

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

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

**DUE PROCESS HEARING DECISION
CLOSED HEARING**

ODR No. 01481-1011 KE
ODR No. 01589-1011 KE
(Consolidated)

NAME OF CHILD: I.H.
DOB: [redacted]

DATES OF HEARING: November 17, 18 and 19, 2010
RECORD CLOSED: December 10, 2010
DATE OF DECISION: December 25, 2010

Parties to the Hearing

Representatives

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Introduction and Procedural History

PRIOR DECISIONS

D.S. (Guardian) is the grandmother and legal guardian of Student.¹ The instant matter is the third and fourth due process hearing between the Guardian and the Cumberland Valley School District (District). The prior two hearings are *I.H. v. Cumberland Valley Sch. Dist.*, ODR No. 01054-

¹ Other than in the original, un-redacted caption of this matter, references to the Student's name and gender have been omitted as a privacy consideration, even if that yields some awkward phrases.

0910 AS (McElligott, June 9, 2010) (*I.H. 1*) and *I.H. v. Cumberland Valley Sch. Dist.*, ODR No. 00908-0910 KE (McElligott, July 31, 2010) (*I.H. 2*).²

In *I.H. 1*, Hearing Officer McElligott considered the appropriateness of an extended school year (ESY) placement that the District offered to the Student for the summer of 2010. In *I.H. 1*, the parties had stipulated what services the Student should receive in the summer. The only question was whether the District had proposed an appropriate location in which to deliver those services. The District had proposed to deliver summer programming in the middle school that the District envisioned the Student being placed in the 2010-2011 school year. The District made this choice, in part, so that the Student would have an easier time transitioning to that middle school. *I.H. 1* at 4. The Guardian and the Student preferred a different middle school because the Student had a negative association with the proposed middle school and because Student's friends attended the other middle school. *Id* at 5. The middle school that the Guardian preferred is the Student's neighborhood school, which the Student attended during some of the 2009-2010 school year. Hearing Officer McElligott found that the proposed middle school was an appropriate location to deliver ESY services in the summer of 2010.

I.H. 2 was initiated by the District pursuant to 34 CFR 300.502(b)(2) to defend its reevaluation report (RR) of December 2009 after the Guardian requested an independent educational evaluation (IEE) at public expense. Hearing Officer McElligott found a number of significant substantive flaws in the December 2009 RR: it included no new assessments or updated data at a time when the Student was experiencing significant difficulties in school; it did not include dates that would allow a reader to “follow the flow of assessment data over time;” data was added to the December 2009 RR without the Guardian's consideration and the team did not meet to discuss this data; and the December 2009 RR failed to consider the “various diagnoses of Asperger's Syndrome or other diagnoses related to the autism spectrum ... swirling around [the Student].” *I.H. 2* at 7-8. As such, Hearing Officer McElligott found in favor of the Guardian.

PRE-HEARING ORDERS

The Guardian initiated a third hearing on August 25, 2010. That hearing request was assigned ODR No. 01481-1011 KE. In that hearing request, the Guardian demanded compensatory education from March 19, 2007³, revisions to the December 2009 RR, revisions of the Student's IEP to include recommendations from an independent school psychologist, and placement at in the same middle school that the Guardian preferred in *I.H. 1*.⁴

The Guardian initiated a fourth hearing on September 19, 2010. That hearing request was assigned ODR No. 01589-1011 KE. In that hearing request, the Guardian demands that the District withdraw a Permission to Reevaluate form (PTRE) dated September 14, 2010 and “incorporate” eligibility categories identified by an independent school psychologist and an independent neuropsychologist. This hearing was consolidated with ODR No. 01481-1011 KE.

² To avoid confusion, *I.H. 1* has a higher ODR file number than *I.H. 2* because it was requested later. However, *I.H. 1* was an expedited hearing concerning summer programming and, therefore, was decided first.

³ The Guardian does not specify an end date for compensatory education in her demand.

⁴ The Guardian also demands reimbursement of attorneys fees. Such demands fall outside my jurisdiction.

A number of pre-hearing motions followed. Most significantly, the District moved to dismiss claims arising prior to August 25, 2008. The District argued that the limitation periods of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA) apply to this case, making claims arising more than two years prior to the filing of 01481-1011 KE time-barred by statute. In response, the Guardian argued that exceptions to the IDEA's limitations period, found at 20 U.S.C. § 1415(f)(3)(D)(i) and (ii) apply in this case, and that all of the facts giving rise to the exceptions are not specifically detailed in the hearing request. The Hearing Officer resolved the issue by denying the District's motion but ordering the Guardian to submit an offer of proof explaining the facts that she believed gave rise to either exception. The Guardian complied by submitting the offer of proof. The District then renewed its motion to dismiss time-barred claims and the Guardian moved in opposition to the District's motion.

With the limitations issue thoroughly briefed, the Hearing Officer took the facts alleged in the Guardian's offer of proof as true and issued a pre-hearing order that claims arising on or before June 8, 2008 are time-barred. A complete legal analysis of that pre-hearing decision is stated in H-8.⁵

ISSUES

There has been some debate as to what issues are properly presented in this matter. Relying on 34 C.F.R. § 300.511(d), the District argues that any issue not raised in the due process complaints are not properly before the Hearing Officer. The cited regulation precludes issues not raised in the complaint “unless the other party agrees otherwise.” *Id.* At the start of this hearing, the Hearing Officer stated what he understood the issues to be. N.T. at 27-29. Both parties agreed with the Hearing Officer's recitation of the issues. N.T. at 28. As such, the issues in this hearing are:

1. Is the Student entitled to compensatory education from June 2008 to the present?
2. Should the Student be placed in the neighborhood school and, if so, what services should the Student receive there?
3. Should the District incorporate the findings of the two prior IEEs into the student's IEP?
4. Should the District withdraw its currently pending evaluation request?

Findings Of Fact

The 2006-2007 (3rd Grade) School Year⁶

⁵ “N.T. ___” refers to the Notes of Testimony of the due process hearing, “P-___” refers to the exhibits offered by the Guardian, “S-___” refers to the exhibits offered by the District and “H-___” refers to the Hearing Officer's Exhibits. The Guardian's exhibits were marked with a “P” in accordance with standard ODR procedures.

⁶ A considerable amount of documents and testimony were presented concerning periods of time prior to June 8, 2008. This provides important background, as the services that the Student received during the period in question were often predicated on what came before.

1. The Student moved into the District in the summer of 2006, when the Student came to live with the Guardian.⁷
2. The Student began school in the District at the start of the 2006-2007 (3rd grade) school year.
3. During the entirety of the Student's education in the District, both the Guardian and the Student's teachers have noted the Student's impulsivity. According to self-reports, the Student knows and understands the correct behavior in a variety of situations, but behaves otherwise due to a number of factors, including impulsivity. N.T. 79, 267, 336. Evaluators have speculated that the Student's background is a contributing factor to this. The Student's first reaction to a situation may be physical aggression, but the Student understands that others do not respond the same way and that the Student's responses are improper. S-5.
4. At the Guardian's request, the District evaluated the Student and issued an initial evaluation report (ER) on May 30, 2007.⁸ S-2. The ER notes that the Guardian reported that the Student had been diagnosed with attention deficit hyperactivity disorder (ADHD) and post traumatic stress disorder (PTSD). The report also includes teacher input, a classroom observation by a school counselor intern, and the results of standardized aptitude testing. Specifically, the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Wechsler Individual Achievement Test – Second Edition (WIAT-II) and the Woodcock-Johnson III Test of Achievement (WJ-III) were all administered. The Student's teacher and Guardian both completed the Scale for Assessing Emotional Disturbance (SAED). The ER includes results from a functional behavioral assessment (FBA), but a formal FBA was not conducted.
5. Academically, the Student fell in the “average” range in all reported math sub-tests on the WIAT-II. S-2. However, there were considerable discrepancies in other tests and sub-tests that assessed the student's full scale IQ, reading and writing abilities. The author of the ER concluded that the Student was “exhibiting specific learning disabilities with written expression and spelling skills.” *Id.*
6. Emotionally, the Guardian rated the Student within the clinically significant range on the SAED. The teacher rated the student just outside that range, but expressed concerns that the Student's emotional state affects the Student's classroom performance. *Id.* The Guardian and the Student both reported that the Student sometimes wanted to hurt []self and that sometimes “voices tell [the Student] to do bad things.” *Id.* at 9. Other teachers rated the student at-risk with overall behavioral symptoms, anxiety, depression, somatization, and atypicality. *Id.*
7. Behavioral concerns consistent with the Student's ADHD diagnosis were noted across the board, as were concerns about the Student's emotional well being and difficulties with organization.

⁷ The Student's traumatic background was explained during the hearing and is well-known to the parties. The abuse that the Student faced in childhood need not be recounted in detail here.

⁸ The Guardian claims to have requested this evaluation on January 19, 2007. Assuming this is true, the violation of the evaluation timeline falls outside the potential liability period in this case.

8. The ER concludes that the Student is a child with a disability and is in need of specially designed instruction. The Student's primary disability category was Emotional Disturbance and the secondary category was Other Health Impairment. The Guardian approved the ER when it was provided to her on June 4, 2007. S-2 at 14.

The 2007-2008 (4th Grade) School Year

9. Although the ER was completed on May 30, 2007, the Student did not have an IEP for the final days of the 2006-2007 (3rd grade) school year. There is some ambiguity in the record about when the Student received an IEP following the ER. The Guardian avers that the IEP came at the start of the 2007-2008 (4th grade) school year. There is no IEP in the record for that period of time. An IEP of September 5, 2007 was originally included in the District's exhibit binder, and may have been included in the Parent's binder as well. As no reference was made to those exhibits during the hearing, they were removed from the binders (and from consideration in this decision) at the end of the final hearing session. N.T. at 759.
10. During the 2007-2008 (4th grade) school year, the Guardian testified that she was spending two and a half hours at night with the Student on homework – math homework in particular – and reported that the Student was overwhelmed and became very upset when the Student had to take tests. N.T. 264-265. This testimony was credible.
11. During the 2007-2008 school year, the Guardian received an evaluation of the Student which placed the Student on the Autism spectrum. The Guardian testified, credibly, that she shared the information in these reports – if not the reports themselves – with the District. N.T. at 267.

The 2008-2009 (5th Grade) School Year

12. The District reevaluated Student during the 2008-2009 school year. The Guardian requested the reevaluation on October 3, 2008. S-5 at 25-26. The record includes a reevaluation report (RR) that certainly comes after the Guardian's request of October 3, 2008. S-5. The date of that RR is not clear. The document itself indicates that the report was given to the Guardian on December 5, 2008. However, the report also considers a psychological assessment that was completed on December 29, 2008 and includes teacher input dated January 13, 2009. The report was signed and approved by the Student's evaluation team, including the Guardian, but there are no dates with the signatures.⁹ It appears that the document was revised a number of times to include new data at various points. Regardless, the document notes that the Student had been diagnosed with ADD, PTSD, Anxiety and “Pervasive Developmental Disorder (PDD-Asperger's Syndrome)”.¹⁰

⁹ This Hearing Officer shares his colleague's concerns regarding the inconsistent or non-existent dates of some of the Student's educational records. Including a date line where ever there is a signature would go a long way to resolve this issue, as would clear records of how and when documents are revised.

¹⁰ PDD, or pervasive developmental delay, and Asperger's Syndrome are, by definition, not the same thing. Despite this, the RR certainly acknowledges that the Student has some diagnosis that places the Student on the Autism spectrum.

13. Substantively, the RR at S-5 summarizes a psychological evaluation conducted by a licensed psychologist. That evaluation noted problems with impulse control, disorganization and social skills and self regulation, all of which supported a “continuation of the diagnosis of Pervasive Developmental Disorder (PDD), NOS Asperger's.” S-5 at 2. Summarizing the psychological report, the RR notes that the Student “has ongoing emotional, behavior and social issues that require intervention.” *Id.* The RR goes on to note the results of the prior aptitude testing and provide updated information from the Student's classroom teacher and emotional support teacher.
14. In addition to the reviews listed above, the RR as S-5 includes the results of an Occupational Therapy (OT) Evaluation and a Speech and Language (S/L) Evaluation. The OT evaluation included a Test of Visual Perceptual Skills – Revised (TVPS-R), a Sensory Processing Measure (SPM) and a review of past work. On the TVPS-R, the Student scored in the average, above average, or significantly above average range in all sub-tests. On the SPM, however, the Student scored in the “some problems” range on the Vision Scale sub-test and in the “definite disfunction” range on the Motor Planning Scale sub-test. As a result, the evaluator would expect to see problems with sensory seeking behaviors in class, as well as with organizing and planning novel actions. Consultative OT services were recommended in the area of sensory modulation and fine motor skills (handwriting and typing).
15. For the S/L Evaluation in the RR at S-5, the evaluator administered the Comprehensive Assessment of Spoken Language – Form 2 (CASL-2); the Test of Pragmatic Language – 2 (TOPL-2); the Test of Problem Solving – 3, Elementary (TOPS-3E); the Social Language Development Test – Elementary; the Clinical Evaluation of Language Fundamentals - 4th Ed. (CELF-4) and the Double Interview by Michele Garcia Winner. In the CASL, the Student scored “average” or “above average” in all sub-tests. On the TOPS-3E, the Student scored “average” in all sub-tests except for Sequencing, in which the Student scored “below average.” The evaluator noted that the score in Sequencing may be deflated as a result of the Student's lack of personal experience regarding some of the questions in that sub-set. The TOPL-2 indicated weaknesses in social/pragmatic language but, again, the evaluator urged caution in interpreting the results, noting that the Student said that [the Student] would respond to certain situations with physical aggression – but that the Student understood that such responses were improper. The evaluator remarked that the Student was exposed to an environment in which physical aggression was used to solve problems before coming under the care of the Guardian. On the Social Language Development Test, the Student was average in all areas except for one sub-test that measures inferencing. The CELF-4 is a rating scale completed by the Student's teachers, all of whom rated the Student below the expected mark for same-aged peers, indicating problems with communicating in context. On both the Social Language Development Test and the CELF-4, the evaluator urged caution in interpreting the results, given the Student's background and emotional issues. The Double Interview is reported, but no explicit conclusions are drawn from it. Ultimately, the evaluator concluded that the Student's few identified problems in speech and language – particularly in social and pragmatic skills – were better addressed through emotional support than through speech and language interventions.
16. The Guardian, both through testimony and through arguments made by her attorneys, criticize the decision to address the speech and language issues described above through

emotional support interventions. The Guardian argues that the evaluators rely too heavily on the Student's self-reports, given the Student's executive functioning difficulties, which make it difficult for the student to act in accordance with the behaviors that the Student knows to be correct. One of the Student's independent evaluators also testified that it would be inappropriate for the Student to be educated with other students who have emotional support needs. N.T. at 418. Instead, the Guardian argues that the Student must learn social pragmatics through speech and language interventions, and claims to have specifically asked for instruction in that modality. N.T. at 275

17. Distractability, impulsivity and relative weakness in social/pragmatic skills are noted throughout the RR, as well as the Student's need for support with written expression. At the same time, the RR notes "solid achievement in reading and math." S-5 at 14. This reporting about math is consistent with PSSA scores placing the Student at the "Advanced" level in math in 4th grade and the "Proficient" level in 5th grade.
18. Even with all of the foregoing, the Student's team determined that additional data was needed and a new WJ-III was administered along with a Behavior Rating Inventory of Executive Functioning (BRIEF), a new SAED and an FBA.¹¹ The FBA was an observation of the student, but not a formal assessment by a trained evaluator. According to the WJ-III, the Student's academic skills (including reading and math) were average, but the Student's fluency with academic tasks and written expression were both in the low average range. S-5 at 15. The BRIEF revealed that the Student has significant executive functioning concerns in nearly all measured areas, and specific interventions to address these concerns are listed. S-5 at 17-18. On the SAED, both teachers and the Guardian provided ratings that indicate the student fits into the Emotional Disturbance category for IDEA purposes.
19. In the end, the RR at S-5 concludes that the Student is still a student with a disability in need of special education with a primary disability category of Emotional Disturbance and a secondary disability category of Other Health Impairment.¹² The Guardian approved the RR at S-5.
20. On January 8, 2009 (after the RR at S-5, whatever its actual date may be), the Student's IEP team reconvened. S-7.
21. The IEP at S-7 indicates that the Student requires assistive technology and exhibits behaviors that impede the Student's learning and that of others. A behavior plan is included in the IEP, as is use of a spell-checker. S-7 at 22, 24. The IEP also reports that the Student has sensory issues as per the OT Evaluation, and has been diagnosed with Asperger's Syndrome. S-7 at 10. Present education levels report strong math ability and average reading ability, but that the Student avoids writing. Behavioral needs are described consistently with the RR. The IEP includes a writing goal, two emotional support goals, an organization goal and a social skills goal. The IEP also includes an extensive list of modifications and specially designed instruction (SDI) to enable the student to make progress towards the identified goals.

¹¹ Again, the omission of dates for this new round of testing is problematic. It is not immediately apparent that this WJ-III is different than the WJ-III in S-2.

¹² This implies that the prior IEP, omitted from this record, used the same categories.

22. The IEP at S-7 indicates that the Student does not qualify for ESY services because the Student “does not demonstrate difficulties with skill regression over breaks.” S-7 at 30. The Guardian testified that ESY was not discussed at the IEP meeting. N.T. at 268.
23. During the time that the IEP at S-7 was implemented, the Guardian testified that she would spend two and a half hours per night doing homework with the Student. N.T. at 264-265.
24. The Guardian was in frequent contact with the District in the 2009-2010 school year, and expressed her concerns about the Student's math and organization skills.

The 2009-2010 (6th Grade) School Year

25. For the 2009-2010 (6th Grade) school year, the Student started attending the neighborhood middle school. The Guardian testified that the Student became overwhelmed in this new setting. N.T. at 279. Emotional support services were increased to two or three 30-minute sessions per cycle. N.T. at 523. The emotional support teacher considered this level of support to be sufficient to meet the Student's needs. N.T. 517.
26. The Student started the 2009-2010 school year under the IEP at S-7. Under that IEP, the Student received itinerant learning support. The learning support teacher was “pushed into” the Student's regular education classes for social studies, science, and writing. The Student would go to the learning support classroom for work on organization skills and writing. N.T. 78. The amount of time that the Student spent in learning support increased during the 2009-2010 school year as a result of the District's adoption of a balanced literacy program. N.T. 133-134.
27. The Student's teachers testified that the Student had difficulty in writing during the 2009-2010 school year. The Student exhibited stress in school during work that involved writing to the point that the Student would punch holes in paper or in calculators. N.T. 66, 77-78, 519.
28. The Student's teachers and the Guardian paint very different pictures of the Student's math abilities in the 2009-2010 school year. At home, the Student would tell the Guardian that the Student did not know how to do math homework and would shut down if the Student perceived that the Student had a lot of math homework problems. In school, the Student demonstrated an understanding of math concepts and could complete homework not done at home in a short time with minimal assistance. N.T. 74-75, 87.
29. Although there was no math goal in the Student's IEP, the Guardian and the District agreed to an accommodation (through an IEP amendment in the SDI section) by which the Student would receive only half the regular math homework every night. P-16 at 20-21; S-13 at 5; N.T. 66, 186. The Student's teachers testified that this program modification was required, but that a math goal was not required, because the Student was not “experiencing any issues with math except for the homework responses.” N.T. 48. Even with this accommodation, the Guardian testified that the Student was now spending four hours per night on homework.
30. The Student was moved to a lower-level math class in 6th grade. The District claims that the Student was too advanced for the lower-level math class, but placed the Student in that class anyway – apparently in acquiescence to the Guardian's demands. N.T. at 40, S-40. At the

same time, the Guardian was also asking for the Student to receive extra help in Math. N.T. at 280, 290.

31. The Guardian argues that the District failed to conduct an FBA until the Student's 5th grade year despite recognizing problematic behaviors in 3rd grade. Reports going back to 3rd grade do include observations that the District characterizes as FBAs. See S-2. These observations, however, are the reports of teachers who are not behavioral analysts and have limited training in that field. The District psychologist who wrote a more complete FBA in the 2009-2010 school year did not conduct any observations that contributed to that analysis. S-15, N.T. 55, 688-689, 699-700.
32. During the 2009-2010 school year, the Student's teacher who was responsible for implementing the Behavior Support Plan testified that the Student's behaviors were inconsistent, as were organizational skills. That teacher did not testify that the Student make progress in either of these areas – both of which were targeted through IEP goals. N.T. at 56, 60-63. If progress data was recorded, it is not part of the record of this hearing.¹³
33. The Student contracted swine flu, and was absent between October 19 and October 29, 2009. N.T. 361-62; S-17.
34. The Student experienced a very large amount of stress in school during the 2009-2010 school year. A gastroenterologist diagnosed the Student with a condition in which the Student's physical reaction to stress caused esophageal spasms, which caused a small blood vessel to rupture, which caused the student to spit up blood. N.T. at 306. The Student's teachers were aware [of the Student's condition]. N.T. at 194. Not surprisingly, the Student made frequent trips to the school nurse. S-18. Some of those trips were also to avoid non-preferred classes.
35. On one occasion, the Student expressed suicidal thoughts to the emotional support teacher.¹⁴ N.T. at 527-528. This prompted an emergency meeting on November 11, 2009. On November 12, 2009, it was determined that the Student would “not be required to complete homework other than studying for tests.” S-7 at 22; N.T. at 189. Only the principal of the Student's middle school, one of the Student's teachers, and the Guardian were in attendance at the meeting in which this accommodation was agreed on. N.T. at 295. On November 13, 2009, the Student stopped taking [a foreign language] class. The purpose of this change was to give the Student time to catch up with missed work. S-19, N.T. at 207. The Guardian understood that the Student would spend the extra time in a math clinic, but the Student was not placed in a math clinic.
36. In December of 2009, the Student's schedule was changed so that the Student would spend the first four periods of each school day in a special education classroom. S-7 at 27; N.T. 189-190, 214-215. This change was not effectuated through an IEP meeting, but through a telephone call that did not include the full complement of the Student's IEP Team members.

¹³ Data for one goal in the 2008-2009 school year is included at P-10.

¹⁴ Various witnesses described this incident as a meltdown or a crisis. There is virtually no description of the incident in the record.

S-13 at 15; N.T. 297-298; 539. Regardless, the Guardian did approve the change. N.T. at 299. While in the special education classroom, the Student primarily worked on English, reading, science and social studies. N.T. at 226.

37. On December 2, 2009, the District issued the RR that was the subject of I.H. 2. That RR, found inappropriate in prior proceedings, identified the school the Student was attending as a partial hospitalization program operated by [redacted]. P-29, N.T. 193. At that time, no IEP Team Meeting had convened to discuss the [partial hospitalization] Program. The [partial hospitalization] program was recommended in the RR.
38. On December 4, 2009, in an effort to address the Student's anxiety, the Student's IEP was revised so that the Student would attend school for only half days. S-13, N.T. at 192.¹⁵ Around the same time, a TSS worker was assigned to work with the Student in school, but that service was quickly discontinued.
39. On January 6, 2010, the Student's placement was changed to the [partial hospitalization] Program. N.T. at 232. The process by which the Student went into the [partial hospitalization] Program was confusing to the Guardian. It appears that two meetings, an "intake meeting" for the [partial hospitalization] Program and an IEP meeting to change the Student's placement, both took place on the same day (if not simultaneously) at the [partial hospitalization] facility. District staff explained to the Guardian why they believed the [partial hospitalization] Program was appropriate for the Student, and why they believed that the middle school was not appropriate. Guardian approved of the placement, believing it was in the Student's best interest. N.T. 232, 307, 309-310, 398; S-24. The District did not consider whether accommodations could be provided in the Student's neighborhood school (or any other less restrictive setting) before the [partial hospitalization] Program was proposed.
40. The Student attended the [partial hospitalization] Program for only two days. The Guardian testified that the Student's experience in the [partial hospitalization] Program was nothing short of catastrophic. N.T. at 310-312. The Guardian's understanding of the Student's experience in the [partial hospitalization] Program is derived from the Student's self-reporting. In light of the Guardian's positive perception of the [partial hospitalization] Program before the Student started attending, and a lack of testimony or evidence to the contrary, the Hearing Officer finds that the Guardian accurately testified as to what the Student told her about the [partial hospitalization] Program (regardless of the accuracy of the Student's description).¹⁶ Upon hearing the Student's report, the Guardian removed the Student from the program.

¹⁵ The actions taken by the District in November and December of 2009 are clearly in response to the Student's increasing levels of anxiety, which must have manifested in in-school behaviors. [Redacted] is the clearest example on the record. Surely the District was responding to something it saw in the student. It is frustrating, therefore, that the record does not contain a clearer picture of the behaviors that the District was responding to.

¹⁶ The District argues that the Student's self-reporting of experiences in the [partial hospitalization] Program are suspect. The Guardian argues that the Student's self-reporting in the District's evaluations are suspect. Both parties

41. Upon removing the Student from the [partial hospitalization] Program, the Guardian consulted with a physician and received a prescription for homebound instruction for the Student. N.T. at 314. The Student was then placed on homebound instruction and was taught by a special education teacher for five hours per week in a verity of subjects. N.T. at 315. The Student did not receive reading instruction while on homebound. Id. The Student remained on homebound for the remainder of the school year (mid-January 2010 through the end of the 2009-2010 school year).
42. The District offered ESY services to the Student in the summer of 2010. Those services, and the location in which they were to be delivered, were found to be appropriate in prior proceedings. *I.H. 1*. The ESY program would have been delivered in one of the District's middle schools, but not the school that the Student attended during the first half of the 2009-2010 school year. The District selected that middle school, even though it was not the Student's neighborhood school, because it envisioned the Student participating in an emotional support classroom housed in that building during the 2010-2011 school year. The Student did not attend the offered ESY program.
43. The Student received an independent psychological evaluation from a private Certified School Psychologist on June 9, 2010 (the same day that the offered ESY program was found to be appropriate). P-37.
44. Based, in part, upon her experiences with the [partial hospitalization] Program, the Guardian has a remarkably negative view and an aversion towards emotional support programs in general. The Guardian testified that the Student shares this aversion. N.T. at 316-317.
45. On August 9, in conformity with Hearing Officer McElligott's order in *I.H. 2*, the District proposed a list of three "ADOS Trained Independent Educational Evaluators" that could provide an independent Autism evaluation.¹⁷ P-38.
46. On August 10, 2010, the Guardian received an independent neuropsychological assessment from a Ph.D. level clinical neurologist. P-39. The Student was evaluated for that assessment on August 2, 2010. Id.
47. The Guardian enrolled the Student in a cyber-charter school on August 18, 2010. S-43 at 2. The Student's official enrollment date in the cyber-charter was September 15, 2010. The Guardian has consistently averred that the only reason she placed the Student in the cyber-charter was the District's failure to offer appropriate programming, i.e. in the neighborhood middle school and not in an emotional support classroom.
48. On September 14, 2010, the Student's District IEP Team met.¹⁸ P-42, P-47. The Guardian presented the IEP Team with the neuropsychological assessment at P-39 for the first time at

simultaneously rely upon and call into question the accuracy of the Student's self reporting. What matters more in this case is the actions that the parties took (or did not take) in response to the self-reporting.

¹⁷ The Office for Dispute Resolution is not the agency that enforces special education due process hearing decisions.

that meeting. The IEP team reviewed an IEP that would place the Student at the middle school that the Guardian finds objectionable.

49. On September 14, 2010, the District issued a Permission to Reevaluate – Consent Form.¹⁹ Through that form, the District sought, inter alia, to conduct ADOS testing, a speech and language evaluation, and sensory integration and self-regulation evaluations. S-44. The Guardian denied consent on September 20, 2010.²⁰
50. The IEP Team met again on September 28, 2010. P-48. This appears to be a continuation of the meeting that convened on September 14, 2010. The resulting IEP would have placed the Student in the middle school that the Guardian finds objectionable, in an emotional support class for about 80% of the school day.

DISCUSSION AND CONCLUSIONS OF LAW

THE BURDEN OF PROOF

The Guardian requested this hearing and, therefore, bears the burden of persuasion. She must prove the violations she alleges by a preponderance of evidence. If the evidence rests in equipoise (i.e., that it is equal on both sides) the Guardian will not have met her burden. *See L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

THE POTENTIAL LIABILITY PERIOD

As noted *supra*, the potential liability period in this matter starts on June 9, 2008. That liability period – at least for purposes of compensatory education – ends on September 14, 2010. From September 15 onward, the District was not the Student's LEA for IDEA purposes because the Student was enrolled in a cyber-charter school. The cyber-charter became the agency responsible for the provision of FAPE to the Student, pursuant to 22 Pa. Code § 711.3, on September 15, 2010. *See also* 22 Pa. Code § 711 et seq. (Chapter 711).

The Student's break from the District could have been cleaner. The District did convene an IEP Team meeting two weeks after the Student's official enrollment in the cyber-charter. The District was under no legal obligation to convene this meeting, as it had no obligation to provide FAPE to the Student. Under the circumstances of this case, however, it was certainly reasonable for the District to convene the meeting. The Guardian has consistently said that the only reason that the Student attends a cyber-charter school is because she and the District cannot agree about the Student's programming and placement. At any moment, the Guardian could re-enroll the Student. It was certainly wise for the District to go beyond its legal obligations in an effort to have

¹⁸ There was some testimony that the Student does not have an IEP from the cyber-charter, and there was some vague testimony that the cyber-charter has started the IEP process. It would be a presumption to conclude that the Student has a cyber-charter IEP team.

¹⁹ In its written closing argument, the District claims that the PTRE itself was not entered into evidence. The exhibit 44 referenced at N.T. 760 was P-44. S-44 is part of the record of this case, and it includes the PTRE.

²⁰ The Guardian requested hearing 01589-1011 KE on September 19, 2010. The Guardian referenced that hearing request when she rejected the form at S-44 – this was not an effort to start a fifth hearing.

programming ready, should the Student re-enroll. To use this action (convening an IEP Team meeting on September 25, 2010) as a basis to extend the District's potential liability would unfairly punish the District for its efforts to have programming in place for a Student whose return could have been imminent.

INCORPORATION OF IEEs

The Guardian demands “incorporation” of the the independent psychological evaluation at P-37 and the independent neuropsychological assessment at P-39. More specifically, the Guardian demands revision of the Student's eligibility categories to reflect those found in those two IEEs, revision of the Student's IEP and RR to reflect the findings of the IEEs, and provision of the interventions recommended in the IEEs.

Currently, the District is under no obligation to offer an IEP to the Student because the cyber-charter has the obligation to provide FAPE to the Student. *See* Chapter 711. The District must provide assistance to the cyber charter upon the cyber charter's request. *See* Dept. of Educ. BEC: Cyber Charter Schools. This assistance, which does not include the direct provision of services, is much less than the FAPE obligation that the cyber charter now must bear. As such, the Guardian is actually seeking an order specifying what the Student's IEP must contain (or, more broadly, what the District must do with the IEEs) should the Student reenroll.

In a recent case, the United States Court of Appeals for the Third Circuit held that a District's obligation to provide an IEP to a student may extend beyond the end of the school year in which the student reaches 21 years of age – the typical cut off of a District's FAPE obligation to students, regardless of need. *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010). In that case, the student was entitled to services beyond her 21st birthday as a result of a prior compensatory education award, but could only access those services if the District provided an IEP. *Id.* The court held that despite the statutory provisions that typically terminate a school district's FAPE obligation, the District was still obligated to issue an IEP as part of the duty that it owed the student per the compensatory education award.

After the decision in *Ferren C.*, there may be circumstances where a school district must offer an IEP to a student after its obligation to provide FAPE terminates by statute. This is not one of those cases. None of the prior orders created an ongoing obligation to provide IEPs to the Student after the District's FAPE obligation terminated. It is conceivable that the District may be obligated to fund the IEE awarded in *I.H. 2* even though it is no longer the Student's LEA. That issue is not plead in this case, and so it will not be considered.²¹ Funding notwithstanding, there is no authority that would compel the District to offer an IEP prior to re-enrollment, and the District will not be ordered to include particular content in an IEP that it has no obligation to provide.

²¹ Funding the IEEs – particularly the neuropsychological evaluation – did come up in testimony and in evidence. *See*, e.g. P-47. However, IEE reimbursement was not demanded in either of the hearing requests sub judicita or in the issues as defined at the start of the hearing. Moreover, to the extent that such an order would be tantamount to the enforcement of a prior decision, the Hearing Officer's jurisdiction would be suspect.

PLACEMENT IN THE NEIGHBORHOOD SCHOOL

The District will not be ordered to place the Student in the neighborhood school. The District currently has no obligation to provide direct services to the Student. *See* Dept. of Educ. BEC: Cyber Charter Schools; Chapter 711.

WITHDRAW OF THE PENDING EVALUATION REQUEST

The District sought the Guardian's consent to reevaluate the Student on the day before the Student enrolled in a cyber charter school. That PTRE was rejected by the Guardian shortly thereafter. The effect of the Student's enrollment in the cyber charter is quite analogous to the Student moving out of the District. If a school district seeks consent to evaluate, and the student moves out of the district the next day, it is not entirely proper to think of the request as pending.

The Pennsylvania Code allows school districts to request a due process hearing when a parent rejects a permission to reevaluate form. 22 Pa Code § 14.162(c). Parents and guardians have the same right under the IDEA. 20 U.S.C. § 1415(b)(6). The hearing regarding the PTRE was initiated by the Guardian, not the District. The District has taken no action to override that rejection and press forward with the evaluation that the Guardian does not want. Rather, the District argues that it should be allowed to evaluate the Student if and when the Student returns.

The Guardian argues that the evaluations sought by the District are not required, but the District has no current obligation to evaluate the Student. As such, the PTRE itself is not pending. The Guardian needs no order compelling the District to withdraw the not-pending PTRE.

COMPENSATORY EDUCATION

The potential liability period for compensatory education starts in the summer of 2008, continues through the 2008-2009 school year, the summer of 2009, the 2009-2010 school year, and the summer of 2010. No compensatory education will be awarded for the summer of 2010, as the District's offer in that summer was found to be appropriate in prior proceedings. *I.H. 1*. The record is virtually silent as to the summer of 2008. As such, the Guardian has not proven that the Student was entitled to services in the summer of 2008, and no compensatory education will be awarded for that time.

The 2008-2009 school year was the Student's final year in elementary school before moving to middle school. The District evaluated the Student early on in the 2008-2009 school year, starting in October of 2008. The evaluations were not complete, however, and the Student did not receive an IEP until January 8, 2009. Through that IEP, the District acknowledged the Student's diagnoses on the Autism spectrum, but defined eligibility categories as Emotional Disturbance and OHI. Yet mislabeling a student does not entitle the student to compensatory education *per se*. Rather, compensatory education is a remedy to compensate qualifying students for substantive denials of their right to FAPE. A procedural denial alone will not suffice. *See P.P. ex rel. Michael P. v. West Chester Area School Dist.* 585 F.3d 727, 739 (3rd Cir. 2009) (“The right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education.”). The question of the Student's entitlement to compensatory education in the 2008-2009 school year then turns upon whether the Student received appropriate

educational services. It is the Guardian's burden to prove that the Student did not receive such services.

There is no preponderant evidence in the record to suggest that the Student required more academic intervention than the Student received. Both the Guardian and the District recognized the Student's needs in written expression and organization, and the District provided appropriate services to address those needs. The District's testimony about the Student's math abilities at that time was credible and consistent with assessments. Although there is no reason to doubt the Guardian's reporting of the Student's struggles with math homework, the Student's performance in math was not affected in school. There is good reason to believe that the District's responses to the Student's behaviors in the 2008-2009 school year were informal. It is clear that the Student was experiencing stress and anxiety in school, but there is no preponderance of evidence in the record to show how that stress and anxiety resulted in a substantive denial of FAPE.²² Although progress monitoring during the 2008-2009 school year left much to be desired, and it is clear that the Guardian was both concerned and frustrated about the Student's progress as she perceived it, the record does not reveal a substantive denial of FAPE during this period of time.

This analysis changes starting in the summer of 2009. There is a clear record that the District did not apply a proper, or even meaningful analysis regarding the Student's potential need for ESY services. The various factors codified at 22 Pa. Code § 14.132 are not indicated in the IEP, and the Guardian's testimony regarding the lack of discussion about ESY was entirely credible. Consequently, it is impossible to know if the Student would have qualified, had the proper analysis been applied. Although the Guardian bears the burden of proof, evidence concerning the Student's entitlement to ESY services in the summer of 2009 does not exist due to the District's failings, and it would be inequitable to penalize the Guardian for this lack of evidence. Moreover, evidence about the Student's adjustment to middle school strongly indicates that the District, minimally, should have been doing something in the summer of 2009 to prepare the Student for the transition. This type of transition planning was part and parcel to the ESY program that the District offered in the summer of 2010 – which was found to be appropriate. Therefore, the Student will be awarded compensatory education in an amount equal to the services offered in the summer of 2010 (24 hours) to compensate for the District's failure to even consider the Student's need for services in the summer of 2009.

The Student was also denied FAPE during the 2009-2010 school year, but not all of it. The 2009-2010 school year started in September, and there is credible testimony that the Student had significant difficulty with the transition to middle school. The District had a reasonable period of time to assess that difficulty and program accordingly, but the evidence of the Student's increased needs were obvious. *See* FF 13, 20, *supra*. At the same time, the Student was absent for nearly the entire month of October due to an illness. There is no preponderant evidence that the District could have or should have done anything else for the Student from the start of the 2009-2010 school year until the emergency meetings in November of 2009

²² Evidence at S-18 shows the Student made frequent trips to the nurse in the 2009-2010 school year. That same exhibit includes school nurse records from the 2008-2009 school year, but those records were not referenced by any witness during the hearing.

The emergency meetings in response to the Student's crisis convened about two weeks after the Student's return to school, starting on November 11, 2009. From that point forward, the District's actions evidence an ad hoc and haphazard response to the Student's serious condition. Whether the Student's behaviors are a function of an autism spectrum disorder or an emotional disturbance does not matter. What matters is that there was no coordinated effort to determine what interventions could address the Student's needs. Instead, the District simply slashed the expectations placed on the Student in an effort (albeit good intentioned) to reduce stress. No thought was paid to whether such actions would adversely affect the Student's ability to attend school in the long term. These failures were also evident in the RR of December 2009, which was ultimately found inappropriate by Hearing Officer McElligott.

The Guardian argues that all programming offered by the District after the RR of December 2009 is inappropriate *per se*, because appropriate programming cannot be predicated on an inappropriate evaluation. The Guardian's logic is sound. Moreover, the District's failed to consider less restrictive alternatives before moving the Student to the [partial hospitalization] Program²³, and failed to provide services that were calculated to address the Student's identified needs while the Student was on homebound. Then, for nearly half a school year, no systematic effort was made to return the Student to school. Whether the Student's needs are a function of an emotional disturbance or Asperger's Syndrome, again, is irrelevant. What matters is that the Student's needs were not met.

To compensate the Student for this denial of FAPE, the student will be awarded one half hour of compensatory education for each hour that the District was in session between December 4, 2009 and January 5, 2010 (the period of time that the Student was on a half day program) and one hour of compensatory education for each hour that the District was in session between January 6, 2010 and the end of the 2009-2010 school year (the period of time that the Student had no access to school at all with minimal instruction at home).

ORDER

Wherefore, consistent with the foregoing, it is hereby ORDERED that:

1. The Student is awarded one half hour of compensatory education for each hour that the District was in session between December 4, 2009 and January 6, 2010; and
2. The Student is awarded one hour of compensatory education for each hour that the District was in session between January 6, 2010 and the end of the 2009-2010 school year; and
3. The compensatory education awarded herein shall take the form of appropriate developmental, remedial or enriching instruction or other educational services. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the Guardian, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to services that are necessary to an appropriate IEP and may not be used to supplant the IEP. The hourly cost for compensatory

²³ Such alternatives must at least be considered. The LRE requirement is nothing new. *See* *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

DATED: December 25, 2010

/s/ Brian Jason Ford
BRIAN JASON FORD
Hearing Officer