



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
(CONSOLIDATED)

C.M. ON BEHALF OF E.M.,

Petitioner,

v.

ELIZABETH CITY BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 00782-21

AGENCY DKT. NO. 2021-32392

ELIZABETH CITY BOARD OF EDUCATION,

Petitioner,

v.

C.M. ON BEHALF OF E.M.,

Respondent.

OAL DKT. NO. EDS 01495-21

AGENCY DKT. NO. 2021-32505

David R. Giles, Esq., for C.M. on behalf of E.M.

Richard Flaum, Esq., for Elizabeth City Board of Education (DiFrancesco,
Kunzman, Davis, Lehrer & Flaum, attorneys)

Record Closed: October 13, 2021

Decided: November 29, 2021

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, C.M. requested a due process hearing on behalf of her child, E.M., seeking independent educational evaluations (IEE's), and a determination that E.M. is eligible for special education and related services. The Elizabeth City Board of Education (the Board, or the District) asserts that E.M. is not eligible for special education and related services and is not entitled to the requested IEEs. In its petition, the District seeks an order denying the parent's request for IEEs.

PROCEDURAL HISTORY

The parent, C.M., filed on behalf of E.M. a request for a due process hearing on or around December 22, 2020, which was transmitted to the Office of Administrative Law (OAL), where it was filed on January 28, 2021 under OAL Dkt. No. EDS 00782-21. The Board filed a due process petition on or around February 9, 2021, seeking an order denying a parental request for IEEs. The Board's petition was transmitted to the OAL, where it was filed on February 10, 2021 under OAL Dkt. No. EDS 01495-21. By order dated March 10, 2021, I ordered the consolidation of OAL Dkt. Nos. EDS 00782-21 and EDS 01495-21.

A hearing took place on May 3, 5, and 20, 2021, via Zoom, as the OAL offices were closed due to the COVID-19 pandemic. The parties filed post-hearing briefs, and rebuttal briefs, and the record closed on October 13, 2021.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

At the time the due process petitions were filed, E.M. was a twelve-year-old, sixth-grade, student in the Elizabeth School District. He has never been classified as a student eligible for special education and related services, however, he has had a 504 Plan since 2017.

Background

Due to academic concerns in first grade, C.M. requested that her son, E.M., be evaluated by the Child Study Team (CST) near the end of the 2015-2016 school year. The District agreed to the evaluation. A psychological evaluation was conducted in May 2016, as E.M. was noted to have signs of anxiety. He was evaluated using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), observations, interviews and a behavioral assessment. His Full Scale Intelligence Quotient (FISQ) and verbal comprehension index, fell in the average range. The CST also conducted an educational evaluation, consisting of the Woodcock-Johnson IV (WJ-IV), and other assessments targeting language. E.M. scored in the low average range in reading comprehension, fluency, math problem solving and phoneme-grapheme knowledge, and average in the other areas assessed. Results of these assessments did not identify skill deficiencies that were preventing him from functioning at grade/age level. Based on the results of these assessments, the CST determined in June 2016 that E.M. was not eligible for special education and related services.

In early 2017, E.M. was diagnosed with ADHD. The District subsequently implemented a 504 Plan that included a number of accommodations to address E.M.'s ADHD. C.M. consented to the 504 Plan, which became effective in January 2017. In second grade, E.M. received one-on-one multi-sensory, strategic instruction intervention in reading twice a week, and it was noted that his grades showed significant academic improvement as a result. While in the second grade, the District also screened E.M. for dyslexia. E.M. was found to have dysgraphia, but not dyslexia. To address the dysgraphia, the 504 Plan was amended to provide occupational therapy (OT) once per week, but after a few sessions, C.M. opted to stop the OT.

The reading intervention program E.M. received in the second grade did not continue into the third grade. Rather, the District offered E.M. an after-school tutoring program for third grade, which C.M. initially agreed to. He participated in that program for about two months but C.M. eventually chose to pull E.M. from the program and use a private tutor for reading.

An annual review took place on January 18, 2018 to assess progress and review and revise the accommodation plan. This updated 504 Plan was effective January 25, 2018 (third grade) through January 25, 2019 (fourth grade), and includes a long list of accommodations to address E.M.'s ADHD. (J-34.) These include, for example: assistance with organization; simplification of task directions; frequent checks for understanding; multi-sensory instruction as much as possible; refocusing and redirection; short breaks; assistance organizing; and extended time.

2018–2019 School Year, Evaluations Obtained
by Parent, and Mediation Agreement

The District met with C.M. again on September 25, 2018, when E.M. was in the fourth grade, to review the 504 Plan; and again on November 26, 2018. The parent provided consent for the 504 re-evaluation and continuation of 504 services. In February 2019, E.M. began attending an after-school intervention program for reading for one hour, three times per week. This lasted through May 16, 2019, when he demonstrated proficiency in the targeted areas of literacy and comprehension. The targeted areas in literacy included phonological awareness, phonemic awareness, phonics, fluency and comprehension. (J-19.)

A re-evaluation meeting was held in March 2019 with case manager Meghan Lewandowski (Lewandowski), and a District social worker. C.M. did not attend but agreed to continue with the accommodations listed in the 504 Plan at the time. (J-13.) Lewandowski testified credibly that E.M.'s progress at the time was good.

Later that school year, by email dated April 12, 2019 to Diana Pinto-Gomez, C.M. requested that E.M. be evaluated again by the CST. C.M. felt that the 504 Plan was not

adequately addressing all of E.M.'s needs. Intervention and Referral Services denied the request on or about May 29, 2019, and C.M. filed for mediation with OSEPP.

The mediation resulted in an agreement with the District whereby the 504 Plan would be amended to include a one-to-one pull-out scientifically-based reading program with a certified special education teacher, thirty minutes per day for four days a week. (J-4.) This reading instruction, provided through the Sondag program, which is a derivative of Orton-Gillingham (OG), was to start in September of the 2019–2020 school year (fifth grade). The plan was to meet again in December 2019 to assess progress.

In July 2019, about a month after the parties entered into the mediation agreement, C.M. had E.M. undergo a dyslexia screening at the Robinowitz Education Center. C.M. testified that she continued to be concerned about E.M.'s reading and reading comprehension. The dyslexia screening did not conclude that E.M. has dyslexia. Rather, the report generated by the Robinowitz Education Center contains several recommendations, and notes that E.M. has to develop his phonological awareness skills, which are necessary for reading and writing. C.M. testified that she was informed that the Sondag program does not address phonological awareness, and that the Robinowitz Center recommended one-on-one OG instruction. That recommendation, however, does not appear in the report, nobody from the Robinowitz Center testified at the hearing, and I therefore gave it no weight.

The parent also obtained a Psycho-Educational Evaluation from Kean University's Psychological Services in early September 2019. Following the evaluation, which involved testing over the course of three days in September, a report was prepared and signed by a Doctoral Student Clinician and his Ph.D. supervisor in late November 2019 (the Kean report). (J-38.) C.M. testified that E.M. was found to have dysgraphia, and E.M. was also diagnosed with depressive disorder and anxiety. As part of the evaluation at Kean, E.M. was administered the WISC-IV, the WJ-IV, the WIAT-III, and other assessments. The Kean report concludes that, overall, E.M.'s cognitive functioning, as measured by the WISC-V, falls in the low-average range, with a FSIQ of 84, the 14th percentile. The Kean report notes that on the WJ-IV, E.M.'s performance appeared to match his cognitive abilities, with a relative weakness in math calculation skills and

spelling. It also contains a number of recommendations to address the dysgraphia, handwriting, academic weaknesses, anxiety and depression.¹ I **FIND** that the 504 Plan in place at the time provided for most of the academic recommendations contained in the Kean report, and the District later amended the 504 Plan in December 2019, upon receipt of the Kean report, to incorporate the additional accommodations recommended in that report.

2019–2020 School Year

An annual review meeting took place on September 12, 2019. The 2019–2020 504 Plan includes essentially the same accommodations as the 2018–2019 504 Plan, which primarily address E.M.’s ADHD, and also included the Sunday reading intervention program that was agreed to in mediation. A Sunday instructor was assigned to E.M. in September 2019, and C.M. expressed her satisfaction with the 504 Plan at the time.

E.M.’s math teacher, Diana Medeiros Diaz (Medeiros) also testified credibly that she implemented E.M.’s 504 Plan accommodations. E.M. sat in the front of the classroom; and he was redirected and refocused when necessary. She also testified credibly that he participated in class, he completed his assignments, and was an average student—with strengths and weaknesses like every student.

In November 2019, C.M. requested another CST evaluation. The team considered new reports provided by the parent, and specifically the Dyslexia Screening report by the Robinowitz Education Center, and the Kean report (noting that E.M. has a FSIQ of 84). The team also considered E.M.’s records, parental concern, and teacher feedback. Paula Prieto (Prieto), school psychologist who also testified as the District’s expert witness, also spoke with E.M.’s teachers (including his ELA teacher, Math teacher and Reading Interventionist) who reported that E.M. was doing well and benefitting from his 504 Plan. Prieto was aware that E.M. had been diagnosed with ADHD two years earlier, and she

¹ The academic recommendations contained in the report include: allowing E.M. to use a computer for his assignments; provide him with extra time on writing assignments and exams; encourage stretch breaks; provide E.M. with copy of class notes; limit the use of short-answer and essay formats on exams; provide outlines before writing assignments; break down larger assignments into simpler ones.

believed that at the time he was reading at grade level. She noted that a Developmental Reading Assessment (DRA) was administered and his score of 50 indicated that he was reading at grade level. Given the information available, in or around December 11, 2019, the District determined that a CST evaluation was not warranted as he was not suspected of having a disability which adversely affects his educational performance. It was noted that E.M. was benefiting from his 504 Plan, and that this together with the Sunday intervention have helped strengthen and support E.M.'s identified weaknesses. (J-12.) The parent disagreed with the District's conclusion.

C.M. met again with Lewandowski and E.M.'s general education teacher on December 16, 2019. C.M. expressed concerns about E.M.'s writing, and a speech-to-text program for longer writing assignments was added to the 504 Plan. The 504 Plan was revised to include the additional recommendations found in the Kean report, and it continued to contain the accommodations found in the earlier 504 Plans (relative to organization, refocusing, keeping E.M. on task, and to provide multi-sensory instruction as much as possible), as well as a provision for specialized reading intervention (Sunday System) for thirty minutes, four times per week, instructed by a special education teacher.² (J-5.) C.M. raised no concerns with the 504 Plan at the time.

Another meeting was held on March 6, 2020, with Lewandowski, the interventionalist, C.M. and an advocate, to review progress with the reading intervention program.

When the COVID-19 pandemic forced the closure of the District schools in mid-March 2020, the District reasonably expected to be able to reopen in a couple of weeks. However, the District schools remained closed through the end of the school year, with no in-person or virtual instruction. Students were sent packets of assignments to work on at home, and teachers assisted their students through the phone or email through the end of that school year. Assignments were first posted on "Unified Classroom" for students to complete, and after teachers reported that the assignments were too lengthy and complicated, they were permitted to modify those assignments for their students as

² The additional accommodations include providing typed copies of notes; allowing E.M. to use speech to text for longer writing assignments; and to provide a quiet space for testing.

they deemed necessary. Modification to the students' work were made at E.M.'s school. With respect to grading policies at the time, as there was no in-person instruction, the policy was that all students were to receive either a pass or fail grade in their classes for that final marking period. For March through June 2020, E.M. was given assignments, and Sunday instruction packets, to complete at home, and he received passing grades through the end of the school year.

2020–2021 School Year

In September 2020, the District reopened with virtual instruction.

An annual review meeting took place on September 17, 2020, and was attended virtually by C.M., Lewandowski, E.M.'s Sunday instructor, four teachers and a supervisor. The 504 Plan contained the same accommodations found in the prior 504 Plan. (J-5.) As with the earlier 504 Plans, it notes that E.M.'s attention span or distractibility requires shorter working periods or frequent breaks; he has significant difficulty completing tasks; he is distracted easily or has difficulty remaining on task; and he is unable to work continuously for the length of time allocated for test administration and requires a timing or scheduling accommodation. C.M. did not sign the 504 Plan because, unlike the prior 504 Plan, it did not specify that the Sunday instruction would be provided by a special education teacher, only a certified teacher. Despite this change in language, however, E.M.'s Sunday teachers were both certified special education teachers.

Throughout this school year, E.M. routinely did not keep his computer camera on during instruction. He was also regularly unprepared for class, rarely participated, and often failed to hand in assignments. Teachers would call on him and he would either not answer or there would be a long delay before a response. The teacher would monitor E.M. using GoGuardian to verify that he was logged on. E.M.'s teachers, Lewandowski and the principal spoke with C.M. multiple times about the camera issue. C.M. testified that E.M. struggled to focus during remote instruction, and mostly because of the camera. She testified that it was hard for him to ask for help, and that he had difficulty keeping up and understanding the work.

Medeiros was E.M.'s math teacher again for sixth grade. She testified that E.M. regularly had his camera off during class even though it was a class rule to keep the camera on. Medeiros spoke with E.M. several times about keeping his camera on, but eventually she stopped when he kept failing to comply. Medeiros testified credibly that E.M. would be capable of doing the work in a live classroom, as he had done the year before, and that virtual learning was an issue for many of her students.

In September 2020, E.M. was tested for placement in Sondag, after not having received any Sondag instruction since March when the District closed. E.M. tested at Level 2—which required him to redo the same levels of instruction he completed the year before. I **FIND** that, given that E.M. did not receive any Sondag instruction for six months (due to COVID-19 and summer break), it is not surprising that he had to repeat Level 2 instruction; and there is insufficient evidence that this is indicative of a suspected disability or that it suggests that he is in need of special education.

In November, Medeiros started to meet with E.M. one-on-one for extra help in math, per C.M.'s request. Since he was not handing in assignments, Medeiros used that time to assist him in completing those. He also kept his camera off during tutoring. E.M. turned in assignments in January, February and March, with Medeiros' assistance. Math benchmarks were not conducted this first marking period and he failed the math benchmarks for marking periods two and three, while still in virtual learning. Medeiros testified credibly that when E.M. was in person during the 2019–2020 school year, and receiving his 504 accommodations in person, he was able to work at grade level. The accommodations used included redirection, refocusing, using graphic organizers, and copies of notes. She testified credibly that E.M. performed average pre-pandemic.

In November 2020, E.M.'s Sondag instructor changed to Sue Amarin (Amarin), who is certified in special education. The first Sondag instructor had completed lessons one through six with E.M., and Amarin started at level seven. She described Sondag as a multi-sensory approach to learning how to spell and read, and that it is a derivative of OG. Amarin provided the Sondag service four days a week. From the start, E.M. did not have his camera on during this instruction, and Amarin informed C.M. that he would need to have the camera. In November, they completed levels 7 and 8, and they completed

level 9 in December, although Amorin testified credibly that her ability to teach E.M. and move through the lessons faster was impacted by E.M. not keeping his camera on. She had multiple communications with both E.M. and C.M. about the need to have the camera on during instruction, but E.M. regularly failed to appear on camera. E.M. appeared to be struggling with some concepts/sounds in December and he did not pass the mastery test that month. Amorin revisited the sounds he was having trouble with, but he performed worse when retested. Rather than restart that level again and frustrate and discourage E.M., Amorin reasonably decided to start at level 10 after winter break, while still reinforcing the words he had struggled with. Amorin testified credibly that they would have gone through the levels faster and more effectively had E.M. kept his camera on.

When E.M. did keep his camera on in January 2020 during Sunday instruction, he made “great progress.” He completed levels 10, 11 and 12, and performed well on the mastery test in early February 2020. C.M. had created a designated workspace for E.M., which he enjoyed, and it had a positive impact on his performance. In February, however, he started to move around the house, and was not seated in one place and consistent like he was in January. He did, however, complete levels 13 and 14 that month. Amorin still asked E.M. to keep his camera on every day, even though at this point E.M. had permission from his mother to keep it off. On March 11, he failed to master level 15, but passed a couple of weeks later. The entire month of March was spent on one lesson, and Amorin testified that had E.M. kept his camera on and was prepared for his lessons that month, they would have completed more. E.M.’s camera remained off in April and although he reported to Amorin that he did the work, he did not. He continued to be non-compliant with respect to his camera, and did not provide Amorin with feedback during instruction.

C.M. testified that she saw E.M. struggling during remote instruction. I **FIND** that E.M.’s diagnosis of ADHD impacted his ability to focus and remain engaged during the school day, and this became more difficult to manage during remote instruction because E.M. usually kept his camera off.

During that school year, E.M. received some modified assignments in language arts, math, and social studies. The modifications to E.M.’s assignments were not made

per his 504 Plan. During remote instruction, District teachers were given discretion to modify their student's assignments, and these modifications were available to all students in E.M.'s class. C.M. testified that the modifications were helpful, and she believes he should continue to receive modifications through an IEP. She did not, however, present competent expert testimony that E.M. required modified instruction.

Since the first grade, E.M. has been in and out of private therapy. Evelyn Quintana (Quintana) is a licensed social worker who first provided therapy to E.M. in 2018. In 2020, the parents reported severe anxiety, low frustration tolerance, intense anger outbursts, and difficulty regulating emotions. Quintana testified credibly that some of E.M.'s anxiety was related to his academic performance and difficulty making friends. Quintana also confirmed E.M.'s ADHD diagnosis, which the District does not dispute. After treating with her for several months in 2020, he made progress but still had "moderate levels" of anxiety relating to academics. When E.M. returned in September 2020, at the start of sixth grade, with reports of severe anxiety and frustration in relation to online school, Quintana began seeing him once a week throughout that school year. Per C.M.'s request, Quintana submitted an evaluation with recommendations for E.M. to the District in January 2021. (J-41.) In her evaluation, Quintana describes E.M.'s anxiety and ADHD, how that interferes with his ability to function in an academic environment, and she confirmed that he has generalized anxiety disorder. Her recommendations include providing social-emotional support in the school setting by the guidance office to assist in managing school-related anxiety and frustration. While I **FIND** that E.M. experienced anxiety and frustration relating to academics during the 2020–2021 school year, I give no weight to Quintana's opinions concerning E.M.'s academic progress or need for an IEP or CST evaluation. Quintana was not qualified as an expert witness; she is not an LDTC or school psychologist; and she had not seen the 504 Plan for that school year nor spoken with E.M.'s teachers or guidance counselors prior to rendering her opinions. She agreed, however, that E.M. had access to school counselors that school year, but she did not know whether he took advantage of that counseling.

In mid-November 2020, the parent requested another CST evaluation. C.M. was still concerned about E.M.'s reading, and she testified that E.M.'s OG-certified reading tutor informed her that E.M. was reading at a third-grade level. C.M. believed that the

modifications being implemented at the time were beneficial, and she believed that E.M. would require an IEP to continue to receive modified assignments. A meeting was scheduled, and the parent was invited to provide additional documentation.

A virtual meeting took place on December 10, 2020, which lasted about two hours. Prior to the meeting, the CST reviewed several documents, many of which were provided by the parent, including a summary dated December 2020 by E.M.'s tutor, the Kean report, the July 2019 Dyslexia Screening; the May 2017 OT evaluation, the March 2017 Dyslexia Screening, the January 2017 neurodevelopmental report, the June 2016 Initial Educational Evaluation; and the May 2016 Initial Psychological Evaluation. The team noted that the results of the Kean report together with the 2016 Educational and Psychological Evaluations indicate that E.M. is performing within his cognitive potential, and that he has areas of strength and weaknesses. His 504 Plan and grades were also reviewed³; and teacher/interventionist input was considered. They discussed E.M.'s benchmarks⁴ and his Sunday assessment results. The fact that E.M. did not keep his camera on most of the time during remote instruction was also discussed, as it was reported that this made it more difficult for the teachers to implement the 504 accommodations. Specifically, they reported being unable to decipher if E.M. was paying attention, needed to be redirected, or needed a break. The teachers also reported inconsistencies with participation and submitting work. Prieto testified that this resulted in E.M.'s grades going down that year. Prieto prepared the Closure Report dated

³ In the 2018–2019 and 2019–2020 school years, E.M. passed all of his classes, and had mostly A's and B's. At the time of the December 2020 meeting, E.M.'s first quarter grades were available—he had an 81 in math and a 74 in ELA, and did not fail any of his core academic subject. Later in the 2020-2021 school year, and specifically in the third quarter, he had failing grades in math, ELA and Science. These were adjusted automatically in Powerschool to a passing grade of 60, consistent with District policy at the time. I **FIND** that the “passing” grades of 60 on the report cards do not reflect E.M.'s performance or ability. I also **FIND** that E.M.'s grades for the 2018–2019 school year, 2019–2020 school year, and the first half of the 2020-2021 school year demonstrate that he progressed academically; however his grades in math and ELA for the third and fourth marking periods of the 2020–2021 school year (i.e., after this petition was filed) do not.

⁴ E.M.'s performance on the District benchmarks have been inconsistent. No benchmarks were given from March 2020 (when the District schools first closed due to COVID-19) through June 2020. In October 2020 (during remote instruction), E.M. performed below basic standards in math, but later exceeded standards when he retook the test in early November. In January 2021, he exceeded and met standards on the math benchmark, but fell again to below basic standards later in the school year. When instruction was in-person during the 2019–2020 school year, he sometimes tested below basic standards, but also often met and even exceeded standards at times, including in early March 2020, just before the District shut down. In ELA, E.M. also performed below basic standards in September and early December 2020; met standards in January and February 2021; but later fell below basic standards in March and April 2021. The prior school year (before March 2020), E.M. largely met (and even exceeded) benchmark standards in ELA.

December 17, 2020, which concludes that an evaluation was not warranted. (J-2.) C.M. disagreed with this conclusion and reported that she was filing for due process.

C.M. disagreed with the District's determination that evaluations were not warranted, and by letter dated February 1, 2021 from her counsel to the Board's counsel, she requested IEEs "consisting of a comprehensive multidisciplinary evaluation, including a neuropsychological, educational, speech and language, occupational therapy, assistive technology and audiological evaluations."

For the third and fourth marking periods of 2020–2021, E.M. continued to keep his camera off during instruction, he rarely participated, and failed to complete and turn in many assignments. I **FIND** that, despite the challenges of virtual instruction, from September 2020 to about January 2021, E.M. made progress in his academic classes and reading. However, the record, consisting of his grades (before they were adjusted to passing grades) and benchmarks do not demonstrate that he made meaningful academic progress during the third and fourth marking periods of the 2020–2021 school year (after the due process petition was filed). During that time, E.M. was also not completing and submitting his work, and did not adequately engage and participate in the virtual instruction, and his grades suffered.

The issues to be resolved are whether the District is obligated to conduct the IEEs requested by the parent, and whether the District improperly failed to classify the student on or around December 2020.

Expert Testimony

Paula Prieto (Prieto) testified as a fact and expert witness on behalf of the District. She is a school psychologist on the Child Study Team, has conducted up to 500 initial evaluations and re-evaluations, and she was accepted as an expert in school psychology.

Prieto testified that E.M.'s grades went down that year due to his inconsistent participation and the teachers' inability to properly implement the 504 Plan. She testified that E.M. would benefit from being in the classroom, and agreed with the CST that if E.M.

kept the camera on during instruction, the 504 Plan could be implemented properly and he would not have the difficulties (such as the frustration) described by the parent.⁵ She did not believe that an evaluation was warranted.

Prieto testified that E.M. was in school when the Kean report was prepared in November 2019, and that while E.M. did demonstrate some frustration in school at that time, it was not to the extent described in this report. In the classroom teacher was able to address and redirect that frustration. She confirmed that the academic recommendations contained in the Kean report were considered by the District.

Prieto testified that as part of the District's consideration of the Kean report, they considered the most recent 2019 WISC-IV assessment, with the FSIQ of 84, which she described as low compared to the FSIQ of 101 in 2016 (which is in the average range). Prieto did not believe an evaluation was warranted to determine whether E.M.'s IQ was declining given the 20-point drop in three years. She testified that the FSIQ is only one piece that they consider, and that there could have been a number of factors that may have caused this drop. Since she did not evaluate E.M., she could not explain why he performed at a lower level when assessed at Kean. She testified, however, that E.M. was performing consistent with his cognitive potential given this more recent WISC-IV assessment.

Prieto testified that E.M.'s behavior in not turning on his camera and not engaging in virtual instruction also did not warrant an evaluation, and that he was progressing with the 504 Plan per his teachers.

Prieto agreed that E.M.'s phonological awareness is an area of weakness for him but that he does not need specially designed instruction for children with learning disabilities in order to address this weakness. She testified that E.M. can receive that support within the general education classroom, with the interventions that are already in place per the 504 Plan.

⁵ The District re-opened for in-person instruction on the day Prieto testified, May 3, 2021.

Prieto did not agree with the diagnosis in the Kean report of a specific learning disorder with an impairment in written language. She testified that E.M. does not meet the criteria to qualify for a specific learning disability in the special education code since they did not see the impact in the classroom when he was supported with the 504 Plan. Prieto agreed that E.M. has generalized anxiety disorder. Prieto also testified that she did not believe E.M. needs OT per an earlier evaluation,⁶ and that organizational strategies referenced in the Kean report are already being provided to E.M. through the 504 Plan.

Dr. Steven Hertler testified on behalf of the parent. He is a licensed clinical psychologist with a certificate in school psychology. He was accepted as an expert in the area of psychology, and in the assessment of psychological disorders.

Dr. Hertler prepared a psychological report following his March 14, 2021 evaluation of E.M. (P-26.) The reason for the referral for evaluation was to assess E.M.'s ADHD diagnosis; to assess general cognitive ability and administer the Wexler Intelligence Scale for Children (WISC) for educational planning and detection of learning problems; and to confirm or disconfirm the presence of dyslexia.

Dr. Hertler expressed concern that there had been two previous assessments, in 2016 and 2019, with very variable results. When he assessed E.M. in March 2021, he found him to have average-range cognition, with a 92 standard score, at the 30th percentile. Dr. Hertler testified that E.M. was within the average range in verbal comprehension, fluid reasoning, working memory and processing, but low average (16 percentile) in the visual spatial reasoning index. He compared his results to the 2016 and 2019 assessments, and found more consistency between the assessments conducted in 2016 and 2021. He described the 2019 testing done at Kean University as an outlier, and testified that it was completed by an intern, and that even if the intern conducted the assessment properly, E.M. could have just test poorly that day. He testified that the higher scores are more reliable in assessing cognitive ability, and that it would not be appropriate to rely on the 2019 numbers because of the large variation, with scores dropping more than one standard deviation. He found that the 2019 evaluation underestimated fluid

⁶ It is unknown what OT evaluation Prieto was referring to, however, the District did provide OT to E.M. in 2017.

reasoning abilities and fluid reasoning⁷. Dr. Hertler also found weaknesses in both sustained attention and executive functioning, and he confirms the previous diagnosis of ADHD.

Dr. Hertler testified that he assessed E.M.'s academic achievement using the Wexler Individual Achievement Test (WIAT-III) and the Gray Oral Reading Test, and that almost every score on the WIAT-III was depressed, with a lot of variability.

Dr. Hertler concluded that E.M. has a specific learning disability (SLD), dyslexia. He testified that he saw this from the academic testing, including the pseudo-word reading performance and in the borderline spelling performance. He testified that "from the discrepancy model he [E.M.] absolutely qualifies for a diagnosis of dyslexia, because there is a discrepancy and there's a rather sizeable one" but that this is just one way to approach a diagnosis of dyslexia.

Dr. Hertler recommends OG instruction and an IEP and individualized learning plan that recognizes dyslexia. He was aware that E.M. was receiving intervention using the Sunday program, and that this is a derivative of OG. His report contains sixteen enumerated recommendations.⁸ The majority of these relate to the ADHD diagnosis, and several were already incorporated into E.M.'s 504 Plan. The 504 Plan does not mention his recommendation that E.M. will "benefit from focused pull outs emphasizing phonetic training using the OG reading program." He also recommended OT for assistance with E.M.'s writing.

⁷ The verbal comprehension, working memory index and processing speed index results from 2019 are comparable.

⁸ Dr. Hertler testified that a number of his sixteen recommendations are applicable to E.M.'s ADHD diagnosis (including recommendations 1, 2, 7, 10, 11, 13, 14, 15, and 16). Those that relate to the dyslexia diagnosis include: recommendation 2 (OG instruction); recommendation 4 (develop a learning program in recognition of dyslexia); recommendation 5 (use of audio books); and recommendation 8 (provide use of computer to write). OT was also recommended to address his dysgraphia.

Analysis and Additional Facts

Dr. Hertler presented as a credible witness, however, some of his opinions extend beyond the scope of his expertise. He is neither an educator nor a reading specialist; and he is not trained in, nor has he ever provided, OG instruction. I **FIND** that Dr. Hertler is not qualified to offer an opinion as to any reading instruction or program, and I therefore discount his opinion and recommendation that E.M. should receive OG, or any other reading instruction. Moreover, I am not persuaded by Dr. Hertler's opinion that E.M. has dyslexia. I question the manner in which he arrived at that determination after E.M. was found not to have dyslexia on two prior occasions, including more recently in 2019 when the parent herself had E.M. privately screened for dyslexia. Even if E.M. does have dyslexia, I am not convinced that he has a SLD per the special education code that requires special education and related services. Dr. Hertler did not convincingly explain how E.M. requires special education and related services through an IEP, and I question how he arrived at that conclusion when he was unable to identify any school records that he reviewed, and he did not speak with any of E.M.'s teachers, counselors or instructors prior to issuing his opinions and recommendations. Dr. Hertler was not even aware whether E.M. was attending school virtually or in-person. Since Dr. Hertler formulated his opinions without any input from those who educate E.M. and see him in the classroom every day, and since he appears to have reviewed limited or no school records, I give little weight to his opinions concerning E.M.'s educational needs, including his opinion that E.M. requires special education through an IEP. Based on Dr. Hertler's report and testimony, I cannot determine that E.M. has a SLD that requires special education and related services.

Prieto testified as a knowledgeable and credible witness concerning E.M.'s functioning in the classroom, and that had E.M. kept his camera on during instruction, the 504 Plan could have been implemented properly and he would not have had the difficulties described by the parent, such as frustration and anxiety. She testified credibly that E.M. benefits from being in the classroom, where the 504 interventions could be fully implemented and he could be monitored, redirected and the teacher would be able to ensure that he was understanding and completing his assignments. I **FIND** that E.M.'s failure to comply with his teachers' directives to keep his camera on did not warrant an

evaluation; and that his refusal to keep his camera on during instruction time greatly impacted his teachers' and Sunday instructor's ability to monitor, redirect, and engage E.M., and to fully implement the 504 Plan accommodations. I also **FIND** that the 504 accommodations are robust and effective in addressing E.M.'s ADHD in the classroom, and that the parent failed to present any competent expert testimony that E.M. requires specially designed instruction to address E.M.'s ADHD.

Based on Prieto's testimony, I **FIND** that the District appropriately considered the results of the WISC-IV obtained at Kean, and that they had no reason at the time to question the WISC-IV results, including the FSIQ. I also **FIND** that E.M. was performing consistent with his cognitive potential at the time; and that despite the Kean report,⁹ C.M. did not present sufficient evidence that E.M. required special education or related services at the time. I also **FIND** that E.M.'s 504 Plans, which were regularly reviewed and updated by the District in collaboration with C.M., were appropriately tailored to address E.M.'s disability, specifically his ADHD; and that the reading interventions and Sunday instructions provided by the District sufficiently addressed his reading needs at the time. C.M. offered no competent expert testimony to the contrary.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The issues to be resolved here are: (1) whether the District improperly failed to identify E.M. as a student eligible for special education and related services on or about December 2020; and (2) whether the District is obligated to provide the independent educational evaluations requested.¹⁰ The parent asserts that the Board failed to conduct an evaluation of E.M. to determine whether he was eligible for special education and related services, and failed to classify him as he meets the criteria for eligibility under the categories of Specific Learning Disability (SLD) and Other Health Impaired (OHI). The parent seeks an order classifying E.M. as eligible for special education and related services under the categories of either SLD or OHI; and requiring that the District pay for an independent comprehensive education evaluation of E.M. The parent's opening

⁹ I gave little weight to the Kean report as it constitutes hearsay. The evaluators at Kean did not testify at the hearing concerning their findings and the recommendations.

¹⁰ These issues were identified in the April 20, 2021 Case Management Order, without objection.

statement specifically seeks a psychiatric evaluation as well as a neuropsychological evaluation paid for by the District. The Board asserts that neither the law nor testimony offered at the hearing supports these demands, and requests an order denying the parent's request for IEEs.

Did the District Improperly Fail to Evaluate E.M. to Determine Whether he was Eligible for Special Education and Related Services in December 2020; And Did the District Subsequently Fail to Classify Him as Eligible?

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). States who receive federal funding for education are obligated to identify, classify, and provide a "free appropriate public education" (FAPE) to all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1. School districts have an affirmative and continuing obligation to identify and evaluate students reasonably suspected of a disability under the IDEA and Section 504 of the Rehabilitation Act (Section 504 or 504). This responsibility is known as a district's "child find" obligation. See S.W. v. Florham Park Bd. of Educ., EDS 10775-14, final decision (Sep. 29, 2015), 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. Each district must develop written procedures to identify students within the location of the district who may have a disability due to "physical, sensory, emotional, communication, cognitive, or social difficulties." N.J.A.C. 6A:14-3.3(a). These procedures must include evaluation measures to determine a student's eligibility for special education and related services. N.J.A.C. 6A:14-3.3(a)(3)(iii).

An "individual with a disability" is defined under Section 504 as any person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regraded as having such an impairment." 29 U.S.C. 705(20)(B). Section 504 defines a disability as a physical or mental impairment that substantially limits a person's ability to participate in a major

life activity, such as learning. Section 504 has a broad definition of “disability.” Children who are not eligible for an IEP may, therefore, be eligible for a 504 Plan.

The IDEA sets up a three-part test to determine eligibility for special education and related services: (1) the student must have one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c)1-14; (2) the disability must adversely affect the student’s educational performance; and (3) the student must be in need of special education and related services. H.M. v. Haddon Heights Bd. of Educ., 822 F. Supp. 2d 439, 450 (D. N.J. 2011). All three criteria must be met in order to be eligible for an IEP. Here, the parent asserts that E.M. should be classified as eligible for special education under the categories of either SLD, due to his dyslexia, or OHI due to his ADHD.

Here, I am satisfied that at least up until the time the parent filed for due process, the District attentively monitored and addressed E.M.’s needs. The CST evaluated E.M. in 2016, and conducted a psychological evaluation (consisting in part of a WISC-V, observations, interviews and behavioral assessment) and an educational evaluation (consisting in part of a WJ-IV and other assessments targeting language), and based on the results of these assessments, the CST determined at that time that E.M. was not eligible for special education and related services. The parent raised no concerns with that initial evaluation. When E.M. was diagnosed with ADHD in 2017, the District implemented a 504 Plan consisting of standard accommodations to address his ADHD, and when his difficulties in reading emerged, the District implemented a reading intervention program and conducted a dyslexia screening. E.M. was found to have dysgraphia, not dyslexia, and the District amended the 504 Plan to include OT to address the dysgraphia, which C.M. chose to discontinue. The results of the dyslexia screening were confirmed in July 2019 when C.M. had E.M. undergo a private screening for dyslexia.

C.M. routinely agreed to the 504 Plans proposed by the District, and she met with the District regularly concerning E.M. However, she filed for due process in the Spring of 2019 when she believed the 504 Plan was not adequately addressing E.M.’s needs relating to reading. E.M. did have a demonstrated weakness in reading, and the District had been providing additional reading instruction to E.M. since the second grade.

Through the OSEPP mediation process, the parties entered into an agreement whereby C.M. agreed to have the 504 Plan amended to include specialized reading instruction through the Sondag program, a multi-sensory reading program derived from OG. No qualified expert opined that the Sondag program was not an appropriate program for E.H. The Kean report, which the parent obtained privately and provided to the District, was also considered by the District and the 504 Plan was amended again to incorporate additional recommendations consistent with that report. Over the years, the District routinely heard C.M.'s concerns, considered all information provided to it, and adjusted the 504 Plan accordingly to account for E.M.'s changing needs.

E.M.'s attentional weaknesses made it difficult for him to fully engage and participate in remote instruction, and the fact that he usually kept his camera off despite countless requests to keep it on impacted his teachers' and Sondag instructor's ability to implement the 504 Plan accommodations. They did what they could, and despite E.M.'s sometimes slow advancement and inconsistent performance in the Sondag program, he did progress meaningfully in this program and in his academic subjects, at least up until the time the due process petition was filed. I am satisfied that the District met its obligations to E.M. to the greatest extent possible during remote instruction.

The Closure Report that was prepared following the December 17, 2020 meeting was prepared after an extensive review of E.M.'s records, several discussions with C.M., E.M.'s teachers, his Sondag instructor, and CST members. The CST also reviewed and discussed all reports provided by the parent, including the Kean report, both dyslexia screenings, the 2017 report diagnosing ADHD, and the Initial Psychological and Educational Evaluations. The only behavioral concerns reported by the teachers relate to monitoring E.M.'s engagement and attention to tasks due to his camera being off for most of his instruction time. The CST determined that while E.M. demonstrates areas of strength and weaknesses within his academic performance, he was performing within his cognitive potential, and the record at the time supports this conclusion. The District's witnesses testified credibly that when E.M. is in the classroom or fully engaged remotely (with his camera on), they are able to fully implement the 504 accommodations, and that more intensive special education and related services are not necessary. For the reasons stated herein, I **CONCLUDE** that the District satisfied its Child Find obligation, and

provided a FAPE to E.H. in the least restrictive environment. It developed and implemented 504 Plans, with C.M.'s input and consent, that addressed E.M.'s ADHD-related needs and reading issues. The District also regularly reviewed and amended the 504 Plans to address E.M.'s changing needs and information/reports presented by the parent. I also **CONCLUDE** that the District's determination in December 2020 not to evaluate E.M. was reasonable and appropriate. The evidence supports the District's assertion that evaluations were unwarranted at the time given that E.M. was being supported with an effective 504 Plan; that he was performing within his cognitive potential based on the information available to the District at the time; and that he was progressing up to that point despite the challenges posed by virtual instruction. Consequently, I also **CONCLUDE** that the District met its burden to establish that, in or around December 2020, E.M. was not eligible for special education and related services.

While the parent's expert now questions the accuracy of the testing (including the FSIQ) conducted at Kean the District reasonably considered and relied on this data in assessing E.M.'s cognitive ability. Based at least in part on the results of this testing, which revealed a FSIQ of 84, it determined that E.M. was performing within his cognitive potential. C.M.'s expert did not challenge that determination, nor did he testify that the CST should have evaluated E.M. at that time or classified him based on the information available to the District in December 2020.

Is E.M. Entitled to Independent Educational Evaluations?

Parents of a child with a disability have a right to obtain an IEE of a child under federal and state law. 34 C.F.R. § 300.502(a)(1); N.J.A.C. 6A:14-2.5(c). An IEE is defined as an "evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3). A parent has a right to an IEE at the public's expense if the parent disagrees with an evaluation obtained by the public agency unless the agency files a due process complaint and can demonstrate that their evaluation was appropriate. 34 C.F.R. § 300.502(b)(2)(i); N.J.A.C. 6A:14-2.5(c)(1). If the public agency's evaluation is considered appropriate after a due process hearing, a parent still has the right to an IEE but not at the public's expense. 34 C.F.R. § 300.502(b)(3). The issue here is whether

the District has proven, by a preponderance of the credible evidence, that the requested IEEs are unwarranted.

When E.M. was initially evaluated in the Spring of 2016, due to poor academic performance (prior to the ADHD diagnosis), the District conducted an initial educational and an psychological evaluation. At no time did C.M. raise any concerns regarding this initial evaluation or reports.

While I have already determined that the District's decision not to evaluate E.M. in December 2020 was appropriate based on the information available at the time, I cannot ignore the fact that after the petition for due process was filed, E.M.'s academic performance notably suffered, and he failed benchmarks later that school year. While I question the manner in which Dr. Hertler arrived at his opinion that E.H. has a specific learning disability, dyslexia, that requires an IEP, and while I recognize that there were previously two dyslexia screenings disconfirming dyslexia here, I do feel that a more comprehensive assessment should be conducted by a neuropsychologist to determine whether E.M. does in fact have dyslexia. I, therefore, **CONCLUDE** that there is good cause here to order the District to provide E.M. with an IEE by a neuropsychologist to specifically assess whether E.M. has dyslexia; and if E.M. is found to have dyslexia, the District should conduct any additional evaluations of E.M. to identify what, if any, additional supports or interventions he requires to address the dyslexia. I also **CONCLUDE** that good cause does not exist to compel the District to provide a psychiatric, or any other IEE at this time. The parent offered no testimony to support her demand for a psychiatric, or any other IEE.

ORDER

Based on the foregoing, I hereby **ORDER** that the District provide E.M. with an IEE by a neuropsychologist to assess whether he has dyslexia. It is also **ORDERED** that if the neuropsychologist determines that E.M. has dyslexia, the District Child Study Team will convene and conduct the necessary evaluations to determine what, if any, additional supports or interventions E.M. requires to address the dyslexia. All other relief requested by the parent is hereby **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

November 29, 2021
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency November 30, 2021

Date Mailed to Parties: _____

jb

APPENDIX

LIST OF WITNESSES

For Petitioner/Parent:

Steven C. Hertler, Psy.D.

Evelyn Quintana, MSW, LCSW

C.M.

For Respondent/Board:

Paola Prieto

Meghan Lewandowski

Jose Rodriguez

Susan Amarin

Diana Medeiros-Diaz

Diana Pinto-Gomez (rebuttal)

LIST OF EXHIBITS IN EVIDENCE

Joint:

- J-1 ID Meeting Sign-In/Notice of PRISE, December 10, 2020
- J-2 Child Study Team Closure Report, December 17, 2020
- J-3 504 Plan/Notice of PRISE, September 16, 2020
- J-4 Mediation Agreement, June 25, 2019
- J-5 504 Plan, December 16, 2019
- J-6 Sign In-504 Meeting, September 12, 2019
- J-7 Invite/504 Meeting Confirmation, December 16, 2019
- J-8 Sign-In/504 Meeting, December 16, 2019
- J-9 Sign In for March 6, 2020 Meeting
- J-10 DRA Scores
- J-11 Student Grades
- J-12 Closure Report, December 11, 2019
- J-13 March 18, 2019 504 Plan / Meeting Sign In
- J-14 DRA Report, January 19, 2019

- J-15 DRA Report, May 19, 2019
- J-16 DRA Report, January 3, 2020
- J-17 Sondag Mastery Test March 11, 2021
- J-18 Log Entries through February 2021
- J-19 RTI Documents
- J-20 Resume, Paola Prieto
- J-21 Resume, Jose Rodriguez
- J-22 Resume, Meghan Lewandowski
- J-23 Parent Request for Evaluation April 12, 2019
- J-24 Denial of Parent Request for Evaluation, May 19, 2019
- J-25 Evaluation Request, November 24, 2019
- J-26 Evaluation Request, November 12, 2020
- J-27 Referral for CST Evaluation by E.M.'s Doctor, December 31, 2020
- J-28 Request for Independent Evaluation, February 1, 2021
- J-29 Parent's Response to Denial of Independent Evaluation, February 24, 2021
- J-30 Parent's Request for Due Process Hearing, May 28, 2019
- J-31 Section 504 Teacher Input Form, January 19, 2017
- J-32 Section 504 Accommodation Plan, January 25, 2017
- J-33 Section 504 Accommodation Plan, January 25, 2017
- J-34 Section 504 Accommodation Plan, June 2, 2017
- J-35 District Screening for Dyslexia, February 3, 2017
- J-36 Sondag System 2 Progress Summary, 2019-2020
- J-37 Robinowitz Education Center Dyslexia Screening, July 15, 2019
- J-38 Kean University Psycho-Educational Evaluation, September 4, 2019
- J-39 Connections Reading Progress Summary, December 5, 2020
- J-40 Connections Final Assessment (Reading), March 19, 2021
- J-41 Treatment Report of Evelyn Quintana, MSW, LCSW, January 14, 2021
- J-42 Benchmarks Overview Data - All
- J-43 Benchmarks Detailed 2018–2019 and 2019–2020
- J-44 Benchmarks Detailed 2020-2021
- J-45 2020-2021 Grades and Attendance
- J-46 2020-2021 LAL Class Score Detail

J-47	2020-2021 Math Score Detail
J-48	2020-2021 LAL Score Views
J-49	2020-2021 Math Score Views
J-50	2019-2020 Grades
J-51	2018-2019 Grades

For Petitioner/Parent:

P-1	Initial Educational Evaluation, June 9, 2016
P-2	Psychological Evaluation, May 25, 2016
P-3	Not in Evidence
P-4	Pediatric Neurodevelopmental Evaluation, January 11, 2017
P-5	Teacher CBHS Questionnaires, June 20 and 21, 2018
P-6-16	Not in Evidence
P-17	DRA, January 7, 2019
P-18	Not in Evidence
P-19	NJ Tiered System of Supports Implementation Guide
P-20	Not in Evidence
P-21	New Jersey Dyslexia Handbook
P-22	Not in Evidence
P-23	Sonday System 2, Scope & Sequence
P-24	Sonday summary
P-25	C.V. of Evelyn Quintana, MSW, LCSW
P-26	Psychological Evaluation by Steven C. Hertler, Psy.D., March 14, 2021
P-27	C.V. of Steven C. Hertler, Psy.D.

For Respondent/Board:

R-1 to R-7	Not in Evidence
R-8	C.V. of Susan Amorin