAPE. The Section 504 regulations define an "appropriate education" as regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of non-handicapped persons are met, and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§104.33 (FAPE),⁴ 34 C.F.R. § 104.34 (educational setting), 34 C.F.R. §104.35 (evaluations)⁵, and 34 C.F.R. §104.36 (procedural safeguards). The cross-referenced Section 504 regulations impose similar IDEA-like requirements, and yet at other times impose very distinct broader rights and duties not found in the IDEA concerning the identification, education, evaluation, procedural safeguards and placement of disabled students. Unlike public schools, charter schools

⁴ If a student with a disability is eligible for FAPE under §504 but is not receiving FAPE services under the IDEA, that student is entitled to the provision of any services the placement team decides are appropriate to meet their individual educational needs, regardless of cost or administrative burden, and especially where such services have been provided to IDEA eligible students in the past. Those services can be as varied and as comprehensive as necessary to meet a student's need." USDOE, OCR, Resource Guide on Students with ADHD and §504, pg. 27, July 2016.

⁵ *Randolph (MA) Public School*, 21 IDELR 816 (OCR 1994) (OCR opined that, in interpreting data and making program/placement decisions, a district must draw upon information from a variety of sources, including results of independent evaluations, and ensure that the information obtained from all sources is documented and carefully considered).

and cyber charter schools are not required to follow the nondiscrimination regulations found at 22 Pa Code Chapter 15.

Courts, in this circuit, have explained Section 504's FAPE requirement as follows "[districts] must reasonably accommodate the needs of the handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. . . . However, § 504 does not mandate 'substantial' changes to the School's programs, and courts 'should be mindful of the need to strike a balance between the rights of the student and [his or her] parents and the legitimate financial and administrative concerns of the [s]chool [d]istrict.'" *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280-281 (3d Cir. 2012). At the same time, mere administrative or fiscal convenience does not constitute a sufficient justification for providing separate or different services. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 281 (3d Cir. 2012). The 504 regulations further note that compliance with the IDEA procedural safeguards is one means but not the sole means of meeting the due process requirements of Section 504.⁶

To establish a violation of Section 504, a parent must prove that: (1) the Student was disabled; (2) (s)he was "otherwise qualified" to participate in school activities; (3) the school district received federal financial assistance; and (4) the student was excluded from participation in or denied the benefits of the educational program receiving the funds or was subject to discrimination under the program. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) citing *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999)). Like the IDEA, Section 504 does not require a district to provide the best possible education. *Molly L. v. Lower Merion Sch. Dist.*, 194

⁶ *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013), 34 C.F.R. § 104.31-36.

F. Supp. 2d 422, 427, 436 (E.D. Pa. 2002). The sufficiency of a §504 service plan may be demonstrated at least in part by improving grades.⁷

THE IEP MEETING AND THE IEP DOCUMENT

The IDEA and the implementing federal regulations obligate local school districts to locate, identify, evaluate, and provide a free appropriate public educational services, in the least restrictive setting, to children eligible for special education. 20 U.S.C. §1412. To achieve the promise of a FAPE, districts must provide each disabled child an IEP that is reasonably calculated to permit the child to receive a meaningful benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). An IEP is a comprehensive program prepared by a group of people, including the teacher of the Student, other school officials and the Student's parents. An IEP must be drafted in compliance with a detailed set of procedures found at 20 U.S.C. § 1414(d)(1)(B). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Id.*

IDEA PROCEDURAL AND SUBSTANTIVE FAPE VIOLATIONS

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Not all procedural violations amount to a denial of a FAPE. *See, C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 64 (3d Cir. 2010). A procedural violation constitutes a denial of a FAPE where it results in the loss of an educational opportunity and seriously infringes on the parents' opportunity to participate in the IEP process or causes a deprivation of educational benefits. 34 C.F.R. §300.513.

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's

⁷ *Timothy F. v. Antietam Sch. Dist.*, No. 12-2719, 2014 U.S. Dist. LEXIS 44112 (E.D. Pa. March 31, 2014) citing, *Anello v. Indian River Sch. Dist.*, 355 F. App'x 594, 598 (3d Cir. 2009).

circumstances," *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 1001 (2017). The IDEA does not guarantee "the absolute best or 'potential-maximizing' education."⁸ Therefore, as *Endrew and Rowley* make clear, the IEP must respond to the child's unique educational needs and individual circumstances. See, 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

**THE IDEA REQUIREMENT THAT THE STUDENT'S DISABILITY
ADVERSELY AFFECT THE STUDENT'S EDUCATION ALONG WITH THE
NEED FOR SPECIALLY-DESIGNED INSTRUCTION**

The regulation defining each of the IDEA categories of disability is set forth in § 1401 (3) (A) (i) are found at 34 C.F.R. § 300.09. Those definitions, so far as they are relevant here, dealing with an OHI requires that disability condition "adversely affect [] a child's educational performance" to constitute a disability. 34 C.F.R. §§300.8 (c) (9) (ii) (other health impairment).⁹

Neither the federal statute and regulations nor the Pennsylvania regulations define "adversely affects." Ordinary usage suggests that any negative effect should be sufficient. *Mr. I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 10 (1st Cir. 2007) (the phrase "adversely affect" reflects the legislative intent that any adverse effect on educational performance, however slight, meets this prong of the definition."

Determining if a child needs SDI must be based on a case-by-case basis. Likewise, the "need special education' prong relates to the needed

⁸ See, *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1043 (3d Cir. 1993) (recognizing that IDEA does not entitle a child to the best education available, but only one reasonably calculated to provide him or her with a meaningful educational benefit).

⁹ Hearing officers and courts interpret "educational performance" to go beyond grades. See, e.g., *W.H. v. Clovis Unified Sch. Dist.*, 52 IDELR 258 (E.D. Cal. 2009) (finding adverse effect where the student had good grades and performed above average on a statewide examination yet was unable to complete written assignments due to his ADHD).

adaptation of "content, methodology, or delivery" to access the general curriculum and meet the standards applicable to all children. A child could have an IDEA disability that adversely affects educational performance yet not need special education. *Id.* Accordingly, not every educational adaptation, adjustment, or alteration of content, methodology, or instruction delivery is special education.¹⁰

THE IDEA REQUIRES A FULL AND INDIVIDUAL EVALUATION

A student is eligible for IDEA support if, after undergoing a full individual initial evaluation, a student is found to have (1) have one or more of the disabling conditions found in 20 U.S.C. § 1401(3) or 34 C.F.R. § 300.8(a)(1), and (2) as a result of that disabling condition, requires specially designed instruction. 34 C.F.R. § 300.8(a). The relevant IDEA disabling condition in the instant case is OHI The relevant disorder is ADHD.

Under the IDEA, a school district "shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability." 20 U.S.C. § 1414(a)(1)(A). This initial evaluation is called the "Full and Individual Evaluation," or "F.I.E."

The F.I.E. must consist of procedures "to determine whether a child is a person with a disability [as defined by the IDEA]" and should "determine the educational needs of such child." 20 U.S.C. § 1414(a)(1)(C). Each of those determinations is crucial because eligibility for IDEA services is a two-pronged inquiry. 20 U.S.C. §§ 1401(3), 1414(d)(2)(A). When "appropriate," as part of the F.I.E., the school district is required to perform a "[r]eview of existing evaluation data" ("REED"). 20 U.S.C. § 1414(c)(1). The REED must include "evaluations and information provided by the parents," "current classroom-based, local, or State assessments, and classroom-based

¹⁰ July 2019 Special Education Eligibility AND Evaluation Standards, State of Iowa Department of Education (2019)
<https://educateiowa.gov/sites/files/ed/documents/SpecialEducationEligibilityandEvaluationStandardsJuly2019.pdf>
(last visited April 1, 2021).

observations," and "observations by teachers and related services providers." *Id.*

"Upon completion of the administration of assessments and other evaluation measures[,] the determination of whether the child is a child with a disability . . . and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child." 20 U.S.C. § 1414(b)(4). In making its eligibility determination, the team must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher input/recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(1)(i). "If a determination is made that a child has a disability and needs special education and related services, an [individualized education program] must be developed for the child." *Id.* § 300.306(c)(2); see also 20 U.S.C. § 1414(d)(2)(A). The "IEP" is a "written statement" that outlines how, where and how often special education and related services will be delivered to the child. 20 U.S.C. § 1414(d)(1)(A). The school district's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a "FAPE" to all IDEA-eligible students. 20 U.S.C. § 1412(a)(1); see also *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) (describing an IEP as the "primary vehicle" or centerpiece for implementing a FAPE).

IDEA REMEDIES PROVIDE APPROPRIATE RELIEF

Courts and hearing officers have broad discretion in fashioning "appropriate relief" when either conclude a violation of an IDEA or Section 504 results in a failure to provide an appropriate educational program to a particular child.¹¹ Compensatory education should place the student in the position they would

¹¹ 20 USC 1415 (i)(2)(C)(iii), 34 CFR 300.516 (c)(3), *Lester H. v. K. Gilhool and The Chester Upland School District*, 916 F.2d 865 (3rd. Cir. 1990), *Ferren C. v. School Dist. of Philadelphia*, 54 IDELR 274 (3d Cir. 2010), *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

have been in but for the IDEA violation.¹² Compensatory education accrues from the point that the school district either knows or should have known of the injury to the child.¹³ A child is entitled to compensatory education for a period equal to the period of deprivation but excluding the time reasonably required for the school district to rectify the problem. *Id.*

With these fixed principles in mind, I will now untangle the Parties' overlapping arguments and complete the "difficult and sensitive" analysis of the multiple competing child-find, eligibility, evaluation and denial of FAPE factors.¹⁴

DISCUSSION, ANALYSIS AND CONCLUSIONS OF LAW

The IDEA and Chapter 711 requires charter schools to locate, identify, evaluate and provide eligible children with measurable goals, related services and SDI as outlined in an IEP. The Parties agree the Student is a person with ADHD; the Parties further agree the Student's ADHD disorder is an OHI within the meaning of the IDEA. The Parties disagree, however, if the OHI adversely affects the Student's educational performance.¹⁵ The Parties also disagree if, because of the OHI, the Student needs SDI within IDEA's meaning.

¹² *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to "conform[] to . . . [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job." *Id.*

¹³ *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

¹⁴ *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160-162 (1st Cir. 2004) (not reaching the eligibility question).

¹⁵ Hearing officers and courts may interpret "educational performance" to go beyond grades. See, e.g., *W.H. v. Clovis Unified Sch. Dist.*, 52 IDELR 258 (E.D. Cal. 2009) (finding adverse effect where the student had good grades and had performed above average on a statewide examination yet was unable to complete written assignments due to his ADHD).

For the most part, the Parties agree on the relevant facts and the timeline of the events. The heart of the instant disagreement centers on the emphasis that should be applied to the relevant facts. I now find the Student's OHI adversely affected the Student's educational performance. I also find as a result of the Student's IDEA OHI disability, the Student needs SDI. Accordingly, I now find in favor of the Parents and against the District on the IDEA eligibility, evaluation and denial of FAPE issues. An appropriate Final Order follows.

**A SERIES OF PROCEDURAL VIOLATIONS DENIED THE STUDENT
A FAPE**

A child find violation occurs when a cyber-school suspects a student has a disability and fails to evaluate and make an appropriate eligibility decision in a reasonable time. A procedural violation can cause a substantive FAPE violation when it results in the loss of an educational opportunity and/or seriously infringes on the parents' opportunity to participate in the IEP process or causes a deprivation of educational benefits. 34 C.F.R. §300.513.

First, the evidence is preponderant that a reasonable prudent educator would have suspected, identified and found the Student was IDEA eligible—the I.E.E. data identified how the Student's OHI adversely affected the Student's educational performance. In the first report and her testimony, the examiner concluded that, although the Student has average intelligence, the Student did not know how to organize work and/or complete tasks/assignments on time. The I.E.E. examiner described how writing assignments take an extensive amount of time, and even when completed, the Student would produce a "small amount of work." In reporting on one of the direct observations, the examiner noted the Student struggled with organizational skills, had problems remaining focused in class, had problems completing and handing in assignments,

and completing work independently were weaknesses. The I.E.E. examiner's initial report notes that the Student's test performance in certain classes was "poor," along with reports that the Student does not take advantage of the opportunity to make up work when offered.

The most recent PSSA scores from 7th grade were "Below Basic" in Mathematics and Basic in Reading. The I.E.E. report and the Cyber-School initial evaluation describe a connected pattern of strengths, weakness, and inconsistent test scores compared to the Student's overall "Average" ability and "Average" achievement supports a finding that the O.H.I adversely affected the Student's performance. The I.E.E. examiner's observations in the School and the community, combined with the executive functioning testing data and the Cyber-School teachers' comments, clearly establish the Student's need for targeted SDI and individual goal statements to address the OHI. I now find the evidence is preponderant that absent adaptations to the "content, methodology, or delivery" of instruction, the Student would not benefit from the ongoing instruction.

Second, under these circumstances, the Cyber School procedurally erred when they failed to convene a group of knowledgeable people to review the private I.E.E.. They also erred in determining what individual assessments should be included in the initial evaluation.¹⁶ At the time of the initial evaluation, since the Parents did not consent to a Section 504 Agreement, the Student was in regular education 100% of the time without any supports. Under these circumstances, knowing that the Student was a person with A.D.H.D, knowing the Student was then in regular education without accommodations, and knowing that the Cyber-School rejected the

¹⁶ See, *Randolph (MA) Public School*, 21 IDELR 816 (OCR 1994), OCR opined that, in interpreting data and making placement decisions, a district must draw upon information from a variety of sources, including results of independent evaluations, and ensure that the information obtained from all sources is documented and carefully considered.

I.E.E. findings, the Cyber-School had an affirmative obligation to complete a full individual evaluation, including tailored individual assessments, targeted observations along with relevant behavioral, social and executive functioning checklists in all areas of suspected disability.¹⁷

Third, the decision not to collect additional data about the Student's need for SDI was a substantive error that interfered with and delayed the Student's right to a full individual evaluation in all areas of suspected disability. The IDEA requires that the IEP team, not one individual - *i.e.*, the Director of Special Education - determined the need for additional data.¹⁸The Special Education Director's unilateral decision not to collect additional data about how or if the OHI adversely affected the Student's educational performance and if the Student needed SDI interfered with the Parents participation in the evaluation process. As discussed, that same decision further denied the Student the substantive benefits of a timely evaluation and delayed the data when an IEP with SDIs would be offered.

Fourth, the Cyber-School's eventual initial evaluation report was a copy, cut and paste of the private I.E.E. report. The initial evaluation lacked updated Parent input, a direct observation in the online classroom, a curriculum-based assessment, and targeted executive functioning measures assessing attention, organizational skills, task completion and self-regulation in the online classroom. It is no strange coincidence that the same group of people- the Director of Special Education, the Section 504 Coordinator and others - who discounted the private I.E.E. report the first time, would not disregard the I.E.E. report a second time when pasted "as is" into the Cyber-School evaluation report. The procedural violation in failing to collect additional data and identify the Student as eligible was wrong the first time

¹⁷ 20 U.S.C. § 1414(a)(1)(A), 20 U.S.C. § 1414(a)(1)(C), 20 U.S.C. §§ 1401(3), 1414(d)(2)(A), 20 U.S.C. § 1414(c)(1).

¹⁸ 34 CFR § 300.305(a)(1)-(2), 34 CFR § 300.8, and in accordance with 34 CFR § 300.306 (b).

in October 2018, as discussed above, and equally wrong the second time, when repeated in November-December 2018.

Fifth, neither the Director's testimony nor the Cyber-School examiner's testimony explained why they discounted the teachers' critical unchallenged observations in the Cyber-Schools initial evaluation report. Let me explain. Each of the teachers documented how the Student could not focus, how the Student was not completing assignments, and how the Student needed services like meeting with the academic advisor daily to review the daily assignments.¹⁹ The teachers' comments corroborate the I.E.E. examiner's observations and opinions about the Student's need for SDI. Collectively the teachers' input established in October 2018 how the Student's OHI adversely affected the Student's educational performance. At the same time, the teacher's comments documented the Student's need for individualized changes to the delivery of and the content of the teaching methods delivering executive functioning instruction. Neither the Director nor the examiner observed the Student, worked with the Student, or interviewed the teachers, yet each, without additional data, determined the Student's agreed on OHI did not adversely affect the Student's education. The lack of firsthand knowledge garnered from an observation and updated data undercuts the persuasive weight of their collective testimony. On the other hand, the I.E.E. examiner and the teachers' comment complement, complete and corroborate the IDEA eligibility analysis. For example, the teachers' comments document how absent day-to-day SDIs, the Student could not organize, complete or turn in work. Accordingly, I now find the teachers' superior knowledge of the Student and the I.E.E. examiner's direct hands-on work coupled with the multiple observations of the Student, are more persuasive than the Director of Special Education and the Cyber-School

¹⁹ See, FOF #24, for a detailed list of the teacher's observations about how the OHI adversely affected the Student's education and the need for SDI.

Examiner's testimony on the need for SDI²⁰ Accordingly, I now find based on the corroborating testimony, of the teachers and the I.E.E. examiner, the Cyber-School failed to complete a full individual evaluation in all areas of suspected disability. Simply put, the Student has an IDEA disability, the IDEA disability adversely affects and the Student's education the Student needs SDI. Therefore the record is preponderant the Cyber-School failed to identify the Student, offer an IEP and a FAPE.

Sixth, the failure to hold a meeting with the Parents, once requested, to explain the data, denied the Student the benefit of participating in a full individual timely evaluation of the Student in all areas of unique need and suspected disability. Charter schools are required to provide, upon request, an explanation of and/or interpretation of any answer sheet or other education record or related tests a student has completed.²¹

The record is preponderant that the Cyber-School never explained the evaluation report data or the basis for its decision why the Student did not need SDI. The failure to explain the data and assessment tools prevented the Parents and the other team members from understanding the data and stopped the Parents from providing any input about the Student's educational needs. This rift in communication, thinking and understanding of the Student's circumstances divided the Parties and fueled the dispute.

The Cyber-School's contention that the Parents were free to contact the R.R. examiner completely misses the point. The Cyber-School, not the Parent, is

²⁰ See, *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways local staff who are more familiar with the student and the local curriculum, can be better-qualified than third parties to gauge the student's needs, individual circumstance and progress).

²¹ 34 C.F.R. §300.613 (b)(1). *Letter to MacDonald*, 20 IDELR 1159 (OSEP 1993) (finding that local education agencies have a duty to explain tests to a parent or inform a parent regarding testing instruments or data that constitute the basis for its educational decisions about needs, eligibility or SDI).

responsible for preparing the evaluation and explain the evaluation.²² Even if the Parents had a side door discussion with the R.R. examiner, the discussion would have compounded the Cyber-Schools' procedural error. Assuming the Parents did contact the examiner, and further assuming the examiner provided the Parents with an explanation, the other team members would have been left out of the discussion, thereby repeating the information imbalance that necessitated the meeting. Accordingly, I now find the failure to hold a meeting to explain the data, in this instance, interfered with the Parents' right to participate in the evaluation process. This violation also denied the Student the benefit of a full comprehensive evaluation in all areas of educational need and suspected disability.

After reviewing the extrinsic and intrinsic evidence as a whole, I now find the Parents meet their burden of proof on the child-find and IDEA eligibility issue. The Cyber-School's initial evaluation was inadequate, incomplete and insufficient. I also find that the above procedural violations interfered with the Student's right to a full individual comprehensive evaluation in all areas of unique need. The above string of procedural violations also interfered with the Parent's participation in the evaluation, delayed SDI receipt, and a FAPE. Accordingly, I find that the above procedural violations caused a substantive denial of a FAPE. An appropriate Order follows.

**THE 504 AGREEMENTS, THE ACCOMMODATIONS,
THE EXECUTIVE FUNCTIONING COACHING SCHEDULE AND FAPE
THE CYBER SCHOOL FAILED TO PROVIDE PROCEDURAL SAFEGUARDS**

²² See, e.g., *New Mexico Pub. Educ. Dep't*, 115 LRP 12278 (SEA NM 03/02/15) (A district's failure to conduct a comprehensive reevaluation deprived the parent and the IEP team as a whole of the reliable information the team needed to fashion an appropriate IEP and thereby deprived the student of FAPE.); and *James v. District of Columbia*, 68 IDELR 11 (D.D.C. 2016) (The "Summary of Existing Data" that the District of Columbia prepared in response to a guardian's request for an updated psychological assessment of a teenager with an intellectual disability did not fulfill the district's obligation to reevaluate the student.).

"The essential question is whether the school district 'reasonably accommodate[d] the needs of the handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits.'" *K. K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 153 (3d Cir. 2014), citing *Ridley School Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) (citations omitted). In October 2018, the Student enrolled in the Cyber-School. At the time of enrollment, the Parents provided the staff with a copy of a Section 504 Agreement prepared by a public school.²³ The Section 504 Coordinator reviewed the Section 504 plan and stated that the Cyber-School would provide the accommodations, as best they could, in the online environment. After that, the teachers began implementing accommodations like chunking assignments and provided extended time to complete work. At or about the same time, the Parents presented the Cyber-School with the private I.E.E. report. While the actual date is unclear, the record is preponderant that sometime in November or early December, the Cyber-School learned that the Parents did not consent to the public school Section 504 plan. Aware that the thought to be intrastate Section 504 Agreement was not approved, the Section 504 Coordinator directed the staff to stop providing all accommodations. This decision violated the Student's Section 504's procedural due process protections. ²⁴

The Section 504 regulations require schools to issue notice concerning actions regarding the identification, evaluation, or educational placement of persons, who because of handicap, need or are believed to need special education or related services. 34 CFR 104.36. Finally, the regulations

²³ The record does not explain why at the time of enrollment, the Parents did not tell the Section 504 Coordinator that they did not consent to the Section 504 agreement prepared by the public School. They did, however, tell the Coordinator that they thought the Agreement was "watered down." This lack of candor did not go unnoticed.

²⁴ *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children With Disabilities Education Act*, Department Of Education, Office of Civil Rights, <https://www2.ed.gov/about/offices/list/ocr/504faq.html>, Jan. 10, 2020 (last accessed March30, 2021).

provide that students must be reevaluated prior to any significant change in placement. 34 C.F.R. §104.35 (a). Fitting within a pattern of much more streamlined procedural safeguards than those of the IDEA, the Section 504 regulations do not require that a Section 504 Agreement is in writing. Similarly, the Section 504 regulations, unlike the Pennsylvania Specific Chapter 15 regulations, not otherwise applicable to charter schools, do not prohibit oral Section 504 Agreements. 22 P.A. Code §711.2 and §711.3., 34 C.F.R. §104.32-36.²⁵ Therefore, the Section 504 Agreement's termination was also a substantive violation of Section 504 FAPE standards. 34 C.F.R. §§104.32-36

The Cyber-School knew the Student was a person with a disability. The Section 504 Coordinator told the Parents the Cyber-School would implement the public school Section 504 Agreement. The Parents' failure to consent to the Section 504 Agreement in the public setting did not negate the Cyber-School's duty once the Coordinator orally stated and the Parents orally agreed the Cyber-School could implement the Agreement. Simply stated, the Cyber-School knew that taking away the agreed-on accommodations would negatively impact the Student's access to, participation in and commensurate opportunity to benefit from participation in the entire program. The Cyber-School knowingly disregarded the Student's FAPE rights, knowing the negative effects that unilateral decision would have on the Student as a whole.

The record is preponderant that once notified of the Cyber-School decision, the Parents disagreed. After that, the parties went back and forth on the IDEA eligibility issue and the Section 504 issue. Unlike a public school,

²⁵ See Perry A. Zirkel, Comparison of IDEA IEPs and Section 504 Accommodations Plans, 191 Ed.Law Rep. 563 (2004); Zirkel, P. (2017). *An updated comprehensive comparison of the IDEA and Section 504/ADA*. *West's Education Law Reporter*, 342(3), 886-915 n.97 (2017). (for a more specific tabular analysis of the Section 504 requirements describing the lack of standards requiring written versus oral Agreements).

subject to 22 Pa. Code Chapter 15, 22 Pa Code Section 711.2 and Section 711.3, the applicable charter school regulations and cross-references to the Section 504 regulation permit oral Agreements, absent a writing. The record is preponderant that the Parents asked, and the Section 504 Coordinator agreed to implement the public school Section 504 Agreement. Therefore, once initiated, the public school Section 504 Agreement became the pendent program/placement. Even assuming *arguendo*, the oral Section 504 Agreement between the Parties was not otherwise enforceable, the Cyber-School at a minimum, after treating the Student like a person with a disability, should have provided Prior Written Notice and procedural safeguard protection when they unilaterally terminated all services. 34 C.F.R. §104.36.

The record is clear the termination of services resulted in a change in the delivery of services, a change in the placement and otherwise prevented the Student from accessing benefits or fully participating in School. 34 C.F.R. §§104.32-36. Accordingly, I now find the intrinsic and extrinsic evidence supports a finding that the Cyber-School denied the Student a FAPE when they failed to provide the agreed-on accommodations, failed to issue Prior Written Notice and failed to issue Section 504 procedural safeguards explaining the decision to terminate services. This combination of procedural violations proximately caused a substantive Section 504 denial of a FAPE and interfered with the Parents' procedural rights to participate in the Student's education. An appropriate Order follows

THE PARENTS' CONSENT TO A SECTION 504 AGREEMENT

In September 2019, following a series of Section 504 discussions, the Parents consented, and the Cyber School began to implement a Section 504 Agreement during the IDEA eligibility dispute. Unlike the first time, in 2018, the Cyber-School provided the Parents with procedural safeguards. While the record is clear the Student's grades improved, the record is preponderant

that the Student's executive functioning skill set continued to substantially limit and adversely affect learning. While Section 504 accommodations are not expected to "erase" the Student's disability, the record is preponderant that absent the delivery of individualized SDIs targeting executive functioning, the Cyber-School failed to meet its' "duty under § 504 was to mitigate the impact of Student's disability. This failure caused another denial of a FAPE.²⁶ For example, the Student continued to have attention, organizational and executive functioning issues, yet the Section 504 Agreement failed to offer any supplemental aids, auxiliary supports, related aids or SDIs.²⁷ The record is also preponderant that the Student's OHI/ADHD caused the Student to fidget, failed to self-regulate impulses and complete assignments on time. To the extent the Cyber-School argues that a study skills class targeted executive functioning, I disagree. The record is clear that although the Student took a study skills class, the class did not provide any benefit. Therefore, I now find the September 2019 Section 504 Agreement failed to include supplemental aids/services, instruction, or targeted supports to provide the Student with a commensurate-reasonable opportunity to achieve or access the same benefits otherwise provided to non-handicapped students. An appropriate Order follows.

**THE EXECUTIVE FUNCTIONING COACH, THE UPDATED
ACCOMMODATIONS AND THE DELIVERY
OF INDIVIDUALIZED INSTRUCTION**

Upon receipt and review of the I.E.E. examiner's second report, the Cyber-School offered a new revised Section 504 Agreement. The revised

²⁶ See, *H.D. v. Kennett Consol. Sch. Dist.*, No. 18-3345, 2019 U.S. Dist. LEXIS 173481 (E.D. Pa. October 4, 2019), *Molly L.*, 194 F. Supp. 2d at 436 (citing *Carlisle Area Sch.*, 62 F.3d at 533-34).

²⁷ While not defined in regulations, OCR Letters of Findings provide that the term "related aid" means the same as "related services" under the IDEA. Prescott (AZ) Unified Sch. Dist. No. 1, 352 IDELR 541 (OCR 1987). OCR has also stated that the term "related aids and services" means the same as "supplemental aids and services" as set forth in the least restrictive environment requirement at 34 CFR §104.34(a).

Agreement offered to provide one-on-one weekly executive functioning instruction. The offer of services also included 72-hours of one-on-one recovery services to make up for services not provided during the 2018-2019 and 2019-2020 school year. The Section 504 Agreement also offered a list of individualized adaptations which otherwise modified the "content, methodology, or delivery" of the instruction to meet the Student's OHI disability-related needs. The Section 504 Agreement also provided several tailored accommodations. For instance, the Agreement included one-on-one tutoring and teaching time, which enabled the Student to explain ideas and concepts to the teachers. This one-on-one time reinforced in-depth processing of material rather than rote memorization of unrelated facts. The time also allowed the Student to organize and relate new ideas to information previously learned. The Section 504 Agreement also targeted the Student's written expression executive functioning organizational deficits, provided regularly scheduled evening one-on-one tutoring, a private virtual office, and targeted self-regulation impulsivity deficits. All individualized Section 504 services, related aids, and accommodations would be progress monitored every four (4) weeks. The progress monitoring would allow the teachers to track which accommodations, services or aids were working. When viewed as a whole, the Section 504 Agreement essentially included an executive functioning look-alike goal statement, a written expression look-alike goal statement, supplemental services like the evening virtual office services, look-alike SDIs and/or accommodations.

Simply put, the then-current Section 504 Agreement contained all of the essential components of an IEP. The record is also preponderant that the increased instructional opportunities, like one-on-one services and other accommodations-related aids, supplemental services allowed the Student to access and benefit from participation in the least restrictive regular education environment. After reviewing all of the extrinsic and intrinsic

evidence, I now find although the document was called a Section 504 Agreement, it included all of the essential elements of an I.E.P with SDI.²⁸

The extrinsic and intrinsic evidence leads me to conclude that this Section 504 Agreement otherwise met the *Rowley* and *Endrew* FAPE standard and the *Ridley* reasonable accommodation standard. Therefore, I now find that the 2019-2020 Section 504 Agreement offered and provided a FAPE. This conclusion does not end the analysis as I must now analyze what, if any, appropriate relief is necessary to remedy the denial of a FAPE and any learning loss.

THE SUSPECTED LEARNING LOSS AND THE CALCULATION OF APPROPRIATE RELIEF

Compensatory education is an equitable remedy that involves discretionary relief, crafted to remedy an educational deficit created by an educational agency's failure to provide a FAPE to a student. *Dept. of Defense Education Authority G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295 (4th Cir.2003). Without transcript references to prove a specific loss in the record, the Parents suggested an award of one (1) hour per day for 495 days totaling 495 hours of compensatory education. (Parents' Closing, p.34).

²⁸ See, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 68 IDELR 52, (OCR 2016) page 27 and footnote 76 citing *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) and *South East. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979). If a student with a disability is eligible for FAPE under §504 but is not receiving FAPE services under the IDEA, that student is entitled to the provision of any services, including special education the placement team decides are appropriate to meet their individual educational needs, regardless of cost or administrative burden, and especially where such services have been provided to IDEA eligible students in the past. Those services can be as varied and as comprehensive as necessary to meet a student's need. "For example, a school could consider modifying its homework policy and providing greater flexibility in meeting deadlines to a student with ADHD who consistently forgets his homework because of ADHD. (For a different student, one who does need special education or related services, this modification could be in a Section 504 Plan. As a related aid or service in a Section 504 Plan, the school also could teach the student skills or strategies for organizing his homework to ensure that it is completed and submitted. The school could also work with the student's parents to help establish that routine.).

I agree a remedy is owed; however, I disagree with the suggested calculation.

The record is preponderant that the Parties, in a rare moment of collaboration, after reviewing the two private I.E.E.s crafted a Section 504 Agreement that called for the Student to receive 72 hours of prospective additional services to make up for the lack of executive functioning instruction during the 2018-2019 and 2019-2020 school year. The Section 504 Agreement also included one (1) hour a week of prospective executive functioning coaching for the 2020-2021 school year. The I.E.E. examiner that I found persuasive above on the Student's IDEA eligibility, discussed in detail above, agreed on multiple occasions on direct and cross-examination that 72-hours of prospective one-on-one executive functioning services was an "appropriate" amount of make-up time. The same I.E.E. examiner also opined that one hour a week of executive functioning coaching coupled with the other aids/services/SDIs in the Section 504 Agreement was an "appropriate" amount of retrospective and prospective time. The I.E.E. testimony is the sole evidence on this point. Therefore, after reviewing the I.E.E. examiner's testimony on the "appropriateness" of the retrospective executive functioning make-up time, I now find a lack of proofs that would otherwise justify a contrary upward discretionary adjustment of compensatory education, greater than the time in the Service Agreement. Accordingly, I now find the Parents failed to meet their burden of proof to substantiate the request for additional compensatory education. I also find that based on a careful and thoughtful review of the record, one hour a week of executive functioning time is appropriate prospective relief. The Parents' request for 495 hours of compensatory education is denied. An appropriate Final Order follows.

SUMMARY

First, the record is preponderant, the Student is a person with an IDEA disability, who because of the disability, needs SDI. To remedy the IDEA violation, the Cyber-School is directed to have an IEP in effect before the start of the 2021-2022 school year. Second, the record is also preponderant that the Cyber-School made a series of procedural and substantive errors that caused a denial of a FAPE. The same procedural and substantive errors interfered with the Parents' right to participate in the child-find, evaluation and IEP/FAPE process. Within 180-days of the ORDER below, the Cyber-School is now directed to complete a self-evaluation as called for at 34 C.F.R. § 104.6. The Cyber-School should take whatever remedial action and/or voluntary action needed to correct the substantive and procedural violations above or any other remedial action deemed necessary as identified in the self-evaluation. Third, the record is preponderant that the Parties agreed that 72-hours of one-on-one make-up executive functioning instruction would otherwise remediate any learning loss that occurred during the 2018-2019 and the 2019-2020 school year. Therefore, the Parent's request for additional compensatory education is denied. Fourth and last, the intrinsic and extrinsic evidence is preponderant; the Parents failed to prove that an upward adjustment beyond the agreed to one hour a week of executive functioning coaching is otherwise appropriate. An appropriate Final Order follows. All other claims and/or affirmative defenses are dismissed with prejudice.

ORDER

1. The Cyber-School is Ordered to prepare and offer an IEP within 90-days of this Order.
2. The Cyber-School is directed to have an IEP in effect before the start of the 2021-2022 school year.

3. Within 180-days of this Order, the Cyber-School is directed to complete a self-evaluation according to 34 C.F.R. § 104.6. The Cyber-School should take whatever remedial action and/or voluntary action needed to correct the substantive and procedural violations referenced above.
4. The Parents' claim for compensatory education is denied.
5. All other claims and/or affirmative defenses are dismissed with prejudice.

/ Charles W. Jelley, Esq. LL.M.

Special Education Hearing Officer
ODR FILE #22521-1920 KE