

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

Closed Hearing

ODR No. 29134-23-24

Child's Name:

A.L.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

June 21, 2024

INTRODUCTION

A.L. (hereafter "Student"), attended Laboratory Charter School (hereafter "LEA") from the beginning of [redacted] grade (2019-2020 school year) through the completion of [redacted] grade (2022-2023 school year). The Parent filed a Complaint on January 30, 2024 claiming that the LEA did not provide a Free Appropriate Public Education ("FAPE") from the Student's enrollment in [redacted] grade (2021-2022 school year) through [redacted] grade (2022-2023 school year), and the applicable Extended School Year ("ESY") periods. The Parent requested compensatory education for the alleged failure to provide FAPE.

The Complaint proceeded to a two-day, closed, due process hearing that was convened via video conference on April 8, 2024 and May 2, 2024.

For the reasons set forth below, the Parent's claim is granted.

ISSUE

1. Did LEA violate the Student's right to a Free Appropriate Education (FAPE) within the meaning of the IDEA during the 2021-2022 and 2022-2023 school years and applicable ESY periods?
2. If so, is an award of compensatory education warranted?

FINDINGS OF FACT

All evidence including the exhibits admitted to the record, the transcripts of the testimony and the parties' closing statements was considered.¹ The only findings of fact cited in this Decision are those needed to address the issue resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

¹ References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number.

1. The Charter School is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a)(2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. The Student, [redacted], resides with Mother and siblings (P-10, P. 1, 2; P-17, p. 6; P-19, p. 1, 2) and has intermittent contact with Father (P-11, p. 2; P-19, p. 2).

[redacted] (2018-2019)

3. Due to developmental delays in the areas of cognitive and communication development, the Student received Early Intervention services ("EI"): speech and language services ("SL"), behavioral therapy, occupational therapy ("OT"), and physical therapy ("PT") (S-10, p. 4).
4. The Student attended a different charter school for [redacted] (2018-2019 school year) (S-10, p. 4) where an evaluation was conducted producing an Evaluation Report ("RR") dated June 1, 2018, which concluded that the Student qualified for special education under the disability category of Speech and Language Impairment and needed OT (P-24/S-3, p. 2; S-10, p. 4).

[redacted]Grade (2019-2020)

5. The Student transferred to the LEA for [redacted]-grade (2019-2020 school year) (P-3; S-10, p. 4). The Student was placed in Itinerant Learning Support and received OT and SL services (P-24/S-3, p. 1).
6. Early in the school year, the Parent was called to meet with the Principal and others to discuss the Student's behavior described by the teachers as temper tantrums, falling to the floor, crying and being disruptive. The Principal suggested that the Parent obtain an outside evaluation to see if the Student was eligible for a 1:1 aide (NT, p.76-79; 85).

7. An Individualized Education Plan ("IEP") meeting was held November 1, 2019. The LEA conducted an OT evaluation and concluded that the Student should receive OT for 30 minutes per week (P-5, p. 7) and SL for 30 minutes per week. The decision was based on evaluations conducted in previous years at previous schools (P-5, p. 7, p.22). The 2019 IEP included: two OT goals; two language goals with corresponding Specially Designed Instruction ("SDI") and benchmarks; and one social skills goal with corresponding SDI and benchmarks (P-5, p. 13-18). The placement was Itinerant Learning Support with the Student in the regular education classroom for 96 percent of the school day (P-5, p.23).
8. On January 10, 2019, an outpatient provider conducted a comprehensive biopsychosocial evaluation of the Student. The Mother described the Student as being developmentally delayed and having poor emotional regulation. As a result of the assessment, the provider recommended case management, a psychological evaluation, family therapy, and individual therapy (P-10, p. 11).
9. The mandatory school closure during the pandemic started in March of 2020, the Student's [redacted]-grade school year.

[redacted] Grade (2020-2021)

10. During [redacted] grade, the Student participated in remote learning for the entire school year (P-11, p. 2). The Student worked from home with [redacted]siblings; all working on computers to access their education (NT, p. 89). The Student was resistant, struggled to pay attention, and "basically sat there, nonresponsive" (NT, p. 89-92).
11. The annual IEP was due on or before November 1, 2020, however, the IEP was not issued until May 20, 2021. The present levels of functional performance included in the 2021 IEP were taken from 2019 (P-8, p. 8).

12. There was scant parental input, noting only that Mother was concerned about fine motor skills (e.g., tying shoes), reading comprehension/writing, and language skills (P-8, p. 11).
13. The 2021 IEP included the OT testing results from 2019. The IEP OT progress monitoring completed in June 2022, reported that there was no change from the baseline (P-8, p. 19). The handwriting goal was not progress monitored (P-8, p. 20). There was limited progress reported for the expressive vocabulary goal (P-8, p. 21). The speech and language goals were the same as in the previous IEP.
14. The progress reporting indicates the Student's regression and recoupment were scattered. Moderate progress was reported on the Student's overall language skills in June 2022; however, this goal was reported to be mastered in November 2021, January 2022, and March 2022 (P-8, p. 23). In June 2022, progress monitoring indicates "limited progress"; however, this goal was reported as "mastered" in November 2021, January 2022, and March 2022 (P-8, p. 25).
15. The IEP found that the Student continued to be eligible for OT and SL services (P-8, p. 27). The amount of SL the Student was to receive was unclear. In one place, group SL was listed as 30 minutes once per week (P-8, p. 27). Later, under Educational Placement, SL is listed as 60 minutes per week (P-8, p. 29).
16. The Student was found to be "not eligible" for ESY during the summer 2021 (P-8, p. 28).
17. The Educational Placement was Itinerant Learning with SL and OT provided as related services (P-8, p. 27).
18. The LEA did not conduct an RR of the Student of during the [redacted] grade school year (NT, p. 92).

[redacted] Grade (2021-2022)

19. At the beginning of [redacted] grade, the Student struggled while transitioning back to in-person learning after the year of remote learning. The difficult transition was further exacerbated by an unusual number of staffing changes and how far the Student was behind the others academically. The Student continued to act-out, having temper tantrums and falling to the floor, crying, throwing things, and hitting (NT, p. 94-96).
20. During the Fall of 2021, the LEA conducted diagnostic assessments in the areas of Math, Reading, and Language Arts. The results indicated that the Student tested well behind in math, reading and language arts as compared to the national percentile ranks (P-12, p. 1-2).
21. In January 2022, the Parent self-referred the Student to a community-based outpatient facility affiliated with a local hospital. The community-based facility conducted a comprehensive biopsychosocial evaluation of the Student. The Student was referred for outpatient psychological services to address behavior problems, including case management, family therapy, individual therapy, and a psychiatric evaluation (P-10, p. 11).
22. In May 2022, the Student participated in a psychiatric evaluation at the same outpatient facility. The psychiatrist diagnosed the Student as having an unspecified adjustment disorder with mixed disturbance of behavior and conduct. One of the recommendations was to hold an IEP meeting (P-11, p. 1, 6).
23. The May 31, 2022 IEP included goals for vocabulary; language skills, social skills, three for OT, and SL (S-1/P-13, p. 16-12). Many of the goals were cut and pasted from those in the 2021 IEP. The related services included were OT and SL (S-1/P13, p 27).
24. The May 31, 2022 IEP indicated regression over school holidays and breaks. ESY was offered, but only one OT/writing goal was listed for the

summer. The IEP fields for ESY services to be provided, location, frequency, beginning date, and anticipated duration were left blank (S-1/P-13, p. 28-29). A NOREP for ESY was not entered into evidence.

25. On July 6, 2022, the local crisis treatment center that provided services to the LEA, produced an IBHS (“Intensive Behavioral Health Services”) Treatment Plan (P-17). The IBHS Plan included three goals: (1) increase self-control and self-regulation; (2) improve listening skills; and (3) improve impulse control (P-17, p. 7). The IBHS Plan also included de-escalation strategies for the LEA to provide that are consistent with trauma-informed practice (P-17, p. 8). No evidence was provided by the LEA demonstrating that this data was taken into account by the IEP team or even seen by the Student’s teachers.
26. The new Special Education Coordinator² testified that the treatment center’s reports are in the Student’s file that she reviewed and that, in fact, the treatment center has an office in the school, provides services to the students who attend the LEA, and shares copies of the reports with the LEA (NT, p. 338, 342).

[redacted] Grade (2022-2023)

27. On October 18, 2022, the Student was assessed at home by the crisis treatment center that provided services to the LEA and Clinical Documentation for a Written Order was developed (P-18). This assessment was conducted following an incident at school that resulted in the Student allegedly attempting to [redacted](P-18, p. 1).
28. The report noted that the Student suffered recent traumas: [redacted](P-18, p. 1, 2).

² The Special Education Coordinator who was at the LEA during the time the Student was at the school was no longer there.

29. During that school year, the LEA complained to the Mother multiple times about the Student's behavior (e.g., temper tantrums, fights, throwing things, and eloping) (P-18, p. 1). The Mother reported that during the [redacted] grade, the Student had five different teachers and two teachers in the first two months of [redacted] grade (P-18, p. 2). The examiner recommended that the Student have a psychiatric evaluation, an evaluation for an Autism Spectrum Disorder and that the Student's IEP be monitored (P-18, p. 5).
30. On November 6, 2022, a Functional Behavioral Assessment ("FBA") report was released from the crisis treatment center that collaborated with the LEA (P-19). This examiner also referred to recent losses in the Student's life and the father's [redacted] when the Student was younger (P-19, p. 2).
31. The FBA concluded that the Student was emotionally immature, struggled with maintaining peer relationships, and acted out when the Student was upset (e.g., whining, annoying others, aggression). The examiner recommended training in anger management and negotiation, self-regulation strategies, clear and consistent consequences for noncompliance, Behavioral Health Training ("BHT"), a Behavioral Consultant, and Mobile Therapy (P-19, p. 6-7).
32. The LEA conducted an RR one year and six months after the Student's triennial reevaluation was due. The November 28, 2022 RR found the Student to be eligible for special education services under the primary disability category of Other Health Impairment ("OHI") due to symptoms that are characteristic of an Attention-Deficit/Hyperactivity Disorder ("ADHD"), and the secondary disability categories of Specific Learning Disability ("SLD") and SLI (P-24/S-3, p. 22).
33. The school psychologist who conducted the 2022 RR reported receiving a bachelor's degree in Psychology and a master's degree in school

psychology and, in 2021, a school psychologist certification (NT, p. 259-260). She was employed by the LEA for less than a year (NT, p. 255-256). She was subsequently hired by another school in Philadelphia where her tenure also lasted less than a year. At the time of the hearing, she was not employed as a school psychologist at any school. She was subpoenaed to testify at the due process hearing (NT, p. 252-256; 258-259).

34. Despite the fact that the Student's last RR was conducted during [redacted], the School Psychologist included evaluation data from it, including Parental Input, and present levels reported by the Student's previous school (P-24, p. 1-3).
35. The School Psychologist only observed the Student for one-half hour as part of the evaluation. During much of that time, the Student was using a Chromebook or having lunch; not receiving instruction (NT, p. 289; P-24/S-3, p. 3).
36. The School Psychologist received input from the Student's [redacted] grade regular education and special education (an instructional aide with emergency certification) teachers (NT, p. 308-309). The School Psychologist did not include input from the Student's [redacted] grade, [redacted] grade teachers despite the fact that the Student was experiencing behavior and academic problems in those grades (NT p. 304; P-24/S-3, p. 4, 5, 12, 13, 15).
37. The 2022 RR included the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V"), a cognitive assessment, in which Student was assessed Extremely Low in two out of five indexes and Very Low under the Full-Scale IQ index (71; 3d percentile) (P-24/S-3, p. 8, 9). The Student's index scores on the WISC-V were divergent and showed substantial variability. For example, the Student scored as low as the first percentile for Visual Spatial Index and as high as the 21st percentile for

the Fluid Reasoning Index (P-23/S-3, p. 8). The School Psychologist failed to note the variability, failed to calculate the General Ability Index ("GAI"), and relied instead on the resultant FSIQ (71; 3rd 27 percentile; Very Low range), which was not a reliable indicator of overall cognitive functioning (P-24/S-3, p. 8-11).

38. The data collected to assess Autism, despite the Parent's concerns about it, was scant. The only person who completed the Behavior Assessment Scales for Children – 3rd Edition ("BASC-3") and Autism Spectrum Rating Scales ("ASRS") was a special education instructional aide with emergency certification (NT, p. 196-197). These scales were crucial to assess the Student's behavior and social needs and, depending on comprehensive data, diagnose autism spectrum needs (NT, p. 308-309; P-24/S-3, p. 11-16). The Parent did not complete the rating scales. Based on the incomplete data, the School Psychologist did not find that the Student met the criteria for autism. Less than a year later, those needs were confirmed during an independent psychological evaluation conducted by an autism center affiliated with a local hospital (P-24/S-3, p. 17; P-29, p. 10).
39. The RR concluded that the Student demonstrated academic need in the areas of math concepts and applications, letter and word recognition, written expression, math computation, spelling, and reading comprehension (P-24/S-3, p. 16).
40. The January 19, 2023 IEP was primarily based on the November 2022 RR. No Parental Input was included in the IEP. Goals listed were: two math goals; two phonics goals; one counseling goal; three OT Goals (again, no OT evaluation was conducted); two SL goals; one goal regarding attention to task; and one goal regarding coping skills. Related services were Counseling, SL, OT, Social Skills, and Counseling (P-26, p. 27-40). The Placement was Itinerant Learning Support (P-26, p. 46).

41. The 2023 IEP indicates that the Student was not eligible for ESY (P-26, p. 44). Despite the IEP ESY finding, the LEA presented emails from March 2023 showing that the Parent was offered ESY for summer 2023 and that the Parent declined transportation arrangements so Student did not attend. (S-4, p. 1).
42. During the Summer of 2023, the Mother brought the Student to an Autism Integrated Care program affiliated with a local children's hospital where a psychiatric evaluation was conducted. The resultant report, dated August 17, 2023, noted that despite the fact that the Student was eligible for 1:1 aide and wraparound services, those services were not being provided due to staffing issues (P-29, p. 3). The report noted that the Student was easily upset, perseverated on certain topics, had difficulty making and keeping friends, engaged in repetitive behaviors, and demonstrated some sensory issues (P-29, p. 4). The evaluator noted that the 2021-2022 school year incident involving the Student's alleged attempt to [redacted] occurred after the Student had been taunted by the peer, and the Student's attempts to self-advocate were not responded to by the teachers. The report noted that the LEA called for an emergency meeting to expel the Student but did not follow through after it became clear that the Student's IEP supports were not in place (P-29, p. 5). The Student was observed as having poor eye-hand coordination, a flat affect, lack of eye contact, difficulty engaging in and sustaining reciprocal conversations, and difficulty reading social cues (P-29, p. 6-8). The evaluation included a multitude of standardized tests that concluded the Student met the criteria for diagnoses of Autism Spectrum Disorder ("ASD") with accompanying cognitive impairment, and Attention Deficit Hyperactivity Disorder-Combined presentation ("ADHD") (P-29, p. 10). The examiner/doctor included six pages of recommendations for the IEP team to consider (P-29, p. 11-17).

43. The Parent withdrew Student from the Charter School and enrolled the Student in a new LEA for the Student's [redacted]-grade school year, 2023-24 school year (NT, p. 108-109).

Parent's Claims

The Parent claims that the LEA failed to offer FAPE when it failed to timely and comprehensively evaluate the student in all areas of suspected need including academic needs, behaviors, sensory processing, social skills, emotional regulation, and executive functioning. Therefore, compensatory education is an appropriate remedy for the denial of FAPE.

The Parent asserts that Principal asking the Parent to have child evaluated to determine if the Student was eligible for a 1:1 aide was inappropriate. The LEA was responsible for conducting such an assessment; not the Parent.

The Parent claims that the LEA failed to reevaluate the Student until one year and six months following the previous triennial evaluation. Furthermore, the resultant RR was not comprehensive and failed to provide a detailed description of Student's learning profile.

The Parent contends that the School Psychologist lacked competency as a school psychologist in many important areas (NT, p. 278, 282, 283, 290, 311-312, 313). As a witness at the due process hearing, the school psychologist was evasive, obstructive and defiant, despite the fact that she had sworn to testify truthfully under oath (NT, p. 245, 260, 261, 298, 299, 302).

The Student's mother repeatedly expressed concerns to the LEA regarding a suspected autism diagnosis, yet the School Psychologist's assessment was incomplete.

Despite clear evidence that Student struggled academically, socially/emotionally, and behaviorally in school, the LEA only offered the Student SL and OT services without any additional supports and services.

As a result, the LEA failed to provide a FAPE to the Student and an award of compensatory education is warranted.

LEA Arguments

The LEA argues that, even if liability against the LEA is found on the basis of some *procedural* defect, the Student is not entitled to receive a compensatory award because the Student suffered no educational harm or loss.

Furthermore, the LEA argues that the Parent failed to produce any evidence to support the contention that the LEA *substantively* violated IDEA in a way that prevented the Student from receiving meaningful educational benefit, and failed to establish by a preponderance of the evidence that the LEA caused substantive harm to the Student or the Parent, therefore, an award of compensatory education must be denied.

The LEA alleges that it properly identified the Student as one with special needs and provided programming. The LEA further contends that the Parent produced no substantive opinion or proof that she made attempts to contact the LEA personnel to discuss any concerns regarding the Student's education at the LEA.

The LEA maintains that it properly and thoroughly evaluated the Student and provided FAPE via an IEP each year the Student attended the LEA. The LEA purports that the IEP goals and SDIs reflect the results of the evaluations, and the IEP included multiple goals to address the Student's math computation, phonics and word recognition, social and emotional skills, occupational therapy needs, and speech and language development.

Furthermore, the LEA asserts that it offered ESY, but the Parent declined the transportation offered and the Student did not attend the program.

Therefore, the LEA requests that the Hearing Officer deny the Parent's complaint.

GENERAL LEGAL PRINCIPLES

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. *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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who filed the Complaint. In essence, the Parent must prove by a preponderance of the evidence that the LEA failed to provide FAPE for the time period in question and that compensatory education is an appropriate remedy.

Credibility Determinations

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. See 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).

The School Psychologist's testimony was disconcerting, evasive, prickly, obdurate, and, at times, nonsensical.³ Based on her spotty employment history, erratic conduct, and strange responses during the hearing, the Hearing Officer finds the School Psychologist's testimony to be unreliable and untrustworthy. Therefore, the Hearing Officer has given the School Psychologist's testimony no weight here in determining whether or not the reevaluation was comprehensive and appropriate. The RR document speaks for itself.

The other witnesses appeared to be genuinely interested in testifying credibly and to the best of their ability and knowledge of the Student.

Child Find and Eligibility under IDEA

The IDEA and state and federal regulations obligate local education agencies (LEA) 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

³ For example, during the remote hearing the witness initially refused to keep her camera on, then kept moving out of range of the camera. Later, the witness repeatedly answered by saying, "I plead the blood."

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.” LEA 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, LEA are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment” or to evaluate “every struggling student.” *Id.*

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).

“Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an eligible child [], the content, methodology or delivery of instruction.” 34 C.F.R. § 300.39(b)(3). The process of identifying children with disabilities is through evaluation.

Evaluations

When the LEA receives a written request for an evaluation from parents and the LEA agrees to conduct an evaluation, it must provide a Permission to Evaluate (PTE)/Consent form and a Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) to the parents within a reasonable time. 34 C.F.R. 300.503(a); 34 C.F.R. 300.300(a).

The group of qualified professionals, which reviews the evaluation materials to determine whether the child is a child with a disability under 34 CFR 300.306 (relating to determination of eligibility), shall include a certified school psychologist when evaluating a child for autism, emotional disturbance, mental retardation, multiple disabilities, other health impairments, specific learning disability or traumatic brain injury. 22 Pa. Code §14.123.

The IDEA establishes requirements for evaluations. 20 U.S.C. § 1414. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not the 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).

Evaluations must assess “all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B).

And, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related-service needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). In regard to the assessment tools utilized: (1) the LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate

educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b).

Reevaluations

In general, a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311 - (1) If the public agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation. (b) Limitation. A reevaluation conducted under paragraph (a) of this section - 3 (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) *Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.* [emphasis added] 34 CFR IDEA § 300.303.

Free Appropriate Public Education (FAPE)

The Individuals with Disabilities Education Act ("IDEA")⁴ 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

⁴ 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).

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).

Procedural Denials of FAPE

A procedural violation occurs when an LEA fails to abide by the IDEA's process-based requirements, procedural safeguards, and timeline requirements and is not a *per se* denial of FAPE; it is a denial of FAPE only if such violation causes substantial harm to the child or his parents. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). Furthermore, a procedural violation of the IDEA "must actually interfere with a provision of FAPE." *DiBuo v. Bd. of Educ.*, 309 F.3d 184, 190 (4th Cir.2002).

Substantive Denials of FAPE

Substantial harm can only be found where the preponderance of the evidence in the record indicates that the alleged procedural inadequacies: (1) impeded the student's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); see also *Rodrigues v. Fort Lee Bd. of Educ.*, 458 Fed.Appx. 124, 127 (3d Cir. 2011) (finding a lack of measurable goals in an IEP was a procedural error that did not affect the student's substantive rights or deny a FAPE where the student was mainstreamed and progress was measured by grades and state proficiency

assessments; the court found no IDEA violation); *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed. Appx. 920, 923 (3d Cir. 2010) (finding that IEP lacking annual goals relating to student's needs stemming from his disability was not a procedural flaw giving rise to a substantive harm because the school still provided FAPE).

Individualized Educational Plans

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

identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

Extended School Year (ESY)

The IEP team must consider each year whether the Student is eligible for ESY. Some of the factors to consider are regression, recoupment, self-sufficiency, independence, and mastery. 22 Pa. Code §14.132(a)(2) and §711.44(a)(2). If the IEP team determines the services are necessary to provide FAPE, ESY must be provided. 34 CFR 300.106(a)(3).

When ESY is offered by the LEA, the IEP must notify parents of the eligibility and content of the program that will be provided including a description of the type and amount of ESY services, the beginning and ending date of the services, duration, frequency and location of services.

Compensatory Education

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). "The remedy of compensatory education is available only where a student's substantive rights are affected by a school district's noncompliance with the IDEA." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that the student is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also

endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014).

DISCUSSION

The LEA failed to timely and comprehensively reevaluate the Student; provide timely and adequate academic supports; systematically assess and program for the Student’s behavioral, emotional regulation, executive functioning and social skill deficits; and develop appropriate programming to support the Student’s speech, language and fine motor deficits. These procedural and substantive denials of FAPE to Student caused substantial harm to the Student.

Procedural Denials of FAPE

The IEP team must conduct a review, at least once a year, to discuss the student’s progress toward achieving their IEP goals. This annual review is also necessary to ensure that the current placement and services are appropriate. The student’s progress should be reviewed to determine if services need to be changed for the student to achieve progress. When necessary, students are to be reassessed.

In this case, despite a number of behavioral incidents and progress data demonstrating that the Student was struggling, the LEA failed to review the Student’s placement and program at least annually. In essence, the LEA ignored the progress data, repeatedly cut and pasted data from previous IEPs, and failed to meet the IDEA timelines.

The LEA was on notice of the Student's behavioral needs. In the early days of the Student's first year at the LEA, the Principal called the Parent in to meet as a result of the Student's behavior. Rather than evaluate the Student, the Principal told the Parent to have the Student evaluated to assess eligibility for a 1:1 aide. The LEA improperly delegated this responsibility to the Parent. While this event occurred outside of the period in question, it demonstrates that the LEA knew that the Student needed additional supports and sets the stage for a pattern of behavior by the LEA to ignore its IDEA mandated responsibilities to evaluate and provide appropriate services to the Student to ensure meaningful educational benefit.

The LEA failed to timely reevaluate the Student. The Student's RR during [redacted] was dated June 1, 2018. The LEA did not provide the triennial RR until November 28, 2022, about 18 months late.

Jumping to the time period in question here, the Student's 2020 IEP was due on or before November 1, 2020. No 2020 IEP was entered into evidence. The LEA failed to produce an IEP until May 20, 2021.

Despite receiving a number of reports obtained by the Parent from the crisis treatment center and calling in the Parent when the Student's behavior was disruptive, for several years the LEA ignored the data and failed to meet its obligation of providing a Functional Behavioral Assessment ("FBA") or conducting evaluations and annual reviews, as needed, that would have provided a more in depth picture to appropriately address the Student's academic, behavioral, emotional regulation, executive functioning and social-skill deficits.

Substantive Harm

The preponderance of the evidence in the record indicates that the procedural inadequacies and the substantive violations adversely impacted

the Student's ability to access their education resulting in a deprivation of educational benefit. The LEA (1) impeded the student's right to FAPE; (2) significantly impeded the Parent's opportunity to participate in the decision-making process; (3) failed to comprehensively evaluate the Student's needs; (4) did not offer appropriate and sufficient services to address the Student's academic and behavioral needs; and (4) failed to ensure that the IEP was being implemented with fidelity.

In addition to being procedurally deficient, the 2022 RR failed to include parental input, failed to adequately assess for autism, and did not offer a meaningful ESY program to address regression and recoupment needs.

The LEA is obligated to assess all areas of the Student's suspected disability. The 2022 RR failed to evaluate the student in all areas of suspected need including academic needs, behaviors, sensory processing, social skills, emotional regulation, and executive functioning.

Despite the Parent's concern about autism, the 2022 RR failed to comprehensively assess whether or not the Student was exhibiting the behaviors commonly associated with an autism spectrum diagnosis. The 2022 RR included BASC-3 and the ASRS rating scales completed by the instructional aide who only recently received emergency certification. Rating scales were not included from any other teachers or the Parent, which would be necessary to provide an all-encompassing perspective of the Student's learning profile.

The former School Psychologist's ½-hour observation during the RR process was insufficient because she did not see the Student receive instruction from the teacher. The observation was limited to the Student working on a Chromebook, eating lunch, and playing.

IEP Deficiencies

An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Despite clear evidence that the Student struggled academically, socially, emotionally, and behaviorally in school, the IEP only offered the Student SL and OT services without any additional supports and services until 2022. By then, the Student had fallen far behind their peers. During the Fall of 2021, the result of diagnostic assessments in the areas of Math, Reading, and Language Arts indicated that the Student tested well behind in math, reading and language arts yet the Student's IEP failed to offer any academic or learning support. When the diagnostic assessments were readministered less than a year later in May 2022, the Student scored between two and four years behind their peers in all academic areas. The 2022 IEP did not include any of the diagnostic assessment data nor did it provide any additional academic goals or offer any SDI to address Student's academic needs.

The IEP team's failure to conduct an annual review on a timely basis failed to ensure that the Student was achieving meaningful educational benefits from the placement, program, and services.

The LEA was also not providing the services recommended by the treatment center. Despite the fact that the Student was found to be eligible for 1:1 aide, that service was not being provided allegedly due to staffing issues.

Extended School Year ("ESY")

The LEA failed to provide the Student with a FAPE during the summers of 2021 and 2022.

The 2021 IEP indicated that the Student was not eligible for ESY. During the 2020-2021 school year, the LEA offered only remote instruction. The LEA was on notice that the Student was struggling, yet the IEP team painted a picture of the Student successfully accessing their education remotely – which was contrary to the evidence presented by the Parent who was watching her child struggle with it daily – and determined the Student was not eligible for ESY. While the pandemic impacted how the students in Pennsylvania accessed their education during 2020-2021, there was no evidence presented by the LEA whether ESY was provided during that summer or why the Student was not found to be eligible. The 2022 RR found the Student to be falling even further behind.

The 2022 IEP noted regression of skills during school holidays and breaks. The IEP only offered one OT goal and no academic, behavioral, social/emotional or speech and language supports, or services. As a result, the LEA failed to provide the Student a FAPE during ESY 2022, and the Student did not make meaningful progress.

Compensatory Education

The LEA was clearly on notice that the Student was struggling. The current Special Education Coordinator testified that the treatment center reports and those from the local hospital were in the Student's file; however, there was insufficient evidence of how that data was considered or addressed by the IEP teams by anyone who actually worked with the Student. The LEA provided three witnesses: (1) the School Psychologist was no longer at the school; (2) the instructional aide who had to be certified as a Special Education Teacher on an emergency basis; and (3) a new Special Education Teacher who was not at the school while the Student was there and who merely reviewed the Student's file. This situation affirms the LEA's difficulty with staff transitions, and demonstrates why it was difficult to paint

a clear picture of why the Student's documented needs never made their way into the Student's IEPs for so long.

The evidence demonstrates that the Parent was called many times to address ongoing behavioral issues. The Student received assessments from the crisis treatment center that were obtained by the Parent; not the LEA. The LEA directed the Parent to the community-based center, but the LEA did not offer evidence demonstrating that procedural safeguards were given to the Parent or that the treatment center was conducting evaluations in lieu of the LEA. Therefore, these assessments cannot be considered to be a substitute for the evaluations the LEA should have conducted when it noticed that the Student was struggling with academic and behavioral challenges. These assessments were received by the LEA and should have alerted the LEA that the Student was in dire need of additional services to access the Student's education and meaningfully benefit from it; yet the LEA failed to do anything about it.

The LEA's failure to take steps to remedy the deficiencies in the Student's program and services in a timely manner, constitutes substantive noncompliance with IDEA. This failure to offer FAPE justifies an award of compensatory education.

LEGAL CONCLUSIONS

1. The Parent met its burden of proving by a preponderance of the evidence that the LEA violated the Student's right to a FAPE within the meaning of the IDEA during the 2021-2022 and 2022-2023 school years and the two applicable ESY periods.
2. An award of hourly compensatory education is warranted for the substantive denial of FAPE during the 2021-2022 and 2022-2023 school years and the two applicable ESY periods.

ORDER

1. Having concluded that a denial of FAPE occurred, compensatory education is ordered for the deprivation. There is no evidence in the record to support a qualitative award; thus, a quantitative remedy is awarded.
2. **Calculation of Compensatory Education:** The Student is entitled to compensatory education in the amount of five (5) hours for each school day⁵ that the LEA was in session during the 2021-2022 and the 2022-2023 school years, and the applicable ESY time periods. Half days will be prorated accordingly.


The Student's Parent may decide how the compensatory education is spent, subject to the following conditions and limitations. The award may be used for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services' needs. The award may not be used for products or devices that are primarily for leisure or recreation.

The compensatory award shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the LEA through Student's IEP to assure meaningful educational benefit should Student return to the LEA.

Compensatory services may occur after school hours, on weekends, and/or during the summer months whenever it is convenient for the Student and the Parent. The hours of compensatory education may be used at any time from the present until Student's 22nd birthday. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; and the cost to the LEA of providing the awarded hours of

⁵ Students at the [redacted] school level are entitled to 900 hours of instruction per school year over 180 school days, equating to 5 hours per day. 22 Pa. Code §§ 11.1, 11.3.

compensatory services may be limited to the average market rate for private providers of those services in Philadelphia County where the LEA is located.



Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision

June 21, 2024

ODR 29134-23-24