

March 23, 2022

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 2203125

BEFORE

**MARGUERITE M. MITCHELL
HEARING OFFICER**

**PARENTS, PRO-SE
ALISIA ST. FLORIAN, ATTORNEY FOR SCHOOL**

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student and Mendon-Upton Regional School District

BSEA# 2203125

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

On October 8, 2021, Parents filed a *Hearing Request* against the Mendon-Upton Regional School District (“District” or “MURSD”). At the joint request of the parties, the Hearing was twice rescheduled for good cause, and a Pre-Hearing Conference was held on December 16, 2021. The Hearing commenced before me on January 7, 2022, and for good cause, at the request of the parties, continued to January 21, 2022, and January 28, 2022, via a virtual platform, jointly requested by the parties.

The official record of the Hearing consists of documents submitted by the Parents and marked as Exhibits P-1 to P-8, P-8A, P-9 to P-10, P-10A, P-11 to P-22, P-24, and P-31 to P-37¹; documents submitted by the District and marked as Exhibits S-1 to S-22; and approximately 16 hours of stenographically recorded oral testimony by nine witnesses resulting in a 3-volume transcript.

Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother

Father

Jennifer D’Angelo

Director of Student Support Services – MURSD

Amanda Farley

Speech Language Pathologist – MURSD

Sarah McCausland

Occupational Therapist – MURSD

Wanda Monroe

Preschool Special Education Teacher – MURSD

Dr. Rebecca Snelgrove

School Psychologist – MURSD

Layne Ward

Occupational Therapist – MURSD

Jackie Wheelock

Early Childhood Coordinator – MURSD

Alisia St. Florian, Esquire

Attorney for MURSD

Alex Loos

Court Reporter – Doris O. Wong, Associates

Marguerite M. Mitchell

Hearing Officer

¹ Exhibits P-23, and P-25-P-30 were excluded on the objection of the District as irrelevant to the issues for Hearing in that they consisted of copies of laws, regulations, legal decisions, and analysis, that were not otherwise directly discussed or exchanged by the parties at any time. Exhibit P-36 and P-37 were admitted solely for the purpose of reflecting Parents’ impressions of Student’s performance at the time they were completed, but not as evidence of the appropriateness of the eligibility determinations, as they were first provided to the District on January 6, 2022.

At the parties written request the record remain open until February 11, 2022, for submission of written closing arguments. The District filed its *Closing Argument* on February 10, 2022. Parents filed their *Closing Argument* on February 11, 2022, and the record closed on that date.

ISSUES IN DISPUTE:

The issues for hearing in this matter, as specified by the parties, are as follows:

1. Whether the decision of the District to deny Student's special education eligibility was appropriate, or whether Student requires special education services in order to receive a free, appropriate public education ("FAPE");
2. Whether, since April 2021, the District violated Student's procedural rights and if so, whether those violations resulted in a denial of a FAPE to Student or deprived her Parents of meaningful participation in the special education process; and
3. If so, whether Student is entitled to compensatory relief.

POSITIONS OF THE PARTIES:

Parents' Position

Parents challenge MURSD's findings of no eligibility following three Team meetings between April and November 2021. Parents submit that Student's challenges and delays in her social-emotional development, behavior, attention, executive functioning, self-regulation, play skills and classroom functioning in the private preschool she attended up until the 2021-2022 school year are a basis for eligibility, despite Student's average to above-average abilities and progress in other areas of development, including academic skills. Parents further argue that Student struggles with transitions. Additionally, Student's recent diagnosis of ADHD, in the summer of 2021, supports eligibility. Parents further disagree that the 504 Plan, first offered by the District in October 2021, is appropriate or sufficient to meet Student's needs as it fails to provide Student a FAPE in the least restrictive environment (LRE).

Parents also allege that MURSD committed several procedural violations that amounted to a denial of a FAPE for Student. Specifically, Parents allege the District did not properly respond to their initial request for an evaluation but rather requested more information before issuing an Evaluation Consent Form. Second, the District did not initially complete the type of psychological evaluation requested by Parents in April 2021. Third, the District failed to conduct a Functional Behavioral Assessment ("FBA"), or otherwise provide notification of its refusal to conduct the same. Fourth, the District failed to provide timely notice of the August 30, 2021 Team meeting, and refused to hold the meeting virtually, as Parents requested. Fifth, the District failed to hold the August 30, 2021 Team meeting in a timely manner. Finally, Parents allege the District engaged in improper pre-determination regarding eligibility outside the Team process prior to the June 2021 and August 2021 Team meetings.

Parents request Student be found eligible under the Health (ADHD) and Developmental Delay (social-emotional skills) categories. They seek an individualized educational program (IEP) with goals for school readiness, self-regulation, and social skills. They request placement in an integrated preschool classroom 5 days a week. They also request Student have a behavior plan for school and home developed by a Board-Certified Behavior Analyst (BCBA), with positive behavioral reinforcement; consult by a BCBA (to the Team and Parents); consult by an Occupational Therapist (OT) (to the Team); a social skills group by a Speech-Language Pathologist (SLP) 1 x 30 in the B-Grid; and individual counseling 1 x 30 in the C-Grid. As a result of the District's failures, Parents also seek compensatory education from April 2021.

District's Position

The District asserts its findings of Student's ineligibility for special education were proper and based upon information known to each Team at the time such determinations were made, as each Team considered the evaluation results and input of all Team members, including Parents, prior to making its eligibility determinations. Moreover, given Parents' continued concerns, the June 2021 Team proposed performing further cognitive, social emotional and behavior testing, a speech evaluation focused on social pragmatics and an occupational therapy evaluation, and the District reconvened the Team in August 2021 to consider the results of said evaluations. This Team also considered the impact of Student's recent diagnosis of ADHD in rendering its finding of ineligibility. In October 2021 the District also offered Student accommodations through a 504 Plan. In November 2021, after reviewing outside independent Neuropsychological and Occupational Therapy Evaluations (which yielded no new diagnosis), the Team again properly found Student ineligible for special education and renewed its offer for accommodations via a 504 Plan. Parents ultimately agreed to consider a 504 Plan in December 2021. All evaluations considered by the Teams recommended accommodations and modifications, but there were no recommendations for specialized instruction or related services ever provided to the Teams.

The District also denies that it violated any procedural requirements or that any compensatory services are owed to Student. According to the District, all consented to evaluations were completed within the required timelines, Team meetings were held timely, and the Team made proper, thoughtful determinations, inclusive of Parents' input. To the extent there were any procedural violations, they were *de minimis*, and did not result in a denial of a FAPE to Student or prohibit Parents' meaningful participation in the special education eligibility process.

FACTUAL FINDINGS²:

1. Student is an "inquisitive and exuberant", "spunky and curious" 5-year-old³ preschooler who loves unicorns and all animals and wants to be a veterinarian when she grows up. However, throughout her life, Parents have had concerns as to her attention, and her social and behavioral functioning, particularly in school settings and during transitions. (Mother VI, 201-07; P-22; Parents *Closing Argument*).

² I have carefully considered all the evidence and testimony presented in this matter. I make findings of fact, however, only as necessary to resolve the issue(s) presented. Consequently, all evidence and all aspects of each witness' testimony, although considered, is not included if it was not needed to resolve the issues.

³ Student turned 5 in December 2021. She was 4 for most of the relevant time associated with this Hearing.

2. On the evening of April 14, 2021, Mother emailed Jackie Wheelock, MURSD's Early Childhood Coordinator and Pre-Kindergarten (PK) Team Chairperson to request a special education evaluation of Student, advising,

Hi. I wrote to the team chair and principal but also found your email and wanted to write to you as well as I'm not sure who takes I takes (sic) for the district – I would like to request an evaluation for [Student], for full psych/cognitive and occupational therapy. [Student] is in the 3/4 Comets class at United Parish and her teachers have expressed concern with her ability to participate in classroom routines. (Mother VI, 209, VII, 52; P-1).

3. Ms. Wheelock is responsible to coordinate all special education matters for MURSD's preschool, including IEP development, evaluations, referrals and she acts as Team Chairperson. Ms. Wheelock has a master's degree in speech and language pathology, and holds licenses and certifications in communication disorders, speech-language pathology, and special education administration. She previously worked as an educator and Team Chair in the District. (Wheelock VI, 47, 53).
4. Ms. Wheelock responded to Mother's email at 7:46 a.m. on Thursday, April 15, 2021, to advise she was happy to start the process and to inquire if Student had ever had Early Intervention (EI) services. She further advised that if Student had not had EI services, the District "... set[s] up a screening with the appropriate specialists at our school before proceeding with a full evaluation." She also provided the name of the special education preschool teacher who would be in touch with Parent after the April school vacation (which was the following week) and copied her on the email. (Wheelock VI, 48; P-1).
5. Mother replied later that morning to confirm Student did not receive EI services and to ask if the screening was within the 30 school days timeframe to evaluate. Mother explained that she wanted the evaluation before the school year ended so "any necessary changes to her preschool plans for next year" could be made. (Wheelock VI, 48; Mother VII, 52; P-1).
6. On Saturday, April 17, 2021 (during the April break), Ms. Wheelock replied to Mother. She advised that to "make the referral", the District needed "a detailed and specific statement of [Parents] concerns in terms of *suspected disability*" (emphasis in original) similar to what EI provides. She explained that if "sufficient information regarding a suspected disability" was provided, the referral would be sent to Parents upon return from the April break; otherwise the District would invite Parents to bring Student in for a screening shortly after that date. She attached the Parents Notice of Procedural Safeguards. (Wheelock VI, 48-49; P-1).
7. Mother replied within an hour of receiving Ms. Wheelock's email to advise she did not "... want to get off in the wrong foot here but I am well aware of my rights" as she works in special education in another district⁴. She further advised that Student's "... teachers have expressed concern with [Student's] ability to follow classroom routines and make transitions.

⁴ Mother holds an undergraduate degree in rehabilitation science and a Doctor of Physical Therapy (DPT), along with additional intervention specialist certifications. Mother has worked as a Physical Therapist (PT) in public schools (not MURSD), full and part-time for over 6 years, supporting Pre-K to post-graduate students. She also worked as a PT for EI for 4 years in addition to per diem rehab positions as a skilled nurse. (Mother VII, 13-16).

She has been removed from the classroom several times. I am requesting evaluation of her as she is having difficulty accessing her preschool program.” (Wheelock VI, 48; P-1).

8. On Tuesday, April 27, 2021, Ms. Wheelock sent Parents an N1 with an Evaluation Consent Form proposing a developmental assessment, cognition and social-emotional assessment, occupational therapy assessment, educational assessment, and home assessment of Student. No observation was recommended at this time. A Developmental History questionnaire was also provided. Ms. Wheelock relied on her “professional judgment” in proposing these evaluations as she felt they addressed the areas of concern Parents had for Student, given her preschool age. The N1 summarized the email exchanges, quoted Mother’s statement of concerns in her April 17, 2021, email (set forth, above), and noted that “the parent did not provide the requested statement of suspected disability”. A psychological evaluation was not proposed. Parents accepted all proposed evaluations and returned the signed the Consent Form to the District the same day. They did not request any additional assessments. (Wheelock VI, 49, 56-57, 108; Mother VI, 210, VII, 52-53; P-4; P-13; S-5; S-19).
9. On April 28, 2021, Ms. Wheelock and Mother exchanged further emails which reflected various disagreements⁵. Ms. Wheelock forwarded these emails to Ms. D’Angelo, MURSD’s Director of Student Support Services, who advised she would contact Parents. Ms. D’Angelo spoke with Mother to clarify that the District was not looking to deny anything Parents were requesting, but rather was seeking additional information to ensure it is assessing and evaluating in all areas of suspected disability. (D’Angelo VI, 139-40, 154-55, 175; P-3; P-4).
10. Ms. D’Angelo has worked in education for 18 years, holding positions as a paraprofessional, special education teacher, team chair, department leader and special education administrator. She holds Massachusetts educator certifications as a special education administrator, moderate disabilities educator, math teacher, school business administrator, superintendent, and assistant superintendent for both comprehensive and vocational high schools. She is currently in her second year with MURSD. (D’Angelo VI, 153-54).
11. A progress report prepared in or about April, 2021 by Student’s then-private preschool was received by the District⁶. The record is unclear if this was ever reviewed at a Team meeting. This progress report reflected that Student consistently “met” (C) expectations for responding when greeted by teachers, making choices independently and working well on independent projects, and was “working on” (W) all other social growth areas. Student received Cs in all areas of language skills, gross motor skills and math skills, apart from a W for following 1 to 2 step directions and controlling her own body. All literacy skills were rated W, except for a C in recognizing her printed name. Fine motor skills were varied. Student was described as bright, happy, very affectionate, a “wealth of knowledge” and engaging with peers to join her imagination play or running around the playground. She needed frequent reminders to do her “jobs” in the morning. She was working on mastering classroom routines, sharing toys, and always keeping her hands “to herself” during play. She was also noted to struggle sitting at

⁵ It is not necessary for purposes of this decision to set forth the specific issues of disagreement in these emails.

⁶ Although it is unclear when the District received it, Mother testified she received it shortly before filing her initial request for an evaluation in April 2021. Mother explained that when the preschool gave her this report it also requested a meeting wherein they shared concerns as to Student’s behaviors not included in it. (Mother VI, 204-05).

circle and needed redirection and reminders as well as encouragement to be independent with some tasks and care for her own belongings. (S-20).

12. On or about April 28, 2021, Mother returned the completed Developmental History questionnaire. Socially, Parents noted Student did not have any trouble making friends, describing Student's social strengths to be that she is "very social and loves meeting new people. She loves to ask questions and engage with people of all ages. She likes to help 'babies' and younger children. She is very funny and loves telling 'jokes' and stories about her stuffed animals ...". Student's social challenges, however, were,

She is social to the extreme and doesn't understand social cues. She will hug someone and tickle them while they/their parent are saying no or continue when they cry. She walks into people's houses in our neighborhood and does not respond to verbal cues to come back, I need to go touch her to get her attention to return to me (luckily our neighbors think she is cute.) (P-15)

Parents also were concerned with Student's "struggling with routines, rules, and transitions at preschool as this is the main goal of school. She has some definite sensory needs that [they] find manageable at home, but [they are] not sure if her needs are greater in a classroom setting (or if it is not a sensory need at all)". Parents short-term goal was for Student to follow multiple step directions, participate in classroom activities, and transition between activities with verbal prompts and picture cues. Long-term, if Student was not found eligible for special education, Parents advised they "would appreciate some specific strategies that [they] could provide to her private preschool.... Her teachers and the director seem to be at a loss of what to do with her." (Wheelock VI, 88; Mother VI, 213; P-15).

13. Ms. Wheelock emailed Mother on April 29, 2021, to advise that she had requested input from Student's preschool teachers at United Parish. She explained that she provided them with assessment forms (the "Ed A/B forms") but offered to allow them to report on Student in whatever format they chose. (Wheelock VI, 133-34; P-4).
14. On May 3, 2021, Ms. Wheelock emailed Mother to advise her Student's private preschool Director had requested Ms. Wheelock observe Student and sought Parents' consent. Ms. Wheelock testified she also supported the observation request. Parents challenged Ms. Wheelock's credentials to perform an observation and Ms. D'Angelo again spoke with Mother. Parents ultimately allowed Ms. Wheelock to conduct the observation at Student's private preschool. (D'Angelo VI, 156-57, 176; Wheelock VI, 102, 113, 131-32; P-4).
15. On May 11, 2021, Mother emailed Ms. Wheelock to request a Psychological Evaluation of Student due to additional concerns raised by Student's private preschool teachers, without altering the timeline for the evaluation and the Team meeting. She explained she "wanted to ensure we are evaluating her in all areas of suspected disability." She also informed Ms. Wheelock that Student was being assessed for ADHD by her pediatrician. Finally, Mother provided a list of behavior interventions the family provided at home (e.g., picture schedules, visual and auditory timers and motor breaks throughout the day with vestibular input). (P-5).

16. On May 13, 2021, Ms. Wheelock emailed Ms. D'Angelo regarding Parents' Psychological Evaluation request. Ms. Wheelock advised that the school psychologist could not conduct this evaluation before the current timeline expired and noted her opinion that the District was not procedurally required to conduct the newly requested evaluation within the then-current evaluation timeframe. Further, she questioned the benefit of a psychological evaluation, based on her own observation of Student, as she found Student's challenges to be attentional. While Ms. Wheelock supported administration of the BASC and BRIEF, she opined that "[w]e are not at the level of needing a BCBA here, just FYI." (Mother VII, 52-54, P-5).
17. On May 14, 2021, Ms. Wheelock emailed Mother to explain that a psychological evaluation could not be performed without changing the timeline. She also advised that she had observed Student for about an hour that week and planned to return the following week at a different time. She noted that "clearly, [Student] has challenges with activity, focus and attention, so I am pleased to hear that you are involving the pediatrician to evaluate her for ADHD. The pediatrician will likely give you and her teachers behavior rating scales to complete at that time." She also offered to forward an Evaluation Consent Form the following week should Parents still wish to proceed with the psychological evaluation including cognitive, behavior and social-emotional assessments⁷. (P-5).
18. Wanda Monroe is a Pre-Kindergarten Special Educator with MURSD. She has taught an integrated preschool class for 27 years. She has a bachelor's degree in early childhood education and special education, K to 8, and a master's degree in preschool education. (Monroe VII, 211-12).
19. Sara McCausland is an Occupational Therapist with MURSD. She has a master's degree in Occupational Therapy and has been licensed as an Occupational Therapist in the Commonwealth of Massachusetts since 2015, thereafter working as an OT in public schools. She has been employed in this capacity for 7 years, the last 5 with MURSD. She has evaluated 100 to 150 preschool students during this time and also provides direct services to students ages 3 to 18. (McCausland VII, 214-16).
20. Ms. Monroe and Ms. McCausland evaluated Student on May 10, 2021, for approximately an hour. They administered the cognitive, social-emotional, physical, fine motor skills, and adaptive behavior domains of the Developmental Assessment for Young Children – Second Edition (DACY-2). The evaluation consisted of both standardized tasks and parent rating scales, with the social emotional domain being assessed solely using a parent rating scale. The evaluators also formally and informally observed Student when she was greeted, walked to the testing room, and walked back after the evaluation. Finally, clinical observations were used to assess Student's sensory processing skills. (McCausland VII, 105-08, 119-20, 126; Monroe VII, 199-201; P-17).
21. Ms. Monroe and Ms. McCausland testified that the DACY-2 provides a picture of typical skills along the developmental profile of preschoolers. Although Ms. McCausland does not always use the DACY-2 to perform initial evaluations of students to assess fine motor and

⁷ Parents ultimately chose not to pursue this as they did not want to extend the timelines. (Mother VI, 210).

visual motor skills) (some, Ms. Monroe always uses the DACY-2 as her evaluative tool for preschool students. (McCausland VII, 111; Monroe VII, 215, 225-26, 232).

Ms. Wheelock testified that the District's general practice is to assess preschool students' cognition using the DACY-2 cognitive domain; however, given the information Parents provided in their initial referral, she also included the social-emotional domain, which is not typically assessed⁸. (Wheelock VI, 49, 56-57; Snelgrove VIII, 62, 82; P-17).

22. Ms. Monroe and Ms. McCausland's joint Developmental Assessment report noted that Student separated easily and accompanied the evaluators to the testing area. She took breaks lasting 3-5 minutes between tasks, but not excessively so. These breaks did not impede or impact her evaluation, and, overall, the assessment time, inclusive of breaks, was considered appropriate for her age. Student actively participated in the evaluation and was able to complete it without the need for repetition of directions or redirection during the standardized portions. (McCausland VII, 103-06, 108, 109-10, 118; Monroe VII, 196-97; P-17).

Student's skills were in the average range in all areas assessed, except the parent rating scale responses placed Student's social-emotional skills in the very poor (1st percentile) range. Additionally, parent rating scale responses placed Student's self-help skills in the adaptive-behavior domain in the below average (14th percentile) range, as Student was reported to be unable to manipulate buttons and fasteners independently, and to dress herself completely, and she did not consistently cover her mouth and nose when coughing and sneezing. Ms. McCausland and Ms. Monroe concluded that the self-help skill deficits did not raise "red flags" for her as many preschool aged students struggle with these skills. According to Ms. Monroe, what she observed was also inconsistent with the subjective parent rating scale responses of the social-emotional domain. She, however, agreed that Parents' responses were consistent with Ms. Wheelock's observation as Student sometimes struggles with transitioning and with interacting with peers. No deficits were found that impacted Student's ability to participate in the classroom or access the curriculum, thus, the evaluators did not recommend direct or consultative services for Student⁹. (McCausland VII, 107, 121-24, 136-37; Monroe VII, 201-02, 216-17, 227; P-17).

23. Ms. Wheelock observed Student at her private preschool on May 11 and May 18, 2021. Each observation lasted approximately 45 minutes to an hour and occurred at different times of the day. Student's classroom consisted of 12 students and 2 teachers. Ms. Wheelock prepared an Observation Report that summarized information shared by Student's preschool teachers, described Student's observed actions at approximately five-minute intervals and concluded with Ms. Wheelock's impressions. Ms. Wheelock explained that although she is not a licensed BCBA, she has been trained in this methodology and strove to conduct and report on her observations from an ABA perspective. Over the course of both days, she observed Student entering school and transitioning to and from the classroom to the playground. Student was also observed engaging in her arrival routines, small group table

⁸ Dr. Snelgrove MURSD's school psychologist, agreed that the DACY-2 is the "standard battery" used to evaluate preschool Students for special education, due in large part to its cognitive component.

⁹ Ms. McCausland generally recommends direct or consult OT services if students are unable to use utensils, navigate the environment, participate in the dressing process, recognize home, hang up a backpack, or put on simple clothing like a hat or jacket. Student did not have any of these skill deficits. (McCausland VII, 137-42).

activities, clean-up, assisting with setting up for circle time (at the request of the teacher), hand washing, and snack. (Wheelock VI, 51, 91-93, 103; P-16).

24. Overall, the Observation Report concluded that Student's behavior and performance were "inconsistent". Student understood classroom routines but followed them inconsistently on her "own timeline". She "appears challenged by the imposed structure of the preschool". Transitions were "somewhat challenging", and Student readily complied with preferred tasks,¹⁰ but not non-preferred tasks. As Student preferred isolated play or being in charge, and was possessive of specific items, this interfered with her demonstrating appropriate play and sharing skills. Additionally, Student "still require[d] adult support to navigate the social scene of the preschool classroom and she does stand out as needing more support than her peers." Ms. Wheelock was of the view that Student was not a child with a disability as she did not need more adult support than she was receiving and did not require adult support all the time. (Wheelock VI, 91-93; P-16).
25. The Team convened virtually on June 14, 2021¹¹. The Team reviewed the Observation Report; the Developmental History Report Ms. Wheelock prepared, summarizing Parents' responses; and the Developmental Assessment Report. The Team also considered the input of the Parents and their advocate/friend. The Team determined Student was not eligible for special education under any disability category. Parents and their advocate/friend disagreed, opining that Student met the criteria for developmental delay, specifically, because of her social and emotional functioning. Mother read the definition of "developmental delay" contained in Massachusetts Special Education regulations during the meeting. Referencing the language of the definition, the MURSD Team members rejected this position because Student's "learning capacity" was not "significantly limited, impaired or delayed" per the DACY-2. Additionally, Parents had noted in the Developmental History Report that Student was a very social child who did not struggle making friends, and despite having some reported challenges in school, these challenges were also reported not to be an issue in the community. The Team also specifically considered the evaluation results of the social-emotional domain of the DACY-2 as it related to Parents' suggestion Student met the criteria for a developmental delay but rejected that this result alone was sufficient for such a finding because it consisted solely of a parent rating scale, containing subjective responses with "yes/no" options, but without options for "sometimes" or "maybe". The Team further discussed that the observation of Student did not comport with the reported concerns of her teachers. Finally, the Team also considered Ms. Wheelock's opinion that Student's challenges did not rise to the level of a developmental delay or a social emotional disability, as Student's needs could be met with minor in-class supports¹². (Mother VI, 211-16;

¹⁰ Student's teachers, however, had informed Ms. Wheelock Student "never complies with requests at first request".

¹¹ The last day of school was June 15, 2021. (Wheelock VI, 50).

¹² Certain Notices of School District Refusals to Act (N2s), specifically S-2, S-6, and S-12, were admitted as relevant over Parents' objections. Parents relied on Mother's emails of June 18, 2021 (the day Parents received the N2 of the June 14, 2021 Team meeting), to support their objection. (P-35). Parents did not, however, object to Team meeting notes from the June 14, 2021 Team Meeting (S-15), that corresponded to the N2 prepared after the June 14, 2021 Team Meeting (S-12). Mother was also advised she could spend as much time as needed in her testimony noting all areas of disagreement with the N2s. She did this only for Exhibit S-12. (Mother VI, 210-11). I rely on the N2s to the extent they are also supported by testimony of other witnesses or other exhibits in the record.

Wheelock VI, 50-51, 106-07, 118, 128-29; Monroe VII, 201-02, 204, 206, 208, 217, 227-28, 232-39; P-15, P-16; P-17, P-24; S-5, S-12; S-14; S-15).

26. At the June 14, 2021 Team meeting, Parents informed the Team they were not satisfied with the District's evaluations and requested an independent educational evaluation (IEE). In response, the District offered to conduct further assessments. Ultimately, after speaking with Ms. D'Angelo, Parents withdrew their request for the IEE as the District agreed to both perform additional evaluations and reconvene the Team over the summer to review the results and redetermine eligibility. The new evaluations consisted of a Psychological Evaluation, including behavior and emotional rating scales, an Occupational Therapy Evaluation, focusing on sensory processing performance, and a Speech and Language Evaluation, focusing on social pragmatic performance. The parties dispute whether there was also an agreement for the District to perform an FBA. (Mother VI, 216; Wheelock VI, 107; McCausland VII, 124-25; D'Angelo VI, 141-42; S-12; S-13; S-14; S-15).
27. On June 17, 2021, the District sent Parents an N1 and Evaluation Consent Form proposing, "at Parent's request", a Social Language/Pragmatics Assessment, Behavioral/Emotional rating scales, Occupational Therapy Assessment and Psychological Assessment. (P-14; S-5; S-13).
28. On June 23, 2021, Mother emailed Ms. D'Angelo to ask why the District had not recommended an FBA. Acknowledging that performing an FBA over the summer would be challenging as Student was not in a school program, Mother also asked whether Student could attend a District summer program. Further she stressed the importance of getting teacher input for the evaluations, although she noted she was unsure if Student's private preschool teachers were available to fill out the behavioral/emotional rating scales. Finally, she requested confirmation of the Team meeting date, explaining she had rescinded the request for an IEE based upon her understanding that both the evaluations and Team meeting would be completed over the summer. Ms. D'Angelo testified that the District could not agree to Mother's request for Student to attend a District summer program due to challenges with COVID restrictions. Additionally, this option would not provide a true picture of Student in a natural environment, as she was not otherwise eligible for the District's extended school year (ESY) special education program that was only offered to special education students. Additionally, no pre-K ESY programs were offered to any students that summer. (Mother VII, 28; D'Angelo VI, 144, 161-63, 192, 193; P-6).
29. On June 25, 2021, Parents returned the Evaluation Consent Form accepting all proposed evaluations and additionally requesting a "Functional Behavioral Assessment as discussed via phone on 6/16/21". Parents also added that "[m]eeting needs to be held over the summer, prior to the beginning of the school year as discussed and agreed upon via phone on 6/16/21." (P-14; S-5; S-13).
30. The District never issued any written paperwork, including, but not limited to, an N-2, in response to Parents' request for the additional assessment of an FBA on the Evaluation Consent Form. (D'Angelo VI, 191-192).

31. On June 30, 2021, Ms. D'Angelo emailed Mother and offered to observe Student in a private summer program if she attended one and confirmed the District would reach out to Student's private preschool for its input. She further confirmed the Team would meet before the beginning of the school year as soon as the evaluations were completed. Mother replied to advise that Student was not attending a summer program and had been pulled from her swim class "because she is a safety risk and needs to wait until there is availability in an adaptive program". Mother testified she believed Student's inability to participate in this swim program was "part of her disability". Mother also testified that she informed Ms. D'Angelo it was the District's responsibility, not Parents, to determine how to perform the agreed upon assessment of Student. Finally, Mother's advised that Student's pediatrician had diagnosed her with ADHD the previous day¹³. (Mother VII, 26, 28; D'Angelo VI, 142-44; P-6).
32. Between July 16 and July 19, 2021, Mother and Ms. D'Angelo exchanged emails and had a telephone conversation regarding the observational components of the evaluations. Although Mother advised that her "biggest concern" was that the evaluation be "comprehensive" (as she did not consider the spring 2021 evaluations to have been so), to avoid any "unnecessary testing", she also continually insisted the evaluations be completed over the summer. Ms. D'Angelo informed Mother the District would perform the observational components in "varied settings" as "a transitional (sic) class environment" was not available. She also advised that the Team would "include data from the spring initial evaluation meeting including the classroom observations". Finally, she offered to pursue an observation of Student when school resumed in the fall, if needed. (D'Angelo VI, 142-43, 146-47; P-7).
33. On July 21, 2021, Dr. Rebecca Snelgrove performed a psychological and social emotional evaluation of Student. Dr. Snelgrove holds an educator license as a School Psychologist, all levels, and is also licensed as a Licensed Mental Health Counselor (LMHC) with the Commonwealth. Her highest degree earned is a clinical doctorate, and a diplomate and specialization in school neuropsychology, enabling her to administer a neuropsychological exam. Her experience includes several years of graduate internships, a post-doctoral project year doing school psychology, as well as over 12 years as a school psychologist at multiple levels. She has worked for MURSD for approximately a year and a half, focusing on grades K to 4. Dr. Snelgrove has only administered 3 other psychological evaluations of preschool students, besides Student. Generally, she explained, preschool Students are evaluated via the DACY-2, a test she does not administer. Of the 3 she administered to other students, only 1 occurred before the DACY-2 was conducted because the parent specifically requested the Wechsler Preschool and Primary Scale of Intelligence (WIPPSI), by name, in the initial referral. The others, as with Student, took place after the DACY-2 as the Team felt more information was needed upon its review. (Snelgrove VIII, 57-62, 80-83, 95).
34. Dr. Snelgrove prepared a Confidential Report of Psychological and Social Emotional Functioning, summarizing her evaluation results, conclusions, and recommendations¹⁴. Prior

¹³ The Pediatrician's letter with this diagnosis was not included in the record, however, the District acknowledged receiving this letter on July 12, 2021. (S-5).

¹⁴ Dr. Snelgrove administered the following standardized assessments: WPPSI-IV (standard and selected subtests); NEPSY-II – a Developmental Neuropsychological Test for Children, Second Edition (including subtests); Behavior Assessment System for Children – Third Edition (BASC-3), consisting of both parent and teacher checklists; Brown Executive Function/Attention Scale (BROWN EF/A), consisting of parent and teacher checklists; and Social Skills

to her evaluation, Dr. Snelgrove interviewed Mother to learn Student's history and sent parent rating scales. She also reviewed Student's record, including her prior evaluations and the Observation Report. Finally, she provided Student's private preschool with rating scales to complete, if possible, as Mother had specifically requested this. The Director of the private school advised the teachers were unavailable but offered to do it herself. She noted, however, as Dr. Snelgrove included in her report, that she did not "... directly teach '... but assisted in the classroom especially when [Student] had one of her many meltdowns'". (Snelgrove VIII, 24-26, 45, 71; P-20).

35. Dr. Snelgrove noted that Student separated easily to accompany her to the testing room. Student initially tested limits and showed some resistance but followed instructions when she realized she could rely on Dr. Snelgrove to provide promised breaks and rewards. Student left her seat without permission twice, first, when Dr. Snelgrove was initially reviewing the evaluation process with her, and then after the first subtest (block design)¹⁵, but otherwise stayed seated and completed all tasks. (Snelgrove VIII, 13, 15-17, 20; P-20).

Cognitively, Student scored between the superior (Verbal Comprehension Index (VCI)) and low average (Visual Spatial Index (VSI)) range, with scores also in the average (Fluid Reasoning (FR) and Working Memory (WM)) and high average (Processing Speed (PS)) range. Student scored within the average range on subtests assessing abilities impacted by attention difficulties and impulse control. She demonstrated strength in abstract and inductive/deductive reasoning, and she learned and retained a significant amount of factual information that she effectively conveyed in a greater way than a typical 4-year-old. (P-20).

Socially and emotionally, Student exhibited impulse control difficulties and attentional challenges across settings, based on the responses on both the parent and teacher rating scales, and per the school observation by Ms. Wheelock. Student's impulsivity, struggles with concentration, and tendency to misbehave increased significantly with less-preferred tasks, such as school work and subtests not involving manipulatives or bright colorful objects. Additionally, as Student tended to respond to less preferred activities with frustration and anger, she had more social success at home than at school. However, as Student generalized facial expressions "above expected levels" during the structured testing, she possessed a higher ability to perceive how others may feel or that another person's impression of a situation may differ from her own. (Snelgrove VIII, 17, 38-39, 44-47; P-20).

Behaviorally, according to Student's private pre-school's responses on the BASC-3, Student received clinical ratings of clinical significance in 7 areas, while Parents rated Student clinically significant in 1 clinical rating area. No clinically significant adaptive ratings were identified by either school or Parents, although each rated her as at-risk in one adaptive rating area¹⁶. Dr. Snelgrove explained clinical ratings report on the clinical emotions or behaviors

Improvement Scale-Social Emotional Learning (SSIS-SEL), consisting of parent and teacher checklists. (P-20).

¹⁵ The block design subtest is one of the subtests associated with the VSI. Dr. Snelgrove did not notice Student to struggle with focus or sustaining attention after this subtest. (Snelgrove VIII, 16, 21-22, 78).

¹⁶ The 1 area given an at-risk adaptive rating by the school (adaptability) was given an average adaptive rating by Parents, while the 1 area given an at-risk adaptive rating by Parents (social skills) was given an average adaptive rating by the school.

themselves (i.e., the reasons a person may attend therapy), while adaptive ratings report on the child's coping and management of the clinical emotions. (Snelgrove, VIII 27-29, 78-79).

Dr. Snelgrove indicated that although the school responses to the social/emotional rating scales identified higher levels of concern than the Parents did, this was because Student was engaging in more preferred activities at home than at school. Additionally, Dr. Snelgrove recognized that the teacher rating scales were completed by the Director, who primarily interacted with Student when she was struggling behaviorally. Thus, while Dr. Snelgrove found the school rating scales to be a valid and accurate reflection of the Director's experiences with Student, she focused on her individual item responses rather than the final score. For instance, both Parents and the Director noted social and emotional challenges but also both indicated she was adaptable and resilient (more so at home) and the teacher ratings indicated her social skills fell in the average range, meaning she was also able to manage "to some extent the social nature of experiences at school." Thus, Dr. Snelgrove concluded, based on these individual item responses, Student's deficits could be appropriately supported through accommodations and modifications in the general education classroom, and did not require specialized instruction or related services for her social, emotional, or behavioral challenges in school. (Snelgrove VIII, 25-33, 35-36, 38-41, 52-54, 65, 79-80; P-20).

36. On July 22, 2021, Amanda Farley, Speech Language Pathologist, performed a Speech and Language evaluation of Student. Ms. Farley is a licensed SLP in Massachusetts and Rhode Island and is also certified by ASHA. She holds a master's degree in speech-language pathology. She initially spent 2 years working as an SLP for EI and has worked for MURSD as an SLP for over 16 years. She performs 10-15 preschool speech evaluations per year since joining MURSD. (Farley VII, 175-76).
37. On July 22, 2021, Layne Ward, OTR/L, performed an Occupational Therapy evaluation of Student. Ms. Ward is a licensed OT in Massachusetts and with the National Board of Occupational Therapy. She holds a master's degree in Occupational Therapy. She has worked as an OT for MURSD for two years. She has performed approximately 20 OT evaluations of preschool students. (Ward VII, 273-74).
38. Ms. Ward and Ms. Farley jointly administered their evaluations for approximately 1 hour, inclusive of transition times to and from the testing room. Each evaluator performed standardized testing and undertook behavioral observations during the transition and testing periods. By evaluating Student together, each evaluator was able to observe Student's interaction with and engagement in the subtests of the other evaluator from a more relaxed standpoint. This provided opportunities to observe Student in situations other than the contrived interactions their own standardized testing required. (Ward VII, 245; Farley VII, 150-51, 154-55, 178-79).

Student separated and transitioned easily to the testing environment. She required movement breaks and used a fidget between subtests, but not during each subtest. Each subtest took between 10-15 minutes to complete. Towards the end of the testing Student was observed to have distracted attention at between 5-8 minutes, but Ms. Ward considered this appropriate for 4-year-olds. When she required a break, Student self-advocated by standing up, or asking

if she could go look at something across the room. At times Student was restless but this did not interfere with her completing a subtest. She was also easily redirected to task with a verbal prompt or use of “first/then” strategies. On one occasion Student walked away from a conversation with Ms. Farley and verbally indicated “I’m thinking”, which Ms. Farley testified was an appropriate strategy and proper self-advocacy. On one other occasion Student was reluctant to complete a task on a subtest, but with encouragement she complied. No other reluctance was observed. None of Student’s behaviors during testing were considered unusual for her age. (Farley VII, 145-51; Ward VII, 245-48; P-18; P-19).

39. Ms. Farley administered the Comprehensive Assessment of Spoken Language, 2nd Edition (CASL-2) focusing on receptive vocabulary, expressive vocabulary, sentence expression and pragmatic language. The CASL-2 was chosen for its pragmatic language subtests which were specifically requested to be assessed. She also informally assessed Student, following an observation protocol, to assess Student’s social pragmatic language skills. Ms. Farley tries to observe students in a classroom setting, but this is not always possible, such as with Student. She did not find it necessary to speak with Student’s private preschool teachers given Student’s solidly average evaluation scores (including in social pragmatic language) In addition, she did not have a Release to do so, and was aware of the earlier observation at this school. Had Student scored below average on any subtest, Ms. Farley would have performed further related testing and, at a minimum, sought a release to speak with Student’s private preschool teachers. Ms. Farley concluded that Student did not have a speech or language disability, thus no recommendations were made for school-based speech and language services. She did make general suggestions to encourage speech and language development in 4-year-olds. (Farley VII, 153-54, 162-66, 176-78, 191-93; P-18).
40. Ms. Ward administered the Peabody Developmental Motor Scales-2nd Edition (PDMS-2), and the Sensory Profile-2 (consisting of school and parent rating scales), as the testing requested specifically sought to assess sensory processing¹⁷. Finally, she observed Student informally. Student’s private preschool Director completed the school form as the teachers were unavailable. (Ward VII, 248).

The school report (noted to be a subjective measure completed by the preschool Director) described Student to have age-appropriate fine motor skills and average visual motor development but some underdeveloped sensory processing skills. Overall, however, Student was reported as having sensory processing challenges in all areas at school, so it was difficult to determine whether her needs were sensory-based, or due to other environmental elements, such as attention issues. Regardless, the identified school sensory challenges could be addressed through environmental modifications and changes to Student’s school routine and accommodated within the general education classroom. (Ward VII, 248-49, 253-54, 263).

Parents’ report (also a subjective measure) depicted Student as a sensory seeker whose sensory needs could present behaviorally. However, after considering the school report, the home report, her observations of Student, and her clinical judgment, Ms. Ward concluded specially designed instruction or direct services were not needed. She recommended accommodations including movement breaks, use of fidgets, task breakdowns and visual

¹⁷ She would have used the DACY-2, but it had already been administered.

models to support Student's functioning in the classroom. She also recommended incorporating "heavy work" opportunities into Student's daily routine, especially before transitions or tasks requiring substantial concentration or long periods of sitting¹⁸. (Ward VII, 254-55, 263-66, 281-82, 283, 285-287, 289-90; P-19).

Ms. Ward testified that when using the term "modifications" in her report she did not mean specially-designed instruction, as she had recommended "tweaks" rather than any changes to Student's environment. Student's ability to sustain attention and her functioning overall was age-appropriate, despite her movement and sensory-seeking behaviors. Further, the accommodations and modifications she recommended could be provided by a classroom teacher or assistant. (Ward VII, 257-57, 263, 265; P-19).

41. On July 29, 2021, Mother emailed the District advising Student would be undergoing an outside neuropsychological evaluation, and that an intake was being scheduled. She also advised that Student had started therapy at her pediatrician's office the previous week. (P-7).
42. On August 17, 2021, Ms. D'Angelo's assistant emailed Mother and informed her the District was "looking to schedule the Team meeting for 8/30/21 at 1:00 PM. Once I hear back from all the team members I will let you know." Mother responded that she was expecting a meeting more than 2 days prior to the start of the school year (students started September 1, 2021)¹⁹. Mother found it "disheartening" that the meeting was planned for the same week school started, as the District had agreed to hold the meeting "prior to the start of the school year". Mother was also "discouraged that MURSD has made this process so difficult every step of the way." Ms. D'Angelo responded on August 18, 2021, confirming the August 30, 2021 date and advising that the District was honoring its commitment to complete the agreed-upon testing and holding of a Team meeting prior to the start of the year, a timeframe that "far exceeded the 30- and 45-school day timeline for evaluations and a good-faith effort by the district to address [Parents'] concerns". (P-8; S-22).
43. On August 19, 2021, the District attempted to forward a Team Meeting invitation form and Attendance Sheet for an in-person Team meeting on August 30, 2021, at 1:00 PM, but it was sent to an incorrect email address²⁰. (P-8A; S-5)
44. On August 23, 2021, Mother picked up a copy of all evaluation reports. Although she communicated with Ms. D'Angelo's assistant that day by email to coordinate this, there were not any communications confirming the Team meeting. (P-9).

¹⁸ According to Ms. Ward, direct OT services would be needed if Student could not attend for any period of the evaluation, was prohibited from participating in the evaluation, or required an excessive number of cues to participate. Student's movement seeking behaviors did not require this as they did not "impact her functioning" since her attention to seated tasks was found to be age appropriate. (Ward VII, 263, 277).

¹⁹ Mother also testified that she considered August 30, 2021 to be the "first day of school". Various MURSD staff testified that August 30, 2021 was the first day for staff, but students in grades 1-12 started on September 1, 2021, Kindergarten students started a week later, and preschool students started a week after that. (Mother VII, 92-96; Farley VII, 181-82; Snelgrove VIII, 66; D'Angelo VIII, 101-02).

²⁰ This error was discovered several months later (well after the 8/30/21 Team meeting), in the fall of 2021, when the District responded to Parents' student record request. This error is the subject of a Problem Resolution System complaint but is not a part of this Hearing as it is outside the BSEA's jurisdiction. (D'Angelo VIII, 107-08; S-5).

45. On Saturday, August 28, 2021, at 9:30 PM, Mother sent an email to the District advising of Parents' concerns due to not yet receiving a meeting invite or Zoom link for the Team meeting that was supposed to be taking place the following Monday." Mother also noted that Monday was her first day back at work, so she needed confirmation quickly. She also again raised her concerns that an FBA had not been completed and advised she "... expect[ed] a written plan to be in place that is mutually agreed upon during our meeting." (P-9).
46. Ms. D'Angelo's assistant replied to Mother at 7:36 AM, Sunday morning, to provide her with another copy of the Team Meeting invitation and noted she had thought she had put this in the envelope with the evaluations. Mother did not check her email until Monday morning when she was at work, whereupon she immediately emailed to request the meeting be held virtually, as Parents would need to rearrange their schedules. She emailed again approximately an hour and a half later, noting Parents would need to rearrange their schedules for an in-person meeting. Ms. D'Angelo's assistant then spoke with Mother by phone, advising that the meeting could not be held virtually that day and offering to reschedule it. Ms. D'Angelo testified that since August 30, 2021, was a professional development day, it was not possible to confirm all District staff invited to the meeting would receive an email changing the meeting from in-person to virtual prior to its scheduled time. While Ms. D'Angelo did not consider the option of having only parents attend virtually with the staff present in-person, she also testified that no Team meetings had ever been held with only Parents attending virtually. She found this option to be challenging as it would be hard for staff to engage with Parents as a Team if they needed to "pass around a computer" for a specific person to interact virtually with Parents. (Mother VI, 220-21, VII, 62-68; D'Angelo VIII, 109-10, 117, 120, 123; P-10; P-10A).
47. Parents declined the District's offer to reschedule the August 30, 2021 Team meeting because of their strong belief that Student needed to be in a preschool environment. Rescheduling would have delayed this for her. (Mother VII, 99).
48. The Team meeting was ultimately held on Monday, August 30, 2021, in person. Parents attended along with Ms. D'Angelo, Ms. Monroe, Dr. Snelgrove, Ms. Ward and Ms. Farley. The Team reviewed the Psychological Evaluation, Occupational Therapy Evaluation, and Speech and Language Evaluation (inclusive of social pragmatics). Despite hesitancy by Ms. D'Angelo to discuss the reports from the June 14, 2021, meeting, at Parents' request, the Team also considered the information reviewed by the Team during the June 14, 2021 meeting, including the Developmental Assessment Report and the Observation Report. (Farley VII, 181-183; Ward VII, 177; Snelgrove VII, 65-66; Mother VI, 221-22, VII, 31-37; D'Angelo VI, 164-66; S-6; S-7).

Relying on the ADHD diagnosis from Student's pediatrician, the Team determined that Student met the criteria for a Health Disability, but ultimately found Student continued to be ineligible for special education as she did not require specially designed instruction for her identified disability category. The Team discussed that the only recommendations in the evaluations were for modifications and accommodations in the general education classroom, not for direct services. Parents advised they were not satisfied with these evaluations, given the Team determination. Parents also shared their original concerns regarding the

incompleteness of the original evaluations conducted in June, 2021. (Farley VII, 181-83; Ward VII, 177; Snelgrove VII, 65-66; Mother VII, 32-37; D'Angelo VI, 164-66; S-6).

49. Ms. Farley testified that the first time she reviewed Ms. Wheelock's Observation Report was during the August 30, 2021, Team meeting. She recalls noting then that emerging skills around peer relationships were observed despite the private preschool teachers' concerns that Student needed support with this. Ms. Farley felt the Observation Report demonstrated Student needed support from teachers to participate with her peers at times throughout the day, primarily during transitions and when engaging in non-preferred tasks, but not constantly. When Mother asked if certain communications by Student noted in the Report were appropriate, Ms. Farley opined, that while she was not there, and could not speak to the context surrounding the communication, it appeared Student's reported verbal and non-verbal actions may have been appropriate at the time, and supportive to what Student needed in that moment. Similarly, Dr. Snelgrove, who reviewed the Observation Report prior to her evaluation, found Student's observed challenge with a peer over a toy to be typical for a 4-year-old. She also felt the Observation Report reflected many positive attributes. (Farley VII, 157-61; Snelgrove VIII, 44).
50. Mother opined those interactions with the District between August 27, 2021, and the morning of August 30, 2021, impacted Parents' ability to properly advocate for Student at the Team meeting. Mother noted both she and Father had to leave work in a rush and were unable to even eat lunch before the meeting. When asked how Parents were not able to fully advocate for Student, Mother advised that she failed to ask the Team attendees, particularly Ms. Farley and Ms. Ward, to provide more input on their impressions of the Observation Report, as she was flustered with the untimely notice of the meeting and unable to properly prepare for it (having spent the morning frantically confirming the meeting time and seeking unsuccessfully to have it held virtually)²¹. (Mother VII, 62-68, 96-99).
51. Sometime between September, 2021 and October 2021, Student began attending a new private pre-school, where she continues to be enrolled²². Mother testified that she informed Student's prior private pre-school of Student's ineligibility determination after the June 2021 Team meeting and asked if Student could return. In response, Mother was informed that Student could return if Parents hired a 1:1 teacher for her, which Parents did not agree to. On cross-examination Mother testified that Student does not have a 1:1 in the current pre-school, although purportedly it has a class of up to approximately 10 students. (Mother VII 49-51).
52. Dr. Sarah Prevelige, Ed.D., NCSP, has a private practice performing neuropsychological evaluations. She has held a Massachusetts's educator license as a School Psychologist since the early 2000s and has also worked both full time and part time as a School Psychologist, where, among other responsibilities, she attended Team meetings and participated in special education eligibility determinations. She has also served as a 504 Coordinator in public schools. (Prevelige VI, 76, 79; P-22; S-8).

²¹ She also would have spoken up about being uncomfortable with one Team member eating during the meeting, causing her to be maskless, but did not do so, given that "tensions were high" from the start of the meeting.

²² Parents did not submit any evidence or testimony from Student's current private preschool staff.

53. Parents secured Dr. Prevelige to perform an independent neuropsychological evaluation of Student, which was conducted on September 9 and September 12, 2021 (after an intake on August 16, 2021). Dr. Prevelige reviewed Dr. Snelgrove's testing, interviewed Parents and performed her own standardized assessments²³. Dr. Prevelige did not speak with anyone from Student's private preschool²⁴ and no preschool records were given to her to review. (Prevelige VI, 72-73, 75; P-22; S-8).

Student separated easily at the start of each testing day. She took frequent breaks to explore the testing space, used fidgets, frequently asked questions, and shared stories. "No symptoms related to nervousness or anxiety were noted and [Student] made good eye contact throughout testing". Early reinforcement was quickly found to go "a long way" with Student, and she worked to receive preferred rewards. Although these behaviors were considered age-appropriate, a second testing day was scheduled "due to [Student's] level of activity and tendency towards distraction" as well as her decreased stamina and motivation. (Prevelige, VI 65-66; P-22; S-8).

54. Student performed at or above expected levels in all areas tested with one exception – a subtest of the NEPSY-III measuring a student's domain of attention, that is generally difficult for 4-year-olds as it requires them to stand with their eyes closed for a set amount of time and not react to anything in their surroundings. Student struggled with not reacting. Since Student's ability to inhibit her impulses was less developed than average, struggles with this subtest were noted to possibly be an indication of early executive functioning challenges. Dr. Prevelige noted that 4-year-olds typically struggle with executive functioning, though, and this one subtest does not, on its own, establish executive functioning problems for a child. (P-22). Student performed better with Dr. Prevelige than Dr. Snelgrove on visuospatial testing²⁵. She also demonstrated consistent well above-average visual-motor integration skills and academic readiness skills above expected levels. (Prevelige VI, 66-67; P-22; S-8).

Student's recall skills and attentional capacity were at or above the expected range. Considering Dr. Snelgrove's cognitive testing results, particularly Student's average working memory, Dr. Prevelige explained that if Student struggles to recall information, it is due to distraction at the time of encoding or having fewer context clues to support her recall, not due to recall deficits. Additionally, although Parents reported Student takes longer than others to complete tasks or respond to questions, and she did rush to complete timed tasks causing her to "sacrifice accuracy slightly for speed", her overall performance fluency was also within expected levels. Further, although Student acted "silly" during the retrieval fluency subtest, she scored above expected levels in this area. Thus, Dr. Prevelige concluded

²³ These assessments comprised the Autism Spectrum Rating Scale (ASRS), the Bracken Basic Concept Scale, Third Edition (both expressive and receptive) (BBS-3), selected subtests of the NEPSY-II and the Neuropsychological Processing Concerns Checklist for School-Aged Children and Youth – Third Edition (NPCC-3) (completed by Mother). (P-22).

²⁴ Dr. Prevelige explained that the purpose of her evaluation was to determine whether Student had a developmental disability, including autism or "other things that might be impacting how [Student] is within a learning environment". It was not a placement-specific assessment, nor was she seeking to determine how Student was functioning in her private-preschool. (Prevelige VI, 73).

²⁵ This skill was tested by Dr. Snelgrove using the Block Design subtest, discussed above.

that “while there is no concern regarding [Student’s] fluency per se, there is the potential that her impulsive behaviors can get in the way of her demonstrating her abilities. (P-22; S-8).

Student’s social-emotional functioning and adaptive behaviors were assessed using the ASRS parent rating scales. None of the responses rose to a clinical level indicative of autism. Prior school evaluations had also failed to identify any concerns related to poor social skills, inflexibility, repetitive movements, and sensory processing that rose to the level of autism either during testing or in the classroom. Parents’ responses resulted in a very elevated attention scale score which explained the reported concerns with variable performance, changes in social skills and repetitive behaviors (Mother noted student had been squeezing her legs together repetitively when sitting). Dr. Prevelige explained that “it is very common that children with attention profiles have some ‘tic-y’ behaviors.” She also noted these behaviors can be interrupted or shaped into something else if they become a distracting or socially stigmatizing. (P-22; S-8).

Overall, Student was found to be an “active” child, with strengths in sensorimotor functioning, memory, visuospatial skills, fluency, academic readiness skills, language skills and cognitive abilities. Student’s attention difficulties resulted in “some variability in her abilities ... and in her behavior”. Student did not demonstrate any symptoms of autism and no cognitive deficits or learning disabilities were found. Although Dr. Prevelige does not diagnose students with ADHD prior to ages 5 or 6²⁶, she noted this was the only diagnosis in Student’s profile (made by her pediatrician). Dr. Prevelige concluded that “despite attention difficulties, [Student] was still able to perform all the tasks presented within the ranges expected (aside from the statue subtest on the NEPSY).” (Prevelige VI, 73-74; P-22; S-8).

55. Dr. Prevelige suggested activities to help Student increase her “parts to whole familiarity” and strengthen and develop her auditory processing skills. She also recommended monitoring Student’s inattention, impulsivity, and hyperactivity, particularly if this continued past Kindergarten. Finally, she listed strategies for working with strong-willed children that could be provided in the home. Dr. Prevelige explained that her recommendations focused on the areas where Dr. Snelgrove reported below expected levels of performance, such as the block design subtest, to strengthen these skills. They were also designed to address Student’s willfulness and some of the reported concerning behaviors. Dr. Prevelige testified that depending on how a Team chose to support Student, her recommendations could be implemented through “general accommodations, 504 accommodations or IEP accommodations”. (Prevelige VI, 79-80; P-22; S-8).

56. Dr. Prevelige did not endorse anxiety or developmental social disorders for Student. Upon questioning by Mother, Dr. Prevelige testified that children are not born anxious; they learn to be anxious from watching others in their environment. Student separated easily from Mother and was not nervous to be with Dr. Prevelige alone in the testing room or to work on the tasks presented, so Dr. Prevelige did not find her anxious. Although Student may have

²⁶ Dr. Prevelige explained this is a professional decision. Preschools tend to be varied settings, ranging from more daycare-based to school-based. As different demands elicit different behaviors, it is hard to diagnose a behavioral disability based on performance in preschool environments. Additionally, high levels of activity, often viewed as distractibility, are common in children under 5. Finally, in her experience, for many children diagnosed with ADHD prior to age 5, the diagnosis is not carried forward as something else may really be involved. (Prevelige, VI 74).

anxious symptoms, they were not at a clinical level to warrant an anxiety diagnosis. Rather, she suggested they may be a learned trait and reflective of family dynamics. Finally, Dr. Prevelige explained that due to the young age of preschool students, she does not administer standardized tests to identify anxiety or use anxiety rating scales. (Prevelige VI, 82-84).

57. Parents did not choose to meet with Dr. Prevelige to review her findings as they were unhappy with her report. Mother sent Dr. Prevelige an email upon receiving the report advising she disagreed with the conclusions and felt Dr. Prevelige had disregarded what Parents were seeing at home²⁷. Mother also indicated that she was surprised no disability was found and that she disagreed with Dr. Prevelige's refusal to diagnose ADHD in a 4-year-old. (Prevelige VI, 80-81).
58. On September 17, 2021, Student underwent a private Occupational Therapy evaluation, and a report was prepared on October 8, 2021. Mother was in the testing room for the evaluation. The report indicates that Student required "minimal to moderate verbal cues secondary to becoming distracted by objects in the room", exhibited instances of impulsiveness, had difficulty staying seated and attending to formal standardized testing, and needed frequent movement breaks. Student was observed informally and clinically, and standardized tests were administered²⁸. (P-21).

Student scored below average on the REAL and BOT-2, average on the SPM-P Home Form, and above-average on the DAP. Student displayed challenges in core weakness and visual motor skills, limited vestibular processing and balance, diminished bilateral motor control and decreased body awareness. Student also had deficits in performing age-appropriate activities of daily living and the presence of the Spinal Galant reflex was noted. As a result, the private OT evaluators found Student eligible for 1:1 weekly outpatient OT services 1x60, focusing on increasing core strength, inhibiting reflexes, improving activities of daily living, increasing body awareness, working on crossing the midline and performing vestibular processing activities. She was also provided with carryover activities to the home. (P-21).

59. On October 11, 2021, Parents were sent an Evaluation Consent Form proposing an Observation of Student. On October 18, 2021, Parents rejected the proposed Observation noting "Functional Behavioral Assessment (FBA) was agreed upon and written on consent for evaluation over the summer and was not completed, and so was submitted as part of hearing request with BSEA. The district received the hearing request on [Friday] 10/8/2021." Mother explained her rejection was based on having been advised by Ms. D'Angelo at the August 30, 2021 Team meeting that a BCBA had already reviewed Student's file and did not find an FBA necessary. This file review occurred prior to completion of the District's July 2021 evaluations, and Student's ADHD diagnosis.

²⁷ Mother testified the autism rating scales she completed required reporting on experiences only in the past 8 weeks. Since the evaluation occurred at the end of the summer, Mother's responses covered Student's behavior over the summer when she was not in a school setting and all her peer interactions were during "unstructured free play activities". Thus, Student's differing preschool behaviors were not reported. Mother suggested the results "might look different" if the evaluation had occurred at a different time. (Mother VI, 223).

²⁸ The standardized tests administered were the Roll Evaluation of Activities of Life (REAL), Bruininks-Oseretsky Test of Motor Proficiency Short Form (BOT-2 Short Form), Goodenough Draw A Person Test (DAP) and SPM-P Home Form, consisting of parent rating scales completed by Mother. (P-21).

According to Mother, the BCBA had “already made up her mind” prior to doing an observation, based upon her limited review of the file. (Mother VI, 217-218; S-4).

60. On October 29, 2021, Parents were sent an invitation to attend an in-person 504 Meeting on November 12, 2021. A copy of the Section 504 Parent/Student Rights information was included. Parents did not attend the scheduled 504 Meeting. Parents would not ultimately agree to discuss a 504 Plan until mid-December 2021. (Mother VI, 234-36; VII, 43-44; P-34; S-1; S-3; S-21).
61. On November 3, 2021, Parents provided the District Dr. Prevelige’s evaluation report. (S-8).
62. On November 15, 2021, the Team reconvened to review the outside OT and neuropsychological evaluations. Mother attended the Team Meeting. Neither evaluator attended, so Dr. Snelgrove reviewed Dr. Prevelige’s report and Ms. Ward reviewed the OT evaluation. Student’s behavioral observations by the outside evaluators were consistent with her behaviors during all District evaluations, as Student was energetic but amicable in both testing environments and completed all testing tasks. Findings of both evaluations were also consistent with the District findings, generally. Student performed better with Dr. Prevelige than with Dr. Snelgrove in some areas, and like Dr. Snelgrove, Dr. Prevelige did not find Student to have any behaviors, or deficits requiring specialized instruction to access the general education curriculum. Student demonstrated weaker fine motor skills in the outside OT evaluation than Ms. Ward’s evaluation. Ms. Ward explained this is likely due to the difference between the medical model and school-based model of OT services. School-based OT services are focused solely on student functioning in the school environment, whereas medical model testing reviews difficulties in all areas of functioning to determine all OT supports that may be needed. (Prevelige VI, 77; Ward VII, 279-80; Snelgrove VIII, 84).

The Team concluded that neither evaluation established a qualifying disability for eligibility. At Hearing, Dr. Prevelige agreed her evaluation does not support finding that Student has a qualifying disability. The Team again considered a Health Disability, based on Student’s ADHD diagnosis, but determined the disability did not impact access to the curriculum and that Student did not require specially designed instruction in any area. While the Team continued to find Student ineligible to receive services through an IEP, they supported pursuing accommodations through a 504 Plan. Parents, however, rejected this offer. The Team also recommended that the evaluation data be shared with Student’s new educational placement. (Mother VII, 41-43; Prevelige VI, 78; Ward VII, 280; Snelgrove VIII, 85; S-2).

63. During the Pre-Hearing Conference held on December 16, 2021, Parents ultimately agreed to attend a 504 Meeting. The 504 Meeting was scheduled and held on December 21, 2022 and a 504 Plan was developed. On January 3, 2022, Parents’ requested revisions were made to the proposed 504 Plan, and an agreed 504 Plan has been developed for the remainder of the 2021-2022 school year. The current 504 accommodations are: adult scaffolding with transitions; transition items; visual schedules; scheduled sensory breaks; alternative seating with sensory input; break down tasks; noise cancelling headphones; monthly OT consult 1x15 to classroom teacher; and weekly school counseling 1x30 for social skills and self-regulation. (Mother VI, 234-36; VII, 43-44; P-34; S-1; S-3; S-21).

64. On December 20, 2021, a Nurse Practitioner in Student's pediatrician's office prepared a letter at the request of Parents for the upcoming Hearing. This letter was never reviewed by the Team. The Nurse Practitioner has known Student for approximately a year and has provided craniosacral therapy to Student since the summer of 2021 to help "calm her nervous system and self-regulate". She suggests that Student "absolutely requires" additional services to be successful, both at home and in school, to support her anxiety, difficulty with self-regulation and sensory integration challenges. Other than noting that a "weighted turtle" helps Student settle and recommending that Student needs a "supported preschool environment", she does not elaborate further on Student's needs. (Mother VI, 231-32; P-31).
65. Student's private Occupational Therapist also prepared an undated letter at the request of Parents for both the Pre-Hearing Conference and the Hearing. The Team never reviewed this letter. The therapist has provided outside OT to Student since October 19, 2021, addressing the areas noted in the outside Occupational Therapy Evaluation, discussed *supra*. The letter indicates that Student benefits from movement breaks and regulation tools such as a wobble stool. Based on the below average findings from the BOT-2 Short Form, it is the outside Therapist's "professional opinion [that Student] would benefit from further occupational therapy services in multiple environments to help her further access her curriculum", but she does not elaborate. (Mother VI, 232; S-32).
66. On December 24, 2021, Student's preschool Teacher for both the 2019-2020 and 2020-2021 school years prepared a letter at the request of Parents for the Hearing. Like the others, this letter was never reviewed by the Team. The letter noted that Student's concerning behaviors did not improve over the course of two years. These behaviors included taking a long time to complete her arrival routine and prepare to leave the classroom, not attending during circle time and being unable to sit still, being hyper-focused on an area of interest to the exclusion of other subject matters, becoming overly attached to an item resulting in distress to share or put the item away, not making eye contact or taking turns, and frequently hugging and kissing classmates even if this was not appropriate. Student often required multiple teacher prompts and 1:1 adult attention and support. Due to Student's insufficient growth and development, and the need for additional, personalized instruction in social interactions, transitions, following classroom routines and age-appropriate play, the teacher recommended Student needed a "structured integrated special education preschool program with access to related services as needed to ensure her continued development in all areas of childhood development." (Mother VI, 233; S-33).
67. In December 2021 Parent completed an Ages & Stages Questionnaire, including the Social-Emotional component, for a Head Start program in which Student currently participates. Reports from these questionnaires were prepared in January 2022 and have not been reviewed by the Team. Overall, these reports were consistent with the information presented by Parents to the District and outside evaluators. Based on Parents' responses, follow up referral for additional professional assessment particularly in the personal-social area, or for EI and/or early childhood special education, was recommended. (S-36; S-37).

LEGAL ANALYSIS:

1. Eligibility for Special Education.

The right to a FAPE for all students with a disability is guaranteed by both federal and state law through the IDEA, M.G.L. c. 71B, and their corresponding regulations²⁹. To benefit from the rights and protections provided by these laws and regulations, however, a child must first be deemed eligible. If a student is found eligible, the Team must then develop an IEP setting forth the special education and related services that meet the special education needs of the student³⁰. An IEP is a "a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated"³¹.

The IDEA defines a "child with a disability" as a student having specifically identified disabilities "who, *by reason thereof, needs* special education and related services". 20 USC 1401(3)(A) and (B)³² (emphasis added). "Special education", in turn, is defined as "specially designed instruction³³, at no cost to the parents, to meet the unique needs of a child with a disability, ... [inclusive of] speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards"³⁴. Thus, "... if it is determined, through an appropriate evaluation ... that a child has one of the disabilities identified ... but only needs a related service and not special education, the child is not a child with a disability...". 34 CFR 300.8(a)(2)(ii). If, however, "... the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability..."³⁵. *Id.*

Similarly, Massachusetts defines a "school age child with a disability" as a child "... who, because of [specifically identified disabilities] ... is unable to progress effectively in regular education and requires special education services, including ... only a related service ... [if they] are required to ensure access of the child with a disability to the general education curriculum"³⁶.

²⁹ 20 USC 1400, *et seq.*; M.G.L. c. 71B; 34 CFR 300.000, *et seq.*; 603 CMR 28.00 *et seq.*

³⁰ 603 CMR 28.02(11); 603 CMR 28.05(3).

³¹ *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990).

³² The identified disabilities in the IDEA include "other health impairments" and for students ages 3 through 9, "developmental delays defined by the state".

³³ "Specially designed instruction", is defined as "adapting, as appropriate to the needs of an *eligible* child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child *that result from the child's disability*; and (ii) To ensure access of the child to the general curriculum" 34 CFR 300.39(a)(3) (emphasis added).

³⁴ 20 USC 1401(29); 34 CFR 300.39(a). Massachusetts defines "special education" as "specially designed instruction to meet the unique needs of the eligible student or related services necessary to access the general curriculum and shall include the programs and services set forth in state and federal special education law." 603 CMR 28.02(20).

³⁵ Massachusetts uses the federal definition of "related services", which are those services "as may be required to assist a child with a disability to benefit from special education". 20 USC 1401(26)(A); *see* 603 CMR 28.02(18). Of relevance, these include "... speech language pathology, ... occupational therapy, ... [and] counseling services ... provided by qualified social workers, psychologists, [or] guidance counselors ...". *Id.*; 34 CFR 300.34(c)(2).

³⁶ M.G.L. c. 71B §1. Relevant to this proceeding, the disabilities recognized in the Massachusetts laws and regulations include developmental delay for children ages 3 through 9 (provided *supra*), and "other health

The regulations define “eligible student” as “... a person aged three through 21 ... who has been determined by a Team *to have a disability(ies), and as a consequence* is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service”. 603 CMR 28.02(9) (emphasis added). “Progress effectively in the general education program”, in turn, is defined as,

to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district. 603 CMR 28.02(17).

Thus, both the federal and state laws utilize a 2-pronged approach in determining a student’s eligibility for special education³⁷. The first prong involves identifying whether the student has one or more of the enumerated disabilities enumerated in the laws³⁸. The second prong involves determining if, by reason of that disability, the child is unable to progress effectively in the general education program (i.e., make documented growth in the acquisition of knowledge and skills, including social/emotional development, with or without accommodations) without specially designed instruction or is unable to access the general curriculum without a related service³⁹. Should a student only need related services but be able to access the general curriculum, without them, the student is not eligible for special education⁴⁰.

“[I]n determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student’s educational and developmental potential”⁴¹. In Massachusetts, the evaluation is to be conducted by “appropriately credentialed and trained specialists” within 30 school days of receiving parental consent and adapted to the age of the student. 603 CMR 28.05(2). Initial evaluation assessments must include, “an assessment in all areas related to the suspected disability” and an “educational assessment by a representative of the school district”⁴². 603 CMR 28.05(2)(a). Additional, optional assessments include “a comprehensive health assessment ... a psychological assessment ... [and] a home assessment”. 603 CMR 28.05(2)(b). Reports of these assessments must be issued to a multidisciplinary Team convened to review them and determine eligibility. 603 CMR 28.05(2)(c). Just as the appropriateness of an IEP is

impairment”, including health impairments “due to ... [ADD] or [ADHD] ...”. 603 CMR 28.02(7)(b) and (i).

³⁷ *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 13-14 (1st Cir. 2007); *In Re: Lynnfield PS*, BSEA # 12-1425, 18 MSER 247 (Berman, 2012); *In Re: Agawam PS*, BSEA # 08-2564/08-4033, 14 MSER 53 (Byrne, 2008); *In Re: New Bedford PS*, BSEA # 01-3505, 7 MSER 261 (Crane, 2001); *In Re: Berlin-Boylston RSD*, BSEA # 00-1711, 6 MSER 247 (Byrne, 2000); *In Re: Canton PS*, BSEA # 00-2912, 6 MSER 239 (Erlichman, 2000); see *In Re: Stoughton PS*, BSEA # 99-0807, 5 MSER 1 (Oliver, 1999).

³⁸ *Id.*

³⁹ *Id.*; see M.G.L. c. 71B §1; 603 CMR 28.02(17).

⁴⁰ 20 USC 1401(26)(A); see 34 CFR 300.34(a); 34 CFR 300.39(a). The student may be eligible for 504 services.

⁴¹ 603 CMR 28.02(9); see 34 CFR 300.8(a).

⁴² 603 CMR 28.05(2)(a). Of note, “[w]hen a child is being assessed to determine eligibility for services at age three, an observation of the child’s interactions in the child’s natural environment or early intervention program is *strongly encouraged*” (emphasis added).

not to be viewed in hindsight, so too must a review of a Team’s eligibility determination be made by looking at the information available to the Team at the time of its determination⁴³.

2. Procedural Due Process Claims

IDEA procedural protections are guaranteed to students while they are participating in the process of eligibility evaluations and determinations. Procedural errors only amount to a deprivation of a FAPE if “the procedural inadequacies – (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits”⁴⁴. These procedural protections serve a dual purpose; they ensure meaningful parental participation and that each eligible child (or those for whom eligibility is still being determined) receives the protections of the IDEA⁴⁵. However, procedural violations that are technical or *de minimis*, and thus do not result in educational harm, are not actionable⁴⁶.

3. Burden of Persuasion.

In a special education due process proceeding, the burden of proof is on the moving party.⁴⁷ If the evidence is closely balanced, the moving party will not prevail.⁴⁸ Parties alleging procedural violations also bear the burden of proving the alleged procedural deficit⁴⁹.

DISCUSSION

In making my determinations, I rely on the facts I have found as set forth in the Findings of Facts, above, and incorporate them by reference to avoid restating them except where necessary.

This dispute is about Student’s eligibility for special education, as well as Parents’ claims that MURSD committed procedural errors resulting in a denial of a FAPE to Student since April

⁴³ See *Roland M.* 910 F.2d at 992; *In Re: Littleton PS*, BSEA #15-04613, 22 MSER 102 (Putney-Yaceshyn, 2016); *In Re: Newton PS*, BSEA #14-08637, 23 MSER 104, (Figuroa, 2015) (“In determining the appropriateness of a Team’s determination of eligibility . . . , one must objectively look at the information available to the Team at the time the determination is made . . . (citations omitted)).

⁴⁴ 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M.*, 910 F.2d at 994 holding that “[b]efore an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits” (citations omitted).

⁴⁵ See *Honig v. Doe*, 108 S.Ct. 592, 598 (1988) (“Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness”); *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034, 3050 (1982) (“Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation in every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard”). But see *In Re: Haverhill PS* BSEA # 2005314, 26 MSER 176 (Berman, 2020) finding that “. . . although Parents are Team members, entitled to fully participate in the IEP development process and to have their views considered, they are not entitled to dictate the terms of an IEP.”

⁴⁶ *Roland M.* 910 F.2d at 994; see *In Re: Newton PS*, 23 MSER 104 (2015).

⁴⁷ *Schaffer v. Weast*, 126 S.Ct. 528, 534, 537 (2005).

⁴⁸ *Id.* (placing the burden of proof in an administrative hearing on the party seeking relief).

⁴⁹ *Roland M.*, 910 F.2d. at 995.

2021. Upon consideration of the evidence, the applicable legal standards, and the arguments offered by the parties, I find that each of the 3 Team ineligibility determinations were appropriate, and the District did not commit any procedural errors amounting to a denial of a FAPE for Student. Thus, no compensatory services are warranted. My reasoning follows:

1. Team Findings of Ineligibility.

To properly assess whether each of the Team's findings of ineligibility was appropriate, I must look at the information available to each Team at the time it met⁵⁰. The initial eligibility Team held in June 2021 had before it the Developmental Assessment Report, the Developmental History Report, and Ms. Wheelock's Observation Report. In addition to the District evaluators and Ms. Wheelock, both Parents attended the Team meeting, along with an advocate/friend. Student's then-private preschool staff had been provided with educational assessments to complete, but did not do so. However, they did give input to Ms. Wheelock during her observations, which information was included at the outset of her Observation Report.

Parents rely on the social emotional domain results in the DACY-2, their statements of concerns summarized in the Developmental History Report and the private preschool teachers' statements of concern summarized in the Observation Report, to assert that the June 2021 Team erred in finding Student ineligible for special education. They state that this information supported a finding that Student presents with a developmental delay in social and emotional functioning, yet the Team rejected such a finding. For reasons I ultimately find to be persuasive, I find the Team's determination of ineligibility to be supportable.

The social-emotional domain assessment consisted of the single subjective parent rating scale allowing parents to respond only with "yes" or "no", but lacking more informative options such as "sometimes" or "maybe". Additionally, when Parents' responses were compared to other information before the Team, including the Observation Report, Parents' responses for the Developmental History Report, and the evaluators' informal observations of Student, there were some conflicting opinions. I find these inconsistencies support the Team's decision not to rely solely on the level of concern indicated by the DACY-2 rating scale responses. As such, while the June Team appropriately considered whether, given the results of the social-emotional domain in the DACY-2, Student had a developmental delay in social emotional functioning, the evidence demonstrates that the Team's determination was proper, based on the totality of the information then available to it. As such, Parents failed to meet their burden of persuasion that the June 2021 Team erred in finding Student ineligible for special education services.

When the August 30, 2021 Team met, new information was available. Student's pediatrician had diagnosed her with ADHD and additional evaluative information from the Psychological Evaluation by Dr. Snelgrove, the Occupational Therapy Evaluation by Ms. Ward, and the Speech and Language Evaluation, inclusive of social pragmatics, by Ms. Farley, was considered. This Team also reviewed the information before the June 2021 Team, most importantly, Ms. Wheelock's Observation Report. Parents attended the meeting along with Ms. D'Angelo and the

⁵⁰ See *Roland M.* 910 F.2d at 992; *In Re: Littleton PS*, 22 MSER 102 (2016); *In Re: Newton PS*, 23 MSER 104, (2015).

MURSD evaluators and provided their input. Given the additional information, the Team again found Student ineligible for special education. Parents also challenge this finding.

Considering the totality of the information before the Team in August 2021, I again conclude its determination was supported by the evidence. While Dr. Snelgrove agreed that Student has impulse control difficulties and attention challenges (especially when faced with less-preferred or less-engaging tasks), which cause her to struggle socially, she concluded that accommodations and modifications to the general education classroom, as opposed to specialized instruction or related services, were the appropriate supports. The standardized testing Dr. Snelgrove performed showed that Student's cognitive scores fell between the low average and the superior range, and Student performed in the average range on subtests tapping attention difficulties and impulse control. I find Dr. Snelgrove's testimony and the explanation in her report as to the basis for her conclusion to be credible and consistent with other information in the record, including Ms. Wheelock's Observation Report⁵¹.

Similarly, Ms. Ward's Occupational Therapy Evaluation, revealed that Student performed in the average range, consistent with age-appropriate expectations, in all areas except sensory processing, where she scored in the underdeveloped range. However, Student's sensory processing subtests again mainly consisted of subjective reports from Parents and Student's prior private preschool director. Ms. Ward concluded that environmental modifications and changes in Student's school routines in the general education classroom were needed, but that did not require specially designed instruction or direct occupational therapy services to access the general education curriculum. Ms. Ward credibly testified that her conclusions were based on the totality of the information she obtained including the reports from the private preschool, Parents' rating scales, her own observations of Student, the results of her standardized assessments and her clinical judgment.

Ms. Farley, who conducted the Speech and Language Evaluation, did not find that Student presented with a speech and language disability and therefore, did not recommend the provision of speech and language services for Student. Notably, Student scored in the average range for general language ability and on all subtests of the CASL-2, the assessment Ms. Farley chose as it contained a standardized subtest for pragmatic language, an area Parents had specifically requested be assessed. Ms. Farley also offered credible testimony regarding her conclusions and clinical reasons for choosing this test protocol. Additionally, I found persuasive Ms. Farley's explanation that neither Student's standardized scores, nor behaviors observed during testing supported the need for her to observe Student in another setting prior to finalizing her evaluation.

Thus, while based on her recent ADHD diagnosis the August Team appropriately considered the possibility of a Health disability for Student, the totality of the information available to the TEAM did not support a finding that Student could not make effective progress without specially designed instruction. As such, Parents failed to meet their burden of persuasion that the August 2021 Team had sufficient information on which to change the prior finding of ineligibility⁵².

⁵¹ Dr. Snelgrove's conclusions were also later supported by Parent's expert, Dr. Prevelige at the November 2021 Team.

⁵² See *Schaffer v. Weast*, 126 S.Ct. at 534, 537.

The Team reconvened for a third and final time on November 15, 2021, to review two independent educational evaluations— a Neuropsychological Evaluation by Dr. Prevelige and an Occupational Therapy Evaluation by a private agency. Although neither independent evaluator attended the meeting, Dr. Prevelige testified at the hearing. The Team concluded that neither independent evaluation identified a qualifying disability.

At Hearing, Dr. Prevelige agreed that her evaluation did not identify a specific disability. Although she noted Student had difficulties with attention that resulted in “some variabilities in her abilities ... and in her behavior”, (P-22) she did not find the presence of any disability that would qualify Student for special education. She acknowledged Student’s pediatrician’s diagnosis of ADHD, but also credibly and persuasively provided unrefuted testimony as to the reason she does not endorse either ADHD or anxiety as disabilities in young children. Moreover, Dr. Prevelige did not make any recommendations for specialized instruction or programming or for any direct related services. Instead, she recommended accommodations and continued monitoring of Student’s inattention, impulsivity, and hyperactivity.

Parents disagreed with both the November 2021 Team determinations and their own expert’s conclusions, but presented no other credible expert testimony or evidence to refute Dr. Prevelige’s findings. Mother’s testimony, alone, is insufficient as she is not a trained school psychologist, and her differing opinion, while valid as a parent, is inadequate to challenge or refute Dr. Prevelige’s expert opinion. Both independent educational evaluations were generally consistent with the MURSD testing. The only exception was the result of the fine motor skills assessment and the differing recommendations for services in the private Occupational Therapy Evaluation, which Ms. Ward credibly explained was due to the difference between the medical and school-based models for OT services. Ms. Ward’s testimony on this point was also unrefuted. Thus, I conclude that based on the information available to the November 2021 Team, it correctly again determined that Student was ineligible for special education.

Finally, I note the emphasis placed on observational data by the parties, particularly Parents. Given the consistency of the results in both the standardized assessments administered by the independent and District evaluators, and their behavioral observations of Student, it is doubtful that additional observational data would have changed the Team determination or provided information different to that offered by Ms. Wheelock’s observation. Parents’ argument in this regard is thus unpersuasive. Although the only observation of Student in her natural educational environment was conducted by Ms. Wheelock prior to the June 2021 Team meeting (another observation could not be performed prior to the August 2021 or November 2021 Team meetings as Student did not participate in an educational program during the summer of 2021 and Parents rejected the District’s proposal to observe Student in October of 2021), the August 2021 Team reviewed Ms. Wheelock’s Report. Dr. Snelgrove also reviewed Ms. Wheelock’s report prior to commencing her evaluation. Observation data of Student in her natural educational environment was, therefore, available to later Teams.

Neither of Parents independent evaluators observed Student in her prior or current private preschools, spoke with any of her private preschool teachers or reviewed their records⁵³. Given

⁵³ The independent evaluations were another opportunity for Parents to obtain an observation of Student in an educational program, however, neither evaluator observed Student outside the testing setting. It is unclear why

that Parents' Hearing Request was received in early October 2021 and the Hearing was held in January 2022, Parents had ample time to obtain their own additional observations of Student across a variety of settings, but they failed to do so. They also presented no evidence regarding Student's performance or behavior at her new pre-school. Thus, Parents are unpersuasive in suggesting additional observational data would be sufficient to overturn the ineligibility finding.

Lastly, I turn to the letters offered by Parents from Student's prior private pre-school teacher, private OT provider, and Nurse Practitioner. These letters were created specifically to support Parents' position at Hearing. They were not available to be reviewed at the time any of the Teams convened, and none of the authors of these letters ever attended a Team meeting. The letters are lacking in objective standardized measures or assessment information to support a qualifying disability or Student's need for specially designed instruction and/or related services to access the general education curriculum. It is well established that Team decisions must be reviewed by examining what was available to each Team when the decision was made; Team decisions "cannot be judged exclusively in hindsight"⁵⁴.

The record also lacks information regarding specific experience, credentials, or depth of knowledge about Student of the authors of these letters, and none of them testified at Hearing, thus rendering it impossible for me to assess their credibility. Further, the information contained in the preschool teacher's December 2021 letter is based on her experience with Student the previous school year. Her letter offers no indication as to Student's functioning in her current preschool, and no other information was presented regarding the current preschool. I find that none of these letters offers sufficient evidence to overturn the Teams' findings of non-eligibility.

While the weight of the evidence supports the ineligibility determinations by each Team, Parents steadfast advocacy for their daughter is admirable. However, the IDEA is not designed to anticipate possible future special education needs of students, but rather the present special education needs of a child, as indicated by relevant, reliable, current and evaluative information. *See* 34 CFR200.8(a). There is no doubt that Parents wish the greatest possible success for Student and have her best interests at heart. To that end, despite initial resistance, Parents agreed to implementation of the current 504 Plan. This Plan incorporates many of the recommendations and accommodations supported by both the District evaluators and Dr. Prevelige⁵⁵. It will, therefore, not only properly support Student in the short term, but also provide additional information to Parents and the District in the future, as Student progresses in her education⁵⁶.

Parents did not ask their independent evaluators, who performed their testing in the fall of 2021, to so observe Student, or even provide them with information from her private preschool, especially given their insistence the District perform an FBA over the summer of 2021.

⁵⁴ See *Roland M.* 910 F.2d at 992; *In Re: Littleton PS*, BSEA #15-04613, 22 MSER 102 (Putney-Yaceshyn, 2016); *In Re: Newton PS*, BSEA #14-08637, 23 MSER 104, (Figueroa, 2015)

⁵⁵ See *In Re: New Bedford PS*, 7 MSER 261 (2001) explaining how Section 504 differs from special education law; *In Re: Stoughton PS*, 5 MSER 1 (1999) finding a student with ADD ineligible for special education but eligible for a 504 plan that was determined to appropriately accommodate the ADD's impact on the student's attentional, organizational and study skill challenges.

⁵⁶ See *In Re: Stoughton PS* 5 MSER 1 (1999) finding that should Student's performance not improve after implementation of the approved 504 accommodation plan, this may provide evidence to support eligibility for special education, however "... at this time, Student is not a student with special education needs, as defined upon state and federal special education law".

2. Procedural Violations.

Parents allege that the District committed several procedural violations between April 2021 and November 2021, resulting in a denial of a FAPE to Student or significantly impeding Parents' participation in the eligibility determination process. Specifically, Parents allege the District improperly responded to Parents' initial request for testing in April 2021, failed to test in all requested areas, improperly responded to Parents' request for an FBA in June 2021, did not provide notice of or properly convene the August 2021 Team meeting, and pre-determined eligibility outside the Team process prior to the June and August 2021 Team meetings⁵⁷. With one exception, I find the claimed procedural violations, if they occurred, to be "*de minimis*". As to the one procedural error I do not find to be merely technical, the preponderance of the credible evidence establishes that Student's right to a FAPE was not impeded, Parents were not significantly impeded from participating in the eligibility decision-making process and Student did not suffer a deprivation of educational benefits because of it⁵⁸. I address that non-technical error last.

A. The District's Response to Parent's Referral for an Evaluation and its Initial Testing.

Contrary to Parents' contention, the District did not violate any procedural requirements in its response to Parents' initial referral for an evaluation, received on April 15, 2021. Parents allege the District improperly required Student be "screened" or that Parents provide a statement of Student's suspected area of disability prior to commencing any evaluations. Parents also allege the District did not perform the requested psychological evaluation. While Ms. Wheelock initially suggested screening Student before commencing the requested evaluations, a prerequisite screening was not ultimately required. Rather, Parents received their Procedural Safeguards Notice on April 15th and the Evaluation Consent Form on April 27th (3 school days after receipt of Parents' initial referral due to the intervening April school break), as required by 603 CMR 28.04(1)(a).

Similarly, there were no procedural violations in Ms. Wheelock's email communications with Mother, including her April 17, 2021 request for Parents to provide information on Student's suspected areas of disability⁵⁹. Ms. Wheelock offered credible testimony explaining that she made the April 17, 2021 request so as to fully understand Parents' concerns for Student, as Student was privately placed out of district, and hence was not known to MURSD. The request was not made to complicate or delay the referral process, as Parents claim. Supporting this explanation is the N1 form provided to Parents with the Evaluation Consent Form, that explained the District had not received a comprehensive statement of disability, as requested, but quoted Mother's entire reply to Ms. Wheelock's April 17, 2021 email. As this response was all the information that the District had at that time delineating Student's needs, its verbatim inclusion in the N1 form demonstrates the District considered all the information it had regarding Student, prior to proposing any of its evaluations. Districts are required to initially evaluate in all areas of a suspected disability and to seek information from parents as to the reasons for the referral, any

⁵⁷ The claim of pre-determination prior to the August 30th Team meeting is considered over the District's objection.

⁵⁸ 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M.*, 910 F.2d at 994.

⁵⁹ While I agree with Parents that these emails demonstrate that a collaborative relationship had not developed between the parties, this is not a procedural violation. I also commend both parties for maintaining professionalism and courtesy despite their disagreements.

concerns parents have and what skills or abilities their child possesses⁶⁰. In this case, the District met these requirements.

Moreover, I do not find the District's initial evaluations of Student in the spring of 2021 to be improper or inconsistent with Parents' initial referral request for "a full psych/cognitive and occupational therapy" assessment. (P-1). In response, the District proposed, as noted on the Evaluation Consent Form, to perform a developmental assessment, cognition and social-emotional assessment, occupational therapy assessment, educational assessment, and home assessment⁶¹. Parents fully consented to these proposed assessments and did not request any additional evaluations at that time. Further, at the request of Student's private preschool, the District also conducted an observation of Student at that preschool, with Parents' consent.

Next, Parents claim their request for a "full psych/cognitive" evaluation should have prompted the District to perform a separate psychological assessment of Student. While the DACY-2 is not a psychological assessment per se, Ms. Wheelock, Ms. Monroe and Ms. McCausland all testified that said measure includes a cognitive component, and is a standard evaluative tool used to assess preschool students for special education eligibility not only at MURSD, but also in other Districts. Ms. Wheelock further explained that she added the social-emotional domain of the DACY-2 to the proposed testing based on the concerns Mother expressed in her emails. The uncontroverted witness testimony on this point was credible and convincing.

Consistent with the other MURSD witness testimony on this point, Dr. Snelgrove also credibly explained that in her over 12 years of work as a school psychologist, she has found the DACY-2 to be the initial evaluative tool administered for preschool students, not just in MURSD, but in other District's as well. Notably, Dr. Snelgrove has only performed three other psychological assessments of preschool students, two of which were done after completion of the DACY-2, as was done for Student, based on the need for more information. The only one done prior to administration of the DACY-2 occurred because that parent specifically requested a "WPPSI" on the Evaluation Consent Form. Parents' initial request, in this case, did not reference the WPPSI.

Relying on these witnesses' testimony, I find it reasonable and procedurally appropriate for the District to have proposed, and upon consent, performed, only the DACY-2, inclusive of its cognitive and social-emotional domains, in response to Parents' request for a "full psych/cognitive" evaluation. Nothing about the phrasing of Parents' request required the District to perform a psychological assessment separate from the cognitive assessment administered to Student⁶². Moreover, including the social-emotional domain of the DACY-2, which is not administered to all students, but was added in response to the Mother's specific concerns, also ensured Student was assessed in all areas of "suspected disability". Finally, per Parents' request,

⁶⁰ 603 CMR 28.04(1) and (2)(a)(1).

⁶¹ Neither the IDEA nor Massachusetts special education law requires Districts to propose all evaluations requested by a parent in response to a parent's referral for an initial evaluation. Districts must only assess in all areas of "suspected disability", which determination is to be made prior to proposing evaluations. "In evaluating each child with a disability under §§300.304 through 300.306, the evaluation [must be] sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 CFR 300.304(c)(6); *see also* 603 CMR 28.04(2)(a).

⁶² Additionally, a psychological assessment is an optional, not required, initial evaluation assessment. 603 CMR 28.04(2)(b)(2).

an occupational therapy assessment was also administered. Parents have not proven that the District's consented-for evaluations or its initial testing was improper or in any way violated any procedural requirements. Rather, the weight of the evidence supports a finding that the evaluations proposed and conducted were appropriate and compliant with state and federal special education laws.

B. Notification and Convening of the August 30, 2021 Team Meeting.

Similarly, Parents have not proven that the District violated any procedural requirements in the notification for or in the convening of the August 30, 2021 Team meeting. Parents challenge the timeliness of the notice of this Team meeting and claim the District improperly refused to hold that meeting virtually upon Parents' request. Parents also claim that the date of this meeting violated their procedural rights as the meeting was not convened over the summer as had been agreed, but rather on the first day of school.

As to the last part of the claim, Team meetings are not procedurally required during the summer, even if a district has agreed to do so. Rather, Teams must meet "45 school-working days" after receipt of a parent's written consent for an evaluation. 603 CMR 28.05(1). Since Parents' consent to the proposed evaluations was received by the District on June 25, 2021 (a date after the last day of that school year), and the Team convened on August 30, 2021 (the first school-working day after receipt of Parents' consent), there was no procedural error⁶³.

The Team meeting notification and the District's decision to hold the Team meeting in-person rather than virtually, as Parents had requested, also did not violate any procedures. The IDEA requires Parents be notified of Team meetings early enough to ensure they have an opportunity to attend and that the meetings be scheduled at a mutually agreed on time and place. 34 CFR 300.322(a). Here, the District initially advised Mother on August 17, 2021, by email, that it was "looking to schedule the Team meeting for 8/30/21 at 1:00 PM". Mother replied advising of her concerns with the meeting being scheduled so close to the start of the school year, but at no time did she indicate the proposed date or time was a conflict for Parents. Ms. D'Angelo's response to Mother's concerns also confirmed that the Team meeting would be held on August 30, 2021.

Although the District attempted to forward a Team Meeting Invitation to Parents via email on August 19, 2021, Parents never received it as, unbeknownst to the District (until after October 1, 2021), it was sent to the wrong email address. However, between August 19, 2021, and the Team meeting, Parents continued to communicate with the District about other matters, but never sought to confirm the Team Meeting date, time, or location, even though Mother picked up a copy of the evaluation reports on August 23, 2021. Rather they first requested additional confirmation the weekend preceding the Team meeting, and first learned it was to be in person the morning of the meeting. As the prior Team meeting had been virtual, it was reasonable for Mother to assume that this meeting would be too. Thus, while her surprise to learn the meeting would be in-person is understandable, as were her subsequent efforts to request a virtual meeting instead, the District's decision to convene the Team in-person was not procedurally improper.

⁶³ Certainly, however, best practice would dictate that such an agreement should be honored, particularly to establish and promote a collaborative relationship between the parties to the agreement.

Unfortunately, it was not possible for the District to shift to a remote meeting that day, and the explanation offered by the District was reasonable. Ms. D'Angelo candidly testified that she did not endorse the idea of having only Parents participate virtually, given the challenges for the full team to engage with them in this way. As such, I find it was proper for the District to have declined to convene the meeting remotely. I further note that the District offered to reschedule the meeting, so it could be held virtually, although Parents declined this offer.

Even if I were to find the District erred procedurally in its scheduling or convening of the August 2021 Team meeting, and I do not, any issues were due to the District's good faith efforts to honor, as best it could, the agreement it had reached with Parents to evaluate Student and convene an eligibility Team meeting during the summer of 2021, rather than to any bad faith attempts to impede parental participation in the meeting⁶⁴. As such, any violation of the IDEA in these circumstances would have been *de minimis*⁶⁵.

Parents claim they were unable to fully participate in the Team process due to the District's refusal to hold the Team meeting virtually. However, the preponderance of the evidence shows both Mother and Father attended the entire August 2021 Team meeting, shared their concerns regarding the evaluations completed for the June 2021 Team meeting, successfully advocated to have the information the June 2021 Team reviewed also be discussed by the August 2021 Team, and voiced their disagreement with the August 2021 Team's determination. Mother's testimony that her advocacy was impacted because she failed to ask the August MURSD Team members who were not at the June Team meeting for their input about Ms. Wheelock's observation, was unpersuasive. All these MURSD Team members testified at the Hearing, and the record shows Mother did indeed inquire as to Ms. Farley and Dr. Snelgrove's opinion of the observation, then. The IDEA protects parents from being "significantly" impeded from their opportunity to participate in the decision-making process because of procedural violations⁶⁶. The record is clear that in this matter, Parents have always had an opportunity to strongly and consistently advocate for Student, including at each Team meeting. Thus, Parents' argument in this regard is unpersuasive. Again, even assuming there were procedural violations that were more than *de minimis*, which I do not find, I am not persuaded that Parents' participation in the August Team meeting was "significantly" impacted, or that Student's right to a FAPE was denied.

C. The Pre-Determination Claims.

Finally, Parents claim that the District improperly pre-determined Student's ineligibility prior to both the June and August 2021 Team meetings. Specifically, in support of their claim of pre-determination prior to the June 2021 Team meeting, Parents rely on Ms. Wheelock's email to Ms. D'Angelo on May 13, 2021, wherein she stated that she found Student's challenges after the

⁶⁴ See *In Re: Agawam PS*, 14 MSER 53 (2008) reasoning that even if procedural timelines of an evaluation were violated, they are excused by the District's,

good faith effort to include all testing arranged or requested by the parent and, at the urging of the parent, to convene a team prior to the beginning of the 2006-2007 school year In addition, as Oliver was at no time during the process actually eligible to receive special education services, the fact that he did not, did not deprive him of any education benefit to which he was entitled.

⁶⁵ *Roland M.*, 910 F.2d at 995 finding that a District fulfilled the "essence of its procedural responsibilities" due in part to the "lack of any indication of 'procedural bad faith'" on the District's part.

⁶⁶ 20 USC §1415(f)(3)(E)(ii)(II); 34 CFR 300.513(a)(2)(ii).

observation to be “completely attentional” and also added “[w]e are not at the level of needing a BCBA here”. They also submit that the BCBA’s review of Student’s file (which at that time did not include an ADHD diagnosis or the July 2021 evaluation reports) at Ms. D’Angelo’s request, and her subsequent conclusion that it was not then necessary to do an FBA was improper pre-determination prior to the August 2021 Team meeting.

I do not find either communication with Ms. D’Angelo to be inappropriate pre-determination. Both instances involved a discussion between Ms. D’Angelo and another District professional whom Ms. D’Angelo supervises, regarding Student’s presentation and needs. It was proper for Ms. Wheelock to share her professional opinions with her supervisor, who is also the District’s Special Education Department Head. Similarly, given Parent’s concern and repeated requests for an FBA, it was appropriate for Ms. D’Angelo to seek the BCBA’s professional opinion as to the need for conducting an FBA. Notably, Ms. D’Angelo was not a member of the June 2021 Team meeting, and the BCBA was not a member of the August 2021 Team meeting. Eligibility determinations are made during Team meetings by Team members. The record shows that, as discussed *supra*, the Team decisions regarding Student’s eligibility were based on a review of the evaluative information presented and the input of all participants at both the June and August 2021 Team meetings. The evidence is convincing that Student’s eligibility findings were made only after all the relevant information was presented and discussed at these two Team meetings by the Team members, including Parents⁶⁷. Parents have not proven that the ineligibility determination was made outside the Team process; thus, their pre-determination claims fail⁶⁸.

D. Request for the FBA.

The record supports Parents’ contention that the District’s failure to provide a written response to their request for an FBA was more than a technical procedural violation. Regardless of whether in June 2021 Ms. D’Angelo and Mother discussed the District performing an FBA that summer, Mother specifically requested an FBA as an “additional evaluation” on her response to the June 2021 Evaluation Consent Form. The District neither conducted one, nor issued written notification of its refusal to do so, such as an N2 form, as required by 34 CFR 300.503(a)(1). The evidence also shows Ms. D’Angelo discussed this FBA request with Mother after receiving the signed Evaluation Consent Form and advised her it would not be possible to conduct the FBA over the summer due to Student not being in any educational program at that time. However, Parents did not withdraw their request for an FBA after this discussion. Thus, the District’s failure to provide prior written notice of its refusal to conduct an FBA after receiving the Evaluation Consent Form requesting it, was more than a “*de minimis*” procedural violation.

However, as discussed below, after careful consideration of the record before me, I do not find this violation resulted in a denial of a FAPE to Student, or otherwise significantly impeded Parents’ participation in the eligibility decision-making process⁶⁹. Parents claim that an FBA

⁶⁷ Compare *In Re: Amherst-Pelham RSD*, BSEA #12-1264, 18 MSER 187 (Crane, 2012) finding pre-determination occurred where the Team chair held “pre-meetings” with district Team members directing them on things that were and were not allowed to be said during the upcoming Team meeting, including prohibiting staff who supported offering certain services from agreeing to this at the meeting.

⁶⁸ *Schaffer v. Weast*, 126 S.Ct. at 534, 537; *Roland M.* 910 F.2d. at 995.

⁶⁹ See *In Re: Wareham PS*, BSEA No. 2202891, 27 MSER 512 (Berman, 2021) finding that the failure to provide 6 months of consultation as mandated in Student’s IEP was more than a technical procedural violation, but as Parent

would have provided the August 2021 Team needed information relating to how Student presents and performs in an educational environment. However, the August 2021 Team had such information available to it via Ms. Wheelock's Observation Report, which was thoroughly reviewed and considered by the Team at Parents' request. Moreover, Dr. Snelgrove also credibly explained how an observation provided more global information to the Team than an FBA, as an observation reports on all that Student did during the period observed, whereas an FBA, as it is designed to address specific questions, focuses only on Student's actions related to the presenting questions. Thus, while I agree that an FBA would have provided some specific information to the Team regarding targeted behaviors of concern, Parents did not present sufficient evidence as to what new information from an FBA would have altered the Team's eligibility determination⁷⁰.

Parents also failed to show they were prejudiced in any way by not receiving written notice the District would not be conducting the requested FBA during the summer break, as they had actual knowledge of this decision through Ms. D'Angelo's telephone conference with Mother on July 19, 2021.

Moreover, the record shows that on October 11, 2021, after Student began attending a new private pre-school, the District proposed to observe her, but Parents did not consent. While the proposal was not for an FBA, an observation might well have provided more useful information to the Team than an FBA. Had Parents accepted this proposed observation, it is also reasonable to expect that it would have been completed in time for the November 2021 Team meeting, thereby enabling that Team to obtain and discuss the additional observation information that Parents were seeking. Mother's explanation for declining the proposed observation (that the observer had already pre-determined the outcome) was not persuasive, as the determination of eligibility for special education is made by a Team, inclusive of parents, not a single observer. Further, there is no evidence that Student has been denied any educational benefit to which she was otherwise entitled, in this matter, as Student was never found eligible for special education⁷¹. As Parents did not prove the District's failure to provide written notice of its refusal to conduct an FBA in response to Parents' request on the Evaluation Consent form educationally harmed Student or significantly impeded their procedural participation rights, there was no deprivation of FAPE- a necessary finding for Parents to prevail on a procedural violation claim⁷².

ORDER:

1. The Team determinations that Student was ineligible for special education on June 14, 2021, August 30, 2021, and November 15, 2021, were appropriate. The Teams determinations that Student is ineligible for special education services is upheld. Parents' claim in this regard is DENIED.

failed to show Student was deprived of an educational benefit or otherwise harmed by this lack of consultation, compensatory services for these missing consultations were not warranted.

⁷⁰ See *In Re: Agawam PS*, 14 MSER 53 (2008) finding information that could have been provided in a consented-to home assessment never performed would not have resulted in an eligibility finding for the student, as none of the educational evaluations supported such a conclusion.

⁷¹ *In Re: Agawam PS*, 14 MSER 53 (2008).

⁷² 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M.*, 910 F.2d at 994.

2. Since April 2021, the District has not committed any procedural violations amounting to a deprivation of a FAPE to Student or significantly impeding Parents' participation in the eligibility decision-making process.
3. No compensatory services are warranted as Student is not eligible for special education and was not denied a FAPE by the District.

Respectfully submitted,
By the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

March 23, 2022