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Pennsylvania

Special Education Hearing Officer DECISION

Child's Name: E.H.

Date of Birth: [redacted]

Dates of Hearing: 4/1/15, 5/18/15, 5/19/2015, 5/27/15, 6/5/2015, 6/18/2015

CLOSED HEARING

ODR File No. 15720-14-15-AS

Parent

Parent

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Date Record Closed:

July 7, 2015

Date of Decision:

July 27, 2015

Hearing Officer:

William Culleton Esq., CHO

INTRODUCTION

The Student¹ is an eligible resident of the respondent District, and has completed first grade. (NT 14-15.) The District has identified Student with Emotional Disturbance under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). (NT 14-15.)

Parent asserts that the District failed to offer and provide Student with an appropriate placement and with a free appropriate public education (FAPE) as required by the IDEA during the period relevant to this matter, Student's kindergarten (2013-2014) and first grade (2014-2015) school years. Parent seeks compensatory education and an order that the District place Student in a more restrictive, more intensive educational setting, with services as specified in an evaluation report by an evaluator in private practice. Parent also alleges that the District failed to produce all of Student's educational records as requested; therefore, Parent seeks an order to produce educational records.

The District denies all claims and asserts that Parent obstructed its efforts to provide a FAPE.

The hearing was concluded in six sessions. The record closed upon receipt of written summations. I have reviewed and considered all of the testimony and all exhibits admitted into evidence. I conclude that the District failed to provide an appropriate placement for Student and I order the IEP team to place Student in a small group setting forthwith.

ISSUES

1. Did the District fail to offer and provide Student with an appropriate placement during Student's kindergarten and first grade school years?

¹ Student, Parent and the respondent District are named in the title page of this decision; personal references to the parties are omitted. Student's mother (Parent) alone requested due process; Student's father is not a party, but testified in opposition to the requests for relief in this matter.

2. Did the District fail to provide Student with a FAPE during Student's kindergarten and first grade school years?
3. Did the District fail to provide Student with all requested educational records of the Student?
4. Should the hearing officer order the District to change Student's placement and educational setting, with specified special educational services?
5. Should the hearing officer order the District to provide Student with compensatory education for or on account of all or any part of the relevant period from the first day of school in the 2013-2014 school year until such time as the District should offer an appropriate placement and a FAPE to Student?
6. Should the hearing officer order the District to produce any educational records?

FINDINGS OF FACT

1. Parents, who are now divorced and share custody, adopted Student at approximately twenty months of age. Student has a history of challenging, sometimes violent behaviors as early as age two, as a result of which Student was expelled from multiple day care programs. (P 1, 2.)
2. The local county early intervention program evaluated Student when Student was two years and ten months old and found above age-expectancy cognitive development, and expressive and receptive communication level within age expectancy. (P 1.)
3. The intermediate unit evaluation found that Student's behavioral concerns were due to a lack of participation skills, social skills, self-regulation skills and play skills. Student's personal-social development score was within age expectations. The evaluation found Student eligible for special education with a developmental delay in the form of a disruptive behavior disorder, with a function of escape from unwanted tasks or situations. (P 1.)
4. An occupational therapy evaluation indicated no educational fine or gross motor needs, but needs with regard to sensory processing were detected. (P 1.)
5. When Student was approximately 4 1/2 years old, a local behavioral mental health agency evaluation diagnosed Student with posttraumatic stress disorder and disruptive behavior disorder. Evaluation noted that Student's behavior had improved in the early intervention program, with the use of a token economy behavior support program and a personal care assistant (PCA). (P 3.)

6. Student has been exposed to Parents' marital discord in the home, including frequent angry verbal altercations and behavior that traumatized Student. Student's behavior often deteriorates due to Student's exposure to parental behavior. In addition, Parents' physical custody of Student varied during the week and custody orders changed during the kindergarten year; all of this contributed to Student's demonstration of inappropriate behaviors. (P 3, 4; S 9.)
7. In October 2012 and May 2013, the Student's early intervention Individualized Education Program (IEP) noted that Student's aggressive behavior was variable, and included screaming, swiping materials off of surfaces, pushing, kicking, hitting, scratching, biting and throwing objects or furniture. The IEP also noted an established pattern of oppositional defiance. Episodes of aggressive and oppositional behavior ranged in duration from 30 seconds to 45 minutes. Such behavior had decreased with the supports in place, including wraparound services, PCA in preschool classroom, and occupational therapy. (P 6, 13.)
8. The October 2012 IEP also noted that Student was demonstrating difficulty with fine motor skills and sensory processing; however, by May 2013, these issues had resolved. (P 6, 13.)
9. During the 2012-2013 early intervention year, Student's violent and aggressive behaviors continued. Nevertheless, Student's ability to comply with directions and ability to regulate Student's behavior improved. (P 11, 13.)
10. In April 2013, Parent filled out a parent information form for the District, in which Parent mentioned Student's tantrum behavior. The District did not become aware of this report until October 2013. (P 10.)
11. Parent registered Student with the District in May 2013. Registration materials did not disclose that Student was receiving early intervention services. However a physician's report submitted in conjunction with registration did mention Student's diagnosed behavior disorder and classification with developmental delay. (P 12.)
12. At a meeting in or before the summer of 2014, Student's father informed the District's supervisor of special education that Student's behaviors in early intervention included meltdowns, throwing things, physical aggression, and sensory needs, and that Student had been diagnosed with disruptive behavior disorder. (NT 317-318; P 15.)
13. One June 17, 2013, Student's father signed a permission to reevaluate presented to Student's father for the second time. The permission included a psychoeducational evaluation and occupational therapy evaluation. (P 14.)
14. Student's father also returned a parent information form, which disclosed Student's exposure to Parents' marital discord, Student's issues with compliance, transitions, self-control and behavior, and noted Student's history of disruptive and physically aggressive behaviors in early intervention. The report mentioned throwing items at school, total meltdown, sensory needs, and Student's diagnosis of disruptive behavior disorder. Student's father included reports from the early intervention program that showed Student's behavioral progress over time. (P 11, 15; S 2.)

15. On August 27, 2013, District issued a reevaluation report for Student. The report found the Student no longer had a disability and was not eligible for special education. The report noted Student's history of resistance to authority, classroom disruption and physical attacks on caregivers and peers. It also noted some difficulty with transitions, Student's potentially clinically significant difficulties with self-regulation, shifting (from one activity to another) and emotional control, as well as overall executive function difficulties. (S 2.)
16. The report also noted that Student was entering kindergarten with a high level of academic school readiness. Student exhibited at least average cognitive ability and academic achievement. Evaluator noted that Student' past history included a timeline of strong progress in learning behavioral self-control in the classroom. (NT 1220-1222, 1253-1255; S 2.)
17. The District was aware of the Student's behavioral history in preschool, and of the supports provided to Student in pre-school, including the one-to-one aide to support behavioral self-control and provide for safety. The District was aware that Student was experiencing the Parents' conflict and separation and the District evaluator took that into consideration in deciding not to classify Student at that time. (NT 336, 1160-1183, 1211; S 2; P 11.)
18. The August 2013 reevaluation report recommended close monitoring of Student as Student entered kindergarten. It also recommended that Student's educational team meet early in the year in order to assess Student's needs for intervention, if any. Parents agreed with the decision not to classify Student. (NT 1171; S 2.)
19. The August 2013 re-evaluation report recommended an occupational therapy evaluation. This was not accomplished while Student was in kindergarten. (NT 1225, 1230-1231; S 2; P 14.)
20. Student entered kindergarten in the regular education classroom, attending half-day sessions. (NT 78-80.)
21. Student's teacher was a certified, masters level special education teacher, in her first year as a classroom teacher, who had served as an instructional PCA for three previous years. (NT 79.)
22. Sometime in the Fall of 2013, Student's teacher was thought to be somewhat overwhelmed with the challenges of the kindergarten classroom, including the challenges presented by Student and those presented by other children in the classroom, so the principal asked the assigned emotional support teacher to provide support to Student's teacher in addressing Student's behaviors. (NT 1355-1357.)
23. On October 28, 2013, the District issued an addendum to the evaluation report, after belatedly receiving Parent's parental input form, which appeared to be dated April 16, 2013. The addendum reevaluation report noted that Student had been exhibiting difficulty during transitions, and had demonstrated several behavior outbursts, including physical aggression in the classroom. The addendum recommended further evaluation of Student's social and emotional needs and the educational need for emotional support services in the school setting. (S 2; P 10.)

24. On October 29, Student was suspended for a violent behavioral outburst and the District excluded Student from school for four days pending a risk assessment at a local behavioral health agency. (NT 99-101; P 19, 20, 26; S 7.)
25. After this incident, on November 6, 2013, the District made arrangements to have an ABA trained aide attend Student at all times, under the supervision of an ABA trained consultant. These personnel created a behavior support plan for Student. (NT 81, 106-107, 328-329, 456-457; P 19, 26; S 4.)
26. During Student's kindergarten year, the District did not perform an in depth or "Level III" Functional Behavioral Assessment (FBA), that would include systematic definition of target behaviors and data-gathering, with the involvement of a board certified behavior analyst (BCBA). Student's regular education and special education teachers developed a behavior intervention plan on their own prior to November 6, 2013; after that, the behavior intervention plan was under the direction of the ABA trained personnel. (NT 90-93, 328, 1394; S 2, 4.)
27. The regular education interventions put in place allowed variability in the structure of staff response to behaviors, contrary to the Student's need for a high level of structure and consistent staff responses to behaviors. (NT 996-999, 1000-1006, 1050, 1063-1065, 1201-1202, 1205; S 6, 7; P 184.)
28. The behavior intervention plan required the regular education teacher to color in blocks of time according to the teacher's assessment of Student's behavior; good behavior was colored green, and rewards were to be delivered for days in which most time periods were green. Inappropriate behavior was colored red, and notable behaviors were to be described in writing. A third category of behavior was colored yellow, and the behavior of concern was sometimes described and sometimes not described. (S 7.)
29. In November 2013, there were several days on which Student did not earn a reward because most of Student's behavior was colored yellow in the behavior sheets; however, the behavior sheets did not specify or count the specific behaviors of concern. In December, there were three incidents of violent behavior, including throwing folders, bumping into a peer, and a severe meltdown that included pushing, kicking, and screaming; on two days, there was no "green" behavior but the negative behavior of concern was not noted. (S 7.)
30. On December 16, 2013, the District issued an addendum to the reevaluation report, identifying Student as a child with a disability under the IDEA, with classification of emotional disturbance. (S 4.)
31. The December 2013 addendum noted severe behavioral outbursts including physical aggression in the classroom, striking teachers and staff, kicking, eloping, throwing objects and furniture, tearing things off walls in the classroom, screeching in common areas, attempting to bite and grabbing at clothing. It also noted that Student had some difficulties establishing and maintaining friendships. (S 4.)
32. Student's teachers reported that Student's negative behaviors were related to transition from school to home, but had improved due to the arrival of a new PCA in the classroom.

Student's emotional support teacher reported that Student's emotional status seemed volatile and varied from day to day. (S 4.)

33. The December 2013 addendum recommended one-to-one support during the school day; breaks, prompts, cues, praise and rewards; consistency and preparation for transitioning from school; riding the bus to school; participation in social skills group; and management of services by a case manager. (S 4.)
34. Before December 2013, Parent obtained a private therapist for Student, and Student received private psychotherapy from then until the end of the year and during first grade as well. (S 22; NT 807, 852-854, 859-860.)
35. Regular education interventions were not consistently effective in helping Student to exhibit appropriate behavior. Student's behavior continued to disrupt Student's education and that of others until December. In January 2014, Student, in separate incidents, kicked toys; threw materials and a chair; kicked the teacher; knocked a peer to the ground, bit the teacher twice, kicked and hit others; hit a teacher; and had difficulty coming into school for which the time period was colored red, but the behavior was not described. (NT 82-86, 92-93, 102, 116, 122-123, 330, 419-421, 452-454, 1351-1352, 1355-1356, 1390, 1201-1202; S 7; P 21, 27, 35.)
36. Student's behavior improved somewhat in February and March 2014, and the beginning of April. Nevertheless, Student threw something in February, and refused to pack up for home on one day in March; on another day in March, Student refused to unpack at the start of the day. In April, Student bit a teacher who was redirecting Student, pushed a peer, threw a book at a peer, and showed increased anxiety, irritability and defiant behavior. (S 7; P 21.)
37. On March 11, 2014, the District offered an initial IEP to Parents at an IEP meeting. The IEP noted that Student had great progress with behavior management in the school setting, and relied heavily upon the emotional support strategies that had been implemented. The IEP noted that there were no concerns about Student's academic performance or ability, and there were no concerns about Student's executive functions in relation to school performance. The IEP listed needs as "rewards system", "breaks when needed", "social skills", and "counseling by special education counselor". The IEP did not list as needs executive functions, anger management, sensory needs or difficulty with transitions; however, these needs were discussed at the IEP meeting. (NT 338-339; S 6.)
38. The March 2014 IEP placed Student in itinerant emotional support, located in regular education with supplementary aids and services. The IEP reflected the team's conclusion the Student did not need placement in an emotional support classroom. (S 6.)
39. The March 2014 IEP offered one goal: demonstrate appropriate behavior. This was to be measured through daily behavior chart, and specially designed instruction included strategic seating, redirection, positive reward system, immediate positive feedback and praise, breaks, and additional supports as deemed necessary. (S 6.)

40. The IEP offered an ABA trained PCA in all classrooms daily, passive restraint as a last resort, and social skills group “up to” one time per week (30 minutes). (S 6.)
41. The IEP included an assessment of Student's problematic behaviors, positing a function of obtaining attention, sensory stimulation and escape from situations and activities. It identified the need for Student to learn coping skills and to develop impulse control. It posited antecedent strategies including redirection, strategic seating, "stop, think, then do" verbiage, a positive behavior reward system, daily behavior charts, the availability of an ABA trained PCA throughout the school setting, breaks and passive restraint as a last resort. It posited replacement behavior and consequences of reduction of supports, and posited staff responses to inappropriate behavior, including planned ignoring and use of consistent language in directing Student regarding inappropriate behavior. (S 6.)
42. The behavior support plan offered Student “up to” 20 minutes per week of counseling. (S 6.)
43. Neither the IEP nor the behavior support plan offered special modifications for transitioning to or from school. Bussing was available to and from school. (S 6.)
44. Parent did not sign the IEP, and disapproved the NOREP without written explanation. On March 11, 2014, Student's father signed the IEP and the NOREP, approving the placement. The IEP was implemented when Student’s father signed the NOREP. (NT 334-335; P 30; S 6.)
45. District teaching personnel implemented a behavior support plan during Student's kindergarten year, from October 2013 to June 2014. The data collection form defined "target behaviors" in terms of the appropriate replacement behaviors desired from Student. Data was collected by coloring blocks of time on a form with red yellow or green. Rewards were made available for time periods in which the color was green. (S 7.)
46. The District did not implement the IEP offered social skills group while Student was in kindergarten. (NT 94, 346, 1400-1403, 1425-1426; S 6.)
47. Student did not receive counseling, a related service offered in Student’s IEP. (NT 1423-1424.)
48. The District provided systems of communication with both Parents, in light of the fact that the Parents were not communicating with each other and were sharing physical and decision-making custody of Student. Because Parents could not be present in the same room with each other, the District held separate IEP meetings for them; some of these involved attorneys and a court appointed guardian, creating scheduling challenges. (NT 348-349, 381-386, 464-465, 940, 1353-1355; S 2.)
49. The District provided educational records to Parent on multiple occasions, including daily behavior reports during ESY programming. (NT 125, 450-451; P 56.)

50. Student missed 21 days of school while in kindergarten. Three of these days were for suspension due to Student's behavior, in October. Thirteen of these days were not due to Student's behavior in school. (P 19.)
51. Student did not always take the school bus to school; Student had few difficulties transitioning from the school bus to the school. When Parent brought Student in an automobile, there often were severe difficulties in transitioning from Parent's car to the school door. (NT 133-134, 1433-1434.)
52. While in kindergarten, Student was restrained on the school bus or excluded from it eight times. (P 21.)
53. Serious incidents became more frequent in May 2014, when Student's behavior regressed and Student exhibited frequent serious behaviors until the end of the school year. On May 9, 2014, Student was excluded from the school bus for the remainder of the school year. (NT 84-85, 116, 122-123, 419-424, 987; P 32; S 7, 8; P 21, 35.)
54. Serious incidents sometimes reached the level of requiring passive restraints to ensure Student's safety and that of others. (NT 119, 1395-1396.)
55. Student frequently was off-task during class time in kindergarten. (S 7, 8, 15, 27.)
56. May 2014 benchmark testing indicated Student's performance at a below basic level in writing. At the beginning of first grade, Student also scored below basic with a reading and writing prompt. Nevertheless, Student was considered to be performing at grade level academically overall. (S 21.)
57. The District offered Extended School Year services to Student for the summer of 2014 pursuant to a custody court order; Parent opposed provision of ESY services and had scheduled other activities for Student, so that scheduling of ESY services was changed and reduced services were delivered due to Student's other scheduled activities. Student's first grade teacher provided the ESY services; a PCA accompanied Student. (NT 123-125, 138, 344-345, 356-357, 365; S 3, 8.)
58. The District did not make an eligibility determination regarding ESY for summer 2014 through the IEP process, and Parent was not invited to participate in an IEP meeting to make such determination. (NT 1413.)
59. The District recognized some difficulty with accomplishing higher-level executive tasks; this was attributed to Student's attention and impulsivity problems. (P 35.)
60. Parents continued to share custody of Student, including physical custody for portions of the school week. Student had to be transported from and delivered to different Parents' homes during the school week. (S 9.)
61. Based in large part on concerns due to Student's behaviors in May and June 2014, both parties sought a meeting to discuss Student's IEP for the coming first grade year. (S 8 to 11.)

62. From the beginning of school in first grade, Student exhibited problematic and sometimes dangerous behaviors, including increasingly frequent elopement. Student's behaviors escalated in both intensity and duration during the time between the beginning of school and the end of December. Restraints were used multiple times during this period. (NT 488-492; S 15, 21, 22, 27; P 71.)
63. Student displayed minimal attention to task in the classroom. Student spent much classroom time crawling and wandering around and hiding under a desk. The classroom teacher ignored this behavior and instructed the rest of the class to ignore this behavior. Student was extremely disorganized and highly dependent upon the classroom aide to help find materials and respond to classroom instructions. Student displayed a lack of respect for authority. Student missed a great deal of instructional time. (S 15, 21, 27.)
64. Throughout the Student's kindergarten and first grade years, Parents employed differing behavior management strategies at home, that also differed from those attempted by District personnel at school. There was little communication and cooperation between Parents, and District personnel were unable to obtain consistent and prompt decision making from Parent. Both Student and the District were influenced to side with one or the other parent in the ongoing conflict. (S 21.)
65. The District convened an IEP meeting on October 7, 2014, and included 16 participants, including relevant educators, administrators, attorneys and an advocate. (S 11.)
66. Subsequently, the District offered an IEP with the meeting date of October 7, 2014. (S 11.)
67. The October 2014 IEP continued Student in itinerant emotional support, with a goal essentially the same as that of the previous IEP, and the same specially designed instruction, accommodations and modifications, with some added modifications. The IEP included in addition a plan for supporting Student's transitions from arrival in the morning to leaving for the day. It contained explicit directions to staff, including directions as to how to react to instances in which Student should fail to transition appropriately. The IEP also included a crisis plan with explicit directions to staff for response to dangerous behavior by Student. (S 11.)
68. The crisis plan included use of passive restraints as a last resort, but provided for waiver of the IEP meetings required by law whenever restraints are utilized. (S 11.)
69. The District agreed to conduct a re-evaluation of Student, to include parent and teacher input (including an audiology assessment and a report from Student's gastrointestinal physician), achievement testing, records review, a "Level III" FBA, and an occupational therapy evaluation. On October 9, the District agreed to fund an Independent Educational Evaluation (IEE), including neuropsychological and psychiatric evaluations. (S 11, 21.)
70. On or about October 13 and 16, 2014, Student engaged in violent behavior in school, including running out of the school building, tearing down artwork on hallway walls, attempting to kick staff, throwing objects, flipping desks, biting, hitting, scratching, spitting, screaming, and head butting. (S 13.)

71. The IEP, transition plan and crisis plan were mailed to Parent after the IEP meeting, but Parent indicated that she had not received them. They were re-mailed on November 14, 2014. Parent did not sign the NOREP for the October 2014 IEP until November 25; Parent disagreed with the IEP and requested a due process hearing. (S 11, 16.)
72. On December 9, 2014 Student was removed from school and referred to the local behavior health service for a risk assessment. While exiting school at the end of the school day Student began a tantrum in which Student was hitting, kicking, spitting, biting, wiping objects off of desks onto the floor, and throwing glass objects so that they broke and scattered glass all over the floor. Student also picked up a glass object and threw it in the direction of staff. Much of this behavior occurred during attempts to passively restrain Student. The behavior health service recommended that Student was not safe to return to school. It recommended further assessment for appropriate level of psychiatric services. (S 19, 20.)
73. On December 17, Student was evaluated and referred for partial hospitalization at the local psychiatric hospital. Student attended for twelve days, during which no academic demands were placed upon Student. The program psychiatrist diagnosed Student with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, and Adjustment Disorder; the diagnosis called for ruling out Reactive Attachment Disorder. The psychiatrist noted that Student's prognosis was "poor". (S 22.)
74. Student was discharged from partial care without medications, as Parent preferred not to utilize medications for Student. The program social worker indicated that Student had done well in a small structured environment, after a period of adjustment. (S 22.)
75. On December 17, 2014, the District sent a re-evaluation report to Parents, which was dated December 1, 2014, and was based upon data gathered prior to that date. The report included parental input with regard to varying behavioral strategies used separately in the homes of each of Student's parents. It explicitly addressed whether or not Student was exhibiting attention and hyperactivity issues, as suspected. It noted that Student was increasingly experiencing encopresis, with attendant disruption of class time and embarrassment. (S 21.)
76. The re-evaluation report concluded that Student continued to need special education as a child with the disability of emotional disturbance. It found that Student was learning and progressing through the first grade curriculum, demonstrating "strong academic skills." Nevertheless, it found that Student needed individualized supports to "navigate" through the school day, because Student was missing large amounts of instruction due to struggles with aggressive outbursts, work refusal behaviors and Student's need for frequent movement and breaks during the school day. Supports were needed to help Student perform functional skills that are typically performed independently by first graders, including entering the school building, navigating the building, taking bathroom breaks, unpacking and packing belongings and performing one step directions. (S 21.)
77. The report concluded that Student performs best in a small controlled setting with a small group or individual setting. It noted that Student has the most difficulty regulating

Student's behaviors during large instruction and transitions. The report indicated that Student requires "intensive emotional support throughout the school day." The report also noted a need for explicit instruction in social skills. (S 21.)

78. The report noted occupational therapy recommendations to address Student's behavioral and sensory needs, including a sensory diet and the use of "the zone program". (S 21.)
79. The District convened an IEP meeting on January 23, 2015, attended by both Parents and fourteen other participants. The IEP offered to continue Student's placement in itinerant emotional support services at Student's neighborhood school. (S 25.)
80. The IEP reflected recommendations as the result of an audiological evaluation in November 2014, including preferential seating; a separate, quiet, uncluttered work area for Student within the classroom; use of visual cues to supplement auditory information; frequent prompts and checks; repeated directions; frequent positive reinforcement; frequent movement and listening breaks during the day; and external organizational aids. (S 25.)
81. The IEP reflected teacher input indicating a reduction in the frequency, intensity and duration of Student's inappropriate behaviors during the three weeks subsequent to Student's partial hospitalization. This included oppositional behavior, conflict with peers, increased time in the classroom, willingness to express negative emotions, and reduced impulsivity, anxiety and oppositional behavior. (S 25.)
82. The IEP included a sensory diet developed through collaboration of the occupational therapist and the board certified behavior analyst, both of whom had evaluated Student and provided reports. This included training for teaching and related services staff, a provision for changing the sensory diet frequently, monitoring Student's use of the diet and dealing with refusal, which would be to refrain from forcing it on Student. (S 25.)
83. The IEP included an FBA that was based upon both structured assessment instruments and data collection during three separate days in November 2014. The FBA contained definitions of the target behaviors and explicit instructions on implementation of interventions, including the use of praise for positive behaviors and the use of re-direction rather than planned ignoring for refusal and non-compliance with directives in the classroom. It also included interventions designed to be proactive, addressing antecedent conditions, and the teaching of replacement skills. (S 25.)
84. The IEP provided new goals in addition to the goal for maintaining appropriate behavior in school. New goals addressed muscular development to permit longer periods of sitting in a chair in class; use of sensory strategies; writing sentences to address visual spatial processing; reduction in tantrum behavior; and use of coping skills to self-regulate behavior. (S 25.)
85. The IEP provided specially designed instruction including sensory strategies and assistive technology; proprioceptive activities; tactile stimulation and joint compression; a second space within the classroom; brevity of directions; an individualized chair; specialized

response to escalation of behaviors; and use of a research based emotional support curriculum. (S 25.)

86. The IEP provided for related services including an ABA trained PCA; social skills group one time per week for 30 minutes; counseling one time per week, for 20 minutes; and occupational therapy twice per week for 30 minutes per session. (S 25.)
87. The IEP provided for staff training and consult with a BCBA and occupational therapist for implementation of the behavior support plan and the FBA. (S 25.)
88. By signature dated February 9, 2015 on the NOREP sent on January 22, 2015, Parent agreed to implementation of the recommended placement as a pendent placement, and to implementation of all services offered in the IEP except the use of restraints. On the same date, Student's father signed the NOREP without reservation of rights. The January 2015 IEP was implemented at that time. (NT 239; S 26.)
89. In February 2015, the parties received the report of the private neuropsychologist evaluation initiated in or after November 2014. The report classified Student with ADHD, disruptive mood dysregulation disorder, and anxiety disorder; the evaluator recommended evaluation for post-traumatic stress disorder, and noted ongoing problems with encopresis. It found Student's cognitive ability to be average, and Student's academic achievement also to be average and grade level. It noted prominent difficulties with attention and impulsivity. (S 27.)
90. The report found serious difficulties with social skills, personal boundaries and emotional dysregulation. (S 27.)
91. The private report recommended individualized, small group instruction in a self-contained emotional support setting with a low student-teacher ratio. The report recommended a full twelve month day program within a positive therapeutic milieu. The report noted that Student requires "flooding" of positive reinforcement for being on task, participating appropriately and coping with emotional difficulties. The report recommended specially designed instruction in mathematics and written language, including spelling. It recommended provision of classroom notes to Student as an accommodation for Student's inefficient graphomotor skills and organizational deficits. (S 27.)
92. The report recommended that Student ride the bus to school and recommended against home schooling. (S 27.)
93. The District issued a re-evaluation report dated March 20, 2015, reflecting its review of the February 2015 private neuropsychological evaluation report. The report included a review of the private neuropsychological report and recommendations, a District response, a report of observations on five different days in March 2015, since implementation of the most recent behavior support plan, and data gathered on the Student's response to the new behavior support plan and the sensory diet in January, February and up to March 15, 2015. (S 34.)

94. The re-evaluation report continued Student's identification with emotional disturbance, with no secondary classification of Other Health Impairment to account for the previous medical diagnoses of ADHD. The re-evaluation report presented data indicating that the most recent interventions had significantly and positively affected Student's behavior, when combined with a change in the governing custody order, which vested physical custody in Student's father during the school week, enabling Student to come to school in a predictable pattern almost every day. (S 34.)
95. The District's psychologist reported five observations over a two week span in March, with time sampling indicating Student's on task behavior to be 73%, 65%, 86% (during a station at which Student played an educational computer game) and 66% on four of those occasions. On one occasion, the observation could not be conducted, in part because Student required passive restraint and was sent home. On another of the days of observation, Student was passively restrained due to a physical outburst. During these observations, Student worked on crayoning during a mathematics assignment; left on requested breaks and left the classroom with the PCA's permission twice, and repeatedly struggled with maintaining attention and keeping up with the pace of the class due to attention and organizational difficulties that slowed Student's response to directions. Student also was seen to violate the personal space of peers repeatedly. (S 34.)
96. The observations did not note any use of the sensory diet. (S 34.)
97. The observations noted significant improvement in Student's time on task, an absence of the irritability that Student had displayed previous to January 2015, and better self-advocacy and tolerance for frustration. (S 34.)
98. The re-evaluation report contained a report of the audiological evaluation conducted in November 2014, which emphasized the need to address Student's difficulties with maintaining attention in order to appropriately address Student's measured deficits in auditory decoding, integration and output organization. (S 34.)
99. The re-evaluation report contained data from January through mid-March, indicating the effect of the behavior support plan and sensory diet implemented according to the January 2015 IEP. This data also traced the effect of the "setting event" of a change in physical custody during the school week. The data supported the re-evaluation report that Student's most problematic behaviors had decreased in frequency, duration and intensity during the measured period of time. Data also supported the report that Student's time on task had improved over that period of time. (S 34.)
100. During the period of time from January 2015 through June 2015, Student was out of the classroom for significant portions of Student's assigned classroom time. Student did not accept administration of most elements of the sensory diet. Student created frequent situations when the classroom had to be cleared. Student sometimes eloped from the classroom. Student sometimes was restrained and escorted from the classroom. When removed to the emotional support classroom, Student rarely completed classwork there. During this period of time, Student requested and was given increasing amounts of time on breaks from the classroom. Data reporting sheets from the PCA indicated frequent

instances of irritability with peers, often leading to altercations. (NT 495-497, 503, 513-514, 523-527, 536, 612-615, 622-625; P 175, 178, 185, 186, 189, 190, 101, 193, 194, 195, 197, 200, 203, 205, 208, 210, 211, 212, 213, 217, 219, 224, 227, 228.)

101. The first grade PCA was not recording data concerning intensity or duration of behaviors. The PCA was instructed to utilize planned ignoring and sometimes offered sensory breaks not on a scheduled basis. (NT 502-506, 529-530, 542-544.)
102. Student's academic performance declined toward the end of first grade, with poor performance in Mathematics. (NT 607.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce in all classrooms, daily preponderance of evidence³ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

³ A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipoise”, the Parent cannot prevail.

DUTY TO OFFER A FAPE, INCLUDING AN APPROPRIATE PLACEMENT

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

However, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995). An IEP is not required to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at

the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

Pursuant to its obligation to offer and provide Student with a FAPE, the District must provide Student with an appropriate placement. See, P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. 2013)(defining placement as an interest protected under the IDEA); R.B. v. Mastery Charter Sch., 762 F. Supp. 2d 745 (E.D.Pa. 2010)(describing change of placement as fundamental change in educational program that ensures provision of a FAPE). Placement is part of the selection of services that delivers a FAPE through the IEP. P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS, above. A “placement” is not the same as a “place” or location of the services; rather, “placement” is the level and type of services to be provided to Student, wherever those services are provided. Id. at 19. However, if the location of the services has a substantial impact on the quality of the services, there is authority that suggests that location can be a factor in determining whether or not the placement in the location in question is part of an IEP that is reasonably calculated to provide meaningful educational benefit. R.B. v. Mastery Charter Sch., 762 F. Supp. 2d 745, 763 (E D. Pa. 2010).

APPROPRIATENESS OF STUDENT’S KINDERGARTEN PLACEMENT – SEPTEMBER THROUGH DECEMBER

Parent argues that the District provided an inappropriate placement during the entirety of Student's kindergarten year. Parent argues that the District should have known that Student needed special education during the transition period from Early Intervention services to kindergarten; therefore, the District failed inappropriately to recognize Student’s need for special education by failing to identify student as a child with a disability in August 2013. I conclude that, in hindsight,

Parent may be correct, but applying the legal standards discussed above, requiring the placement to be appropriate based on the District's information at the time of the offer, Parent has failed to show that the District's August re-evaluation inappropriately found Student ineligible for special education.

I find above that the District knew that Student had presented with serious behavioral difficulties as a young child. The District was well aware that Student had been diagnosed at such a young age with disruptive behavior disorder. The District was aware that Student had received supports in early intervention. The District's evaluator admitted knowing the above facts.

Nevertheless, I conclude that the information available to the District at the time of the August evaluation did not require it to classify Student at that point. The early intervention program had reported a year's worth of behavioral data that showed that Student had made some progress in learning skills related to attaining behavioral self-control. While inappropriate behavior seemed level over the year by these data, the intensity and frequency of the behavior seemed to improve. Student appeared to be learning to control Student's behavior. There was information that suggested to the evaluator that it might be possible to reduce supports for Student.

The evaluator also credibly testified that she used professional judgment in light of her experience with very young children such as Student; it was her judgment that transitioning children often have behavioral issues at a young age, issues that resolve by kindergarten. This appeared to be the case with Student.

In view of these considerations, the evaluator decided to deny eligibility at that time, but to recommend continued monitoring of Student's behavior, and noted that the District and Parents should move quickly if Student began to regress behaviorally. Both Parents strongly supported that decision, endorsing the hopeful view that the best plan was to allow Student to start school

with a clean slate. The evidence in this record does not prove by a preponderance that this judgment was inappropriate. A contrary conclusion would amount to second-guessing the District's classification decision based upon information that the District did not have at the time. The IDEA forbids this, as explained above.

It follows that placing Student in regular education was not inappropriate from the date of that re-evaluation until there was reason to review its conclusions. I find that the Student's behavior was not problematic for the first few days of school, but it started to deteriorate soon after the start of school. By October, the behaviors previously noted in preschool were being seen in kindergarten and by October 21, 2013, the Student's behaviors escalated into serious misconduct necessitating removal from class. The District initiated a re-evaluation at the end of October, and completed it by December 16, 2013, identifying Student with emotional disturbance. I find no error in this sequence of events.

APPROPRIATENESS OF STUDENT'S KINDERGARTEN PLACEMENT – JANUARY THROUGH MARCH

In early November 2013, while Student was still appropriately placed in regular education, Student was sent home and asked to stay home for a few days after Student engaged in an episode of violent behavior. At this point in time, the District contracted with a behavioral health service agency to provide a PCA for Student, one-to-one; this individual had some training in Applied Behavioral Analysis (ABA). The regular education teacher and the special education teacher devised an intervention for Student that continued while Student was being re-evaluated and identified, and while the District was convening an IEP team to provide special education services. The intervention was based upon a form to be filled out by the regular education teacher, noting

the overall tenor of Student's behavior in different portions of the school day, and color-coding them as good (green), bad (red), or something in between (yellow). When notable, the behaviors would be described on the data forms next to the colored-in time period in which they were observed. The form specified rewards to be delivered by the teachers when Student's behavior was rated as good, or "green".

When the District identified student as a child with a disability on December 16, 2013, the District was obligated to provide Student with an appropriate placement and program within 30 days – by January 15, 2014. 34 C.F.R. §300.323(c). It failed to do so. Instead, it waited until March 11, 2014 (a delay of two months and twenty-six days) to deliver a proposed IEP at an IEP meeting, contrary to the IDEA's requirements for timely action. This, it violated IDEA procedures and left Student in the inappropriate November 2013 placement for over a month without an IEP.

The District argues that the delay was due to the intense marital strife in which the Parents were engaged. It points out that Parent refused to be in the same room with Student's father, refused to work with the District's appointed case manager (for reasons that had nothing to do with the case manager's educational performance for Student) and disagreed with Student's identification and with the IEP itself. It argues that a plethora of lawyers descended upon it, further confusing and delaying the scheduling of meetings required by the IDEA.

The facts of record do not support this argument. While the above things did occur, there is no evidence to support any causal connection between these legal complications and the recorded delay of one month and twenty-six days from the thirty-day mark on January 15, 2014 to the date of the initial IEP meeting. Nor is there any exception in the IDEA's time lines for parental resistance, marital discord or the involvement of lawyers. Thus, on the record and the law, I find unavailing the District's protestations.

Student exhibited severely inappropriate and violent behavior in December 2013 and January 2014. Existing interventions seemed to curtail some of Student's inappropriate behaviors during the period from February 2014 to April 2014. Nevertheless, Student engaged in some violent and dangerous behaviors during this period, albeit less frequently. During this period, the Student's behaviors were not defined with any precision, and the data sheets were not filled out with either precision or consistency. The data sheets do not reveal the prevalence of lower-severity behaviors that interfered with instruction, such as inattention, interrupting class, leaving Student's seat and defiance of instructions. Thus, the evidence of improvement in behavior was essentially based upon subjective report.

APPROPRIATENESS OF STUDENT'S KINDERGARTEN PLACEMENT AND PROGRAM – MARCH 11, 2014 IEP

I conclude that the placement and program offered by the District in March 2014 was inappropriate for this child. The placement was itinerant emotional support, which meant that Student was to be instructed in the regular education setting with the same informal interventions that had been provided since November 2013. Although Student was identified with emotional disturbance, with a history of severe and dangerous behavior and the re-emergence of such behavior in kindergarten, the District failed to perform a complete and systematic functional behavior assessment (FBA), by a qualified professional, based upon careful definitions of behavior and systematic data collection. It provided a behavior support plan that did little more than mirror the goal and instructional modifications offered in the IEP. Although the evaluation report and the history indicated that Student was exhibiting sensory needs, and although the re-evaluation report called for an occupational therapy evaluation, none was performed during Student's kindergarten year, and no sensory diet was provided. The IEP called for counseling and social skills training,

but the record is preponderant that these were never provided. Although transitions were identified as the antecedent to much of Student's disruptive behavior, the IEP did not design any interventions to address this antecedent.

Meanwhile, as noted above, Student's behavior remained problematic in March and early April, and plummeted from mid-April 2014 until the end of the school year. Repeatedly, Student engaged in dangerous, aggressive and destructive behavior that required the humiliating application of physical restraint and removal from the classroom. Student was excluded from the school bus due to behavior, even though the re-evaluation had recommended school bus travel to school, as a way to support Student's difficulties with transition from Parent's automobile. Therefore, the record is preponderant that the flawed placement failed to address Student's emotional, behavioral and social needs in kindergarten – the grade level at which the curriculum is most focused upon classroom behavioral skills and social skills.

APPROPRIATENESS OF STUDENT'S KINDERGARTEN PLACEMENT AND PROGRAM – FIRST GRADE

The record is preponderant that the placement of itinerant emotional support was inappropriate for Student during first grade. From the beginning of the school year until December, when Student was removed from school after a violent and dangerous melt-down, Student's behavior was frequently out of control, and Student's classroom attention to task was absent for significant periods of time, during which Student was not available for instruction. Student's classroom skills were deteriorating from a problematic baseline. Student's relationships with peers suffered. Student was not learning emotional self-regulation skills, behavioral self-control, or social skills that other students had learned already. Student often struggled to keep up with the

pace of instruction, although Student's robust cognitive skills permitted Student to perform on grade level academically.

Recognizing the need for intervention, and apprised of the Parent's intention to pursue her legal rights, the District agreed to re-evaluation, IEE, auditory evaluation, a "Level III" FBA by a BCBA, based upon systematic data-gathering, and a new IEP. The new IEP, formulated in October 2014, before receipt of all of the agreed-upon evaluations, maintained the itinerant emotional support placement and a goal similar to the previous single goal for good behavior. However, a positive behavior support plan and a crisis intervention plan were added, along with some new specially designed instruction.

In December 2014, Student experienced a violent melt-down, after which Student was referred for risk assessment, and thence to a psychiatric hospital for assignment to a level of care. Student was placed in partial hospitalization, where academic demands were minimized in favor of psychiatric treatment and stabilization. Student returned to school in January, and exhibited improvements in both affect and behavior for a short period of time. However, between January's first day of school and the end of the school year, Student's behavior steadily deteriorated, with increasing successful escape behaviors involving going to the nurse's office numerous times, and going to the emotional support teacher's classroom often.

This occurred despite the District's intensive efforts to shore up its itinerant placement with supplemental supports and services. Between January and June 2015, the District, in communication with Parent's attorney, funded an IEE consisting of a neuropsychological evaluation, an occupational therapy evaluation, an audiological evaluation and a "Level III" FBA. It issued and revised the IEP repeatedly, as the reports from these evaluations became available. Services continued to include a one-to-one personal care PCA who was ABA trained; counseling

once per week; social skills class once per week; a Positive Behavior Support Plan and a Crisis Intervention Plan. In the Spring, the District began to implement a sensory diet that the occupational therapy evaluation had recommended. A special area of the emotional support classroom was available to Student for regaining control when upset. A research based emotional support curriculum was instituted. A research based social skills curriculum was implemented.

Although District educators subjectively reported that Student's melt-downs had receded in frequency, duration and intensity, the Student's PCA credibly testified that Student continued to have violent melt-downs, exhibiting dangerous behaviors such as throwing objects at people and kicking and punching staff who intervened. Student's refusal behavior seemed to change shape as Student learned to go to the nurse's office and to the emotional support teacher's classroom in order to escape classroom work demands. Neither that teacher nor the PCA were able to ensure that Student do the work in these alternate "breaks", and so Student learned that the IEP and behavior plan were a reliable way to escape class work. Although staff were trained and tried to implement the sensory diet, Student refused most of the elements of that diet, and its elements, refused when offered according to a set schedule as set forth in the plan, became activities that served to reward Student for escaping work demands. In short, the District's assigned staff failed to implement the behavior support plan and the sensory diet with fidelity.

The exhibits show that behavioral data were kept, although it did not measure duration or intensity of target behaviors, and there is some doubt as to the fidelity with which the data were kept. Nevertheless, this data, and the testimony of the PCA who kept it, credibly depicted the nature of Student's behaviors. Student's days were frequently punctuated with off-task behaviors and escapes to the nurse or to the emotional support teacher's classroom. Student's weeks were punctuated by behavioral outbursts that included punching peers, throwing objects and destroying

property, and punching and kicking educational staff and administrators. This behavior became more frequent as time went on. I conclude by a preponderance of the evidence that the District's placement, even with all of the improved and added services in first grade, failed to help Student to bring Student's behavior under control.

The District argued, and it even obtained from its contracted behavioral intervention consultant data to show, that the Student's behaviors were triggered by Parent's association with Student. Data showed that Student's transition to and from the father, and to and from the Parent, correlated with spikes in tantrums and inappropriate behaviors. I reviewed these data, and find that they are flawed and carry reduced weight, for three reasons. First, they are based upon a limited number of data points. Second, the data gathering sheets show that there were instances of outbursts that were not so correlated. Third, the argument is beside the mark.

The argument fails regardless of its statistical validity because the District's obligation does not depend upon the absence of extraneous triggering events for the behavior of concern. The Student's needs are not negated by parental discord or the negative influence of a parent's behavior on that of the child. The District is required to provide a placement reasonably calculated to enable the Student to obtain meaningful educational benefit, regardless of who the child's parents are, or what negative influences they may have on the child's behavior.

FAILURE TO PROVIDE A FAPE IN KINDERGARTEN AND FIRST GRADE

Based upon the analysis above, I find by a preponderance of the evidence that the District failed to provide student with a FAPE in part of Student's kindergarten year and for the entirety of Student's first grade year. The IDEA defines a FAPE as special education and related services that, among other things, are provided through an IEP that meets IDEA standards. 34 C.F.R. §300.17.

The IDEA standards require that the IEP must meet the child's needs arising from the child's disability in such a way as to "enable the child to be involved in and make progress in the general education curriculum" 34 C.F.R. §300.320(a)(2)(i)(A). These standards also require the IEP to meet all educational needs that arise from the child's disability. 34 C.F.R. §300. 320(a)(2)(i)(B).

In Pennsylvania, the general education curriculum must address basic developmental needs in the emotional, behavioral and social domains. The regulations promulgated by the Pennsylvania Department of Education for public education require local education agencies to "prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa Code § 4.11(c). The Department's regulation entitled "Elementary Education: primary and intermediate levels" mandates that "curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning". 22 Pa Code 4.21(b).

None of these educational benefits are attainable without a basic ability to regulate emotions and control one's behavior. M.C. v. Central Regional S. D., 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); Breanne C. v. Southern York County School District, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral,

social and emotional.) The record in this case is preponderant that the District did not provide Student with supports that were reasonably calculated to provide Student with the opportunity to make meaningful progress in these areas of the curriculum.

I reach this conclusion in light of the District's knowledge, as of December 2013, that Student had a history of severe behavior disorder, and that the same patterns and kinds of behavior were recurring with increasing frequency and severity in the placement to which the District had assigned Student. Moreover, from this point of time forward, the District was aware continually that Student's severe behavioral dysregulation was recurring despite its addition of supports to the placement, and the District became increasingly aware that Student's emotional disorder was complex in both etiology and manifestation. Yet the District maintained Student in the minimal level of emotional support placement throughout the relevant time.

FAILURE TO PROVIDE REQUESTED DOCUMENTS

I decline to order production of more educational records, based upon the evidentiary record in this case. While I have examined the evidence concerning production or non-production of educational records, I do not find preponderant evidence that the District has deliberately withheld such records contrary to either the IDEA or my previous orders in this matter. Moreover, in light of my order below for a change of placement, I conclude that an order for more educational records at this time would unnecessarily embroil the parties in a minute examination of past history, to the detriment of any hope for a collaborative determination of the appropriate educational placement going forward.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I found that most of the witnesses were credible and reliable, and specifically I found that Parent's testimony was credible and reliable, based upon its fidelity to the record, and upon the way in which Parent repeatedly chose to respond to questions from both parties' counsel. I also found Student's father to be credible and reliable; although I disagree with his ultimate conclusion in this matter, I do so with respect for his calm, thoughtful and respectful efforts to support the District's work with his child.

I found the PCA's testimony to be credible and reliable, both in the way in which the PCA answered questions, and also because the data that this witness had collected day by day corroborated her testimony. Conversely, I assign much reduced weight to the testimony of the first grade teacher, who swore during a May 2015 due process hearing session that the Student's tantrums had become more verbal than physical during a month in which the Student had been restrained at least five times for extreme violent behavior, including throwing bean bags, crayons and a telephone at staff and punching them and a peer. The teacher stated erroneously that Student had been upset only three times that month without escalating to a tantrum; this is contradicted in the documentary evidence. (NT 624; P 224, 227, 228.) On the day after this testimony, ironically, Student had a tantrum lasting about fifty minutes, during which Student hurled different objects at staff repeatedly, and kicked and punched them as they intervened. (NT 633, 642-643; P 224, 227, 228.)

Similarly, I accord little weight to the testimony of the emotional support teacher. The teacher swore in court in June 2014 that he had not delivered the IEP-specified social skills small group instruction to Student in kindergarten, (P 41); however, the teacher swore in this due process hearing that he had provided such social skills instruction to Student, (NT 1358-1360, 1399-1403).

I also accorded reduced weight to the District's psychologist's testimony, because her testimony and final re-evaluation report concerning first grade were overtly prepared for the purpose of defending the District in this litigation, with the attendant and well recognized detriment to reliability that such a purpose implies. Therefore, I accepted her testimony and opinions in light of this evidence of some bias in favor of the District.

While the private psychologist testified overtly on behalf of Parent in this matter, there was no such evidence of bias, and I accord her testimony full weight. I note that her recommendations flatly contradict Parent's long-desired goal of home-schooling Student, and that the report criticized Parent's practice of transporting Student to school rather than allowing Student to take the school bus, as recommended by the District's re-evaluation reports.

I accorded full credibility and reliability to the testimony of the BCBA who developed the behavior support plan implemented with limited success in first grade. This witness was expert, forthcoming and clear about the data basis of her opinions. Nevertheless, I gave greater weight to the opinion of the private neuropsychologist on the question of the appropriateness of the itinerant emotional support placement, because the psychologist's data on the overall course of Student's pathology and behavioral dyscontrol was far broader and more comprehensive, simply because of the nature of her methodology and the scope of her assessment. Moreover, the BCBA's factual basis for her opinions was dependent upon the fidelity of the data-gathering and implementation of the behavior plan; the record is preponderant that both data-gathering and implementation were

flawed due to the PCA's lack of clarity on definitions of the data to be gathered, such as the definition of classroom "assignments", (NT 616-617, 746-747), and the PCA's testimony that she deviated from the behavior plan by allowing Student to escape work demands very frequently toward the end of her tenure with Student.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). In this matter, I conclude that an hour for hour order for compensatory education is particularly inappropriate, while the record provides considerable support for the "make whole" approach to compensatory education, an approach that is far better suited to righting any deprivation that this young child may have suffered due to the failure of the District to provide Student with a FAPE.

The hour for hour approach in this matter is particularly difficult to implement with any fairness or precision. In a general sense, such a remedy would likely be inequitable to some extent. It also would be difficult to calculate appropriately.

I conclude that such an approach would be to some extent inequitable, because the District was hampered in its response to Student's needs by the Parent's pervasive resistance to proposed interventions, and by the profound struggle between these Parents, whose dedication to the Student's wellbeing was colored by a struggle to control the educational decision making process. Moreover, I am persuaded that any compensatory education order would immediately become the focus of additional struggle between the Parents, and such a heightening of tensions may actually

be harmful to Student. Moreover, I take seriously the father's opinion that additional instructional services would be difficult to implement appropriately for Student due to Student's full schedule of activities and need to have some recreational time with each parent.

In addition, I note that the failure to address Student's developmental needs in the areas of behavior and social skills was not always pervasive throughout Student's school days. Indeed, the data show that Student had many days during which Student was able to access academic education, along with periods of time in which Student was unavailable for instruction due to removal from school, inattention, and escape or elopement behaviors. Moreover, the record shows that, despite Student's behavioral struggles and inattention, Student was able to function academically on grade level for the entire period during which the District was failing to appropriately address Student's emotional and behavioral difficulties. In short, the record does not show with any precision what days Student was receiving substantial academic benefit and what days Student's behavior prevented even academic participation and learning.

On the other hand, the record provides solid, reliable support for a remedial order aimed at providing Student with the supports that Student will need going forward in order to learn the emotional self-regulation, behavioral skills and social skills needed to re-enter the least restrictive educational setting on a developmental par with Student's grade-level and age-level peers. As the private evaluator explained, Student requires an immediate placement in a more restrictive and therefore more supportive educational environment, but only with the goal of helping Student to learn the necessary developmental skills that will enable Student to function successfully in all aspects of the general education setting.

On the record before me, I conclude that Student has great strength of intelligence and the ability to learn rapidly, when provided supports that appropriately reduce the interference of

Student's attention, sensory and oppositional deficits. Student also displays admirable qualities of personality that should enable Student to overcome Student's now severe deficits within a reasonable amount of time. Still, I am persuaded that none of this will happen in the itinerant emotional support placement.

On this record it is essential to provide Student with an emotional support placement that delivers instruction and related services in a small classroom setting, through qualified and experienced educators, as recommended by the private neuropsychologist. (NT 1022-1025; S 27 p. 21-) The placement should be a twelve month, full day program and it should offer therapeutic support, closely coordinated with the educational component; this level of service will provide the compensation called for on this record, as it will help Student to recover to a grade-appropriate and age-appropriate developmental level as soon as is reasonably possible. While such programming must be available to Student, the placement should be molded to fit Student's overall developmental and emotional needs; thus, if full time educational services are contraindicated taking the Student's best interests into account, the placement should be modified accordingly. The placement should offer access to psychiatric, occupational therapy, audiological and ABA behavior management support as needed. I will order the District to provide such a placement forthwith.

Parent invites me to opine as to the precise program that would be appropriate. I decline to do so. This is the province of the IEP team, as the IDEA mandates. Moreover, the record provides an insufficient basis to create such a specific order as parent suggests.

CONCLUSION

I conclude that the District failed to provide Student with an appropriate placement from January 15, 2014 to the last day of school in June 2015. I further conclude that this failure deprived Student of a FAPE during the same period of time. I decline to order further production of educational records. I decline to order hour-for-hour compensatory education; however, I order the IEP team to place Student in full time emotional support, provided by a setting that is consistent with the above findings and conclusions, taking into account the recommendations of the private neuropsychologist's February 9, 2015 report in this matter.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The District failed to provide Student with an appropriate placement from January 15, 2014 to the last day of school in June 2015.
2. The District failed to provide Student with a FAPE from January 15, 2014 to the last day of school in June 2015.
3. The District did not fail to provide Student with requested educational records of the Student as required by law.
4. Within fifteen days of the date of this order, the District shall convene an IEP team meeting for the purpose of Student's educational placement. The IEP team shall place Student in full time emotional support, in a public or private educational setting either provided or fully funded by the District. Such setting shall provide services that are consistent with this Decision, including a twelve-month, full day educational program that offers therapeutic support, closely coordinated with the educational component. The placement shall offer access to psychiatric, occupational therapy, audiological and ABA behavior management support as needed, as well as any other services that the IEP team determines to be appropriate.
5. Consistent with paragraph 4 hereof, the IEP team shall consider all of the recommendations of [the private neuropsychologist] as set forth in her Neuropsychological Evaluation report

dated February 9, 2015, and shall offer an IEP to Student that provides all such services that the IEP team considers to be appropriate.

6. The IEP team shall offer an IEP and NOREP consistent with this Decision within ten days of the date of the IEP meeting required hereby. The District shall take all necessary actions to facilitate Student's placement as set forth in the IEP.
7. Hour-for hour compensatory education is not ordered.
8. The District is not ordered to produce any educational records.

It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO
HEARING OFFICER

July 27, 2015