

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 Hearing Officer

DECISION

Child's Name: G.L.

Date of Birth: [redacted]

ODR No. 16219-14-15-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Saucon Valley School District
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Dates of Hearing:

June 19, 2015, August 31, 2015, September 3, 2015

Record Closed:

September 8, 2015

Date of Decision:

September 20, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child in this matter (Student)¹ is classified with the disability Emotional Disturbance pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 10.) Student resides within the District and is in sixth grade. (NT 10.)

Student's Mother (Parent) asserts that the District failed to provide Student with a free appropriate public education (FAPE), in that it failed to place Student in an appropriate placement, and failed to provide appropriate special education services to Student from April 30, 2013 to September 3, 2015. Parent seeks an order that the District provide Student with compensatory education and an appropriate placement prospectively.

The hearing was completed in three sessions. I conclude that the District did not fail to provide Student with a FAPE, and I decline to enter an order for compensatory education or prospective relief. Nevertheless, by way of dicta, it behooves the District to convene an IEP meeting on an emergent basis, in order to address Student's educational needs as set forth in a recent psychosexual evaluation, as well as in the testimony of Student's current therapist in this matter.

ISSUES

1. Did the District provide an appropriate placement for Student from April 30, 2013 to September 3, 2015?
2. Did the District provide student with appropriate special education services, such that it provided Student with a FAPE, from April 30, 2013 to September 3, 2015?
3. Should the hearing officer order the District to place Student at a particular, named private day school, or at a private or public school meeting criteria stated by the hearing officer?

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

4. Should the hearing officer order the District to provide Student with compensatory education for or on account of any failure to provide Student with a FAPE during the period from April 30, 2013 to September 3, 2015?

FINDINGS OF FACT

1. Student has average to above average intelligence. Student has a history of difficult behaviors at home and in the District's elementary schools from kindergarten through second grade. Until May 2013, Student's behaviors had been addressed successfully in the regular education setting. (NT 48-50; S 3; HO 3.)²
2. Student is motivated to learn and to behave in a pro-social manner at school. Student has the potential to succeed in school. (NT 70.)
3. Student's parents experienced marital difficulties and separated, and Student's father was [away from the area], before April 30, 2013. Student's father remains [away from the area] after a brief [period when father returned to the area], which proved disruptive to Student. (NT 276, 289-288; S 8, 30; HO 3.)
4. The District initially identified Student as a child with a disability under the IDEA in February 2010. The District classified Student with Speech and Language Impairment. (HO 1-2, 3.)³
5. In May 2013, Student reported having suicidal thoughts and homicidal thoughts directed toward classmates. Student was hospitalized on an emergency basis, released briefly and re-hospitalized due to Student's reports of recurring hallucinations. (NT 45-47, 103-105; S 8; HO 1-5.)
6. During the May 2013 hospitalizations, Student demonstrated intense rage episodes, emotional lability, threatening behavior towards hospital staff and social immaturity. The hospitals assigned various diagnoses, including mood disorder, separation anxiety disorder and pervasive developmental disorder, indicating the need to rule out obsessive-compulsive disorder. The doctors prescribed medications for mood dysregulation, obsessive thoughts and depression. (NT 47; P 1; S 8.)
7. Student returned to Student's District elementary school, and finished the year with an informal behavior plan. (NT 106-107.)
8. In June 2013, Student made statements indicating risk for self-harm, and Parent was called to take Student home. (NT 50-51, 106.)

² The hearing officer admitted into evidence three exhibits marked as Hearing Officer exhibits. These are referred to here as "HO" one through 3.

³ Exhibit HO 1 consists of 28 numbered stipulations of fact, all admitted into evidence as a hearing officer exhibit. In this decision, it is referred to as "(HO 1- [numeral])", where the numeral represents the stipulation number.

9. Student also reported hearing voices and seeing spirits, including bad spirits that directed Student to do harmful things. Student began picking at Student's skin and ingesting blood, and evidenced obsessive thinking about numerous matters, including sexual thoughts and desires. (NT 42-45.)
10. During the summer of 2013, Parent placed Student in outpatient therapy, and obtained a private psychological evaluation and a private psychiatric evaluation. Parent received these evaluation reports some time in August 2013. (NT 108-109; S 6, 7, 8; P 2.)
11. On August 29, 2013, District personnel met with Parent to discuss Student's need for revision of Student's individualized educational program (IEP), and transition to the new school year. Parent provided the psychological evaluation and the psychiatric evaluation to District personnel at that time. (NT 109-112, 199-200; S 6, 7, 8; HO 1-6, 7.)
12. At the August 2013 meeting, District personnel presented Parent with a permission to evaluate form for a comprehensive re-evaluation of Student, including cognitive and achievement testing, speech and language evaluation, classroom observation, behavior scales and a functional behavioral assessment (FBA). Parent signed this form on September 4, 2013, granting permission. The District's behavior specialist was present and gathered preliminary data sufficient to form an interim behavior management plan with the classroom teacher. (NT 125, 229; S 10; HO 1-8, 9.)
13. As a result of this meeting, District personnel provided Student with a crisis management plan. This included consultation with Student's fourth grade classroom teacher on how to respond to Student's behaviors, which were hypothesized to serve the function of escape from school responsibility and participation. Strategies included ignoring non-dangerous escape-function behaviors and providing rewards for remaining in class, based upon points earned. The classroom teacher collected minimal data on Student's presence in class during various times of the day. (NT 110, 363, 382-382, 390-391; S 11, 12.)
14. In the beginning of fourth grade, Student developed serious behaviors resisting transition from home to school. Staff intervened to provide assistance to Parent in getting Student to go into the school building. (NT 115-116, 395.)
15. Student is and was an unreliable reporter of events at school, often either misinterpreting social interactions or making false statements. (NT 63, 68-70, 347-348, 379-383, 424; S 7, 8, 36; HO 3 p. 4.)
16. Student exhibited unusual behaviors at home, such as picking at skin and sucking Student's own blood, that Student did not exhibit at school. (NT 380, 383.)
17. After the first few days in September 2013, Student's escape-function behavior gradually diminished. (NT 253-255, 264, 373-377, 381-383, 391-393, 398-399; S 12.)
18. Prior to October 21, 2013, the District's behavioral specialist made several observations from outside of Student's classroom, with regard to Student's behavior. The specialist was unable to observe any behaviors of concern during these observations. In addition, the specialist maintained notes of the reports of the classroom teacher and other personnel with

regard to inappropriate behaviors by Student, and other staff specifically observed Student for purposes of an FBA. (NT 201-206, 253-254, 367-368; S 12; HO 2.)

19. On October 21, Student was present during a meeting regarding Student's sibling, at which Student's father was present. Student became agitated, threatening and assaultive during the meeting. After the meeting, at a therapy session, Student became so agitated and threatening that the therapist had Student committed to a hospital involuntarily. (NT 122-124, 223-227; S 12; HO 1-5.)
20. The inpatient psychiatric hospital recommended that Student be discharged to a school-based partial hospitalization program operated by the local intermediate unit (PHP). (NT 124-125; P4.)
21. Parent notified District personnel with regard to Student's threats that were specific to District personnel. Parent also advised District personnel with regard to Student's hospitalization and other psychiatric symptoms. (NT 123-124; S 12, 13, 14.)
22. The District convened an IEP meeting to devise an emergent plan to receive Student back from hospital to the regular education classroom on November 6, 2013, anticipating a return on November 7. Student attended school on November 11, 2013. (S 17, 18.)
23. By November 6, 2013, the behavior specialist had not finalized an FBA. At a meeting on that date with Parent, the specialist did not discuss the FBA or seek parental input. This specialist mailed an FBA to Parent the next day. (NT 124-126, 209-212, 215-216, 229-250, 261; S 11, 12; HO 2.)
24. On November 12, 2013, the District agreed to assure funding for the PHP for Student secondary to insurance coverage. On or about November 14, 2013, Student entered the program pursuant to a NOREP signed by the Parent. The District revised Student's IEP to coordinate it with the PHP's program. (NT 195-196, 209-212, 364-368; S 32; HO 1-10, 11.)
25. The PHP provided small-group instruction, individual and group counseling, crisis use of restraint, a school-based behavior support system, and provision of a calming location within the classroom. (S 24, 30.)
26. On December 5, 2013, the District provided to Parent a re-evaluation report. (NT 131-132; S 22; HO 1-12.)
27. The re-evaluation classified Student with Emotional Disturbance under the IDEA, and identified needs in the areas of social skills, reading and writing. It noted weaknesses in processing speed, resulting in problems with fluency in reading, spelling and writing. It also noted that Student no longer presented speech or language impairments. (S 22; HO 1-12.)
28. The re-evaluation did not contain an FBA. (NT 132; S 22.)
29. On December 11, 2013, Student was re-hospitalized by Student's counselor at the PHP. (NT 128-129; HO 1-5.)

30. Beginning December 19, 2013, the District corresponded with Parent to schedule an IEP meeting; the parties settled on an available date of January 9, 2014. On that date, the District convened an IEP meeting, which Parent attended. (NT 132; S 24; HO 1-13, 14, 15, 16.)
31. The draft IEP did not recognize that Student presented behaviors interfering with learning; it contained no goals for behavior, and it did not include a positive behavior support plan. It did have two goals to improve Student's reading, and Specially Designed Instruction, modifications and accommodations to address time on task, attention, organization and following instructions in class. (NT 132-133; S 24.)
32. The District removed Student from speech and language related services. (S 25.)
33. From January 2014 to November 2014, Student remained placed in the PHP. For the first few months, Student evidenced a recurrence of behaviors such as reporting hallucinations, and the program treated these as escape-function behaviors. (S 30.)
34. Beginning in March 2014, Student's escape behaviors reduced and attendance in class improved. By November 2014, Student's behavioral control had improved and school participation was improved; however, Student continued to exhibit some behaviors of concern. (NT 154, 169, 170-171; S 30; P 6; HO 1-20.)
35. Student made significant progress on Student's reading goals during the second half of fourth grade. Student maintained grade level achievement in mathematics. (S 31, 35.)
36. On June 5, 2014, the IEP team revised Student's IEP to include an FBA and a Positive Behavioral Support Plan. (HO 1-18; S 26, 27, 28.)
37. The PHP convened monthly inter-agency meetings to individualize its program to Student's needs. The Parent and District were invited to attend these meetings and did attend with some exceptions. (HO 1-19, 20; S 30.)
38. During this period, Student increasingly reported obsessive sexual thoughts and compulsive watching of pornography. (NT 101, 140, 142-144; P 6.)
39. In the summer of 2014, Student was returned to partial hospitalization after eloping from a summer program and acting out at home. (NT 152-154.)
40. In August 2014, due to Student's conduct during an interagency meeting to plan Student's discharge, the Parent and treatment specialists decided to retain Student in the PHP while continuing to plan discharge later to a less restrictive educational setting. (HO 1-19, 20.)
41. In October 2014, Student escaped from the PHP school building and was restrained by staff, who did not document the incident of restraint and did not report the restraint to Parent. (NT 141-142; P 5.)
42. On November 3, 2014, the IEP team changed Student's placement to a full time therapeutic emotional support program located in a middle school served by the intermediate unit (TES). (HO 1-20, 21; S 29.)

43. Student's IEP, as revised in November 2014, provided for group counseling and individual counseling, in an amount subject to assessment by a licensed social worker. (S 29.)
44. On November 10, 2014, the PHP discharged Student to the TES. (HO 1-20.)
45. The TES did not receive records from the PHP, due to obstacles arising from the difference between the medical system origins of the PHP and the educational system origins of the TES. The two programs are linked in that staff and supervisors have roles in each program and staff of both programs participate in planning for individual students. (NT 469-471, 495-496.)
46. The TES classroom has a ratio of one staff member to five students, but the actual ratio is one staff member to fewer than five students. (NT 413-414, 475-477.)
47. The TES provides individual and group counseling weekly by a licensed social worker; its school psychologist is on site and is also a Board Certified Behavior analyst. It has access to behavioral health services through the intermediate unit. The classroom has three teaching staff at all times, including a trained mental health worker. (NT 475-477.)
48. The TES program utilizes a classroom behavior support system. (NT 479.)
49. The TES program can provide eye contact/line of sight supervision of Student to protect Student from harm and to block compulsive behavior including sexual acting out or sexual opportunity seeking. (NT 486-490.)
50. The TES program provides daily counseling in the form of social skills training and/or violence prevention training. (NT 479.)
51. Student did not experience significant problems with transitioning from home to the TES. (NT 472-473.)
52. While placed in the TES, Student reported to Parent that Student was being bullied by the students in that program. TES staff found no evidence of this. (NT 66, 156-157, 414-417, 509-510; S 36.)
53. Student was exposed to sexual content in the health class curriculum, which triggered Student's obsessive sexual thoughts and desires. (NT 157-159; S 43, 44.)
54. The District changed Student's class roster to remove health class and substitute individual counseling. (S 36.)
55. In January 2015, the IEP team developed an annual IEP, which included a Positive Behavior Support Plan. (HO 1-22, 23; S 34, 35.)
56. In January 2015, the parties agreed to defer further revisions of the IEP or changes to the Student's placement, pending receipt of a psychosexual evaluation. (HO 1-24; S 36.)
57. In January and February 2015, during Student's fifth grade year, Student reported urges to engage in sexual activity with [peers] in the middle school, and began to act on these urges by seeking opportunities to meet [peers]. (NT 142-148; S 37, 38, 39.)

58. Parent arranged for a psychosexual risk assessment and specialized treatment for Student, but her efforts were impeded due to child custody issues. (NT 148-150; HO 1-25, 26; S 40.)
59. While in the TES, Student continued to report to Parent problematic social relationships at school. At home and in therapy, Student continued to have meltdowns and perseverative thoughts, and to make threatening statements when angry; Student continued to be emotionally labile. (NT 66-73, 162, 497-498, 500, 509-510; HO 1-27, 28; HO 3.)
60. In school, Student was able to access the curriculum and performed well. Student did not evidence social difficulties to the teacher or staff. Student did not engage in self-harm. (NT 412-413, 421-424, 427, 430.)
61. Student tends to misread social cues and interactions in a way that produces negative thoughts about those cues and interactions, and can lead to negative perseverative thoughts. (NT 77, 424, 430, 441.)
62. Student expresses fear of returning to school. (NT 144-145, 285.)
63. Pursuant to the Hearing Officer's order, Student received a comprehensive psychosexual evaluation on two dates in July 2015. (HO 3.)
64. Parents have agreed to provide Student with specialized psychosexual therapy to address Student's obsessive thoughts and compulsive behaviors of a sexual nature. In addition, Student continues in therapy for emotional regulation, anger management and frustration tolerance. (NT 85-86, 276-278, 282.)
65. Student needs a placement that is located in a small group setting and is provided in a small special education classroom, and that provides Student with protection against aggressive or hostile peer behavior. (HO 3.)
66. Student needs specially designed instruction and related services that include a crisis management plan and safety plan including control over access to sharp objects; full time one-to-one monitoring at the level of eye contact/line of sight, to prevent self-harm, sexual acting out and attempts to access sexual activity; increased availability of counseling during the school day, including push-in services; ongoing behavior monitoring and data-gathering on Student's behavior, with consultation by a Board Certified Behavior Analyst, and a research-based positive behavior support plan, revised as needed to support Student's behavior; social skills training (including pragmatic language and training on bullying and its prevention in the school setting) through explicit teaching, reinforced in the classroom setting; classroom coordination with and reinforcement of therapy in the areas of emotional self-regulation, anger management, frustration tolerance, age appropriate sexual education including sexual responsibility and refusal skills, and continued support for improving Student's slow reading. (NT 72-73, 77, 81-90, 93-94, 96-103; HO 3.)
67. Student's Parent needs home-based services through the behavioral health system and needs support for completing the necessary application forms and requirements. This is needed in order to support Student's behavior management plan in the school setting. (NT 79, 502-503; HO 3.)

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.⁴ 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 a preponderance of evidence⁵ 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).

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

⁴ 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).

⁵ 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 upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail.

FREE APPROPRIATE PUBLIC EDUCATION

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 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a "basic floor of opportunity" for the child. 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).

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 at which it was made, and the reasonableness of the school 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); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

I review the last offered IEP to determine whether or not that document was reasonably calculated to provide Student with meaningful educational benefits at the time at which the IEP was offered. D.S. v. Bayonne Bd. Of Educ., 602 F.3d 553, 565-565 (3d Cir. 2010). Thus, the determination must be made on the basis of facts known or available to both parties at the time that the IEP was offered. See R.E. v. New York City Dept. of Educ., 694 F.3d 167, 185-187 (2d Cir. 2012).

PLACEMENT

The above standards apply to the determination of the appropriate placement for the child. The essential inquiry must be whether or not the proposed placement is reasonably calculated to enable the student to receive educational benefits. Carlisle Area Sch. Dist. v. Scott P., 62 F. 3d 520, 535 (3d Cir. 1995); Alloway Twp. Bd. of Ed. v. C.Q., 2014 US Dist. LEXIS 33328 (D.N.J. 2014)(FAPE requirement applied to dispute over placement). In determining the appropriateness of a placement, a school district must also consider a continuum of possible alternative placement options, including placement outside the district, if the district does not have an appropriate placement for the individual child. H. D. v. Central Bucks School District, 902 F. Supp. 2d 614 (3d Cir. 2000).

PLACEMENT AND PROVISION OF A FAPE - APRIL 30, 2013 TO END OF FOURTH GRADE

Applying the above standards, I conclude that the District provided Student with a FAPE during the relevant period ending on the last day of Student's fourth grade year. Based upon what it knew as of April 30, 2013, the District reasonably bolstered its regular education services to address inappropriate behaviors, and its methods were successful for a time. During the bulk of the ensuing period of time, Student was placed in a highly structured, highly restrictive school-based partial hospitalization program, pursuant to a medical prescription. The record shows that this placement was appropriate for Student. While the District did commit procedural violations of the IDEA, Parent has not proven by a preponderance of the evidence that any of these violations produced a substantive denial of a FAPE.

As noted above, the District's actions with regard to Student during this period of time must be judged by what the District knew at the time. Student had exhibited both problematic and

peculiar behaviors at a very early age. Some of these behaviors were disruptive in the school environment, and the District is charged with notice of these behaviors. Nevertheless, the District also was aware that its regular education teachers had established educational control and had proven able to educate Student while controlling Student's propensity to engage in inappropriate behaviors. Thus, it is not charged with notice that a change of educational placement was necessary in the beginning of the 2013-2014 school year.

Therefore, when District personnel met with Parent in August 2013 to discuss two private evaluations that Parent had obtained over the summer of 2013, they had good reason to believe that Student's regular education teacher could bring Student's behaviors under educational control by utilizing behavior management techniques prescribed by the District's behavior specialist. Its behavior specialist joined the meeting with Parent, listened to Parent's concerns about Student, and devised an interim behavior management plan with the objective of extinguishing a cluster of behaviors that Student was likely to demonstrate in the classroom, and that all participants believed would likely serve the function of escape from Student's educational program and its demands. The specialist trained the classroom teacher to implement this plan, and the record is preponderant that the teacher implemented it with sufficient fidelity to successfully modify Student's behavior and obtain Student's classroom participation and access to the curriculum. I conclude that the District's approach, based upon continuing Student's placement in regular education with specialized behavior supports, was reasonably calculated to provide Student with the opportunity to receive meaningful educational benefit.

At the same August meeting, the District began the process of obtaining a re-evaluation of Student for purposes of reviewing Student's need for special education under the IDEA, and in particular, to review Student's classification. The District received Parent's written permission to

evaluate on September 4, 2013. Therefore, the District had until November 3, 2013 to complete its re-evaluation. During this period, Student remained in regular education, because Student's current classification was Speech or Language Impairment, which did not require a more restrictive setting. Based upon what the District knew, and based upon the apparent success of its interim behavior management plan, I conclude that it was not unreasonable for the District to defer any change of placement until after receiving a comprehensive re-evaluation.

The District did not meet the deadline specified by the IDEA and Chapter 14 (the Pennsylvania regulations implementing the IDEA) for delivering its re-evaluation report. It made its re-evaluation report available on December 5, 2013, more than one month late. This was a procedural violation, and I note that the District is obligated to ensure that its re-evaluation reports comply with IDEA timelines in all cases. Nevertheless, an administrative hearing officer is not authorized to find a deprivation of a FAPE unless a procedural violation deprives a parent of the opportunity to participate in the IEP process or impedes or deprives a child of meaningful educational benefit. 34 C.F.R. § 300.513 (a)(2).

Parent has not proven by a preponderance of the evidence that the late re-evaluation report resulted in a deprivation of her participation in educational planning for Student. Parent participated in the original August 2013 meeting, which resulted in both the crisis prevention plan and a modification of regular education classroom procedures in order to address Student's behaviors. [Redacted] and the record reflects that Parent was able to communicate with Student's teacher about Student's progress while at school.

To the extent that the District's lateness could have caused a deprivation of parental participation, its impact on parental participation would have been obviated by a supervening event. On October 21, 2013, before the re-evaluation report was due under the law, Student was

hospitalized after an exacerbation of Student's emotional disabilities because of Student's presence at a school meeting with the family, including Student's Father. The evidence is not preponderant that the Student's educational program had caused this recurrence of symptoms. Rather, the evidence more strongly supports the conclusion that this recurrence was caused by Student's proximity to Student's father, mother and sibling at the meeting, which triggered deep-seated pathology, directly causing behavioral dyscontrol.

Thereafter, Student's placement and special education services were driven and directed by medical recommendations, in which Parent participated. The hospital prescribed the highly restrictive and supportive PHP. The District was called upon to be a financial guarantor in this placement, and assumed that responsibility. Within a month of Student's hospitalization, the District completed a change of placement to this appropriate setting, and revised Student's IEP, with parental participation. Therefore, I find that the District's late re-evaluation report did not cause such a deprivation of parental participation as to constitute a denial of a FAPE.

Nor did the late re-evaluation report impede or deprive Student of educational benefit. As discussed above, Student received access to meaningful educational benefit until October 21, 2013, when Student's emotional disabilities became exacerbated, leading to inpatient hospitalization on the next day. The record is unclear how many days Student remained in hospital, but the District convened an IEP meeting to devise an emergent plan to receive Student back from hospital to the regular education classroom on November 6, 2013, anticipating a return on November 7. Student attended on November 11, and was placed in the school based partial hospital program by November 14, 2013. Any lack of meaningful educational benefit during this interim period of time could not be attributed to a late re-evaluation report on the record in this matter.

Parent argues that the District promised an FBA in August 2013 and did not deliver it until May 2014. I conclude to the contrary. The evidence establishes by a preponderance that the District's behavior specialist directed the special education teacher to keep some data, made his own observations on multiple occasions, and obtained other observations by other District staff. The specialist gathered this and anecdotal reports by District staff, then developed an FBA, utilizing a system received from the Pennsylvania Department of Education. He conveyed the results to Parent on November 7, 2013. These results confirmed the successful behavior control strategy that had been implemented from the beginning of the school year.

This FBA became inoperative within days, when on November 14, Student entered the PHP. As noted above, circumstances had changed by October 21, and this FBA was no longer useful, due to the change in placement.

Parent suggests that the November 7 report to Parent either was not an FBA or was so inadequate as to deprive Student of a FAPE. Parent points to the lack of systematic behavior definitions and data-taking. While the process utilized was not as thorough and systematic as might be desired, it can still be called an FBA, and the District expert's opinion on this question is preponderant on this record. Moreover, there is no IDEA definition of FBA, nor is there a requirement for an FBA, or any particular kind of FBA, outside the discipline context under the IDEA.

Parent notes that the District's January 2014 revision of the IEP did not acknowledge that Student's behaviors interfered with learning and that the revision did not include an FBA for the new placement at the PHP. I conclude that the IEP was procedurally deficient in this regard under Chapter 14 (requiring an FBA whenever behavior impedes learning). 22 Pa. Code §124.133(a). There is no doubt that the negative effect of behavior should have been acknowledged at this point,

with Student in a highly restrictive setting. However, I also conclude that the procedural violation did not cause a deprivation of a FAPE, because Parent participated in the IEP meeting, and because the PHP had a class-wide behavior management plan that proved over time to be sufficiently effective for Student that Student was able to receive meaningful – if not maximal – educational benefit.⁶

The PHP placement yielded slow but meaningful progress with regard to Student's escape behaviors and Student's classroom participation and access to the curriculum. Not only did the PHP's systematic behavioral evaluation show progress on a monthly basis starting in Spring 2014⁷, but also, Student made meaningful progress in reading comprehension during the period of time. Therefore, I conclude that Parent has failed to prove by a preponderance of the evidence that the Student did not receive a FAPE during this period.

The PHP placement extended into the next school year, and I find no evidence to disturb the above conclusions for the period from the beginning of fifth grade until Student's discharge from the PHP in November 2014.

PROVISION OF A FAPE IN STUDENT'S FIFTH GRADE YEAR

As noted above, the evidence shows that Student was not deprived of a FAPE while in the PHP in the first months of fifth grade. In November 2014, Student had made sufficient progress

⁶ Student's IEPs indicate that Student was delayed in reading ability, based upon reported grade level of achievement on standardized tests. The January IEP called for small group teaching and goals directed to improving Student's reading. On this evidence I do not find a deprivation of a FAPE with regard to reading. One IEP noted below-grade achievement in writing and spelling, but the record is insufficient to reach a finding on these areas of curriculum.

⁷ Evidence showed that Student escaped from the PHP building about a month before discharge; staff restrained Student but did not report this as required by Pennsylvania regulations. While this impeded Parent's participation by definition, it did not prevent Parent from such access as to lead to any major decisions being made without her. While this represented a behavioral setback, there is no evidence that it delayed discharge or otherwise deprived Student of meaningful educational benefit.

that the PHP discharged Student to a less restrictive setting, a full-time therapeutic emotional support classroom in a public middle school (TES).

While in the TES program in the middle school, Student continued to report serious emotional issues to Parent and to Student's therapist. However, many of Student's claims about events at school were contradicted by the absence of any evidence of them happening at school.⁸ The Student's teacher and the program supervisor both consistently and credibly reported that Student did not experience significant difficulties with emotional regulation, unhappiness, social relationships or school performance. Student did not report Student's sexual thoughts to school staff to a significant extent. Student did not make significant threats of self harm or intention to harm others, and did not engage in skin-picking or self harm behaviors.

I conclude that the evidence is not preponderant that the TES program failed to provide Student with a FAPE. The evidence is contradictory. On one hand, Student reported serious difficulties at school to Student's Parent and therapist; however, the school witnesses credibly testified that Student was doing well there and experiencing none of the extreme difficulties that the Student had reported to Parent. The record is replete with credible testimony, parental admissions during medical history interviews, and examples of the fact that Student is not a reliable reporter of facts.

Therefore, although I find Parent to be credible, her reports as to Student's serious problems at school are almost entirely based upon Student's reports. Nor did Student's current therapist, whose testimony was entirely credible, base his conclusions upon any evidence from collateral sources such as school personnel; his opinions were based entirely upon parental reports

⁸ I make no finding as to whether or not Student engaged in behavior designed to provide the opportunity for sexual acting out, such as making excessive trips to the bathroom. The psychosexual risk assessment recently obtained is sufficient cause to ensure that the District provide robust protective measures against such activity.

and those of the Student. Weighing the testimony, then, I conclude that Student's unreliable reports, the basis for much of Parent's testimony about the District's implementation of Student's program and the benefit that Student received from it, must be given less weight than the consistent and credible reports of Student's teachers in the TES program. Consequently, Parent's factual claims about this program, to the extent that they indicate a failure to provide a FAPE, must fail.

CONCLUSION

In sum, I find that the District did not fail to provide Student with a FAPE during any part of the relevant period of time. Hearing Officer intervention is not warranted, but in dicta I have urged the District to provide, on an emergent basis, the highly supportive special education and related services that the Student needs, as evidenced by the recent psychosexual evaluation report and the testimony of Student's therapist in this matter.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. 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.
HEARING OFFICER

September 20, 2015