

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of:)	
)	
REDACTED)	
)	HEARING DECISION AND ORDER
Complainant,)	
)	DE DP #23-27
v.)	
)	Hearing Dates: Aug. 4 and 16, 2023
REDACTED School District))	
)	
Respondent.)	
)	

Hearing Panel Members:

Jonathan Harting, Esq., Panel Chairperson
Diane Latocha, Educator Panelist
Jon Fletcher, Layperson Panelist

Counsel

REDACTED, Pro Se, for the Complainant
James McMackin, III, Esq. for the Respondent

DECISION AND ORDER

1. PROCEDURAL HISTORY

Complainant, REDACTED (“Student”) filed a Due Process Petition on June 16, 2023, which was received by the Delaware Department of Education on June 20, 2023. The Complaint alleges Respondent, REDACTED School District (“the District”) failed to provide a free appropriate

public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”) since Student’s enrollment with the District. The Complaint also requests this Panel enter an order requiring the District to keep Student in REDACTED current placement as well as a myriad of other remedial requests with regards to changing grades, attendance records, compensatory education, an independent specialist, and staff trainings.

In its Response to the Complaint, the District asserts that REDACTED, Student’s REDACTED (“REDACTED”) has failed to provide the necessary consent for evaluations of Student. The District acknowledges that it is failing to provide FAPE to Student but argues this Panel cannot make an adverse finding against the District because of REDACTED’s refusal to consent to evaluations that the District believes are essential.

A Pre-Hearing teleconference was held over Zoom on June 28, 2023, and a pre-hearing order was issued the same day. A two-day hearing was held on August 4, 2023, and August 16, 2023, over Zoom. The District called one witness, REDACTED supervisor of special education for the District. REDACTED testified on behalf of Student.

Parties submitted joint written closings on August 23, 2023. The Panel has read and considered those submissions. To the extent that testimony was presented to the Panel that is not in accordance with the findings of this Order, then that testimony is not credited. The Panel, consistent with the findings in this order, will remark upon the credibility of the testimony that was presented during the hearing when necessary to make necessary findings and conclusions of law.

II. ISSUES PRESENTED

- a. Whether the District’s requests to evaluate Student at the SMart Center were reasonably calculated to benefit Student and were reasonably presented to

REDACTED such that REDACTED's refusal to consent relieves the District of its FAPE responsibilities?

- b. Whether the District failed to provide FAPE to Student during REDACTED time of enrollment with the District?

III. FINDINGS OF FACT

The Panel accepted into evidence, without objection, the District's Exhibits A-R.¹ The Panel accepted into evidence, over noted objections to potential issues of relevance, Student's Exhibits A-AA (excluding Exhibit G).² The Panel makes the additional following findings of fact:

1. Student is currently REDACTED years old and will be moving into the REDACTED grade at the District for the 2023-2024 academic school year.³
2. Student attended school at the District for REDACTED and REDACTED grade.⁴
3. Prior to attending the District, Student attended REDACTED grade during the 2020-2021 school year at a REDACTED school with the REDACTED School District (REDACTED).⁵
4. Student started with the District in September of 2021.⁶
5. REDACTED is the supervisor of special education with the District, who has served in the field of special education for approximately 27 years.⁷
6. REDACTED testified the District is unable to provide FAPE to students without an understanding of a student's needs.⁸

¹ Hrg. Tr. 36:4-38:19.

² 155:5-189:23. Exhibit G was excluded from evidence as duplicative and redundant.

³ 40:6-8.

⁴ 40:9-12.

⁵ 40:9-12.

⁶ 41:1-3.

⁷ 34:17-35:4.

⁸ 41:4-10.

7. The District conceded it did not have a good understanding of Student and acknowledged it was not providing Student with FAPE.⁹
8. REDACTED believes that Student has a medical diagnosis of selective mutism.¹⁰
9. In the school setting, Student is non-verbal, needs a lot of prompting, and requires someone to assist with communication. For Student's carpentry class, the District supports REDACTED with handling the tools associated with the class.¹¹
10. Based upon REDACTED review of the records within the possession of the District, the District has had additional concerns for learning disability with a diagnosis of ADHD, speech, occupational therapy, physical therapy, and anxiety.¹²
11. Student requires assistance from a one-on-one paraprofessional in the classroom setting.¹³
12. REDACTED testified that the District did not know why Student is non-verbal. Student spoke some words at the beginning of the REDACTED grade but is now completely mute from the District's perspective.¹⁴
13. REDACTED did not receive documents pertaining to a medical diagnosis of selective mutism.¹⁵
14. The District accepted the REDACTED IEP when Student came to the District and deemed it to be compliant as a 60-day transfer into the District.¹⁶
15. Although the District accepted the REDACTED IEP and the evaluation that came with it, the District did not deem it to be a thorough review of Student's educational history.¹⁷

⁹ *Id.*; 45:16-46:1; 80:12-14.

¹⁰ 43:1-6.

¹¹ 44:13-45:2.

¹² 43:19-44:7.

¹³ 44:16-18; 120:11-14.

¹⁴ 45:3-6.

¹⁵ 49:6-11.

¹⁶ 50:12-51:1

¹⁷ 52:8-13.

16. In September of 2020, REDACTED requested records from Student's prior school in New Jersey; however, REDACTED did not consent to disclosure of the records, citing a desire on the part of REDACTED to get a fresh start.¹⁸
17. The District maintains REDACTED did not receive a document or record from a medical professional which determined Student was diagnosed with selective mutism or were able to conduct a selective mutism evaluation of Student.¹⁹
18. Dr. REDACTED is a clinical psychologist from New Jersey, who specializes in anxiety issues and worked with REDACTED for Student's issues of selective mutism. Dr. REDACTED is not employed by the District.²⁰
19. The District received a record from REDACTED noting a meeting held with representatives from REDACTED, REDACTED, and Dr. REDACTED on April 14, 2021, in which Dr. REDACTED supported the idea of more evaluations for Student, such as a neuropsychological evaluation.²¹
20. Both Dr. REDACTED and a speech language pathologist at REDACTED were concerned of Student's anxiety issues and lack of verbal output from Student during REDACTED REDACTED-grade year.²²
21. REDACTED, in reviewing the documentation available to the District for Student in July of 2021 prior to Student's attendance at the District, suggested evaluations of Student.²³

¹⁸ Resp. Ex. C.

¹⁹ 52:17-24.

²⁰ 54:10-17.

²¹ 54:24-56:8; Resp. Ex. H.

²² Resp. Ex. H; Resp. Ex. I.

²³ 56:9-58:4; Resp. Ex. J.

22. The District sent a Prior Written Notice (“PWN”) to REDACTED on July 13, 2021. The PWN identified the SMart Center for further evaluation, noting the agency’s expertise in working with children with selective mutism.²⁴
23. The District included Dr. REDACTED in an October IEP meeting in 2021.²⁵
24. REDACTED recalled Dr. REDACTED suggestions during the October 2021 IEP meeting were to address selective mutism by considering its causes.²⁶
25. The District contends the IEP discussed evaluations for Student on multiple occasions and sent multiple PWNs to REDACTED.²⁷
26. In a cover letter sent to REDACTED on October 21, 2021, the District clarified that its recommendation to use the SMart Center was for evaluations, not therapies. It appears REDACTED had objected to the SMart Center’s therapies. The letter further documented any assessment would be paid by the District.²⁸
27. The District recalls the IEP team had three or four meetings regarding the need to have evaluations for Student.²⁹
28. REDACTED described the IEP meetings as circular in nature, lasting anywhere from five to eight hours, in large part focusing on explaining or discussing the need for evaluations.³⁰
29. The District utilized a mediator through the University of Delaware and the Department of Education to try to assist the team to move forward.³¹

²⁴ Resp. Ex. J.

²⁵ 60:6-10.

²⁶ 62:11-19.

²⁷ 64:8-23.

²⁸ Resp. Ex. K.

²⁹ 65:13-17; 131:23-132:14.

³⁰ 65:18-67:3.

³¹ 67:4-22.

30. When REDACTED reviewed the District's records for Student in July of 2021, it did not possess any record of Student's medical diagnosis of selective mutism.³²

31. The District acknowledges it has no one within the school district who is an expert on selective mutism.³³

32. The District sent out PWNs through email or US mail on the following dates for varying requests to evaluate, requesting parental consent, which were dated:

- a. July 13, 2021.³⁴
- b. August 24, 2021.³⁵
- c. October 22, 2021.³⁶
- d. December 8, 2021.³⁷
- e. January 14, 2022.³⁸
- f. January 27, 2022.³⁹
- g. March 18, 2022.⁴⁰
- h. March 24, 2022.⁴¹
- i. March 29, 2022.⁴²
- j. April 26, 2022.⁴³
- k. September 2, 2022.⁴⁴
- l. October 27, 2022.⁴⁵
- m. June 6, 2023.⁴⁶
- n. June 9, 2023.⁴⁷

³² 69:15-20.

³³ 70:11-13.

³⁴ Resp. Ex. J.

³⁵ *Id.*

³⁶ Resp. Ex. K.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Resp. Ex. M.

⁴⁰ Resp. Ex. N.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Resp. Ex. O.

⁴⁵ Resp. Ex. P.

⁴⁶ Resp. Ex. Q.

⁴⁷ Resp. Ex. R.

33. As late as June 9, 2023, the District was still requesting consent to evaluate Student at the SMart Center.⁴⁸
34. The District has not exercised a re-evaluation without parental consent because of the request to utilize the SMart Center, which is in Pennsylvania and across state lines.⁴⁹
35. The District accepted the REDACTED evaluation from 2020 as compliant, which was used for Student’s IEP during the September 2021 IEP meeting.⁵⁰
36. At the September 2021 IEP meeting, REDACTED recalled telling REDACTED the IEP from REDACTED was sufficient and compliant as a transfer student from REDACTED to the District.⁵¹
37. District accepted the IEP from REDACTED for eligibility purposes as compliant, but the District believed more evaluations would be needed for Student’s programing.⁵²
38. REDACTED provided REDACTED with a 2018 psychoeducational evaluation from New York University (“NYU”) that references a previous diagnosis of selective mutism.⁵³
39. The District had two evaluations in possession, the REDACTED evaluation from 2020 and the NYU evaluation from 2018.⁵⁴
40. REDACTED opined that a medical diagnosis of selective mutism would be necessary to service and support a student with an IEP.⁵⁵
41. REDACTED , in an effort to assist Student, believed an established diagnosis of selective mutism would be helpful to the extent REDACTED does not speak. REDACTED submitted

⁴⁸ 78:24-79:5. Resp. Ex. R.

⁴⁹ 80:2-8.

⁵⁰ 89:2-10.

⁵¹ 82:2-11; 89:11-21.

⁵² 93:21-94:10; 130:13-131:6.

⁵³ 96:8-24.

⁵⁴ 98:11-16.

⁵⁵ 98:18-99:3.

anxiety, another medical issue, a speech/language issue, or a social issue could be affecting Student's ability to speak.⁵⁶

42. The District allowed for Dr. REDACTED to participate in coming up with strategies to educate Student and create weekly goals for Student at REDACTED request.⁵⁷

43. The District stopped regular consultations with Dr. REDACTED after REDACTED indicated there was nothing more REDACTED could suggest after the District had tried implementing the doctor's strategies.⁵⁸

44. Dr. REDACTED's goals were not incorporated into the IEP, but data was taken from the goals for purposes of evaluation.⁵⁹

45. If an evaluation of Student had occurred at the SMart Center, the District and the IEP team were not required to adopt the findings of the SMart Center but would be able to take the evaluation and incorporate it into the construction of Student's IEP.⁶⁰

46. The District proposed the SMart Center, hoping that their experience would guide the IEP team to consider possible comorbidities of Student and recommending appropriate strategies.⁶¹

47. Beyond the concern for selective mutism, the District has concerns for Student's vision, ADHD, physical ability, behavioral concerns, and defiance.⁶²

48. REDACTED asserts the 2018 NYU psychoeducational evaluation conducted by Dr. REDACTED confirms a medical diagnosis of selective mutism.⁶³

49. The NYU evaluation further noted impairments in expressive and receptive language.⁶⁴

⁵⁶ 136:13-138:2.

⁵⁷ 114:22-115:16; 116:5-14.

⁵⁸ 140:6-21.

⁵⁹ 119:16-120:10.

⁶⁰ 125:6-126:2.

⁶¹ 127:14-128:9.

⁶² 130:1-9.

⁶³ 190:3-14; 260:1-6; Pet. Ex. F., 76-77.

⁶⁴ 191:8-20.

50. REDACTED understands Student's diagnosis of selective mutism is not the only issue facing Student.⁶⁵
51. REDACTED, following the September 2021 IEP meeting, stated REDACTED was open and agreeable to the idea of evaluations for Student in the spring.⁶⁶
52. REDACTED received a request to evaluate from the District dated October 22, 2021.⁶⁷
53. Pertaining the October 22, 2021, PWN, REDACTED testified REDACTED did not refuse the evaluations but wanted to ask questions regarding why evaluations were happening after only eight months and why the SMart Center was being suggested.⁶⁸
54. REDACTED believes that the cause of selective mutism cannot be determined, based on REDACTED knowledge and in working with others in the selective mutism community.⁶⁹
55. REDACTED believes the District excluded REDACTED in the process of the IEP meetings or was shut down for asking questions.⁷⁰
56. REDACTED referenced an email response from Dr. REDACTED and other purported professionals in an online post for the proposition that selective mutism's causation cannot be pinpointed.⁷¹
57. On December 16, 2021, REDACTED emphasized REDACTED desire to have the District compare the 2020 REDACTED evaluation to the 2018 NYU evaluation instead of having Student go through another round of evaluations.⁷²

⁶⁵ 191:21-24.

⁶⁶ 194:8-15.

⁶⁷ 197:24-198:2.

⁶⁸ 198:2-17.

⁶⁹ 201:8-17.

⁷⁰ 217:14-218:6; 223:24-3; 241:16-24.

⁷¹ 201:18-202:6; 204:5-205:1.

⁷² 206:21-207:7; 270:5-15. Pet. Ex. E, pgs. 12-13.

58. Student was evaluated for speech at the SMart Center in 2017 and the evaluator, among other findings, notes Student displayed characteristics of selective mutism.⁷³
59. REDACTED testified to wanting to know what the evaluators would test for and details regarding what the testing would look like for Student.⁷⁴
60. REDACTED testified that during the IEP revision meeting of May 5, 2023, and a subsequent meeting on June 6, 2023, REDACTED believes REDACTED was given a predetermined IEP and disagreed with the District's proposed changes regarding services and the proposed change in educational placement.⁷⁵
61. REDACTED testified at length to specific examples where the District failed to provide FAPE to Student. REDACTED testified to REDACTED complaints regarding the District's teaching strategies for Student in specific classes.⁷⁶
62. When asked if the District is to assume Student's failure to communicate in school is based on selective mutism, REDACTED agreed.⁷⁷
63. When asked to consider other possible comorbidities such as anxiety, ADHD, speech/language issues, processing speed, IQ and cognitive abilities that might contribute to Student's inability to communicate, REDACTED adhered to her belief the communication issues were "absolutely based upon selective mutism" given REDACTED observations of Student not being able to speak in the school setting but able to do so in another.⁷⁸

⁷³ Pet. Ex. F., pgs. 84-97.

⁷⁴ 274:17-275:8.

⁷⁵ 277:9-278:15.

⁷⁶ 277:9-298:12; 342:10-353:5; 357:6-378:8.

⁷⁷ 407:22-408:3.

⁷⁸ 409:3-19; 522:14-523:5.

64. REDACTED, near the conclusion of the testimony, asserted a personal problem between REDACTED and the SMart Center, which was not further elaborated upon. This problem was not reported or known to the District until testified to by REDACTED on August 16, 2023.⁷⁹

65. Student had been to the SMart Center in 2017 for speech and language testing disorders that accompany selective mutism.⁸⁰

66. REDACTED was agreeable to an evaluation with an accredited agency with expertise in selective mutism other than the SMart Center.⁸¹

IV. LEGAL STANDARD

It is well-settled that upon a finding that a student in its district is under the auspices of a disability, that student has a substantive right to – and the public school district shall provide – a free appropriate public education.⁸² For students with a disability classification, the appropriateness of the individualized education plan is the cornerstone of a determination of FAPE – along with a review as to whether the District has complied with the procedural safeguards set forth in the IDEA.⁸³ The IEP must be created to provide a student with appropriate goals and supports to allow the child to make reasonable progress.⁸⁴ Recognizing that each student has their own unique needs and academic requirements, the law requires an IEP be more than a form document.⁸⁵ The IEP must take certain subjective measurements to calculate a student’s specific

⁷⁹ 519:10-23; 520:5-11.

⁸⁰ Pet. Ex. F., pg. 91-92; 263:21-264:12.

⁸¹ 521:16-24.

⁸² *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

⁸³ *Id.*

⁸⁴ *Id.* at 994.

⁸⁵ *Id.* at 999.

needs.⁸⁶ A student’s substantive right to FAPE includes the right to an IEP with educational instruction “specially designed...to meet the unique needs of a child with a disability,” including any related services that may be necessary to implement the student’s individual plan.⁸⁷ The U.S. Third Circuit has held that an IEP must be created with an eye towards producing “progress, not regression or trivial educational advancement.”⁸⁸

The federal and state regulations that govern re-evaluations of special educational students is controlled by 34 C.F.R. § 300.300(c) and 14 DE Admin. Code 925.1.3. The Delaware Administrative Code (“Code”) states that “each public agency shall obtain informed parental consent, in accordance with subsection 1.1 prior to conducting any re-evaluation of a child with a disability.”⁸⁹ Subsection 1.1 requires the District to provide “notice consistent with 14 DE Admin. Code 926.3.0 and 926.4.0” before the District “obtain[s] informed written consent from the parent of the child before conducting an evaluation.”⁹⁰ The Code states that if a parent refuses to consent to a re-evaluation, the District can choose to pursue the consent override procedures that are available in the Code.⁹¹ However, the Code also clarifies that the District does not violate its obligations to provide FAPE if the District declines to pursue the re-evaluation.⁹² When a parent fails to consent to services, a school district is no longer obligated to provide FAPE to a student.⁹³

V. DISCUSSION

⁸⁶ *Id.* at 1001-02.

⁸⁷ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (citing 20 U.S.C. § 1401(29)).

⁸⁸ *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254.

⁸⁹ 14 DE. Admin. C. § 925 (1.3).

⁹⁰ 14 DE. Admin. C. § 925 (1.1).

⁹¹ 14 DE. Admin. C. § 925 (1.3.1).

⁹² 14 DE. Admin. C. § 925 (1.3.2).

⁹³ *Cone v. Randolph Cnty. Sch. Bd. of Educ.*, 657 F. Supp. 2d 667, 676 (M.D.N.C. 2009)(citing 20 U.S.C. § 1414(a)(1)(D)(ii)(II)).

- a. Whether the District's requests to evaluate Student at the SMart Center were reasonably calculated to benefit Student and were reasonably presented to REDACTED such that REDACTED refusal to consent relieves the District of its FAPE responsibilities?

Based on the record and the testimony provided to the Panel, it is clear that REDACTED never consented to any evaluation of Student while Student has attended the District, dating back to July of 2021 to the present. No written consent by REDACTED was supplied by the District and REDACTED testimony throughout the hearing establish REDACTED never consented to any PWN or any request to evaluate Student at the SMart Center or elsewhere.⁹⁴ Because the District argues REDACTED failure to consent relieves the District of their responsibility to provide FAPE, the District bears the burden of showing its requests for consent to evaluate were reasonable.

As a starting point, the Panel credits the exhibits presented by the District documenting the Permissions to Evaluate and PWNs that were sent to REDACTED from July 2021 to June 2023, which specifically requested more testing and evaluations of Student at the SMart Center, an agency that specializes in serving children with selective mutism. The District's reasoning for suggesting the SMart Center were based on the observed fact that Student did not verbalize in the school setting and REDACTED own insistence that Student was medically diagnosed with selective mutism. The Panel credits the testimony that the SMart Center was the closest agency, geographically, for the District to suggest, even though the agency is located out of state in Pennsylvania. For purposes of crafting an IEP tailored to Student's perceived individual needs, the Panel finds the District's recommendation of the SMart Center as a logical choice given the

⁹⁴ REDACTED has attempted to dispute this claim that she refused to consent, even though it is plainly clear on the record REDACTED never consented in writing to the requests to evaluate from the District. To the extent REDACTED has not affirmatively consented, the Panel finds REDACTED has effectively and practically refused, despite REDACTED protests. 461:13-462:8.

identified needs of the Student and the District's own acknowledgement that it did not possess the necessary expertise or staff to consider the unique questions regarding Student's non-verbal behaviors in school.

The Panel further credits REDACTED testimony that the District engaged in communication with REDACTED in a variety of ways to both explain and obtain consent from REDACTED, whether it was through PWNs or within the discussions that were held when the IEP team met to consider Student's IEP. For example, in the cover letter dated on October 21, 2021, and the PWN of December 8, 2021, the District explained to REDACTED why the SMart Center was being recommended. The letter informed REDACTED, in an apparent response to objections raised by REDACTED prior to October 2021, that the SMart Center was only being recommended to evaluate Student. The letter clarifies REDACTED would not pay the costs for the testing. Both the cover letter and the PWN of December 2021 recommend the SMart Center conduct assessments to determine if Student had a medical diagnosis of selective mutism. The IEP team had lengthy meetings, lasting multiple hours and requiring continuations. To try to streamline the meetings, the District attempted to use neutral mediators.

REDACTED has argued that she was not an equal participant in the IEP process and has suggested REDACTED has been muzzled or punished for asking questions of the IEP team. At times during testimony, REDACTED characterized the District's actions in a somewhat hostile manner, using terms such as a power play or bargaining chip.⁹⁵ REDACTED seems to suggest the IEP process was biased against REDACTED and Student, forcing the recommendation of the SMart Center upon Student which calls into question whether the request for consents and IEP process were fair.

⁹⁵468:13-15; 276:18-22; 496:19.

The Panel, however, rejects these arguments and finds REDACTED was a participant in the IEP process. While it is clear REDACTED did not agree with the proposals of the District, the disagreement between the two parties does not mean REDACTED was unable to participate or have REDACTED questions answered. On this point, the Panel credits the testimony of the District in which it was represented that the IEP meetings were unusually long, lasting many hours and focusing at length on requests to evaluate, which are not typically points of contention. The IEP meetings were circular in nature and special mediators were brought into the meeting to help facilitate it, without any apparent success. REDACTED claims the District and more specifically, REDACTED, was short-circuiting the IEP process by not answering REDACTED questions or being told to move along. When asked to provide context for an email in which REDACTED stated REDACTED was no longer going to debate REDACTED, REDACTED clarified the response “was after many discussions through the IEP meetings, through emails of us going around and about what the evaluations were, we wanted the evaluations. And it had just, no matter what I said, I couldn’t satisfy REDACTED questions.”⁹⁶ Accordingly, the Panel finds the two-year delay from the time that has elapsed from July of 2021 to June of 2023 in seeking consent to evaluate Student is more attributable to REDACTED actions and behaviors than the District.

The District also believed the SMart Center was a reasonable choice for evaluations because the District wanted the SMart Center to consider and opine on why Student was not speaking in the classroom setting. Stated another way, the District wanted to explore the reasons or cause of Student’s mutism. In support of this, the District maintained that it did not have any medical diagnosis of selective mutism in their records and that an absence of a medical diagnosis

⁹⁶ 525:19-526:6.

was one of, but not the only reason, the District sought evaluations from the SMart Center.⁹⁷ REDACTED testified that the District had two psychoeducational evaluations in its records, a 2020 psychoeducational evaluation from REDACTED and a 2018 psychoeducational evaluation that was conducted by Dr. REDACTED from NYU. The District maintains that both evaluations lacked specific testing for selective mutism and that both evaluations failed to medically diagnosis Student with selective mutism. This contention is critical because REDACTED, contrary to the District, testified to REDACTED belief that both evaluations supported a diagnosis of selective mutism and argued that the District's insistence with obtaining an evaluation at the SMart Center was unreasonable because it was either (1) duplicative, since a medical diagnosis was already obtained or (2) a waste of time and resources because of REDACTED belief that finding the root cause of a student's selective mutism would not yield any meaningful educational benefit.

The Panel has conducted a careful review of the two psychoeducational assessments from the REDACTED ESR of 2020 and the 2018 NYU evaluation and concluded that neither evaluation was a medical diagnosis of selective mutism.

In reviewing the 2020 REDACTED evaluation, the Panel notes the evaluator did not have access to certain historical records from New Jersey. REDACTED testified that REDACTED wanted a fresh start and therefore refused to provide all the records to REDACTED In reviewing the evaluation, references to a past diagnosis of selective mutism are noted; however, there appears to be no specialized testing geared toward selective mutism. The evaluation conducted a battery of tests typically utilized in a standard psychoeducational evaluation (WISC-5, BASC-3, KTEA-

⁹⁷ While the focus of the SMart Center was for its expertise in selective mutism, it is important to note that the SMart Center was requested by the District to consider other comorbidities Student may possess in relation to selective mutism with regards to issues like anxiety, ADHD, vision impairment, speech and language deficits and other concerns.

3) but did not appear to conduct any tests regarding selective mutism. Accordingly, the Panel does not believe this evaluation adequately explored the concern of selective mutism.

The Panel has also reviewed the 2018 NYU evaluation, specifically the summary portion highlighted during testimony.⁹⁸ REDACTED heavily relies on and argued to the Panel that this report by Dr. REDACTED and the language contained within it is a medical diagnosis of selective mutism. After a careful reading of the disputed section, the Panel does not agree with REDACTED contention this evaluation serves as a medical diagnosis for selective mutism for a variety of reasons. First, when reading the evaluation, it is clear to the Panel that Dr. REDACTED did not make a selective mutism diagnosis based on REDACTED own testing, but instead, noted a prior medical diagnosis of selective mutism. In the first paragraph citing the reason for the referral, Dr. REDACTED accepts as an established fact that Student has selective mutism.⁹⁹ Likewise near the end of the evaluation, Dr. REDACTED acknowledged a “previous diagnosis of Selective Mutism, which is *supported* in this evaluation.”¹⁰⁰ This is in contrast to the more active language used by Dr. REDACTED when diagnosing Student for Language Disorder and ADHD (“these scores *warrant* a DSM-V diagnosis of Language Disorder” and “[Student] *meets* many criteria related to the diagnosis of [ADHD]”).¹⁰¹ Furthermore, Dr. REDACTED used similar tests to the psychoeducational evaluation used in the 2020 REDACTED evaluation, such as the WISC-5, KTEA-3, and BASC-3 and does not appear to have employed any selective mutism specific testing.¹⁰² Finally, the 2018 NYU evaluation specifically recommended a re-evaluation of Student

⁹⁸ Pet. Ex. F., pg. 76.

⁹⁹ *Id.* at 68.

¹⁰⁰ *Id.* at 76. (emphasis added).

¹⁰¹ *Id.* at 76-77. (emphasis added).

¹⁰² *Id.* at 68-77.

in a year, which does not appear to have been conducted based upon REDACTED testimony during cross-examination.¹⁰³

Accordingly, the Panel finds the District did not possess a medical diagnosis of selective mutism and, as a result, the Panel further finds the District's request regarding possible causation for Student's selective mutism to be a reasonable request. It is troubling to the Panel that REDACTED has not seemed to provide documentation of a medical diagnosis even though in REDACTED own testimony she claimed Student had been to "several of the best selective mutism experts in the country" and that "[t]hey obviously each did their own exams."¹⁰⁴ The Panel would further note that REDACTED submitted voluminous amounts of pages and exhibits, a majority of which were accepted into evidence, consisting of email communications with teachers and class specific emails regarding class assignments or grades. Because REDACTED appears to be meticulous in document preservation, it makes the absence of any medical report noteworthy and concerning. No expert witness was called by REDACTED and no report has been provided by REDACTED to settle the question of whether a medical diagnosis of selective mutism has been established. REDACTED has suggested to the Panel through REDACTED own research on the internet, emails with Dr. REDACTED, and in chatting with selective mutism experts online, that the District's desire to find the root cause of selective mutism would not be helpful to the IEP process. However, REDACTED is not an expert in selective mutism and to the extent that REDACTED reached out to professionals in the field for their opinion, the Panel cannot give significant weight to any of this evidence.

Based upon the findings above, the Panel finds that the District's request for specialized testing at the SMart Center as appropriate. From the records available to the District, it was

¹⁰³ 446:16-19.

¹⁰⁴ 255:13-16.

reasonable to believe Student had not been given specialized testing or evaluations for a suspected diagnosis of selective mutism for at least five years, maybe more. Even if REDACTED had produced a document or supplied expert testimony to the diagnosis of selective mutism in the past, the Panel would still support evaluations at the SMart Center given that, at minimum, it appears five years has passed, making any such evaluation or diagnosis of selective mutism dated and old for purposes of ensuring an up-to-date IEP for Student.

After considering the District's position with regards to its requests for consents from REDACTED to evaluate, while considering REDACTED objections to those requests and REDACTED arguments that could have potentially countered the reasonableness of the District's requests, the Panel finds the District has sufficiently shown that the numerous requests to evaluate were reasonable and necessary to develop an appropriate IEP for Student. The District has further shown to the satisfaction of the Panel, that REDACTED has not consented to the numerous requests to evaluate at the SMart Center.

As part of this finding, the Panel finds the District's presentation of evidence to be more credible than that of REDACTED presentation. The Panel finds that REDACTED failed to provide certain documents to the District, most notably a medical diagnosis of selective mutism that REDACTED suggests occurred but has no record or expert testimony to support this proposition. The Panel notes that REDACTED claim to start fresh in Delaware coming from the New Jersey school system and consequently rejecting REDACTED request for prior documentation is also worrisome to the Panel in the context of this case. In multiple responses to questions asking if REDACTED had any medical diagnosis of selective mutism, REDACTED indicated, on multiple occasions that REDACTED would have provided it if only it had been asked for.¹⁰⁵ The Panel

¹⁰⁵ 254:6-18; 390:6-391:3; 392:5-23.

finds these answers wanting, given the importance that REDACTED REDACTED attached to the diagnosis of REDACTED child with selective mutism and REDACTED claims that REDACTED had consulted with many experts in the field of selective mutism who had done examinations.¹⁰⁶ Lastly, at the end of the second day of testimony, REDACTED testified, after being pressed for an explanation of why REDACTED objected to the SMart Center, that REDACTED had experienced a personal problem with the staff at the SMart Center when it had evaluated Student in 2017 for speech and language concerns.¹⁰⁷ While the Panel does not discredit REDACTED personal beliefs or feelings towards the center, for purposes of developing the IEP, the Panel would note that REDACTED original objection dating back to 2021 to the SMart Center was that REDACTED simply disapproved of their therapies. If the District had known of this issue prior to testimony, it stands to reason that the District would have likely suggested another selective mutism agency. Instead, nearly two years of time has elapsed.

- b. Whether the District failed to provide FAPE to Student during REDACTED time of enrollment with the District?

Because the Panel has found REDACTED has not consented to the requested evaluations from the District and that those requests were reasonable and necessary for developing an IEP for Student, this Panel will not consider REDACTED claims regarding FAPE, the educational placement of Student or the associated requests of relief asked for by Student. Federal and State regulations hold that if a parent fails to provide necessary consent for the school to request

¹⁰⁶ 255:13-16.

¹⁰⁷ 519:10-520:11.

evaluations, then the school cannot be held liable for FAPE when it cannot reasonably evaluate a student to assess that student's needs and craft an IEP plan.

VI. CONCLUSION AND ORDER

The Panel finds that the District did not violate its requirements to provide FAPE to Student because REDACTED has not provided necessary consent for evaluations. The District's requests to conduct evaluations were reasonable and prudent, given Student's educational history and what was known to the District. The reasonableness of the District's requests for an evaluation from July of 2021 to June of 2023 never dissipated over time, and despite continued requests by the District and multiple IEP meetings discussing the topic of evaluations, REDACTED has refused to consent. For reasons already set forth in this opinion, REDACTED arguments that attempt to counter or rebut the District's requests for consents to evaluate are unavailing and not credible. Therefore, REDACTED claims alleging violations of FAPE must fail.

The Panel orders the following:

1. Records or medical diagnoses of Student in the possession of REDACTED regarding any findings that may have ruled in or ruled out selective mutism, regardless of when the evaluation occurred, shall be provided by REDACTED to the District immediately.
2. The Panel orders an evaluation with an accredited agency specializing in selective mutism be identified by the parties within 20 days and an evaluation be conducted within 60 days of this order, unless the identified agency cannot schedule within the time period ordered, then as soon as that identified agency can reasonably schedule an

evaluation. The agency may be outside the state of Delaware. The IEP team must take all reasonable efforts to utilize an appropriate agency that is not the SMart Center. The cost of the evaluation will be paid by taxpayer expense.

3. The Panel refrains from making any changes in the educational placement of Student until an assessment is completed and the IEP team reviews the findings.
4. The Panel denies the request of Student to find the District withheld FAPE and is in violation of the IDEA.

IT IS SO ORDERED, this 1st day of September 2023.

VII. NOTICE OF RIGHT TO APPEAL

The decision of the Panel is a final order unless a party seeks judicial review. Any party aggrieved by the hearing officer's decision has the right to seek judicial review in the U.S. District Court or the Delaware Family Court within ninety (90) days of the date of this written decision, as provided in 20 U.S.C. § 1415(i)(2) and 14 *Del. C.* § 3142.

/s/ Jonathan Harting, Esq.

PANEL CHAIRPERSON

/s/ Diane Latocha

EDUCATION PANELIST

/s/ Jon Fletcher

LAYPERSON PANELIST

cc: REDACTED
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