

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 Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 27474-22-23

Child's Name:

A.B.

Date of Birth:

[redacted]

Parent:

[redacted]

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Decision Date:

June 28, 2023

Hearing Officer

Charles W. Jelley Esq.

OVERVIEW OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The Parents contend that under either Act, the District failed to locate, identify, evaluate, and educate the Student in a timely fashion. Finally, Parents seek a finding of "deliberate indifference." On the other hand, the District seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with each Act during each school year. Applying the preponderance of evidence standard, and after reviewing the intrinsic and extrinsic evidence, I now find the Parents have met their burden of proof that the District failed to provide the Student with a free appropriate public education (FAPE) under either Act. For all the reasons that follow, I now favor the Parents in part and the District in part. Finally, I now find that the discrimination claims are otherwise exhausted and dismissed without prejudice.²

STATEMENT OF THE ISSUES

At the outset of the hearing, the Parent identified the following issues:

1. Did the District timely and comprehensively evaluate the Student within the meaning of the IDEA? If not, is the Family entitled to compensatory education?

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The federal regulation implementing Section 504, 29 U.S.C. §794 and 794a are set forth at 34 C.F.R. 104, et seq.. The state regulation implementing Chapter 15 are found at 22 Pa. Code Chapter 15, et seq.

² Applying *Luna Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 864, 215 L. Ed. 2d 95 (2023) I now conclude that I do not have the authority to grant a "remedy" or "relief" for claims of intentional discrimination under 29 U.S.C. Section 794a - Section 504's remedy provision.

2. Did the District timely and comprehensively evaluate the Student within the meaning of Section 504? If not, is the Family entitled to compensatory education?
3. Was the District's IEP reasonably calculated to allow the Student to progress in light of their circumstances? If not, is the Family entitled to tuition reimbursement?³
4. Was the District's Section 504/Chapter 15 Agreement reasonably calculated to allow the Student to progress in light of their circumstances? If not, is the Family entitled to tuition reimbursement?
5. Did the District violate Section 504 and engage in intentional discrimination?

At the close of the hearing, the Parties requested, and the hearing officer agreed to extend the decision due date.

FINDINGS OF FACT

1. The Student and the Parents reside within the bounds of the Great Valley School District ("District") at all relevant times and have been and are residents of the District. (NT *passim*).
2. The Parties otherwise agree that the Student is a person with [redacted] Emotional Disturbance due to [redacted]. They further agree that the Student requires specially-designed instruction. Finally, the Parties agree that the Student's disabilities substantially limit the major life function of learning. (S-29, S-60; S-67).
3. The District 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).

³ NT pp.13-14.

4. The Student has attended school in the District since kindergarten. For middle school, the Student moved to the District's Middle School building until November 2022, when the Parent unilaterally placed and then filed the instant action. (S-60; S-73).
5. In March 2020, the District shut down due to the statewide mandate brought on by the Covid-19 pandemic. (NT pp.163-166). During the COVID-19 shutdown, for the remainder of the 2019-2020 school year, the record is clear that the Student, like others, had difficulty completing assignments and attending online classes. (NT pp.163-166).
6. On May 20, 2020, Parent emailed the guidance counselor stating that the Student was not engaging in any school-related activities due to feeling "it's too hard and not the same anyway." The Parent also noted that the Student required constant prompting to do schoolwork, which was unusual for them. (*Id.*).
7. On May 26, 2020, Parent again wrote to the teacher about the Student's not completing assignments and logging in. The Mother complained that the Student was finding it hard to engage and was often frustrated and upset. The teacher responded that he could tell Student was not doing well as they were "requiring an excessive number of reminders to complete even the simplest of tasks." (P-1; P-2).

THE 2020-2021 [redacted]-GRADE YEAR

8. For the 2020-2021 school year, the Student's [redacted]-grade year, the District began the school year virtually. The Parent selected online services when given the option for online or in-school classes. The Student struggled with attendance, test taking, and work completion. As the school year went on, the Student displayed telltale signs of depression and anxiety. (NT pp.162-163; p.170; S-55; S-60).
9. On March 22, 2021, the science teacher emailed Parent about the Student missing online classes and noted the need to complete classwork throughout the week. (P-3).

10. Due to the Student's poor attendance and work completion, Parents requested that the Student returns to in-person learning in the spring of 2021. The District agreed, and the Student returned to in-person learning on or about April 2021. (S-8, NT pp.55-57).
11. Upon returning to in-person schooling, the Student was part of the District's weekly "Safe Space" lunch group. The guidance counselor and a social worker facilitated the lunch group. (NT at 61-62).
12. The school year ended, the Student was promoted to [redacted] grade, and the Student did not have any significant issues through the end of the school year. When tasked about the [redacted]-grade year, the Parent said, "They were fine." (NT p.174).

THE 2021-2022 [redacted]-GRADE SCHOOL YEAR

13. In September 2021, the Student began seeing an outside therapist for what the Parent described as a lot of anxiety and depression. (S-30, p.2; NT, p.176).
14. Also, in September 2021, with the Parents' consent, the Student began attending a coping skills group run by a social worker contracted by the District through a private health system. The coping group was recommended because it focused on other emerging [redacted] issues. (S-9; NT p.66).
15. The guidance counselor and the Student met once or twice a week for check-in, and the Student was permitted to take breaks in the guidance office when needed. (NT pp.78-81).
16. On or about October 29, 2021, the Student wrote a note on the back of a quiz, expressing [redacted]. (S-13; NT pp.68-75).
17. In response, and as part of the District's multi-tiered support system (MTSS), the guidance counselor completed a [redacted] risk screener, which prompted a full risk assessment. *Id.*
18. The Student ratings indicated the Student was a "moderate risk" of [redacted]. As required, the guidance counselor contacted the Parent, who advised her to involve the Student's private therapist. (S-10, S-11, S-12, S-13; NT at 68-75). The

Parent told the guidance counselor that the Student was self-reporting feelings of being "very overwhelmed" with the amount of work that needed to be made up. (S-7). As the feelings increased, the Student became more dysregulated, anxious, and depressed. (NT p.173).

19. Although the Student previously participated in [sports], at school, due to increasing anxiety and interactions with the coach, the Student stopped participating. The record notes that the teachers, guidance counselor, and Parent knew that [the sport] had become an "anxiety-ridden" activity. (NT pp.178-179).
20. The Parent contacted the teachers and the coach to inquire if they noticed anxiety affecting in-school peer relationships and grades. (NT 179-180; NT 178). On or about the same time during the fall of 2021, the Student also began to visit the guidance office frequently, sometimes initiated by the Student or as directed by a teacher. (NT pp. 80-81).
21. In November 2021, the Student began to self-harm and again expressed [redacted]. (*Id.*).
22. On November 18, 2021, after an incident of self-harm, the Parent advised the guidance counselor that the Student was scheduled to attend a partial hospitalization program (PHP) rather than attend school during the day. (S-13; NT p.129-130).
23. On November 23, 2021, the Student began attending the PHP. (S-14; S-15; P-4; NT at 84-85, 135, 446).
24. The guidance counselor regularly communicated with the partial staff about a potential transition back to the District. Initially, they planned to transition the Student back to the District on December 16, 2021; however, the transition was delayed until December 20, 2021, when the Student was taken back to the emergency room. (S-16).
25. The working transition back to school plan called for the Student to return on December 20, 2021, with an agreed morning check-in to discuss the support needed to enable them to get back into their class schedule and daily routine.

Along with their transition back to the District, the Student began an intensive outpatient (IOP) partial program during after-school hours. (S-16; NT pp.86-p.87 pp. 90-91, p.138).

26. On January 27, 2022, the Student was observed, in school, texting [a] hotline. After completing another risk assessment, the District recommended that the Student go to the emergency room. (S-17; S-18; NT p.89, 90).
27. On January 31, 2022, Parent advised the guidance counselor that the Student's doctors were looking into an inpatient hospitalization program. (S-19).
28. On February 1, 2022, the Parent requested an IDEA evaluation. Within the week, the guidance counselor, and the school psychologist, spoke with Parent about the hospitalization, the possible development of a 504 Plan, the initiation of a comprehensive IDEA evaluation, and the status of the return to the PHP. (S-20; NT p.97, pp.141-42, pp.272-73, pp.304-06).
29. On February 8, 2022, the District issued a Notice of Recommended Educational Placement (NOREP) memorializing the parties' discussion. The NOREP noted that the staff would meet with the Student upon returning to the District to discuss 504 eligibility and the IDEA evaluation process. The Parent approved and returned the NOREP on February 9, 2022. (S-22; NT p.306).
30. While awaiting the outside placement, the Student returned to school on February 7, 2022. On February 11, 2022, while completing an in-class assignment, the teacher found a [redacted] note. When Parent was advised, she stated that the Student was returning to the partial program on February 15, 2022. (S-21; S-23; NT pp.98-99).
31. On February 20, 2022, while attending the PHP, the Student was again admitted to the hospital after [an incident]. On February 23, 2022, a therapist from the partial program advised the guidance counselor that the Student was discharged from the partial program and was about "to go inpatient." (S-24; NT pp201-202).
32. On February 24, 2022, the Student was admitted to a private inpatient partial hospitalization residential program located and operated in the District. While

inpatient, the Student received ongoing behavioral therapy throughout the day. Also, per an agreement between the District and the Intermediate Unit (IU), the IU provided educational services to the Student while inpatient. (NT p.43, p.202, p.264). The record does not describe the school day, the work completed, or the grades earned. (NT *Passim*).

33. On April 18, 2022, the Student returned home from inpatient residential to an outpatient, partial program. The new partial placement was expected to last six (6) weeks. (S-26; NT at 203). The record does not describe whether the Student received educational services or if the outpatient program was within the District. (NT *Passim*).
34. Upon completing the outpatient program, the guidance counselor, the Parent, and the Student's primary therapist collaborated on a return-to-school transition plan. Based on the agreed-upon transition plan, the Student would be expected to attend school for only a couple of days, for several hours, at the end of the school year. (S-28; NT at 147-48).
35. The Student transitioned back to school well, using planned breaks as a regular education intervention. (S-29).
36. On or about June 7, 2022, the guidance counselor received a letter from the PHP listing [redacted] as Student specific disabilities. The diagnoses were used to determine Section 504 eligibility. (S-27; S-28, p.1; S-31; NT pp.308-09, p.313).
37. Because the Student returned to school for only the last few days of the school year, the Parties agreed that a 504 Agreement would be developed the following 2022-2023 school year. (NT pp.103-105).
38. The Student remained in the PHP throughout the summer of 2022. During the summer months, the Student was again readmitted to the hospital for several days, followed by several days of inpatient hospitalization at the residential partial hospitalization program. (S-31; NT p.130, p.153, pp.210-211).

THE START OF THE 2022-2023 [redacted] GRADE YEAR

39. Before the 2022-2023 school year, the guidance counselor collaborated with Parent and PHP therapist regarding the Student's transition back to school, the status of potential 504 accommodations, and the delayed IDEA evaluation. Then on or about August 9, 2022, and August 14, 2022, the Parent requested an IDEA disability evaluation from the District. (P-9, S-32)
40. Following discharge from the summer Partial Hospitalization Program on or about September 2, 2022, the Student began another round of Intensive Outpatient Treatment on September 6, 2022. (P-9; S-32).

THE SECTION 504 ELIGIBILITY MEETING

41. The Student returned to the District middle school for the start of the 2022-2023 school year. For the first day of school, August 29, 2022, the Student returned to school. On August 30, 2022, the Student participated in the partial hospitalization program. On August 31, 2022, the Student attended school. On September 1, 2022, the Student attended morning classes and afternoon programming at the PHP. On September 2, 2022, the Student participated in programming all day at PHP. (S-33).
42. The Student participated in the Intensive Outpatient Partial Program on September 6, 2022. (P-26). Also, on September 6, 2022, the school psychologist sent a completed Section 504 Eligibility Form to the Parent. The Eligibility Form states the Student was eligible for Section 504 services. (S-34; S-35). After reviewing the outside records, the District concluded that the Student's [redacted] are protected disabilities within the meaning of Section 504. (S-35).
43. The Eligibility Form further identified that the Student's disabilities substantially limited the major life activities of learning. (S-35). The Mother signed the Section 504 Eligibility form on September 7, 2022, and Father signed the eligibility form on September 9, 2022. (S-35).
44. Afterward, the District sent the Parents a Section 504 invitation to participate in a Section 504 Service Agreement meeting on September 6, 2022. (S-36). At the meeting, the District offered the following Section 504 /Chapter 15

accommodations: 1. the Student would have access to the guidance office for breaks throughout the school day. 2. The Student would be allowed to carry a cell phone throughout the school day for the next month (ending 10/7/22). The Student could contact the Parent and/or outside therapist using the cell phone if needed. This phone and/or text contact will only occur in the guidance suite. The Parent and/or counselor will notify the school if counseling support is needed. 3. The Student would also be allowed to use a fidget toy in the classroom to help reduce stress levels. 4. The Section 504 Plan did not include counseling, positive behavior strategies, or other related aids, supports, or services like social work, counseling, or psychological services. (S-35).

45. On September 6, 2022, the outside therapist provided the school with the essential elements of a safety plan if [redacted] occurred during the school day. (S-38). The safety plan was not included in the Section 504 Plan. (NT p.117, p.63). The record is unclear on how the safety plan was communicated to the teachers. (NT *Passim*).
46. An IDEA Permission to Evaluate was issued to Parents on September 6, 2022. (S-39). The Parent provided consent on September 7, 2022. (S-39).
47. Realizing that the Student continued to struggle in school with thoughts of self-harm, the Parent requested, and the District agreed to substitute an art class for Tech Ed. The art teacher was instructed to ensure the Student would not have access to sharp objects. (NT pp.119-120).
48. On Friday, September 9, 2022, the Student, while unpacking supplies in the office, took a [supply] from the guidance counselor's closet. (S-42). While at home, later that day, the Student [used the supply for self-harm]. (NT pp.224-225). Due to the [self-harm], the Student missed school on September 12, 2022. (S-66, NT p.226). [Redacted.] (NT p.121).
49. The Student returned to school on September 13, 2022, and did not attend school on September 16 or September 19, 2022. (S-66, p.6).

- 50. As attendance was now a concern, the school team proposed a partial school day option; however, on the morning of September 20, 2022, the Student agreed to come to school during period three and stay through lunch. (S-43). The record fails to describe how or if the 504 Agreement was updated. (NT *Passim*).
- 51. The Student's outside private therapist asked the building-level team, the Student, and the Parent to rethink the number of classes the Student should attend weekly. (S-44).
- 52. On September 30, 2022, the outside therapist proposed the Student should attend four classes a week. (S-45). The Student never met that goal. (NT p.122).
- 53. The school psychologist met with the Student on September 30, 2022, to complete the testing portion of the IDEA evaluation. (NT 288). The school psychologist spent about 3 ½ hours testing and interviewing the Student. (NT 291).
- 54. The Student then missed nine full school days beginning on October 4, 10, 11, 12, 13, 14, 20, 27, and 28. (S-66).

THE IDEA EVALUATION REPORT

- 55. On or about October 28, 2022, the District sent the Parent a copy of the evaluation report. The report includes the Student's Multidimensional Anxiety Scale for Children (MASC-2) scores. The Student's most elevated scores were in the Physical Symptoms, including "elevated" symptoms of panic, tension, and restlessness. (S-55).
- 56. The report next includes Children's Depression Inventory (CDI-2) ratings. The Student's total score fell in the "elevated" range. Negative self-esteem was rated as "Very Elevated," with Emotional Problems and Ineffectiveness being rated as "Elevated." (S-55).
- 57. The school psychologist completed a clinical interview with the Student. The psychologist reports that the Student stated they are anxious "just having to live life." Finally, the Student reported feeling chest tightness when anxious in school. (S-55).

58. The psychologist concluded that the Student was a person who required specially-designed instruction. She concluded that "coping skills for unsettled/sad feelings" is the only need. (S-55).
59. The Student's ability and achievement testing scores all fell in the "Average" to "High Average" range. Repeated measures of overall academic success indicate that the Student can produce a grade-level work product. (S-55). At the same time, the teachers report missing homework assignments, low grades, and test scores, showing the Student is not learning. (S-55).
60. On October 28, 2022, the District again requested permission to complete the ATTEND evaluation by the local IU. ATTEND is a service provided by the IU designed to improve student attendance. The ATTEND service eligibility assessment begins with a functional behavioral assessment (FBA) completed by a board-certified behavior analyst (BCBA) in the home, along with limited academic achievement testing. Once the evaluation is completed, the ATTEND staff develop an individualized plan for the Student, which may include daily in-home mobile therapy in the morning. The ATTEND in-home staff person would, in turn, provide ongoing mental health services to help the Parent implement the ATTEND plan, collect data and improve school attendance. (NT pp.602-13).
61. The Parent did not consent to the ATTEND referral or evaluation. (S-60, p.8; NT pp.363-65; p.504; pp.603-604; pp.612-13; p.616).
62. On November 21, 2022, the District sent the Parent the IEP and a Notice of Recommended Educational Placement (NOREP). The proposed "action" in the NOREP states, "Effective 11/15/2022-11/13/2023," the Student will receive the following: "Amount of Special Education Supports: Supplemental," "Type of Special Education Supports: Emotional Support" with the notation that "Location Name of School Building where the IEP would be implemented was "Great Valley Middle School." The NOREP next provides the following: "description of the action proposed or refused by the LEA" as: "Great Valley School District proposes for [redacted] to attend [Redacted IU program] and type of program [redacted] to

address identified emotional and therapeutic needs." (S-63 p.2). Rather than return the NOREP, the Parent filed the instant action on January 13, 2023. (S-73).

THE 2022-2023 IEP

63. The ER team recommended that the IEP team considers direct instruction in coping skills. The ER team also recommended the following accommodations or specially-designed instruction (SDI): check-in/check-out with an adult to problem solve and walk through coping skill strategies; preferential seating; use of fidgets during class; small group testing; extended time on assessments up to 50%; and teacher check-ins to confirm understanding and work completion. (S-55, p.14).
64. An IEP meeting was held on November 14, 2022, to discuss the ER and to develop an IEP. Before the IEP meeting, a draft IEP was created for discussion purposes loosely based primarily on the evaluation report. The draft was shared with Parents before the IEP meeting. The draft IEP recommended placement in the District's Emotional Support program at the Middle school. (P-11; S-61, p.3; NT pp.231-32; p.352; pp.354-55).
65. The team discussed two placement options the District's Supplemental Emotional Support class and the IU's full-time Therapeutic Emotional Support class outside of the District in an all-handicapped school. The IU setting would provide the Student Full-Time Emotional Support in an all-handicapped school, with behavioral health support in an all-handicapped classroom, in a smaller classroom setting. (NT p.26; pp.232-33; pp.299-300; pp.387-89).
66. The IU Therapeutic Emotional Support classroom includes several mental health therapists who could provide on-site psychiatric support, individual and group therapy, and academic support as needed. (NT pp.299-200; pp.357-58; p.62).
67. The District members of the IEP team recommended placement at IU's program, while the Parent opposed the IU program and placement. (NT p.357).
68. Following the IEP meeting, the District's Secondary Supervisor of Special Education emailed Parents a Release to permit the District to share the Student's

information with the IU and seek admission into the program. Parents never signed the Release of records. (NT p.357; S-61 p.1; S-72).

69. Based on the back and forth at the IEP meeting, in addition to the change in recommended placement, the IEP was revised to include a work completion goal and additional SDIs offering supports for group work, modified homework, and incorporated an outline of a transition plan and noted the need to develop an IU specific safety plan. (P-11; S-60, pp.27; pp.28-30; NT pp.355; p.367; pp.372-73; p.78).
70. The Final IEP was then shared with Parents. (S-60; NT pp. 374-75).
71. Although placement at the IU setting was recommended, the final IEP continued to offer Emotional Support in the District, pending placement final placement in the IU setting. (S-60).
72. The District's stated plan was that once the Student was accepted into the IU program, the IEP would be revised to reflect the full-time Emotional Support at the IU, outside of the District, with different academic coursework, SDIs, and participation in individual therapy, group therapy, and related services. At the same time, the District would also issue a new NOREP placing the Student in the IU setting, calling for the collection of baseline data and the development of the new Full-Time Emotional Support IEP. (S-60, pp.32-33; NT pp.366-67, p.376).
73. The November 2022 IEP included one (1) group counseling session to address anxiety, provided every six (6) day cycle for 43 minutes, and one (1) individual mental health counseling session from the social worker every six (6) day cycle for 30 minutes. (S-60 pp.29-30).
74. The explanation of the extent, if any, the Student will not participate in the regular education class portion of the IEP then states that the Student would receive supplemental instruction for Guided Study nine (9) times every 6-day cycle in the special education classroom. (S-60 pp.32-33).

75. Later in the PennData Reporting section of the IEP, the document states that the Student will be in the regular education classroom 100% of the school day. (S-60 p.34).
76. The IEP further notes that the team lacked accurate emotional, social, academic, and behavioral present levels of education, sometimes called "baselines," to measure progress. (S-60, pp.25-27; NT pp.368-69). The IEP further notes that baseline data would be collected once the Student started. *Id.*
77. The November IEP included the following SDIs, including but not limited to; check-ins/check-outs with emotional support staff, preferential seating, teacher check-ins for understanding, involvement in the selection of partners for group work, testing accommodations including small group environment, extended time, and directions read aloud and repeated access to the ES room for a timed to break, participation in an anxiety group 1x per 6-day cycle focused on identifying body reactions, automatic thoughts, working through problems, coping with stressors, and evaluating success to help with the development of skills to manage unsettling feelings, individual counseling one time per 6-day cycle to develop coping skills, identify triggers, and process emotions, guided study in the Emotional Support classroom 15 times per 6-day cycle to assist with work completion, organization, and study skills; check-ins on daily successes and needs pertaining to school, academics, and self; one-to-one processing through social situations; support with coping and problem solving; and review of concepts taught in core classes, a transition plan to support attendance at school modified homework to focus on necessary skills and practice needed to demonstrate mastery of key concepts; and, a safety plan to be created by the Student together with the mental health therapist. (S-60, pp.18, pp.28-31; NT pp.378-82; pp.391-93). The record does not describe which SDIs would follow the Student to the IU placement. (NT *passim*).

78. During the IEP meeting, the Parent did not tell the team of their intent to enroll the Student in a private placement. (S-60, p.20; NT p.298, pp.382-83; S-60; S-62; S-63; S-64; S-65; P-14).
79. The IU Therapeutic Emotional Support classroom is provided in a building at the Intermediate Unit's Child and Career Development Center. The building also houses the middle school program for 7th and 8th-grade students and occasional 6th-graders. (NT p.482). The proposed classroom has a maximum of 12 students. (NT p.535; p.79). The length of the school day is approximately 8:30 am to 2:30 pm. (NT p.482). The students are provided four core subjects: English Language Arts, Math, Science, and Social Studies. (NT p.489). The IU classroom does not use or follow the District's regular education curriculum. (NT pp.568-569). The students in the IU class typically receive two daily group therapy sessions and sometimes receive individual one-on-one therapy. Art, health, and physical education rotate on a six-day schedule. *Id.* The proposed class does not offer advanced placement or honors-level courses. (NT *passim*).
80. Absent Parental consent, the District did not send a referral packet for eligibility consideration for the IU classroom. (NT p.540). However, the District did provide a redacted Evaluation Report, and the IU supervisor reviewed the IEP (NT p.540). The record does not include any input from the proposed IU classroom teacher. (NT *passim*; S-55; S-60).
81. A psychiatric evaluation is completed at the intake meeting. (NT p.542). The Emotional Support program requires the IU psychiatrist to manage all student-specific behavioral health medications. (NT pp.542-543).
82. The IU attending psychiatrist did not review or sign off on the application. (NT pp.567-569). The psychiatrist is the single person who admits students into the IU program. (NT pp.589-591).
83. Once admitted, the Student must stop all outside behavioral health services. (NT pp.589-591). The Student's proposed mental health therapies are funded through

medical assistance, otherwise known as Medicaid. The record does not demonstrate if the Student qualifies for medical assistance. (NT *passim*).

84. A NOREP evidencing IU acceptance is not issued until the psychiatrist approves. The intake IU staff meets without the Parents or the District staff to determine eligibility or acceptance. (NT p.544). The Student's IEP is then rewritten after the placement. (NT *passim*).
85. On December 12, 2022, the District developed and offered the Parent a Student Attendance Improvement Plan (SAIP) meeting was held. The District also repeated its request for IU ATTEND testing. Parents did not participate in the discussion and did not consent to ATTEND services. The resulting SAIP plan, while shared and not approved by the Parent. (NT *passim*).

THE STUDENT'S UNILATERAL PRIVATE PLACEMENT

86. The Student began classes, at the private for-profit school, halfway through the first term in mid-November 2022. Because of the enrollment date, the Student started part-time, sometimes receiving as little as four hours of one-on-one instruction weekly. (P-21; NT p.28). Currently, the Student is attending on a full-time basis. (NT pp.408-409).
87. For every hour of one-to-one instruction, a student receives one hour in the Homework Café. The Café is similar to a study hall period, yet provides more hands-on teaching, attention, and targeted support. (NT p409; p.91).
88. The Student now attends in-person, one-on-one learning five days a week. (NT p.410; p.92). The private school offers continuous learning throughout the summer months. (*Id.*). When the Student first began attending, the head of the school worked closely with the Student's private therapist from the partial program to facilitate the Students transition. (NT p.411; p.93).
89. The private school head and the therapist worked with the Student to create a safety plan. At the time of the hearing, the teachers have not implemented the safety plan. (NT pp.411-412; p.94).

90. At the time of the hearing, the Student had "As" in English 8, Language Arts 8, MS Pre-Algebra, MS Modern US History, and Physical Science. The teachers recommended that the Student take honor classes for the next school year. (P-22; NT p.447; p.95).
91. The private school is a "for-profit" entity and is part of a national conglomerate. (NT p.404; pp.418-19; P-19).
92. The private school is neither approved nor licensed by the Pennsylvania Department of Education. (NT p. 406; pp.419-20).
93. The private school does not employ or contract with a Pennsylvania-certified licensed psychologist, social worker, or guidance counselor. (NT pp.435-36).
94. The private school neither creates nor implements IEPs. (NT p.422).
95. The private school does not employ a licensed counselor or guidance counselor, and none of the staff hold a valid certified emotional support teacher credential. The private school does not offer group or any form of formal counseling or mental health services. (NT pp.251-52; p.422; p.424).
96. All classes at the private school are taught using a one-to-one instruction format. (NT p.403; pp.426-427). When the Student is not in class, they participate in the proctored homework café'. *Id.*
97. Since enrolling, the Student has been performing at or above the expected grade level. (P-16, p.9; NT pp.436-38).
98. The Student scored "Proficient" in Math and Reading on the Pennsylvania System of School Assessment (PSSA). (S-55 p.6).
99. Before enrolling at the private school, the Student earned the following grades; 81% in Math, 40% in French, 8.70% in English, and Language Arts was a 0 (zero). The Student did not receive grades in Social Studies and Science. (S-55 p.7). Eight weeks into the school year, the evaluation report notes that the Student failed to turn in 27 assignments. (S-55 p.12).

100. The private school and the District use the Measures of Academic Progress (MAP) testing protocol to plot learning and growth. The Student District and the private school's MAP scores are as follows:

Math

	Private School Winter 2023	District Winter 2022	District Fall 2020	District Fall 2019
RIT	232	239	233	220
Percentile	65 th	91 st	87 th	83 rd
			(S-55 p.5 vs. P16 p.17)	

Reading

	Private School Winter 2023	District Fall 2021	District Fall 2020	District Winter 2019
RIT	231	235	227	220
Percentile	78 th	80 th	74 th	72 nd
			(S-55 p.56 vs. P-16 p.7)	

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF AND WITNESS CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. The party

seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.⁴

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."⁵ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on particular testimony.⁶

On the Parents' side, I found the Mother open, thoughtful, and candid in acknowledging what she knew, did, and did not do. The witness from the private school was open, frank, and informative about the school's operation. She understood the Student specific facts and did not shy away from points that did not bode well for the school. For instance, although the private placement does not write IEPs and the staff are not certified teachers, she cogently described how the school tailored the Student's day. She also carefully explained how she and the teaching staff leveraged the outside therapist's help to create a safe school.

I also found the testimony of several District witnesses, while credible, candid, and non-evasive, was not entirely persuasive about how the staff leveraged the Student's behavioral health data and the private therapist's time to identify, evaluate and educate the Student. I also found the IU witnesses lacked first-

⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁵ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁶ The fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affected my credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. When the testimony is delivered in a persuasive fashion factors like body language, eye contact, and whether the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

hand knowledge about how the proposed IU services would meet the Student's needs and circumstances. For instance, no one could explain why a Student with average intelligence and ability should go to a school that did not provide equal access to the District's regular education curriculum. Furthermore, while well-meaning, the IU and the District witnesses did not provide persuasive testimony about how the Student would learn to "cope."

IDEA FAPE CLAIMS

The IDEA requires each state to provide eligible children with a "free appropriate public education" (FAPE) for special education services.⁷ A FAPE consists of both special education and related services. In *Board of Education v. Rowley*, 458 US 176 (1982), the Supreme Court held that the FAPE mandates are met when an individual education program (IEP) provides personalized instruction and complies with the Act's procedural obligations. A district meets its FAPE obligation by providing an IEP which is "'reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the Student's 'intellectual potential.'"⁸ IEPs are "... constructed only after careful consideration of the child's present levels of achievement, disability, and growth potential." *Id.* Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, a district is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents."⁹ All the law expects is appropriate services in light of a child's unique circumstances, not those necessarily sought after by "loving parents." *Id.*

The assessment of whether a proposed IEP meets the *Rowley* and *Endrew* standard is based on information "as of the time it was made;" this

⁷ 20 U.S.C. § 1412 *et seq.*

⁸ *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

⁹ *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

commonsense rule is commonly known as the "snapshot rule."¹⁰ While an IEP must aim for progress, progress is not measured by what may be ideal. *Id.*

SECTION 504 CHILD FIND REQUIREMENTS

"School districts have a continuing obligation under the IDEA and § 504 [of the Rehabilitation Act of 1973] -- called 'Child Find' -- to identify and evaluate all students who are *reasonably suspected* of having a disability under the statutes."¹¹ That obligation requires school districts to "identify and evaluate" "children who are suspected of having a qualifying disability" "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Id.* The child find obligation is an affirmative duty; therefore a public school "must do more than wait for an eligible disabled student to contact it."¹²

Child Find requires the district "to identify and evaluate all students who are reasonably suspected of having a disability under the statutes."¹³ When a school district violates its child find obligation by failing to identify a student with a disability and provides no specialized instruction to the Student to meet the unique needs of their disability, the Student has been denied a FAPE."¹⁴

SECTION 504 ONLY FAPE

"To offer an 'appropriate education' under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and access to

¹⁰ *Fuhrman v. East Hanover Bd. of Educ.* 993 F.2d 1031, 1041 (1993).

¹¹ *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995), abrogated on other grounds, *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007).

¹² A school's Section 504 Child Find obligations exist independently from its child find obligations under IDEA. *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 306 (3d Cir. 2018). "School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009).

¹³ *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1066 (D.N.J. 2011).

¹⁴ *Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 391 (E.D. Pa. 2012) (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238-39 (2009)).

educational benefits."¹⁵ If such an opportunity is denied to a disabled student, that student may have a FAPE claim under Section 504.¹⁶

While a FAPE under the IDEA is provided through an IEP, and the Section 504 regulations do not require a writing, our state Chapter 15 regulations do, however, require a written "Service Agreement." Unlike the IDEA, the Section 504's regulations require that disabled students receive a FAPE in "regular" or "special education" classes. Section 504 services can include direct instruction, related aids, related services, accommodations, modification, and auxiliary services, as implemented "by any appropriate means, including, but not limited to, an IEP" or a Service Agreement.¹⁷ In deciding Section 504 FAPE claims, courts apply a "reasonable accommodation" analysis.¹⁸

Tracking the Section 504 regulations, Chapter 15 further provides that "School districts are required to provide disabled students with the aids, services, and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met." 22 Pa. Code 15.1(b). Any disagreements over whether the Student was excluded, denied benefits, or subject to discrimination requires the district to provide prior "notice" along with procedural safeguards, explaining the right to a hearing and review.¹⁹

¹⁵ *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012); *cf.* OCR believes that the reasonable accommodation analysis is limited to employment disputes. In *Letter to Zirkel*, 20 IDELR 134 (1993), OCR opined that 34 C.F.R. §104.33 does not incorporate a cost conscious "reasonableness standard into 504 requirements for elementary and secondary students."

¹⁶ *Karrissa G. v. Pocono Mountain Sch. Dist.*, No. 3:16-CV-01130, 2017 WL 6311851 (M.D. Pa. December 11, 2017); *Molly L. ex rel. B.L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 425 (E.D. Pa. 2002).

¹⁷ *Letter to Williams*, 21 IDELR (OSEP/OCT 1994), 22 Pa. Code 15.1 *et seq.*

¹⁸ *Ridley* at 280; See also, *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (holding that to determine whether the student "was afforded an appropriate education," the court should consider "whether [the student] was provided significant learning and conferred a meaningful benefit").

¹⁹ 34 C.F.R. §104.36 and 22 Pa. Code Chapter §§15.8, 15.9, 15.10.

CALCULATION OF APPROPRIATE RELIEF UNDER THE IDEA AND SECTION 504

Both Parties seek "appropriate relief" within the meaning of the IDEA.²⁰ They also seek tuition reimbursement. Under either the IDEA or Section 504, any award of compensatory education must make the Student "whole."²¹

TUITION REIMBURSEMENT

A multi-part test determines whether parents are entitled to reimbursement for special education services. ²²The test flows from the "*Burlington-Carter*" test. The first step is to determine whether the program and placement offered by the LEA are appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. The steps are typically taken in sequence, and the analysis ends if any prong is not satisfied.²³

ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

THE 2019-2020 and 2020-2021 CHILD FIND CLAIMS

Parents now assert that the District should have evaluated the Student either during the shutdown – the 2019-2020 school year - or immediately after school reopened for in-person instruction during the 2020-2021 school year. They further assert that the District should have, at a minimum, identified the Student under Section 504 after the Student was hospitalized in November

²⁰ *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015); *K.H. v. N.Y.C. Dep't of Educ.*, 63 IDELR 295 (E.D.N.Y. 2014) (potential liability for approximately 14 years of compensatory education).

²¹ *Ligonier Valley Sch. Auth.*, 802 F.3d at 625–26 (interpreting timely and successful filings as entitling the student to "be made whole with nothing less than a "complete remedy" which in cases of compensatory education equates to the period of the denial of FAPE excluding the time reasonably required for rectification, the time frame for any exceptions and prospective relief until the violations are cured).

²² *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985); *Florence County School District v. Carter*, 510 U.S. 7 (1993).

²³ *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

2021. The District counters these broad assertions in several ways. First, they contend that during the shutdown, the Student did not evidence any telltale signs of a disability. Second, they argue that given the reoccurring hospitalizations, the Student was otherwise unavailable, and under these circumstances, they acted reasonably.

To hold a school district liable for failing to identify a student, the Parents must show that school officials overlooked clear signs of disability. Next, the Parents must prove that there was no rational justification for delaying the evaluation. Even assuming a district suspects a disability, the assessment must be comprehensive and completed within a reasonable time. Applying these broad "child find" principles, in light of the circumstances, I agree in part and disagree in part with the District.

THE SHUTDOWN AND THE RETURN TO IN-PERSON LEARNING

First, I agree with the District; nothing in the Student's [redacted] [2019-2020 school year] or [redacted] [2020-2021 school year] profile suggests that the Student's troubles were chronic, acute, or so evident as to create a suspicion of a suspected disability. Before the shutdown, the Student earned passing grades, engaged with peers, and attended school. The record shows that off-task behaviors and homework difficulties did not adversely affect the Student's education or substantially limit learning. Given the challenging times, the homework troubles were not so unusual as to raise a clear suspicion. Simply put, the Student's actions during [2019-2020 school year] and [2020-2021 school year] did not demonstrate that the Student's attention and homework troubles interfered with peer relationships. After carefully reviewing the intrinsic and extrinsic evidence, I now find that the Parent failed to produce preponderant red flag" evidence making out a suspicion of a disability during either the [2019-2020 school year] or [2020-2021 school year]. Accordingly, the [2019-2020 school year] and [2020-2021 school year] "child find" claims are denied.

THE MULTIPLE HOSPITALIZATIONS AND THE DELAYED EVALUATION

Second, I agree with the Parent that the Student should have been evaluated in [2021-2022 school year] after the November 2021 discharge from the inpatient partial hospitalization program. I next find that under these circumstances, the 10-month delay from December 2021 to October 2022 to evaluate the Student and offer a FAPE was unreasonable.²⁴ The District's independent knowledge of the confirmed psychiatric diagnosis created a reasonable suspicion of a disability triggering the IDEA and Section 504 duty to locate, identify and evaluate the Student.

In February 2022, the Parent requested an IDEA evaluation. Instead of completing an IDEA or Section 504 evaluation, the psychologist prepared a NOREP that proposed two "actions." First, the NOREP proposed to delay the IDEA evaluation until the Student returned to school. Second, the NOREP promised to prepare a Section 504 Agreement within a week of returning to school. The District's reliance on the NOREP delaying the evaluation substantially interfered with the Student's IDEA FAPE rights. Likewise, the delay in preparing the Section 504 Agreement denied the Student a FAPE.

Based on these facts, the District should have evaluated the Student even if it did not have an official medical diagnosis of a disability. In *Yadkin County (NC) Schs.*, 76 IDELR 132_ (OCR 2019). OCR determined that the district may have violated Section 504 when it decided to wait until it received an official medical diagnosis to evaluate a grade schooler with an undisclosed disability. If a student is suddenly hospitalized, it may be a sign that they need an evaluation

²⁴ Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. *Ridley Sch. Dist. v. M.R.*, 680 F.3d above at 271-272. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. *Id.*

or a reevaluation.²⁵ If the district chooses to postpone an assessment, it should document legitimate reasons for the delay. In *Hood River County Sch. Dist. v. Student*, 79 IDELR 40 (2021), the court held that the district's failure to credibly explain why it waited nearly two years to evaluate a child for autism was a substantive violation. Under these circumstances, the District should have gathered a team of knowledgeable persons in November 2021 to review the partial records and determine the Student's Section 504 eligibility. The District staff should have arranged to evaluate the Student when the IU provided educational services during the Student's inpatient residential partial hospitalization stay.²⁶

The guidance counselor knew about the Student's initial troubles in [2019-2020 and 2020-2021 school years]. In November 2021 - in [2021-2022 school year] - she learned about the Student's psychiatric diagnosis. When the Student returned to school, the guidance counselor and the psychologist knew the Student was failing. Finally, the guidance counselor and the psychologist knew that the diagnosis and hospitalizations were intertwined with the Student's loss of learning and attendance problems. Aware of these facts, the psychologist caused the District to issue a NOREP that delayed the testing until the Student could attend school. In this instance, the decision on how and where to collect testing data should have been made by a team of knowledgeable people, not

²⁵ *Pennsbury Sch. Dist.*, 65 IDELR 220 (SEA PA 2015) (concluding that the district violated the IDEA when it failed to immediately evaluate the student's eligibility for homebound services after receiving notice of his hospitalization).

²⁶ See, *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N.*, 2017 WL 4641219 (S.D.N.Y. 2017) (district had reason to suspect that an evaluation would be needed where the parent informed the school district that the student was hurting herself, expressing suicidal thoughts, and was recommended hospitalization by a school counselor); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018) (court concluded that behaviors leading to hospitalization are signs of an underlying disability that interferes with a child's ability to learn); *Pennsbury Sch. Dist.*, 65 IDELR 220 (SEA PA 2015) (hearing officer found that a tenth-grade student's self-harming behaviors beginning in ninth grade and admission to an inpatient facility for mental health issues at the start of tenth grade triggered a school district's child find duties).

one staff person.²⁷ Applying *Pennsbury, Krawietz, and M.N.*, I now find that the District either knew or should have known as early as November 2021 that the Student should have been evaluated. Therefore, I now conclude that the District violated Section 504 and the IDEA's child find requirements.²⁸

To the extent the District argues that the delay was reasonable as they could not evaluate the Student due to the hospitalizations, I disagree. In *Letter to Power*, 211 IDELR 31 (BEH 1978), the United States Department of Education, long ago, advised districts that the law clearly provides that children must be served when hospitalized. 34 CFR 300.39 (a)(1)(i). Thus, regardless of the reason for hospitalization, districts must locate, identify, evaluate, and deliver special education and related services at the hospital.²⁹

Section 504 contains its own child-find requirement. Section 504 requires districts to annually "undertake to identify and locate every qualified [individual with a disability] residing in [the district's] jurisdiction who is not receiving a public education." This obligation extends to students attending private schools, children residing in hospitals, and homeless children.³⁰ Because child find is an

²⁷ Evaluations must conform to the procedural requirements set out in IDEA regulations at 34 CFR 300.304 through 34 CFR 300.311. The Part B regulations contain provisions governing the following areas: 1. Initial evaluations. 34 CFR 300.301; 2. Evaluation procedures. 34 CFR 300.304 termination of education evaluation data. 34 CFR 300.305. Determination of eligibility. 34 CFR 300.306 (a) through 34 CFR 300.306 (b). Procedures for determining eligibility and placement. 34 CFR 300.306 (c). Reevaluations. 34 CFR 300.303.

²⁸ See, e.g., *North Kansas City (MO) #74 Sch. Dist.*, 72 IDELR 166 (OCR 2017) (determining that a student's hospitalization due to depression and anxiety, coupled with a parent's request for an IEP or 504 plan, should have prompted the district to conduct an evaluation); *Flagstaff (AZ) Arts Leadership Acad.*, 76 IDELR 157 (OCR 2019) (the district should have proposed to evaluate a student after school officials received an email from the parent indicating that the student had been hospitalized and diagnosed with PTSD, depression, and anxiety); *Aurora (CO) Pub. Schs.*, 61 IDELR 83 (OCR 2013) (stating that districts may not require a parent to request an evaluation before they will consider one).

²⁹ See *N.M. by C.F. v. Wyoming Valley West Sch. Dist.*, 67 IDELR 235 (M.D. Pa. 2016). Pennsylvania district will have to defend Section 504 and Title II claims arising out of its failure to provide IDEA services to a nonresident teenager with ED who spent 70 days in a psychiatric hospital located within its borders. The U.S. District Court, Middle District of Pennsylvania denied the district's motion to dismiss the parent's discrimination claims.

³⁰ *Questions and Answers on Special Educ. and Homelessness*, 110 LRP 212 (OSERS 2008).

affirmative duty, a district's obligation to evaluate is triggered even if the parent doesn't request an evaluation.

A team of knowledgeable people should have discussed possible accommodations like homebound instruction or tutoring at either partial location. The record is preponderant that from October 2021 through June 2022, the Student did not receive either regular or special education services. Therefore, I now find that the failure to locate, evaluate and identify the Student was a substantive violation that denied the Student a FAPE under Section 504 and the IDEA.

THE [2022-2023] SCHOOL YEAR

After spending the summer in an all-day outpatient partial program, the Student returned to the school. Although the Student missed most of the [2021-2022] school year and had failing grades, the District promoted the Student to [the next] grade. As promised, the District issued the IDEA permission to evaluate and also offered a Section 504 Agreement.

On November 14, 2022, the Parties met and developed an IEP. The IEP did not include objective statements describing the Student's emotional, social, or coping needs. Based on the evaluation report, the IEP team concluded that the Student had one need area - "coping." The District then developed an IEP with three goals. Two placements were discussed, the District's Emotional Support class and an IU all-handicapped class in an all-handicapped school outside of the District. The IU class offered a small class size and ongoing mental health support.

THE PRESENT LEVELS OF PERFORMANCE AND GOALS ARE FLAWED

An IEP must include, among other things, "a statement of measurable annual goals, including academic and functional goals ... designed to (A) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and ... (B)

Meet each of the child's other educational needs that result from the child's disability."³¹ The IEP also must include "a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals ... will be provided." Each "IEP must include, among other information, an accurate statement of the child's present levels of academic achievement and functional performance and measurable annual goals, including academic and functional goals."³² Without clearly identifying the Student's present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed.

The IEP offered here fails to include objective present-level statements. The IEP team cannot measure progress or set ambitious goals without present levels. Although the evaluation report lists three mental health disorders, Depression, Anxiety, and a Food disorder, the three-goal statements only address "Anxiety." While "coping" is listed as the single need in the evaluation report, the only references to "coping" pops up as a passing reference in three forms of specially-designed instruction. After reading the specially-designed instruction and the goal statements, I do not know what the Student must do to learn "coping" skills. Furthermore, the specially-designed instruction referencing "coping" does not include an objective measure; therefore, meaningful progress monitoring is limited. I now find the goals are vague and inadequate. Absent greater detail in the goal statement and more explicit descriptions describing how the staff will modify and adapt the specially-designed instruction, the IEP is not reasonably calculated to offer significant learning.

³¹ 34 CFR §300.320

³² Questions and Answers (Q&A) on *U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1* (Dec. 7, 2017)

Putting aside the missing present levels and assuming *arguendo* the goal statements address "coping," the proposed specially-designed instruction is flawed. For example, while the evaluation report states the Student has average ability and achievement, one SDI calls for the Student to be escorted by an adult to the Emotional Support classroom to complete assignments. This statement contradicts the statement of participation in regular education, which calls for the Student to be in the regular education classroom 100% of the school day. Furthermore, another SDI requires the Student to report to the Emotional Support classroom at the beginning of every day and remain in that class for the entire day unless they state they want to go to the regular education room. The manner in which the specially-designed instruction statements change the Student's participation in regular education without explanation was fundamentally flawed and otherwise inappropriate.

THE PROPOSED IU PLACEMENT IS TOO RESTRICTIVE

The IEP next runs afoul of the IDEA and Section 504 least restrictive environment requirements. Removal from regular education occurs only after other forms of supplemental aids and services have been discussed and sometimes trialed. The Student has average intelligence and average achievement. Nothing in the evaluation report suggests that the Student should be educated outside of the regular classroom. Nevertheless, in this instance, but for three accommodations that seem not to have been implemented, the District proposes moving the Student to an all-handicapped school that does not use the District's regular education curriculum. This "action" listed in the NOREP is far too restrictive for this Student at this time. The record is preponderant that the District has not discussed or tried targeted forms of positive reinforcement, cognitive behavioral strategies, or mindfulness strategies like meditation when the Student is anxious or depressed. Therefore, I now find the program and placement, when offered, would not provide the Student meaningful benefit or significant learning.

THE INTERMEDIATE UNIT'S ADMISSION PROCESS IS FLAWED

Finally, in an odd twist, the NOREP states that even though the District believes the IU program and placement are appropriate, the Student cannot attend until the IU psychiatrist, not the LEA, signs off on the placement. Had the Parent agreed, the Student would have remained in the District until the IU psychiatrist admitted the Student. This decision-making process violates the IDEA regulation that no one person has sole authority over what the Student should receive. Furthermore, the IU process violates the black letter requirement that the local education agency representative must be someone who can commit the necessary resources. The District is committing resources, yet a third party controls the IEP process. This arrangement also violates the IDEA IEP planning process. The IDEA requires the District to develop the IEP and then decide the placement. The NOREP and the IEP here state that after the Student arrives at the IU will write the IEP; this practice is contrary to the IDEA and Section 504.³³ Finally, requiring the Student to follow the IU psychiatrist's medication protocol further violates the IDEA.³⁴ The requirement that the Student end their relationship with the private therapist and psychologist is an unacceptable precondition to receiving a FAPE.³⁵ Therefore, I now find that the decision-making process surrounding this Student's placement without a written IEP violates the IDEA's and Section 504 least restrictive environment requirements.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

³³ 34 CFR §300.316; *See, Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Under both the IDEA] and Section 504, students with disabilities are entitled to receive FAPE, which requires a district to meet the individual educational needs of each child and precludes shoehorning children into inappropriate placements.).

³⁴ 34 CFR §300.174(a) LEA personnel cannot require a parent to obtain a prescription for a controlled substance for a child as a condition of attending school, receiving an evaluation under the IDEA, or receiving special education and related services.

³⁵ The district representative should have the authority to commit district resources and be able to ensure that the district can implement the IEP shortly after the meeting. 71 Fed. Reg. 46,670 (2006).

Applying *G.L.* and *M.C.*, once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE. Once the denial of a FAPE knew or should have known date is established, I must calculate and exclude the time reasonably required to rectify the violation. The District's complete defense denying all liability now requires me to find that the rectification period for all FAPE claims is zero.

The first compensatory education knew or should have known date is November 2021, when the District failed to complete an initial evaluation. The second knew or should have known date is November 2022, when the District issued the flawed IEP and NOREP. All of the above violations caused tangible, substantive losses that now require equitable relief.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

Due to the lack of preponderant evidence, I now find the record does not support using a qualitative method described in *G.L.* to calculate the "make whole" remedy. However, applying *G.L.* and *M.C.* I will now craft a blended equitable "make whole" quantitative hourly remedy.

Based on the failure to complete the IDEA evaluation in November 2021, the Student was denied the chance to receive "significant learning" and "meaningful benefit." The record here is preponderant that for significant periods, the Student could not attend school for a full day. While the school day is traditionally six and a half (6.5) hours a day, the record here leads me to believe that the District should have provided five (5) hours a week of in-home homebound instruction. The failure to complete a timely evaluation began in November 2021 of [the 2021-2022 school year] and continued through June 2022. Therefore, the Parties should confer and calculate the total number of compensatory education hours.

Because I found the delay in evaluating the Student was unreasonable, I will also award compensatory education from the first day of school in [2022-2023 school year] until October 25, 2022. After reviewing the testimony, I will follow the

outside therapist's advice that the Student could attend school for at least four classes each week. Therefore, I now find that the Student is awarded 150 minutes a week from the first week of school up to the week of October 28, 2022. Accordingly, the Parties are directed to calculate the award. That calculation should be reduced for any days the Student was medically excused.

USE, AND SELECTION OF COMPENSATORY EDUCATION

The Student may use the compensatory education bank of time for any developmental, corrective, remedial, specially-designed instruction, supplemental aids, or accommodations, including but not limited to tutoring, teaching, transition services, related services, auxiliary aids and services, private evaluations/diagnostic testing, assistive technology supports/devices, or career/vocational counseling as defined in the IDEA or Section 504.³⁶

SELECTION AND PAYMENT FOR COMPENSATORY EDUCATION

The Parents or the Student can select the compensatory education service provider(s) at their sole discretion. The District should reimburse the provider(s) at the rate regularly charged for each service. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the District's rate for travel reimbursement.

The mileage reimbursement is a separate award; therefore, the District should not reduce or offset the mileage charges from the funds used to pay for compensatory education costs. In January of each year, the District should report unused compensatory education hours to the Student and the Parent.

TUITION REIMBURSEMENT IS APPROPRIATE RELIEF

³⁶ *Berks County IU/EI Program*, 117 LRP 9420 (PA 2017) (equal access to IDEA's promise of a free appropriate public education and the parallel promise of a full educational opportunity goal); 34 C.F.R. § 300.109; 20 U.S.C. §1412(a)(2)).

The District's laundry list argument that the private placement is not an approved private school is misplaced.³⁷ Applying *Carter* and *Burlington*, I now find the Parent's private placement is otherwise appropriate.

Before the placement, the Parent gave the District adequate notice of her intent to make the private placement. After receiving the notice, the District did not request another evaluation. Therefore, the Parent cleared the first *Burlington – Carter* timely notice hurdle. Next, as described above, the District failed to offer an appropriate education. The analysis now shifts to a review of the private school.

A unilateral private placement is "appropriate" for reimbursement purposes if it offers instruction specially designed to meet the student's unique needs and the support services the student requires to benefit from that instruction.³⁸ The private placement offered a regular education curriculum. The head teacher worked with the private therapist to develop a safety plan. The private school provides one-on-one instruction for part of the day and small group instruction for part of the day. All staff were aware of the Student's safety concerns. The Student's attendance problems, self-injury, and homework difficulties no longer interfere with the Student's school day or attendance. The placement offers nonacademic opportunities like clubs and field trips. The Student is now completing homework and earning "As" and "Bs." The teachers are recommending "Honors" and "Advanced" coursework. After starting school on a part-time basis, the Student now attends school on a full-time basis. The District's argument that the decline in Student's MAP testing proves that private placement is lacking is misplaced. The record is preponderant that the Student's MAP scores are within the expected standard error of measurement. While the

³⁷ Private placements are not required to meet state standards. See, 34 C.F.R. § 300.148(c); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. at 13.

³⁸ *Lauren P. v. Wissahickon Sch. Dist.*, 51 IDELR 206 (3d Cir. 2009 *unpublished*) (holding that the parents of a teenager with ADHD could not recover the costs of a private school program that failed to address her distractibility and organizational difficulties -- her two key areas of behavioral need).

percentiles went down, the raw score stayed pretty much the same. When viewed as a whole, I now find that the placement provides specially-designed instruction and adequate support to address the Student's "coping" need.

The equities favor the Parent. The procedural and substantive violations described above cut against the District's claims. The staff delayed the evaluation and then failed to offer adequate accommodations like homebound instruction when the Student participated in the partial programs. The Parent, on the other hand, regularly communicated with the staff about the Student's multiple hospitalizations. For the most part, the Parent collaborated with the District and regularly attended all meetings. Finally, the Student's self-harm tendencies and the surrounding circumstances required immediate action. Accordingly, I now find the equities favor the Parent; therefore, the District is now directed to reimburse the Parent for her out-of-pocket tuition expenses for the 2022-2023 school year.

SUMMARY

The Student suffered a multi-year loss of a chance to receive a FAPE. The blended equitable relief awarded here is reasonably calculated to place the Student on the path otherwise disrupted when the District failed to identify, evaluate and educate the Student in the least restrictive environment. Applying *Perez*, I now find I lack subject matter authority to grant the requested Section 504 legal relief.

FINAL ORDER

AND NOW, this June 27, 2023, the District is now **ORDERED** as follows:

1. The Student's IDEA and Section 504 child find claims are **GRANTED**.
2. The Student's IDEA and Section 504 denial of FAPE claims are **GRANTED**.
3. The equitable relief of compensatory education **ORDERED** herein makes the Student whole for any Section 504 or IDEA FAPE violations.

4. The Parents' request for tuition reimbursement is **GRANTED**.
5. To remedy the FAPE violations, the District is now **ORDERED** to fund a bank of compensatory education services as described above. The Parties are directed to calculate the value of the compensatory education hours as required above.
6. The District is **ORDERED** to pay the cost of transportation to and from any compensatory education service, education, transition, or testing provider as described above.
7. The Parent or Student can select the individual(s) or the provider for all make-whole compensatory education services.
8. This hearing officer cannot award legal or equitable relief or remedy the Student's Section 504 intentional discrimination claims; these claims are now exhausted and dismissed without prejudice.
9. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed with prejudice.

Date: June 28, 2023

s/ Charles W. Jelley, Esq. LL.M.
Hearing Officer
ODR FILE #27474-22-23