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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 21257-18-19

CLOSED HEARING

Child's Name:
J. P.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
10/04/2019

Introduction

This special education due process hearing concerns the rights of a child with disabilities (the Student). The Student's parent (the Parent) and the Student's school district (the District) disagree about the Student's educational placement.[1] The Parents requested this hearing and demand that the District fund the Student's placement at a private school (the Private School), and fund an independent educational evaluation.

There is no dispute that the child (the Student) is a "student with a disability" as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. at § 1401(3)(A). Similarly, there is no dispute that the District is the Student's local educational agency (LEA) as defined at 20 U.S.C. § 1401(19).

For reasons discussed below, I find in favor of the Parent.

Issues

Two issues are presented for resolution. They are:

1. Is the Student entitled to an independent educational evaluation (IEE) at the District's expense?

2. Must the District fund the Student's tuition at the Private School during the 2018-19 school year and the summer of 2019?

Findings of Fact

A large record was created during five hearing sessions. I reviewed the record in its entirety. I make findings of fact, however, only as necessary to resolve the issues before me. Consequently, the majority of evidence presented in this case is not discussed in detail for reasons that will become apparent. I find as follows:

I. Settlement Agreements

1. The Student has attended the Private School since the 2012-13 school year. The District funded the Student's tuition at the Private School through a series of three settlement agreements. The District also agreed to fund the Student's participation in the Private School's summer program through those settlement agreements.

2. The first settlement agreement was executed on April 30, 2012 (the 2012 Settlement). Under that agreement, the District paid for the Student to attend the Private School during the summer of 2012, the 2012-13 school year, the summer of 2013, and the 2013-14 school year up to specified dollar limits. The Parents accepted this payment in exchange for waiving all past claims and in lieu of FAPE. P-23.

3. Under the 2012 Settlement, the parties agreed that the District would seek the Parent's consent to conduct a reevaluation by issuing a form no later than March 1, 2014, and that the Parent would provide consent within seven days of receipt. Following the reevaluation,

[1] The Student's Parent is the Student's grandparent. The Student's grandparent satisfies the IDEA's definition of "parent" and, in fact, acts as a parent to the Student.

the parties agreed that the District would convene a meeting no later than June 1, 2014, to plan the Student's educational program for the 2014-15 school year. P-23.

4. The second settlement agreement was executed on June 9, 2014 (the 2014 Settlement). Under the 2014 Settlement, the District paid for the Student to attend the Private School during the 2014-15 school year, the summer of 2015, the 2015-16 school year, the summer of 2016, the 2016-17 school year, and the summer of 2017 up to specified dollar limits. S-1.

5. Under the 2014 Settlement the parties agreed that the District would reevaluate the Student and convene an IEP team meeting no later than June 1, 2017 to plan for the 2017-18 school year. S-1.

6. The third settlement agreement was executed on November 22, 2017. More accurately, the third settlement agreement is an addendum to the 2014 Settlement (the 2017 Addendum).

7. Within the four corners of the 2017 Addendum, the District acknowledged that "as of the date of this Addendum, neither a Reevaluation Report nor an IEP and NOREP for the 2017-18 school term has been issued by the District to the Parent." P-12 at 2.

8. Under the 2017 Addendum, the District agreed to fund the Student's placement at the Private school during the 2017-18 school year, up to a specified dollar limit. P-12 at ¶ 2.

9. Under the 2017 Addendum, the Parents agreed to accept the District's funding in lieu of FAPE. More specifically, the Parents agreed that "whatever program and/or services are offered at the [Private School] shall constitute an appropriate educational program for Student…" P-12 at ¶ 5. The Addendum goes on to specify that the Private School develops and implements its own program, that the District does not ratify, approve or endorse the Private School's program, and that the District accepts no liability for any deficiencies in the Private School's program. *Id*.

10. Under the 2017 Addendum, the District agreed to re-evaluate the Student "at any point after January 1, 2018… [and draft a Reevaluation Report which] shall be completed and mailed or hand delivered to Parent by May 15, 2018." P-12 at ¶ 9. Then the Addendum required the parties to meet prior to June 15, 2018 to develop an IEP for the 2018-19 school year. P-12 at ¶ 10. Next, the Addendum required the District to "issue a final IEP for the 2018-19 school term to Parent by July 1, 2018." *Id*.

11. The 2017 Addendum sets forth what will happen if parental noncooperation renders the District unable to issue an IEP and NOREP by July 1, 2018. Under that condition, the IEP and NOREP issued by the District after July 1, 2018 become the Student's pendent placement in any future proceedings, and the District shall incur no liability for implementing the IEP. P-12 at ¶ 12.

12. Neither the 2017 Addendum nor the 2014 Settlement explicitly address what will happen if the District fails to evaluate the Student or offer an IEP within the timelines established by those documents. *See* S-1, P-12.

II. Evaluation and IEP Chronology and Timeliness

13. The District reevaluated the Student and issued a Reevaluation Report on April 28, 2014 (the 2014 RR). P-20.

14. Pursuant to the 2012 Settlement, the District was obligated to issue a PTRE on or before March 1, 2014. The record does not reveal if or when a PTRE was issued in 2014, but the resulting 2014 RR dated April 28, 2014 was timely.[2]

15. Pursuant to the 2012 Settlement, the District was obligated to issue an IEP for the 2014-15 school year on or before June 1, 2014. No such IEP is in evidence. I find that that IEP was never created. Consequently, the 2014 IEP contemplated in the 2012 agreement was not issued, let alone issued timely.[3]

16. After the District failed to issue an IEP on or before June 1, 2014 as required by the 2012 Settlement, the parties executed the 2014 Settlement on June 9, 2014.[4]

17. Pursuant to the 2014 Settlement, the District was obligated to issue a PTRE by March 1, 2017, convene an IEP team meeting by June 1, 2017. The 2014 Settlement also required the District to propose an IEP on or before June 1, 2017. *See* S-1 at ¶ 7.

18. By November 22, 2017, the District had not issued a reevaluation report, and had not issued an IEP. P-12 at 1. The District's breach was recognized in the recitals to the 2017 Addendum. *Id*.

19. Pursuant to the 2017 Addendum, the District was obligated to complete a reevaluation report no later than May 15, 2018.

20. On March 23, 2018, the District sent a "Prior Written Notice for a Reevaluation and Request for Consent Form." This document is identical in substance to documents more typically called "Permission to Reevaluate — Consent" forms. For ease of reference, I will call the document the 2018 PTRE. The document is dated March 16, 2018 but was not mailed to the Parent until March 23, 2018. P-9.

21. On April 5, 2018, the Parent signed the 2018 PTRE, giving consent for the evaluation.

22. Sometime after April 5, 2018, the District reevaluated the Student. To set the reevaluation in time, the reevaluation included a classroom observation at the Private School on May 23, 2018. P-8.

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[2] Generally, LEAs have 60 school days from receipt of the parent's consent to complete an evaluation or reevaluation. *See* 20 U.S.C. § 1414.

[3] Within the 2014 Settlement, the parties agreed that if the Private School terminated the Student's enrollment, the "Student's IEP issued by the District on March 12, 2012 shall be the Student's pendent educational program, and the Student shall automatically return to the pendent educational placement." S-1 at 4. In each agreement, the parties agreed that the last-issued IEP would be pendent under these circumstances. Such language is common — arguably necessary — for in lieu of FAPE agreements. Quite simply, if there was a 2014 IEP, that IEP would have been pendent.

[4] Unlike the 2017 Addendum, the correlation between the District's breach of the 2012 Settlement and the execution of the 2014 Settlement does not prove causation. The Parent executed the 2014 Settlement on May 6, 2014 - a bit less than a month before the IEP was due. The parties may have been discussing the Student's continued placement in the Private School before the District's deadline to issue an IEP. Assuming that negotiation took place does not excuse the District's breach.

23. The District issued a reevaluation report dated June 7, 2018 (the 2018 RR). P-8. According to information printed on the 2018 RR, a copy was provided to the Parent on June 8, 2018. *Id*.

24. The 2018 RR was completed 23 days after the deadline set in the 2017 Addendum.

25. On June 30, 2018, the District invited the Parent to an IEP team meeting. The District scheduled the meeting for July 5, 2018. P-7.

26. The Student's IEP team met on July 5, 2018. *See, e.g.* P-6. The Parent, the Parent's non-attorney advocate, the District's 7th Grade Special Education Teacher, and the District's Special Education Program Coordinator attended the meeting. The Special Education Program Coordinator signed into the meeting as both the LEA's representative and as a regular education teacher. P-6.

27. The District issued a form seeking the Parents' consent to excuse the District's Occupational Therapist from the IEP team meeting. The form is also dated June 30, 2018. The Parent signed the form, granting consent during the July 5, 2018 meeting. P-6.

28. Pursuant to the 2017 Addendum, the District was obligated to convene an IEP team meeting prior to June 15, 2018. The IEP team convened at the District's invitation on July 5, 2018. P-12 at ¶ 10.

29. The District convened the Student's IEP team 20 days after the deadline set in the 2017 addendum.

30. During the IEP team meeting, the Parent asked to consult with the Occupational Therapist who had been excused. The District agreed, and further agreed to issue a final IEP with a NOREP after the Parent consulted with the Occupational Therapist. *See, e.g.* NT 347-348

31. Sometime after July 5, 2018, the District issued a final IEP with a NOREP. The NOREP and IEP are both dated July 5, 2018. S-8. That date is not accurate by necessary implication (the Parent and Occupational Therapist did not speak with each other on July 5, 2018) and by the District's own admission. *See, e.g.* NT 347-348

32. There is varying testimony about when the District issued the IEP and NOREP. There is no dispute, however, that the Parent signed the NOREP on August 2, 2018, rejecting the IEP. S-8 at 3.

33. I find that the District issued the NOREP shortly before August 2, 2018. The entirety of the documentary record establishes the Parent's practice of promptly signing and returning documents sent by the District via mail. *See, e.g.* S-9. The Parent's certainty and overall credibility on the stand, coupled with the Parent's proven practice, outweigh the District's uncertainty and hearsay.[5]

34. Pursuant to the 2017 Addendum, the District was obligated to offer an IEP no later than July 1, 2018. P-12 at ¶ 10.

[5] At best, District witnesses testified as to which assistants were charged with mailing the IEP and NOREP after they were finished.

35. Using the date printed on the IEP and NOREP (July 5, 2018) the District issued the IEP 4 days after the deadline set in the 2017 Addendum. In actuality, the District issued the IEP roughly 30 days after the deadline set in the 2017 Addendum.

36. August 28, 2018 was the first day of the 2018-19 school term. P-15.

37. The Student continued to attend the Private School during the 2018-19 school year.

38. The Parent requested this hearing *pro se* by filing a complaint on September 29, 2018.

39. The Parent retained counsel and filed an amended complaint on February 1, 2019.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist*., No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this matter, none of the witnesses were intentionally deceitful. To the extent that witness testimony was contradictory, the witnesses genuinely remembered events differently or had honest but irreconcilable opinions. The process by which I resolved conflicting testimony (to the small extent that was necessary in this case) is described above.

Legal Principles

I. Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

II. Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and revaluations. 20 U.S.C. § 1414.

In substance, evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:
assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.
20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

III. Tuition Reimbursement

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

IV. Special Education Settlement Agreements

Case law establishes that hearing officers have authority to determine whether an enforceable contract exists between parties to a special education dispute. *See, I.K. v. Sch. Dist. of*

Haverford Twp., 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution (Quakertown Cmty.)*, 88 A.3d 256 (Pa. Commw. Ct. 2014). Those same cases confirm the long-standing concept that hearing officers have no authority to enforce a contract.

Hearing officers must apply contract law to determine whether a contract is binding upon the parties. Even in such cases, hearing officers still have no enforcement authority. Rather, hearing officers may determine if a contract exists and, if it does, litigants can go to court for enforcement (or, depending on the circumstances, to the Pennsylvania Department of Education).

Discussion

I. 2018-19 Placement

All IDEA remedies are equitable in nature. Even the most common IDEA remedy, compensatory education, is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990). Compensatory education is demanded in this case only in the alternative, but an examination of that remedy is instructive.

Compensatory education is often awarded using a formulaic, "hour-for-hour" method. That method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. In other words, hearing officers must determine what uniquely fashioned, equitable remedy will undo the particular harm caused by the IDEA violation.[6]

The concept of appropriate relief fashioned to undo particular harms is not new in the Third Circuit. The Third Circuit has confirmed hearing officer's authority to award such remedies for nearly a decade. *See Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010). The facts of *Ferren C.* are a good example of this principle in action. The student in *Ferren C.* received a compensatory education award through prior litigation and used that award to obtain educational services. The entity providing those services only works with students who have IEPs. The student in *Ferren C.* aged out of IDEA eligibility before the compensatory education award was depleted, and the school district refused to issue a new IEP. The court reasoned that the school district must issue an IEP to the student, despite the fact that the student aged out, because doing so was the only way that the student could access the previously awarded compensatory education. Without relief tailored to the circumstances, the student in *Ferren C.* would have no access to a remedy.

Similarly, in *Burlington, supra*, the Supreme Court considered IDEA language giving courts authority to "grant such relief as the court determines is appropriate"[7] and found that the "ordinary meaning of these words confers broad discretion on the court" reviewing the matter. 471 U.S. at 369. Within this broad discretion, the type of relief that may be awarded "is to be 'appropriate' in light of the purpose of the Act." *Id.* In other words, appropriate relief is that which

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[6] In Pennsylvania, *Reid* evidence is rarely presented. In the absence of *Reid* evidence, the hour-for-hour method serves as a necessary default. *See Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 36-37.

[7] 20 U.S.C. § 1415(i)(2)(C)(iii).

is necessary to provide a FAPE. *Id.* at 369-70. I see no reason why the same logic should not apply at the due process level.

Application of these principles to this case yields the conclusion that the District must fund the Student's placement at the Private School during the 2018-19 school year — not as tuition reimbursement, but as an equitable resolution of the parties' placement dispute.

As noted above, my authority to resolve contract disputes is limited. Moreover, I dismissed contract claims raised in the complaint via a pre-hearing order. Even so, there is no dispute that the parties are bound by the 2014 Settlement as modified by the 2017 Addendum. The District violated every timeline established by both of those documents. That violation gives rise to IDEA claims, not just contract claims. *See, H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.,* 220 F. Supp. 3d 574 (E.D. Pa. 2016) (the existence of a settlement agreement is not dispositive of IDEA claims).

In 2014, the District promised to reevaluate the Student and offer placement in 2017. The District broke that promise by neither evaluating the Student nor proposing a placement. Upon recognizing its own breach, the District took logical, rational actions: it extended the 2014 Settlement via the 2017 Addendum.

Nothing in the 2014 Settlement required the District to continue funding the Student's placement in the Private School as a result of its breach. Rather, the agreement tied pendency (otherwise known as the IDEA's "stay-put" provision)[8] to the IEP that it did not issue. Consequently, if any dispute between the Parents and District resulted in a due process hearing, the District would have been obligated to maintain the Student's placement in the private school. Again, extending the 2014 Settlement via the 2017 Addendum was logical and rational. The District agreed to fund the program that it would be obligated to fund in the absence of the Addendum while giving itself an extra year to reevaluate the Student and offer a placement of its own.

After buying itself an extra year, it is beyond perplexing that the District violated every deadline in the 2017 Addendum. The Parent took no action to prevent the District from reevaluating the Student, drafting a reevaluation report, convening an IEP team meeting, or offering an IEP. The 2017 Addendum set deadlines for each of these actions, and the District missed all of those deadlines by at least 20 days in each instance.[9]

The District promised that it would evaluate the Student and offer a program by a specific date in advance of the 2018-19 school year. The District broke that promise and did not offer an IEP to the Student when it said that it would. That failure is not simply a breach of contract, but rather constitutes an IDEA violation in and of itself. Through the 2014 Settlement and the 2017 Addendum, the Parent waived nearly all rights and protections under the IDEA – both for the Parent and for the Student. In exchange for all of the District's promises, the Student sacrificed the right to a FAPE. Any breach of the 2014 Settlement or 2017 Addendum, therefore, has FAPE implications.

More specifically, the Parent waived both the Parents' rights and the Student's rights in exchange for two things: District-funded placement at the private school and completion of the IEP process by a date certain. Given the history between the parties, the District's promise to

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[8] 20 U.S.C. § 1415(j).

[9] Even using dates printed on documents which are more favorable to the District, the District still missed every deadline set in the 2017 Addendum.

evaluate and offer programming by dates certain was a substantive part of the consideration in both the 2014 Settlement and the 2017 Addendum. The District's failure to provide that consideration diminishes the Student's IDEA rights without the full benefit of the parties' bargain. This, in and of itself, violates the IDEA, not just contract law.

The District's breach forced the Parents to make decisions about the District's IEP in less time than was agreed to a year prior. At the same time, the District's refusal to continue the Private School placement jeopardized the continuity of the Student's educational program. As such, the District's failures diminished the Parents' IDEA rights, diminished the Student's IDEA rights, placed the Student's educational program at risk, and left the Parents without full consideration for substantial IDEA waivers. This runs counter to the purposes of the IDEA, and so a remedy is owed. *See I.H. ex rel. D.S. v. Cumberland Valley School Dist*., 842 F.Supp.2d 762 (M.D.Pa., 2012).

An appropriate remedy is suggested through the District's actions in 2017. In the past, whenever the District broke its contractual promises, it fully mitigated the harm by continuing the Student's private school placement. I agree that continuing the Student's Private School placement mitigates the harm of the District's most recent breach by ensuring continuity of services. It is equitable, therefore, to continue the Student's placement in the Private School during the 2018-19 school year.

In making this determination, I am aware that the District completed its evaluation, issued an RR, and offered an IEP and NOREP before the first day of the 2018-19 school year. However, the District did not simply promise to get a program in place before school started. The District promised to offer programming by a date certain. The Parents waived important IDEA rights in exchange for the District's promises to complete specific actions by specific dates. It may seem harsh to award a private placement for a late program offer, but this case is not analogous to cases in which LEAs miss IDEA timelines by a few days yielding no actual harm. This case concerns the functional termination of a child's special education rights in exchange for specific promises. The remedy I award is proportional to the District's failures.

In making this determination, I am also aware of differences between this case and *Ferren C.*, *supra*. The award in this case is not necessary to ensure access to a prior award. The logic of *Ferren C.*, however, goes beyond the facts of that case. Particular relief is required to remedy particular violations. The violation in this case is a breach of contract that jeopardized the Student's education.

In making this determination, I am also aware that the majority of evidence presented in this matter goes to the *Burlington-Carter* test. Again, I am not awarding tuition reimbursement. Rather, I find that the Parents waived IDEA rights in exchange for broken promises from the District. Those promises relate to the Student's placement, and so I make an equitable placement award.

In making this determination, I am also aware that I cannot enforce a contract. If the 2017 Addendum spelled out what must happen if the District violated the deadlines through no fault of the Parent, I could not enforce that provision. Nothing in the 2017 Addendum says what should happen under the facts of this case, and so I am not enforcing the 2017 Addendum. Rather, I find that the District's breach impacted upon the Student's IDEA rights, and I craft a remedy to cure the violation.

II. Summer 2019

I award placement at the Private School's summer program during the summer of 2019 for the same reasons that I awarded placement at the Private School during the 2018-19 school year. Since the summer of 2012, the Private School's summer program has been a part of the Student's placement. In light of the District's multiple breaches, all of which impact upon the Student's IDEA rights and protections, awarding placement for the summer of 2019 ensures a continuity of the Student's services.

III. IEE at Public Expense

Awarding an IEE at public expense is not necessary to ensure a continuity of the Student's placement. The District's failure to complete the RR by the deadline set in the 2017 Addendum did not, by itself, jeopardize the Student's education or IDEA rights. Therefore, I must determine whether the District's evaluation was appropriate.

The 2017 Addendum adopts language from the 2014 Agreement, listing the types of evaluations that the District may complete. P-12, S-1 at ¶ 6. The 2014 Agreement, however, still left the particular assessments and types of assessments to the District's discretion. *Id.*

The 2018 RR included a review of the Student's educational records, a summary of information provided by the Parents, a review of prior intelligence tests, academic achievement tests, and developmental and behavioral ratings scales,[10] a summary of input from the Student's teachers, a summary of an in-school observation, and new administrations of intelligence tests, academic achievement tests, and developmental and behavioral ratings scales.[11]

There is no dispute about the accuracy with which prior testing is reported in the 2018 RR. The same is true for the educational records summarized in the 2018 RR. There is a dispute about the accuracy with which information from the Parents and the Student's teachers from the Private School is reported. I find, however, that the district accurately reported information that the Parents and teachers provided. Perhaps asking different questions during the evaluation process may have prompted more complete answers, but the information in the 2018 RR is accurate.[12]

The Parents argue that the 2018 RR falls short of IDEA requirements for failing to assess all of the Student's suspected areas of disability, and for analyzing test data improperly.

Regarding suspected disabilities, the Parents argue that the District should have suspected an executive functioning deficit, and should have evaluated the Student's executive functioning ability. The 2018 RR includes reports of prior testing, some of which indicated an executive functioning deficit. The 2009 BRIEF in particular showed significant executive functioning weaknesses. That test was not repeated in 2018. Similarly, the evaluator who compiled the 2018 RR for the District admitted that the Student has sensory processing needs that impact

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[10] Prior testing included a BDI-2 from 2009; a WISC-IV, WAIT-III, KABC-II, KTEA-II, BRIEF, BASC-2, and SAED from 2011; a WJ-III Achievement, a WJ-III Cognitive, and BASC-2 from 2014.

[11] New testing included a WISC-V, WIAT-III, BASC-3, EBPS-2, GARS-3, and ASRS.

[12] The sole inaccuracy in the 2018 RR is a one-sentence statement that the Student's teachers in the Private School agree with the 2018 RR. P-8 at 8. This is best viewed as unedited boilerplate, not a deliberate effort at deception.

upon the Student's academics and behaviors. *See, e.g.* NT at 65. The District did not assess the Student's sensory needs in the 2018 RR and made no effort to determine whether its proposed placement squares with those needs.

Regarding the test data, the Parents do not dispute the accuracy of the reported results in a literal sense. Rather, the Parents argue that the data is invalid due to flaws in the testing and analysis errors. For the testing flaws, the Parents argue that the 2018 RR does not indicate whether the Student was wearing glasses during the testing. For the data analysis, the Parents argue that the evaluator compared the students using invalid grade-based norms (the Student was compared to a normative sample of children in 6th grade despite the fact that, chronologically, the Student would be in 7th grade at the time of the test were the Student not held back in 3rd grade).

The Parents' argument about suspected disabilities is compelling, particularly as it relates to the Student's sensory needs. The 2018 RR indicated that additional information was needed about the Student's sensory needs, but the District made no effort to obtain that information. The purpose of the 2018 RR was to provide information enabling the IEP team to make a placement recommendation, but the 2018 RR did not say what the Student's sensory needs are, or how those needs can be accommodated in various school environments.

The Parents' argument about the tests results is not compelling. Given the Student's overall presentation and cognitive profile, the evaluator urged caution when interpreting test results. The 2018 RR signals that the test results are statistically valid but may not be a true indication of the Student's abilities. In the absence of such caution, the Parents would have a stronger argument. I find that the administration and interpretation of the test results in the 2018 RR complied with IDEA mandates.

In sum, the 2018 RR was insufficient for its failure to evaluate the Student's sensory needs in relation to the Student's educational placement. To remedy this insufficiency, I award an IEE at the District's expense. That IEE, however, shall be limited to curing the specific omission in the 2018 RR.

Summary and Conclusions

The District has been breaking promises to the Parents since 2014. Up until the summer of 2018, each broken promise resulted in the District's continued agreement to place the Student in the Private School at its own expense with the intention of returning the Student to the District after an evaluation and IEP development. In the summer of 2018, the District broke its promises again, but refused to continue the Student's placement. As a result, the Parents did not receive everything that the District promised in exchange for waving the Student's IDEA rights. This placed the Student's education at risk in violation of the IDEA. To remedy that violation, I order the District to fund the Student's placement at the Private School during the 2018-19 school year and the summer of 2019.

Unlike prior years, the District evaluated the Student and offered a placement in the summer of 2018. Those actions were late and, taken together, warrant the order for continued placement. Examination of the District's evaluation individually, however, requires a more traditional analysis. Under that analysis, the 2018 RR does not comply with IDEA mandates, but only in a limited, specific sense: failure to assess the Student's sensory needs. An independent evaluation of the Student's sensory needs, conducted at the District's expense, cures the 2018 RR's insufficiency.

Finally, I must note that I write this decision roughly one month into the 2019-20 school year. As a procedural matter, the 2019-20 school year is beyond the scope of this hearing. Even so, I urge both parties to carefully consider the practical aspects of the Student's future programming. Nothing in this decision prohibits the parties from working together to develop the Student's educational program and placement now or in the future.

ORDER

Now, October 4, 2019, it is hereby **ORDERED** as follows:

1. The Student's placement during the 2018-19 school and the summer of 2019 was the Private School.

    a. If the Parents paid for the Student's placement at the Private School, the District shall reimburse the Parents for the cost of the Student's tuition, less any scholarship, discounts, or financial aid.

    b. If the Parents did not pay for the Student's placement at the Private School but incurred a debt to the Private School, the District shall pay the cost of the Student's tuition, less any scholarship, discounts, or financial aid.

    c. If the Parents paid for a portion of the Student's placement at the Private School, but still owe a debt to the Private school, the District may direct payments to the Parents, the Private School, or both, in accordance with the foregoing.

    d. The District may condition payment upon proof of receipts or invoices submitted by the Parents or the Private School in accordance with any of its written policies.

2. The District shall fund an independent educational evaluation of the Student's sensory needs to determine what those needs are and how those needs may be addressed in the school environment.

    a. The District may propose evaluators, but the Parents may choose any evaluator qualified to conduct said evaluation regardless of the District's proposal.

    b. The District's total cost for the IEE shall not exceed market rates for similar assessments in the District's geographic area.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER