

*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**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 2389402021 AS**

**Child's Name:** S.B.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

**Local Education Agency:**  
Penn Hills School District  
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Pittsburgh, PA 15235-3339

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**Hearing Officer:** Charles W. Jelley, Esq    **Date of Decision:** 12.17.2020

## **PROCEDURAL HISTORY**

Parent filed the instant due process hearing complaint alleging the District failed to offer a free appropriate public education (FAPE) from March 2018 through June 2019.<sup>1</sup> To remedy these alleged violations, the Parent seeks unspecified appropriate relief. The District argues that at all times relevant times, they provided a FAPE.

For all of the following reasons, after a careful review of the testimony, the extrinsic and intrinsic evidence, I now find in part in favor of the Parent and Student. I also find in part against the District for actionable procedural violations.<sup>2</sup> An appropriate Final Order follows, granting appropriate relief and denying the Parent's claims in part.

### **THE ONLINE VIRTUAL DUE PROCESS HEARING AND PARENT'S DECISION TO PARTICIPATE BY PHONE**

Due to the pandemic's ongoing safety concerns, all due process hearing sessions were held virtually and by phone. Although the District offered to provide the Parent with a laptop and a private room to participate in the due process hearing, the Parent chose to participate by phone only and not use or sign on to the video platform. The hearing officer, District's counsel and the witnesses participated using video and audio conferencing technology. The District objected to the hearing format and the Parent

<sup>1</sup> The Parents claims arise under 20 U.S.C. §§ 1400-1482The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

<sup>2</sup> After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that at times I can draw inferences, make Findings of Fact and Conclusion of Law.

insisted that she be allowed to proceed by phone. Based on the record's back and forth discussion, I denied the District's request and the case proceeded in an orderly fashion. Exhibits were electronically and physically disclosed five (5) days before the hearing. During the hearing, exhibits were shared on the video platform and referenced by number and page for the Parent review. Regular checks were made during the sessions that the Parent had the appropriate exhibit in view. To ensure the Parties were not overly burdened using this novel combination of testimony and technology, the sessions' length was abbreviated. (N.T. *passim* covering all sessions).

At the Parties' request, the Decision Due Date (DDD) was extended for a good cause. The Parties made oral closings on the record. All exhibits from both Parties were entered into the record and considered in the Final Decision.<sup>3</sup>

The factual statements in this Decision constitute the written Findings of Fact required and Conclusion of Law required by the IDEA and state law. (20 U.S.C. § 1415(h)(4), 22 PA Code Chapter 14.162).

### **STATEMENT OF THE ISSUE**

Did the District offer the Student a free appropriate public education from March 2018 through June 2018? If not, should the Student be awarded appropriate relief?

Did the District offer the Student a free appropriate public education from September 2018 through June 2019? If not, should the Student be awarded appropriate relief?

<sup>3</sup> [Errata Redaction by Hearing Officer] (N.T. pp.224-233).

## **FINDINGS OF FACT**

### **THE STUDENT'S COMMUNITY RESIDENTIAL TREATMENT FACILITY PLACEMENT AND THE OUT OF DISTRICT IEP**

1. In May 2017, the Student was placed by the local community behavioral health care agency at a residential treatment facility (RTF) in North West Pennsylvania. The record provided on admission notes the Student was eligible to receive special education under the primary educational disability category of Emotional Disturbance and a secondary disability of Other Health Impairment. (S-47).
2. On March 20, 2018, the local District where the RTF was located initiated a comprehensive reevaluation of the Student's educational needs. The reevaluation report (RR) included a review of the Student's 2017-2018 report card. The RR notes that during the 2<sup>nd</sup> nine weeks of the school year, the Student earned two B's, two A's and two C's. The Student's overall behavior was rated as "Fair." The present levels included teacher input describing how the stuttering increases when the Student is nervous, excited or frustrated. The teachers report the Student is working well below grade level, needs to practice basic math and is easily distracted by other students. The teachers report that the Student is successful when provided one-on-one and small group instruction, a behavior management program, teaching replacement behaviors, positive reinforcement, frequent home/school contact, social stories, stimuli reduction, modeling, daily schedule, verbal and visual cues, preferred seating, staff proximity, peer tutoring, repeated practice, simplified instruction, frequent check for understanding from the teacher, shortened/chunking assignments, prioritized to-do lists and extended time for test/assignments. (S-47 p.3)

3. The RR included a speech/language evaluation using the Stuttering Severity Instrument-4 (SSI-4). The SSI-4 uses three (3) factors to diagnose stuttering: frequency of stuttering events, the longest three stuttering events and physical concomitant related to stuttering events. The Student average frequency of stuttering events was 6% during the picture description task and 25% during conversational speech. Repetitions, blocks and prolongations characterized the Student's speech. The average duration of the longest three (3) stuttering events was between 2 and 3 seconds. Tense facial features, poor eye contact were observed and given a point value of 2/5 in severity in physical concomitants. Overall the Student was given the label of moderate/severe. (S-47 p.5). The RR notes the Student refuses to do any writing assignments, earned a score of 6 points in a series of mixed math problems, reads 75 words correct in one (1) minute with less than five (5) error. The RR does not include or report any recent IQ testing, achievement testing, behavioral, social or emotional ratings, or adaptive behavior assessment. The RR notes that a functional behavioral assessment should be completed to develop a Positive Behavior Support Plan (PBSP). (S-27 p.6).
4. The March 2018 IEP called for the Student to receive Supplemental "Emotional Support," "Learning Support," and "Speech and Language Support" on grounds at the out of county residential treatment facility. (S-48).
5. The April 2018 IEP present levels include report card grades, scores from a local assessment, and the results of a March 2018 speech therapy assessment using the Stuttering Severity Instrument (SSI-4). The Student was diagnosed with a stuttering disorder. (S-48 p.7). The IEP includes transition services along with necessary accommodations to participate in state and local assessments (S-48).

6. The IEP includes a reading decoding goal, a writing goal, a math problems goal at instructional level, a goal to remain on task, a behavioral goal to self-regulate, and a speech goal to address childhood-onset fluency disorder was in the moderate to severe nature. Each goal is linked to the Pennsylvania State Standards. (S-48 pp.17-22). The IEP includes ten (10) different forms of specially-designed instruction (SDI), like extended time and preferential seating. However, the SDIs reference a Positive Behavior Support Plan (PBSP), a stand-alone PBSP describing the PBSP was not attached to or fully described in the IEP. The IEP includes speech therapy one (1) time a week for 30-minutes and counseling services for 30-minutes three (3) times a week. (S-48 pp.23-24). The IEP notes the Student does not require ESY services. S-48 p.25).

**THE STUDENT RETURNS TO THE HOME DISTRICT AND THE HOME DISTRICT'S OFFER OF A FAPE**

7. On April 30, 2018, upon becoming aware that the Student would soon be discharged from the treatment facility, the Student's home District invited the Parent and the Student to participate in an IEP meeting. (S-1). (S-17). The IEP notes a March 20, 2018, reevaluation report (RR) reporting the Student had a history of the following diagnoses, Attention Deficit Hyperactivity Disorder (ADHD 2013), Autism (2015), Oppositional Defiant Disorder and Intermittent Explosive Disorder, no date for this disorder was found in the record. (S-17).

8. The IEP team discussed the Student's return to the District from a community based mental health residential treatment program. The record is unclear if the IEP team, including the Parent, agreed the current District would implement the March 2018 IEP. The District

proposed and the Parent agreed the Student would attend the District's full-time emotional support class. (S-2).

9. The full-time emotional support class is located in a District building and operated by an outside private agency. The full-time emotional support students ride a separate bus and enter the building through a separate door. The school day for the students, including this Student, is not as long as the regular education student's school day. (S-2, S-3, S-5, S-6, N.T. p.139, N.T. p.179)
10. The April 30, 2018, one-page IEP meeting form does not include a statement of present levels, goals, SDIs, related services, supports for personnel, and a statement of supplemental aids and services. The signature page does not include the signature of a regular education teacher or a speech therapist. The record does not include a written waiver excusing the regular education teacher or the speech therapist's attendance. The record does not include written input from the regular education teacher or the speech therapist. (S-2).
11. The students in the full-time emotional support class enter the school building through a different entrance. The full-time emotional support class students are dismissed before the other disabled and non-handicapped peers who attend school in the same building as the full-time emotional support class. (N.T. pp. 195-208, N.T. p. 138).
12. On April 30, 2018, the District issued a Notice of Recommended Educational Placement (NOREP). The Parent agreed to the proposed placement and program in a full-time emotional support class in a regular education building. (S-3). The NOREP notes the District considered and ruled out a regular education classroom placement without support or services in a regular education classroom with supplemental services. (S-2 p.3).

## **THE MAY 2018 IEP AND PLACEMENT**

13. On May 29, 2018, the District and the Parent participated in a third IEP meeting. The proposed IEP included a speech and language goal, a math goal, a writing goal and a reading goal. The IEP included 13 different forms of specially-designed instruction (SDI). The IEP team, over the Parents' objection, decided the Student should continue to participate in the then-current District full-time emotional support classroom operated by the private provider. (S-5).
14. The IEP attendance signatures page notes that a regular education teacher and the speech therapist did not attend the IEP meeting. (S-5 p.2).
15. The record does not include a written waiver excusing the regular education teacher or the speech therapist's attendance. The record does not include written input from the regular education teacher or the speech therapist. (S-5).
16. The May 29, 2018, IEP included a positive behavior support program (PBSP), dated May 30, 2018, which included two-goal statements and a description of the antecedent, behavior and consequence descriptors. (S-4). The signature page with the PBSP does not note the Parent, the regular education teacher, or the Speech Therapist attended the meeting. The form includes the private emotional support program coordinator's signatures, the local education agency (LEA) representative, and the special education teacher. (S-5 p.1).
17. On May 29, 2018, the District provided the Parent with a NOREP, offering the same full-time emotional support class at a regular education building in the District. (S-6). The Parent did not return the NOREP and the Parent did not consent to the Student's continued placement in the full-time emotional support class. (S-5, S-6).

**THE SEPTEMBER 2018 NOREP PLACING THE STUDENT IN  
REGULAR EDUCATION**

18. On September 4, 2018, the District issued and the Parent signed the NOREP offering to place the Student in a supplemental Emotional Support program at the high school. (S-7).
19. The September NOREP calls for the Student to receive Algebra 1, English and Biology in a supplemental emotional support and learning support class. The remainder of the day, the Student would participate in regular education classes. (S-7).

**THE PARTIES AGREE TO CHANGE THE STUDENT'S PLACEMENT  
FOR THE 2018-2019 SCHOOL YEAR**

20. On September 21, 2019, the District invited the Parent to attend an IEP conference on September 24, 2018. The one-page IEP meeting form states the Parties discussed the Student's grades, [Civics 22%, Robotics 35%, Algebra-1 98%, English 100%, Biology 73%], attendance issues, and discipline concerns. (S-10). (S-10).
21. The September 24, 2018, one-page IEP meeting form includes a handwritten notation states that the Student could take a study hall in place of guitar lab. The notation states that the supervisor of the full-time emotional support program [the private agency] would issue a NOREP correcting the "Biology class." The record does not describe the nature of the issue the NOREP would correct about the "Biology class." The record does not include a corrected NOREP. (S-10).
22. The one-page IEP meeting form found at Exhibit #10 does not include a statement of present levels, goals, transition services, SDI, a positive behavior support plan, related services or suggested accommodations. (S-10).

23. The IEP attendance signatures page notes that a regular education teacher and the speech therapist did not attend the IEP meeting. (S-10). The record does not include a written waiver excusing the regular education teacher or the speech therapist's attendance. The record does not include written input from the regular education teacher or the speech therapist. (S-10).

### **THE OCTOBER 2018 IEP MEETING**

24. On October 8, 2018, the District issued an invitation to participate in an IEP conference on October 31, 2020; the Parent agreed to the meeting and returned the form. (S-11).

25. On October 31, 2018, the District and the Parent met for a fourth IEP meeting. The IEP team, including the Parent, reviewed the Student's grades, [English 95%, [Redacted] Ways 76%, NJROTC PE 75%, NJROTC 10%, Guitar Lab 66,%, Biology 71%, Robotics 38%, Algebra 1, 85%], a review of the Student's then-current discipline profile reflecting 13 disciplinary referrals, attendance records, including a notation of four (4) tardy slips for being late for class. The discipline referrals noted violations of the code of conduct for physical altercations, insubordination, unsafe behavior, defiant behavior, and technical equipment misuse. Handwritten notes on the IEP meeting form states the Student would receive an in-school suspension (ISS) for cutting class. The handwritten notes on the IEP meeting form state, "Mom will follow up and schedule a meeting with the team." (S-13).

26. The Speech Therapist did not attend the meeting. The record does not include a written waiver excusing the attendance of the speech therapist. The record does not include written input from the speech therapist. (S-2). On October 31, 2018, the District issued an invitation

to an IEP conference scheduled for November 20, 2018. The Parent agreed to attend the meeting and returned the form. (S-12).

27. The one-page IEP meeting form notes the District did not issue a NOREP. (S-13).

**THE NOVEMBER 2018 IEP AND THE PROPOSED ACTION TO  
CHANGE THE STUDENT'S PLACEMENT BACK TO FULL-TIME  
EMOTIONAL SUPPORT CLASS**

28. On November 20, 2018, the IEP team met to discuss the Student's removal from the NJROTC class, by the principal, for skipping class. The one-page IEP form notes the team reviewed the Student's second nine (9) grades, [English No grade listed, Civics 10%, [redacted] Ways No grade, NJROTC No Grade, NJROTC 40%, Guitar Lab 50%, Biology No Grade, Robotics 10% and Algebra 1 72%]. The IEP meeting form notes seven (7) additional discipline code violations like [threatening and aggressive behavior]. (S-14).
29. The IEP notes the speech therapist did not attend the IEP meeting and did not include a written waiver excusing the speech therapist's attendance or written input from the speech therapist. (S-14). The record does not include documentation that the Parent agreed to or consented to the speech therapist's non-participation. (S-14).
30. On November 20, 2018, the District issued and the Parent consented to the District's permission to reevaluate. (PTRE). (S-15). The PTRE notes the reevaluation would include a functional behavioral analysis (FBA) among other standardized assessments. (S-15).
31. On November 20, 2018, the District issued a NOREP and the Parent approved the proposed action to change the Student's program/placement to a full-time emotional support class. (S-16).
32. The NOREP notes placement in an Itinerant Emotional Support class or a Supplemental Emotional Support Class would not meet the Student's

needs. The record does not include a copy of the November 2018 IEP. (S-16, N.T. *passim*).

**THE JANUARY 18, 2019, REEVALUATION REPORT AND THE  
FUNCTIONAL BEHAVIORAL ASSESSMENT**

33. On January 18, 2019, the District provided the Parent with a copy of the reevaluation report (RR). The RR included Parent and teacher input and a history of the Student's multiple IDEA disabilities and community based behavioral disorders. The RR reviewed the Student's declining academic performance, discipline history, and attendance problems. The speech therapist reported that in March 2018, when assessed with the Stuttering Severity Instrument (SSI-4), the Student was diagnosed with a stuttering disorder. The notation reports the Student feels "sad" about the stuttering. The Student reports stuttering for a "very long time." The speech therapist reports that with 30-minutes of speech a week, the Student has improved with controlling the speech rate, prolongations, and facial grimaces when speaking. However, stuttering, intelligibility and mumbling still occur when the Student speaks at a rapid pace. (S-17 pp.1-6).
34. On the Woodcock-Johnson Test of Cognitive Ability Fourth Edition (WJ-IV), the Student earned an overall IQ of 81, in the "Low Average Range." On the Woodcock-Johnson Test of Achievement Fourth Edition Form A (WJ Ach-IV), the Student earned 13 "Very Low," six (6) "Low" scores, and three (3) "Low Average" scores. The Student's percentile scores ranged from a low of 0.2 percentile ranking in Broad Reading to a high at the 12<sup>th</sup> percentile in Writing Samples. (S-17, p.8). The Student's Math Calculations skills fell at the 2<sup>nd</sup> percentile, Math Problems skills fell at the 3<sup>rd</sup> percentile, while Board Mathematics skills fell at the 1<sup>st</sup> percentile. (S-17 p.8).

35. The Parent's ratings on the Behavior Assessment System for Children, Third Edition (BASC-3), noted elevated "At Risk" scores for Externalizing Problems and Adaptive Skills and "Average" scores for Internalizing Problems and Behavioral Symptoms Index. The teacher's BASC-3 ratings noted "Clinically Significant" rankings for Externalizing Problems, School Problems, Behavioral Symptoms Index, Adaptive Skills and "At-Risk" rankings for Internalizing Problems. (S-17 pp.8-16). The Student's BASC-3 Self-Report noted "Average" scores relating to School Problems, Internalizing Problems, Inattention-Hyperactivity, Emotional Symptoms Index, and "At-Risk" for Personal Adjustment. (S-17 p.16).
36. The RR included the results of a Functional Behavioral Assessment (FBA). The FBA notes the behaviors of concern could be related to a medical or psychiatric condition. The FBA notes that "Antecedent" events occur before certain events, people, and certain stimuli like demands or termination of preferred activities. The FBA noted social skills, communication skills, organizational skills, self-regulation skills, study skills as factors relating to misbehavior. The FBA noted that at times the Student's misbehavior increases access to peer or adult attention. The student's direct observation noted that small group classes "has not been effective" strategy (S-18 p.10). The FBA notes multiple instances of unsafe misbehavior, at sometimes lasting up to seven (7) minutes in duration. (S-18). The FBA notes that peer comments, directions to the Student and unstructured time are Antecedents. The FBA did not include any recommendations or strategies to manage the Student's misbehavior. (S-18).

**THE FEBRUARY 14, 2019, IEP AND THE ACTION TO CHANGE THE STUDENT'S PLACEMENT**

37. On February 14, 2019, the Parent and the District met to develop a revised IEP. The present levels of performance is a copy, cut and pasted from the body of the RR. While the present levels noted the FBA would be attached, the FBA was not attached to the IEP. Contrary to FBA, the IEP present levels note the Student "does better in a smaller class of students" (S-21 p.19 vs. S-18 p.10).). The present levels note the Student needs more time to practice necessary math skills. (S-21 p.19).
38. The IEP includes a series of generalized transition statements. After graduating, the Student wants to join the "Navy," plans to attend school, work part-time, and does not plan to use public transportation. (S-21 p.21).
39. The IEP notes the Student will work toward meeting the following academic goals: "[redacted] will solve multi-step equations with 80% accuracy 4 out of 5 consecutive nine weeks." "Given a graphic organizer [redacted] will complete [redacted] thoughts into a 3 paragraph essay with 5 sentences in each paragraph using correct grammar, punctuation, capitalization, and varied sentence lengthy [sic] with 80% accuracy on 2 out of 3 trials for three consecutive nine weeks. "Given a grade level prompt, [redacted] will read 130 wpm with 80% accuracy on 4 out of 5 inats. [sic]. [Redacted] will work toward meeting the following behavior goals addressed in the PBSP." [Redacted] will remain on task and attempt to complete the task with no more than two given prompts 80% of the time for 3 consecutive nine weeks. [Redacted] will remain in the [redacted] area (i.e., designated seat), classroom 80% of the time for 3 consecutive nine weeks." (S-21 pp.21-22). The body of the IEP does not include a present level of educational performance or baseline data linked to each of the goal statement. (S-21).

40. The IEP includes 15 different SDI forms, including graphic organizers, small group instruction, extended time on tests and assignments. (S-21 pp.31-32).
41. Each of the goal statements and the SDIs would be provided in the full-time emotional support class. (S-21).
42. The IEP team determined that as of the date of the IEP, the Student was showing progress toward meeting academic and behavioral goals; therefore, the Student does not need extended school year (ESY) services. (S-21 p.33).
43. The IEP notes that due to the Student's need for a highly structured environment; therefore, the Student would not participate in any regular education classes. The IEP does not include notations that the team discussed using supplemental aids or services to support the regular education student using the regular education curriculum. Instead, the IEP proposes that the Student participates in the District funded the third party provided full-time in the emotional support classroom using the regular education curriculum. (S-21 p.34).
44. The IEP team discussed and developed a PBSP. The PBSP included an "Assessment Summary" describing the Antecedent, the Student's Behavior, the Consequence and Perceived Function of the Behaviors of Concern. The PBSP includes two goal statements; the first statement addresses task completion and the second targets remaining in a designated area. The PBSP included program modifications and SDIs. (S-22 pp.1-7).
45. The IEP form signature page does not include a regular education teacher or a speech therapist's signature. The record does not include a written waiver excusing the regular education teacher or the speech therapist's attendance. The record does not include written input from

the regular education teacher or the speech therapist. (S-22, N.T. *passim*).

46. On February 14, 2019, the District issued a NOREP calling for the Student to continue participating in the then-current full-time, privately operated, full-time emotional support class. (S-19). The Parent signed the NOREP and did not check the box approving, disapproving or requesting a due process hearing. (S-19, p.2).

### **THE MARCH 2019 MANIFESTATION DETERMINATION REVIEW**

47. On March 13, 2019, the District convened a Manifestation Determination Review (MDR) meeting to consider a change in the Student's placement. (S-24).
48. The MDR form lists six (6) events that could trigger an MDR meeting. The District initiated the MDR review under the generic category of "Other." (S-24).
49. The discipline incidents under review in the "Other" category necessitating the proposed change in the placement included a series of discipline write-ups like leaving school without permission, possession of [contraband], throwing snowballs, possession of [redacted] in school, possession of [items that were not] the Student's, on school grounds. (S-24).
50. On the same day the confiscated [redacted] product, the contraband was placed in the draw of the Coordinator of the full-time emotional support class in the District. During the school day, the Student went into the Coordinator's office, took the [contraband] and left the school. Shortly after this incident, the staff began to talk about an out of District placement in a more restrictive setting. (N.T. pp.180-181).
51. The MDR notes of the meeting state the Student was not regularly taking prescribed medications, was not coming home after school, was

angry, frequently talked about gangs, and refused to go to school. (S-24).

52. The MDR standard review questions and sub-question found on pages 6 and 7 of the MDR form were left blank, yet the boxes indicating the Student's behavior was not related to the Student's disability were checked "No." By checking the "No" box, the team concluded that the Student's behaviors were not related to the Student's disability. (S-24).

53. After reviewing the discipline incidents and violation of the District's code of conduct, the MDR/IEP team determined that the Student's misbehavior was not caused by the Student's disability, was not a consequence of or substantially related to the Student's disability. (S-24 p.6). Typically, this type of finding would have led to regular education discipline consequences. (S-24).

54. While the MDR form notes the meeting occurred on March 14, 2018, the Parent signed the MDR on March 11, 2018. The record is unclear if the Parent was invited to or if the Parent attended the MDR meeting. (Compare S-24 p.8 with S-25 p.27 p.1).

### **THE MARCH 2019 NOREP'S PROPOSED ACTION TO CHANGE THE STUDENT'S PLACEMENT AND THE ONE PAGE IEP MEETING FORM**

55. On March 15, 2019, the District scheduled an IEP meeting to discuss a change in the Student's placement. The one-page IEP meeting form found at District # 27 notes the participants also discussed the need to schedule a follow-up IEP meeting to discuss if the Student qualified for ESY services/ESY goal due to the student's decline in behavior. (S-27). Despite the low grades, the increase in disciplinary referrals, the tardy

slips, and the removal from one regular class, the record does not reflect the ESY meeting ever took place. (S-27, N.T. *passim*).

56. The one-page IEP meeting form notes the participants at the meeting reviewed the "manifestation determination packet" with the Parent. The MDR form goes on to state, ". . . when answering questions on the manifestation it was mentioned that [redacted] does have some behaviors exhibited are due to [redacted] disability.' [sic]. The IEP meeting form then goes on to state that" The IEP team still feels a change in placement is needed [redacted] will be placed at [redacted school] for the remainder of the 2018-2019 school year." (S-27).
57. The one-page IEP meeting form does not describe what supplemental services, aids, modifications or accommodations were discussed to maintain the Student's current placement. The one-page IEP meeting form does not describe what new services the proposed placement would provide or why the services could not be provided in the District. (N.T. *passim*, S-27).
58. The one-page IEP signature page does not include the signature of a regular education teacher, a psychologist, or a speech therapist. The record does not include a written waiver excusing the attendance of the regular education teacher, the psychologist, or the speech therapist. The record does not include written input from the regular education teacher, a psychologist, or the speech therapist. (S-22, N.T. *passim*).
59. The one-page IEP meeting form does not include a statement of present levels, goal statements, transition services, SDIs, related services, supports for personnel, supplemental aids/services, or a class schedule. (S-22).

**THE JUNE 2019 NOREP EXTENDING THE OUT OF DISTRICT  
PLACEMENT INTO THE 2019-2020 SCHOOL YEAR**

60. On June 5, 2019, the District convened an IEP meeting. The one-page IEP Team Meeting form states the team, including the Parent, met and agreed the Student would remain at the out of District placement for the first nine (9) weeks of the 2019-2020 school year. The form goes on to state, “[redacted] will continue [redacted] 45-day placement, there and a meeting will be held at the end of the first nine (9) weeks of the school year.” (S-29).
61. The June 5, 2019, IEP Team Meeting form is a one-page document that does not include a statement of present levels, goals, SDIs, related services, supports for personnel, a statement of supplemental aids and services or the PBSP. The Coordinator of the full time private emotional support program attended the meeting and signed the form indicating she was the Student’s special education teacher. Two individuals from the then-current out of District private placement signed the form. The LEA and the Parent signed the form. The record does not include a written waiver excusing the attendance of the speech therapist. The record does not include written input from the speech therapist.
62. On June 4, 2019, the District issued a NOREP. The NOREP calls for the Student to remain at the out of District Itinerant Emotional Support for the start of the 2019-2020 school year. Like the earlier NOREP, the District ruled out the private full-time emotional support and itinerant emotional support class. The NOREP notes that the Student’s needs could not be met in either type of educational setting. (S-28).
63. On June 7, 2019, the Parent signed the NOREP approving the out of District placement in an Itinerant Emotional Support placement. (S-28).
64. The record of the Student’s attendance, prepared by the provider, at the new out of District, Itinerant Emotional Support placement, found

at Exhibit 46, states the Student entered the out of District placement on "03/21/2019" and left the program on "03/29/2019." The form states that the Student had five (5) unexcused absences and attended school for two (2) days. (S-46).<sup>4</sup> The record does not explain the gap in time between the attendance records, the NOREP and the one-page IEP Meeting form. (S- 46 vs. S-28 and S-29).

65. On June 4, 2019, the District issued a new NOREP. The NOREP calls for the Student to remain at the out of District Itinerant Emotional Support for the start of the 2019-2020 school year. Like the earlier NOREP, the District ruled out the private full-time emotional support and itinerant emotional support class. The NOREP notes that the Student's needs could not be met in either setting. (S-28). The NOREP did not mention ESY services. (S-28). On June 7, 2019, the Parent signed the NOREP approving the placement. (S-28).

### **THE STUDENT PLACEMENT AT THE DETENTION CENTER**

66. From May 20, 2019, through June 4, 2019, during the same time frame, the Student was placed in the Itinerant Emotional Support class; the Student was placed, by Court Order, at [redacted], a detention center. While at the [detention center], the student received Reading, Math, English, Science, Physical Education, Teen Life, Art, Social Studies and Consumer Science class. (S-45). The record does not indicate if the Student was provided with special education services at the detention center. Sometime after June 4, 2019, the Student returned to the RTF in Northwest Pennsylvania. (N.T., *passim*).

<sup>4</sup> The Index of Exhibits included with the school District's binder mislabeled Exhibit 46 as Exhibit 45. I have corrected this typo in identifying all exhibits.

## **RELATED MATTERS AND COMPANION CASE**

67. In August 2020, as the dispute was proceeding, the Student was discharged from the RTF. The Parent contacted the District and the District convened an IEP. After that meeting, the District issued a NOREP. The Parent rejected the NOREP and filed an additional due process Complaint alleging a general denial of a FAPE for the 2020-2021 school year. The new Complaint was assigned to this hearing officer at ODR FILE #23134-2021 AS. Upon reviewing the one-page Complaint, this hearing officer issued a Ruling finding the Complaint Insufficient and directing the Parent to file an Amended Complaint. The Parent then filed an Amended Complaint and a hearing was scheduled. When the Parties went on the record, this hearing officer learned that the Parent had not provided the District with a copy of her mandatory 5-day disclosure of exhibits and witnesses. After a brief discussion on the record, this hearing officer dismissed the Parent's second due process Complaint at ODR FILE #23134-2021 AS, without prejudice, with the statement that the *pro se* Parent could refile at a later date.( ODR FILE #23134-2021- AS).<sup>5</sup>

68. The last agreed upon NOREP between the Parties in 2019 was at the out of District Itinerant Emotional Support class. (S- 46 vs. S-28 and S-29).

## **CONCLUSIONS OF LAW**

First, after reviewing the testimony and the non-testimonial extrinsic evidence found at School District Exhibits 1 through 49, pursuant to 20 U.S.C. § 1415(f)(3)(E)(ii), granting hearing officers equitable authority to

<sup>5</sup> The transcript, the Complaint, the Amended Complaint, the emails to and from the Parties and this hearing officer at ODR FILE #23134-2021 AS are all in the possession of each party. The content of those documents are incorporated by reference herein as though fully set forth at length, this dispute.

correct procedural violations, for all the reasons that follow, the District is now directed to correct the multiple procedural violations described below; an appropriate Final Order follows.<sup>6</sup>

Second, applying *Rowley, Andrew, Dunn*, and after factoring in the preponderant evidence of procedural violations, I now find that the Parent failed to meet her burden of proof that the Student was denied a FAPE from March 2018 through January of 2019; an appropriate Final Order follows, denying this partial claim follows.

Third, applying *Rowley, Andrew, Dunn*, and after factoring in the preponderant evidence of procedural violations, for all the reasons that follow, I now find the District failed to offer and provide the Student with a FAPE from February 2019 through June 2019, an appropriate Final Order granting appropriate relief follows.

Fourth, applying *Rowley, Andrew, Dunn*, along with the *Armstrong* Remedial Order #2, and after factoring in the preponderant evidence of procedural violations, I now find that the District failed to offer the Student an appropriate 2020 ESY summer program; an appropriate Order follows.

Fifth, as this Final Order could now be the subject of a possible appeal, I will now decline jurisdiction over the Parent's second due process Complaint regarding the Student's 2020-2021 school year. My practice is not to take on a new matter with the same parties while either party may appeal a Final

<sup>6</sup> E.g., *Phila. Sch. Dist.*, 118 LRP 19611 (Pa. SEA Feb. 9, 2018) (finding no substantial denial of FAPE but ordering correction of procedural defects in IEP); *Red Lion Area Sch. Dist.*, 115 LRP 12726 (Pa. SEA Mar. 9, 2015) (finding no substantive denial of FAPE but issuing various orders to correct procedural violations); *Dawn G. ex rel. D.B. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (contention that the hearing officer's prospective procedural remedies were ultra vires after ruling that the district met the substantive standard for FAPE is rejected); *D.C. Pub. Sch.*, 111 LRP 20046 (D.C. SEA Aug. 20, 2010) (finding no substantial denial of FAPE but ordering district to issue prior written notice to parent); *Fulton Cty. Sch. Dist.*, 49 IDELR ¶ 30 (Ga. SEA 2007) (ordering a new manifestation determination as a result of procedural violations in the first manifestation determination).

Order. Therefore, I will now recuse myself from any further involvement as the fact finder in the Parent's 2020-2021 due process dispute.

## **APPLICABLE LEGAL STANDARDS**

### **CREDIBILITY AND PERSUASIVENESS OF THE WITNESSES' TESTIMONY**

The burden of proof in an IDEA dispute comprises two considerations, the burden of going forward and the burden of persuasion. Of these, the 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. In *Schaffer v. Weast*, 546 US 49 (2005), the Court held that the burden of persuasion is on the party that requests relief; in this case, the Parent. 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). At all times, this hearing officer applied the preponderance of evidence standard when reviewing all claims. 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. *Id.* During a due process hearing, the hearing officer is also charged with judging witnesses' credibility, weighing evidence, and assessing the witnesses' overall persuasiveness. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witness's testimony.<sup>7</sup> I did not find the testimony of the third-party Coordinator's testimony particularly persuasive on many points in dispute. However, I did find the teacher's and

<sup>7</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *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); 22 Pa Code §14.162 (requiring findings of fact).

the Parent's testimony more persuasive regarding specific events, circumstances and interactions, in dispute, in developing the Student's IEP and regular education schedule.<sup>8</sup>

### **THE IDEA SUBSTANTIVE FAPE STANDARD**

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 US 176 (1982), the Court held, provided that the procedures outlined in the Act are followed, the IDEA's substantive requirements are met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction. At the same time, the Court also held "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 189. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. NE*, 172 F.3d 238, 247 (3d Cir. 1999). In *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010), the Court explained that a substantive violation occurs when a school district drafts an IEP "that is not reasonably calculated to enable the child to receive educational benefits.

Recently, the Supreme Court reconsidered the application of the *Rowley* two-pronged standard. The Court observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch.*

<sup>8</sup> It is a well settled practice that a finding fact based upon generally uncorroborated unobjected statements, cannot satisfy the moving parties' contentions, burden of production or persuasion. See, *A.Y. v. Dep't of Pub. Welfare*, 537 Pa. 116, 641 A.2d 1148 (Pa. 1994), *J.S. v. Manheim Twp. Sch. Dist.*, No. CM 8-04246, 2019 Pa. Dist. & Cnty. Dec. LEXIS 2346 (C.P. Feb. 25, 2019).

*Dist. RE-1*, 137 S. Ct. 988-989 (2017). The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The IDEA contemplates that the expertise will inform the fact-intensive IEP exercise of school officials and the child's parents' or guardians' input. The *Endrew* Court explained that "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000. The Court's review of *Rowley* did not change the Third Circuit's application of *Rowley*.<sup>9</sup> FAPE is achieved "through the development of an individualized education program ("IEP") for each child with a disability." *Id.* The IEP is crafted annually by a team that includes a representative of the local educational agency, the child's teacher and parents, and, in appropriate cases, the child. 20 U.S.C. § 1414(a)(5).

### **THE IDEA PROCEDURAL VIOLATION DENIAL OF A FAPE STANDARDS**

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 64 (3d Cir. 2010). A procedural violation constitutes a denial of a FAPE where it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation or causes a deprivation of educational benefits. 34 CFR §300.513. *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

### **MANDATORY IEP TEAM MEMBERS**

Whenever a school district proposes to substantially or materially alter a student's then-current educational program, the District should convene an IEP meeting beforehand. *Letter to Green*,<sup>22</sup> IDELR 639 (OSEP 1995).

<sup>9</sup> *Dunn v. Downingtown Area Sch. Dist.* 904 F.3d 248 (3d Cir. 2018).

An IEP team must include the following individuals:

1. The parents of the child.
2. No less than one general education teacher of the child (if the child is or may be participating in the general education environment).
3. No less than one special education teacher of the child or, where appropriate, no less than one special education provider of the child.
4. A district representative who: i) is qualified to provide, or supervise, the provision of specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources.
5. An individual who can interpret the instructional implications of evaluation results.
6. At the discretion of the parent or the District, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.
7. Whenever appropriate, the child. 34 CFR § 300.321 (a).

While the IDEA does not expressly require related services personnel to attend IEP team meetings. Related services personnel may be required members in individual cases, such as where the individual is the child's designated "special education provider. 34 CFR §300.321 (a)(3). *Letter to Rangel-Diaz*, 58 IDELR 78 (OSEP 2011).

### **THE IDEA INCLUDES THE OPTION TO AMEND AN IEP WITHOUT A FACE-TO-FACE MEETING**

Once the parties agree on the contents of the annual IEP, a parent and a district can agree not to convene an IEP team meeting to make changes. 34 CFR § 300.324 (a)(4)(i). However, as soon as the parties agree on the District's changes, it should develop a written document to amend or modify the child's current IEP. 34 CFR § 300.324 (a)(4)(i). After that, the District may modify the IEP without a meeting and confirm that the IEP team is informed of the changes. 34 CFR § 300.324 (a)(4)(ii). Whenever changes are made in the child's IEP, the District must provide the parents with a revised copy of the IEP, if they ask for it. 34 CFR § 300.324 (a)(6).

## **PROCEDURAL DUE PROCESS REQUIREMENTS TO EXCUSE STAFF FROM ATTENDING AN IEP MEETING**

Provided that the District complies with the IDEA procedural requirements, mandatory members, like the special education teacher and other district members of the IEP team, can be excused if the parent and the District agree in writing. 34 CFR § 300.321 (a)(2) through 34 CFR § 300.321(a)(5).<sup>10</sup> The Act describes two different procedures to excuse team members whose content area is or is not being discussed at the meeting. First, at 34 CFR § 300.321 (e) (1), the regulations provide:

A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

Second, at 34 CFR 300.321(e)(2), the regulations provide:

A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—(i) The parent, in writing, and the public agency consent to the excusal; and(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP before the meeting.

Simply stated, the excusal of IEP team members whose area of service is being discussed whose area of service is not being modified or discussed requires a written agreement between the parent and the District. While the excusal of a team member whose area of service is being discussed or

<sup>10</sup> e) *IEP Team attendance.* (1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

modified requires written consent. 34 CFR 300.321 (e)(2), *Letter to Finch*, 59 IDELR 15 (OSEP 2012).

The regulations note the term "agreement" refers to an understanding between the parent and the District. 71 Fed. Reg. 46,673 (2006). While the consent is much more demanding. 34 CFR § 300.9.<sup>11</sup> Therefore, based on the plain language of the regulations, districts should be careful to document, in detail, the various procedural requirements to excuse different classes of IEP team members.<sup>12</sup>

### **APPROPRIATE RELIEF WITHIN THE MEANING OF THE IDEA**

The IDEA allows hearing officers to award appropriate equitable relief. Appropriate relief can take many forms, including compensatory education, tuition reimbursement, reimbursement for costs and future orders to comply with the IDEA's procedural requirements.<sup>13</sup> The plain language of the Act provides that "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). Recently the Office of Special Education Program (OSEP)

<sup>11</sup> 34 CFR § 300.9 Consent. *Consent* means that—(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication.

<sup>12</sup> See, *Prince George's County Pub. Schs.*, 7 ECLPR 55 (SEA MD 2009) (district's excusal form failed to identify which individual was being excused from which meeting, therefore, the district did not obtain adequate parental consent for the excusal); *Dublin City Sch. Dist.*, 111 LRP 20334 (SEA OH 02/09/11) (failure of the district to provide documentation of agreement to excuse any required IEP team members led to finding that the district violated the IDEA), *Anoka-Hennepin Independent School District #011*, 114 LRP 37490 (SEA MN 03/03/14) (early departure of two general education teachers from an IEP meeting without the parent's written consent violated the IDEA). *R.G. and C.G. v. New York City Dep't of Educ.*, 62 IDELR 84 (E.D.N.Y. 2013) (absence of any general education teacher at IEP team meeting impeded the student's right to FAPE), *B.B. v. Catahoula Parish Sch. Dist.*, 62 IDELR 50 (W.D. La. 2013) (general education teacher's input should have been sought before removing student from all general education classes).

<sup>13</sup> Zirkel, P.A. 2013. "Adjudicative Remedies for Denials of FAPE under the IDEA." *Journal of the National Association of Administrative Law Judiciary* 33 (1): 214-241, Zirkel, Perry A. "The Remedial Authority of Hearing and Review Officers Under The Individuals With Disabilities Act" *Administrative Law Review*, vol. 58, no. 2, 2006, pp. 401-427. *JSTOR*, [www.jstor.org/stable/40711960](http://www.jstor.org/stable/40711960). Accessed 11 Dec. 2020.

commented that “The SEA, pursuant to its general supervisory responsibility . . . must ensure that a hearing officer's Decision is implemented in a timely manner unless either party appeals the Decision. This is true even if the hearing officer's Decision includes only actions to ensure procedural violations do not recur and no child-specific action is ordered.” *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

### **ESY ELIGIBILITY TIMELINE**

The determination if a student is eligible for ESY services is dependent on whether the student is a member of the *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) (*Armstrong*) group or if the Student meets the IDEA criteria. As defined by the *Armstrong* Remedial Order No. 2 Guidelines, the *Armstrong* group includes students with autism/pervasive developmental disorder, serious emotional disturbance, severe intellectual disability, degenerative impairments with intellectual disabilities, and severe multiple disabilities.

For students in the *Armstrong* group, ESY IEP team review meetings must occur no later than February 28 of each school year. The February 28, ESY determination date may require the LEA to reschedule the annual IEP team review or conduct a separate ESY eligibility IEP team meeting for this review (see 22 Pa. Code Chapters 14 (§§14.102 (a)(2)(x), 14.132). The NOREP/PWN offering or denying ESY eligibility must be issued to the parents no later than March 31 of each school year. If the student has been determined eligible for ESY, the ESY program specifics must be included in the IEP and NOREP.<sup>14</sup>

<sup>14</sup> Extended School Year Eligibility, [https://www.education.pa.gov/Policy-Funding/BECS/PACode/Pages/Extended\\_School\\_Year.aspx](https://www.education.pa.gov/Policy-Funding/BECS/PACode/Pages/Extended_School_Year.aspx)(Pennsylvania Department of Education issued March 10, 2013, reviewed April 15, 2013)(last checked on December 13, 2020).

Pennsylvania regulations provide additional guidance for determining a child's eligibility for ESY services, setting forth seven specific factors for the IEP team to consider. 22 Pa. Code § 14.132(a). School districts are not required to provide ESY based upon "[t]he desire or need for ... respite care ... [or] the desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code § 14.132 (c)(3).

The IDEA also defines the term ESY services to mean special education and related services that: Are provided to a child with a disability: (i) Beyond the normal school year of the public agency; (ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; that (2) Meet the standards of the state educational agency. A public agency cannot (i) limit ESY services to particular categories of disability; or (ii) Unilaterally limit the type, amount, or duration of those services. 34 CFR § 300.106

### **APPROPRIATE RELIEF WITHIN THE MEANING OF THE IDEA**

The IDEA vests hearing officers with authority to award appropriate equitable relief. Appropriate relief can take many forms, including compensatory education, tuition reimbursement, reimbursement for costs and future orders to comply with the IDEA's procedural requirements.<sup>15</sup> The plain language of the Act provides that "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." Recently the Office of Special Education Program (OSEP) commented that "The SEA, pursuant to its general supervisory responsibility . . . must ensure that a hearing officer's Decision is implemented in a timely manner unless either

<sup>15</sup> Zirkel, P.A. 2013. "Adjudicative Remedies for Denials of FAPE under the IDEA." *Journal of the National Association of Administrative Law Judiciary* 33 (1): 214-241, Zirkel, Perry A. "The Remedial Authority of Hearing and Review Officer under the Individual with Disabilities Education Act," *Administrative Law Review*, vol. 58, no. 2, 2006, pp. 401-427. *JSTOR*, [www.jstor.org/stable/40711960](http://www.jstor.org/stable/40711960). Accessed 11 Dec. 2020.

party appeals the Decision. This is true even if the hearing officer's Decision includes only actions to ensure procedural violations do not recur and no child-specific action is ordered." *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

With these fixed legal principles in mind, I will now analyze the instant dispute over the Student's FAPE.

### **OVERVIEW OF THE STUDENT'S FAPE CLAIMS**

In general terms, the Parent contends that the multiple changes in the Student's program/placement beginning in March 2018 and continuing through the end of the 2019-2020 school year resulted in a denial of a FAPE. To support this broad statement, the Parent relies on eight (8) exhibits. These snippets or parts of IEPs, NOREPS, are otherwise provided in full as District Exhibits.

The District denies the Parent's claims and instead points to the high school emotional support teacher's testimony, the Coordinator of the private full-time emotional support program and its 49 Exhibits, which they argue prove the District met the IDEA's requirements announced in *Rowley*, *Endrew*, and *Dunn*. For all of the following reasons, I agree in part with the Parent and disagree with the District in part; an appropriate Final Order follows granting appropriate relief and other corrective action.

### **THE FIRST INSTANCE WHEN THE DISTRICT FAILED TO INCLUDE MANDATORY DATA AND INPUT**

The regulations clearly define the District's responsibility for securing parent participation and what should be included in a legally sufficient IEP, FBA, MDR and a NOREP. Sadly and left unexplained in this record, the non-testimonial extrinsic evidence is preponderant that in many instances, the District failed to draft legally sufficient procedural accurate documents that fostered parental participation, offered a FAPE or adhered to the applicable federal or state regulations. I will now flesh out the procedural violations that require immediate corrective action by the District. Concurrently, I will

also clear up, describe and define instances when procedural violations either caused a denial of a FAPE or interfered with the Parent's participation in the FAPE/IEP process.

In some instances, in particular, the MDR and again in the IEPs, several substantive content areas were left blank or partially completed. For example, in several of the IEPs, the content areas targeting the use of supplemental aids were left blank. This same omission of useful data can be found in the MDR record. The MDR lacks documentation that the Student was subject to 10 or more days of out of school disciplinary action. The MDR form lacks documentation that the Student was a danger to himself or others or brought a weapon or drugs to school. The MDR team failed to complete many of the working questions addressing if the behavior of concern was a manifestation of the student's disability. Absent this outcome-determinative data, the District placed the Student in an out of District restrictive placement. An appropriate Final Order follows.

**SECOND, INSTANCES OF PROCEDURAL VIOLATIONS WHEN THE DISTRICT FAILED TO INCLUDE OR EXCUSE MANDATORY AND DISCRETIONARY IEP TEAM MEMBERS**

It is black letter law that an IEP team must include a special education teacher, the parent, the LEA, a regular education teacher and related service personnel who provide direct services. The March 2018, October 2018, November 2018, February 2019, March 2019 and June 2019 IEP meetings failed to include either the special education, the regular education, the speech therapist or a psychologist. I included the psychologist as the record does not explain who on the team understood the RR test data, the instructional implication of the RR data or the SDI implications of the FBA. As further described below, at times, these procedural violations contributed to a

denial of a FAPE and interfered with the Parent's right to participate in the IEP process.

### **THIRD, INSTANCES WHEN THE PARENT DID NOT MEET HER BURDEN**

The Parent did not thoroughly develop the record explaining if the procedural violations relating to the composition of the IEP team from March 2018 through January 2019 resulted in a denial of FAPE. Shortly after the Student returned to the District, the team met and developed an IEP with four goals, SDIs including speech therapy. The record is clear that from March 2018 through June 2018, the Student went to school, adjusted to the changes after being discharged from the RTF and was otherwise successful. In May 2018, the District offered to continue the full-time program at the Parent's request. In September 2018, the Student was moved from a full-time emotional support class to a supplemental emotional support class at the high school with non-disabled peers. As early as October 2018, the team met to review the Student's adjustment to the high school. For the most part, the Student's grades, while not great, were acceptable. Simultaneously, the Student's behavior, social, and emotional control issues were beginning to emerge. By November, after the principal removed the Student from one class for cutting class, the team revised the IEP and recommended a return to the full-time class. After returning to the full-time class when the Student did not settle in, the District offered and the Parent agreed to a reevaluation. Accordingly, I now find that during this short three-month period, the District's actions were consistent with the IDEA's responsibilities to offer a FAPE and revise that offer when on notice of the Student's changing circumstance.

### **FOURTH, INSTANCES OF PROCEDURAL VIOLATIONS WHEN THE PARENT MET HER BURDEN**

By the time February 2019 rolled around, armed with new data, the District, while closely monitoring the Student's behavior, failed to revise, rethink and

redraft an appropriate IEP. The FBA included a statement that participation in “small classes” was “not meeting” the Student’s needs; fully aware of this “red flag” warning, the team doubled down and continued to work on the same goals, SDIs and PBSP goals.

Although aware of the Student’s downward trend the team did not make any substantive changes that were reasonably calculated to provide meaningful benefit. For instance, while the Student’s IEP from the northwest Pennsylvania included three (3) one-on-one 30-minute counseling sessions per week, which by all accounts resulted in a successful experience, the District did not rethink its position and include counseling. For some unexplained reason, the IEP did not complete the section of the IEP discussing what supplemental aids and services could be put into place to stop the emerging regression. In straightforward terms, the District’s 49 exhibits do not explain why the District, after completing the FBA and the RR, returned to the same old insufficient four IEP goal statements and two-goal PBSP program. The Student was acting out, grades were dropping, attendance was becoming a problem, the SDIs were not working, the PBSP was not sufficient and the regular education discipline practices were not reducing the Student misconduct. Yet, the District did not rethink its strategy or rewrite the IEP to provide ambitious goals and challenging objectives. Accordingly, I now find that from February 2019 through March 2019, the District denied the Student a FAPE; an appropriate Final Order granting appropriate relief follows.

#### **FIFTH, INSTANCES OF SUBSTANTIVE AND PROCEDURAL VIOLATIONS REGARDING THE ESY ELIGIBILITY DETERMINATION AND THE ESY PROGRAM**

While the ESY claim is not pleaded individually, the equitable ESY relief Order here is supported by a plain reading of the Parent’s due process Complaint. The Complaint alleges the Student’s behavior “regressed” and “deteriorated” in the “chaotic” and “disorganized” class.

Students with serious emotional disturbance are part of the *Armstrong* group, which requires districts to determine the Student's ESY eligibility by February 28 of each year. Once discussed, the District, no later than March 31 of each school year, should have offered a NOREP, proposing or refusing ESY services.

Each time the District held IEP meetings in October 2018 and in November 2018, the District should have noticed the Student's overall behavior and academics were declining. The January 2019 RR and FBA also noted the severity of the social, emotional, behavioral and academic regression. The non-testimonial extrinsic evidence known in the February 2019 IEP, along with the FBA, the PBSP noted continuous regression in academics and behavior; yet no one acted.

The FBA notation that placement in small classes was "not meeting" the Student's needs is another missed ESY "red flag." The record is preponderant that in February, the District should have offered an ESY program. The record is preponderant that again in March and clearly by June 2019 IEP team should have taken action on the Student's ESY eligibility. Yet no one did. The escalation of behaviors noted in the District's Exhibit's February to June 2019 Exhibits, coupled with the multiple moves in and out of the full-time emotional support class and the subsequent move to the out of District placement are additional noteworthy classic ESY "red flags;" yet no one did.

Therefore, I now find the record is preponderant that the District failed to determine eligibility in February and offer the Parent a NOREP/PWN of its Decision in March 2019. This procedural violation is particularly troublesome since the March IEP meeting notes changing the Student's placement to a more restrictive setting includes a statement that the District would make the ESY determination "in the future." Yet the Decision never happened.

In June 2019, the District again shirked its ESY FAPE responsibility when the IEP team met and District issued another NOREP extending the out of District Itinerant Emotional Support placement and again ignored the Student's ESY eligibility. Sadly, after three or more opportunities to get it right, the District failed to offer the Student an ESY FAPE. Accordingly, I now find that the Student was otherwise eligible for ESY services; therefore, an appropriate Final Order granting appropriate relief follows.

**SIXTH, THE MARCH 2019 MOVE TO THE ITINERANT SUPPORT PROGRAM WAS NOT REASONABLY CAUCLUATED**

The move to the out of District Itinerant Emotional Support program was predicated on the MDR/IEP teams' review of three violations of the District's Student Code of Conduct. The six-person MDR group reached two conclusions. First, without responding to all of the discussion questions, the MDR concluded the Student's behavior was not caused by, or directly and substantially related to, the student's disability. Second, the MDR group concluded the Student's behavior was not a direct result of the District's failure to implement the IEP. The IEP team reviewed the MDR team's Decision and reached the same conclusion.

The record is clear the Parent was part of the IEP team review of the MDR. Yet, the record is not clear if the Parent was part of the MDR. I reach this conclusion as the MDR Exhibit # S-24 states the MDR meeting occurred on March 13, 2019, although the Parent signed the form on March 11, 2019. (Compare S-24 p.8 with S-24 p.3, with S-25 p.27 p.1).

The conclusion that the behavior was not a manifestation, in most, if not all instances, traditionally leads to a NOREP describing the MDR decision and then a move to a regular education discipline hearing. After agreeing the conduct was not related to the Student's behavior, the IEP team, for some unexplained reason, decided to place the Student in the out of District, Itinerant Emotional Support program.

The March one page IEP meeting form does not include a statement of present levels, transition services, goal statements, a description of the related services or a discussion about rewrites to the PBSP. The limited testimony in the record suggests that the team believed the Student would receive counseling services at the out of District placement. Neither the one-page IEP meeting form nor the NOREP proposing the Itinerant Emotional Support class's placement promised any counseling services. It is black letter law that a significant change in placement requires the team to review hard data. Sadly, the MDR did not include any data in this instance as many, if not all, of the behavior, disability, or IEP related MDR questions were left blank.

First, the District never explained and the record is unclear why the Student's misconduct triggered the MDR, as the Student misconduct did not fit any of the traditional MDR triggers. Second, the record is unclear, how the MDR team could reach its conclusions when the team did not document what data or how they responded to the MDR questions and sub-questions. Third, the District never explained why or how the meeting occurred on March 13, 2019, and the Parent signed the document on March 11, 2019. Fourth, the record is preponderant, the IEP one page form does not come close to meeting the IDEA regulations describing the seven-plus essential elements of a legally sufficient IEP. 34 CFR ¶300.320. Fifth, neither the NOREP nor the IEP supports the limited testimony that the out of District placement would or could provide counseling. Sixth, assuming *arguendo*, the one-page IEP meeting form is legally sufficient, the non-testimonial extrinsic evidence does not begin to explain how an Itinerant Emotional Support placement providing special education services for up to 20% of a school day would meet the Student needs, when a full-time Emotional Support program providing services 100% of the school day did not. Seventh, neither the record nor the non-testimonial extrinsic evidence explains how the same four-goal statements beginning in March 2018 that were never changed would now

produce meaningful progress. Eighth, the non-testimonial extrinsic evidence and testimony do not explain the Student attendance records found at Exhibit # 45. The attendance records from the out of District place state the Student went to the program on seven occasions and then stopped going. The District never explained what if anything was done to revise, rethink or rewrite the IEP. Furthermore, the record is clear that the Student was placed at [a detention center], by Court Order, from May 20, 2019, through June 4, 2019. However, the March and June NOREPs leads one to believe the Student was in the out of district placement. (S-45). Ninth, the District's exhibits do not explain why the District issued a NOREP on June 4, 2019, extending the placement into the 2019-2020 school year, the same day the Student was released from detention. Accordingly, I now find the District failed to offer the Student a FAPE from February 2019 through June 2019; an appropriate Final Order follows.

### **THE CALCULATION OF APPROPRIATE RELIEF**

The case law provides that hearing officers are authorized to make equitable awards of appropriate relief. The calculation of appropriate equitable relief can take three or more forms. First, some courts make an hour-for-hour award, *i.e.*, the quantitative approach. Other courts use the qualitative approach, which aims to put the student in the same position he or [she] would have occupied but for the school district's violations of the IDEA. Finally, some courts combine both approaches and make an equitable calculation.<sup>16</sup> In this instance, considering the procedural violations, the nature of the Student's disability, and the Student's placements' history, I

<sup>16</sup> See, Perry Zirkel, The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update (2017) (collecting cases and describing each approach) <https://perryzirkel.files.wordpress.com/2017/05/calculation-of-comped-article.pdf> (last visited 12.13.2020).

now find the hour-for-hour equitable approach is the appropriate method to calculate the relief.

When the record is viewed as a whole, the full-time emotional support program associated with the RTF placement and the Student's placement in the District's full-time class from March 2018 through May/June 2018 provided stability and offered the Student a reasonable opportunity to make progress. Based on this record, a full-time placement calls for seven-plus hours of instruction each day. Therefore, each month the District roughly provides 20 or more days of school. Factoring in the Student was denied a FAPE from February 2019 through June 2019; I now find the Student was denied 90-days of appropriate education. Therefore, using a seven and half hour school day (7.5), I now find the District should provide the Student with 675 hours of compensatory education [90 days x 7.5=675].<sup>17</sup> The Parent is free to select the provider of these services.

Typical ESY programs run for eight to ten weeks during the summer. After reviewing the record, I now find given the Student's disability and taking into account the downward trend in the Student's behavior, the Student is now awarded four and one half (4.5) hours of ESY services per day for nine weeks. Therefore, the District is now Ordered to provide 45-days of compensatory services totaling 202.5 hours.

The Parent can use this award of compensatory education services to provide special education services, specially-designed instruction, tutoring during the summer, tutoring after school or on the weekends, assistive technology, transition services, related services or supplemental services as defined in the current IDEA or any future amendments.

<sup>17</sup> I make this award aware of the District's practice that Student's in the full-time class have a shorter school day. The District never explained why when the Student was in the supplemental program, in the same building, the Student went to school for seven (7) plus hours a day. Therefore, I now find a 7.5 hour school day is the correct starting point.

The District is also directed to reimburse the Parent selected provider at the providers' rate where the services are provided.

The District is further Ordered to separately fund the Student's transportation to and from the compensatory education provider. The Parent can submit proof of all out of pocket transportation expenses for payment. In the alternative, at the Parent's election, the District is directed to reimburse the Parent at the same rate they would pay a private carrier to transport the Student to and from the service.

Once the Parent selects the provider, the Parent shall notify the District of the provider's name and location. At the same time, the Parent notifies the District about the provider's name; the Parent will advise the District how transportation should be reimbursed as set forth above. If the Parent transports the Student to the program and then returns home and then goes back to pick up the Student, the District is Ordered to reimburse the Parent for all trips and mileage to and from the provider.

All Parent and provider services shall be paid for within 30-days of receipt of the Parent's canceled check, provider invoice, mileage log or receipts for transportation costs.

The District is further directed to inform the Parent each month of the remaining balance of unused compensatory education time.

As the District did not put forth any evidence calculating the reasonable rectification period, I now find that affirmative defense is now waived. In the alternative, assuming the rectification period is an equitable defense, I now find based on the frequency and the continuing nature of the above procedural violations, the equities favor the Parent and the Student; therefore, the District claim for a reasonable rectification period is now waived.

## **CONCLUSION**

The Parent failed to meet her burden that the District's offer of a FAPE from March 2018 through January 2019 was inappropriate. The record is preponderant that the District failed to offer a FAPE from February 2019 through June 2019. The record is clear the District failed to offer an appropriate ESY FAPE. For all of the reasons above, the Parent's claims are denied in part and granted in part. An appropriate Final Order follows directing the District to correct all procedural violations follows.

### **ORDER**

**And now**, this 17th day of December 2020, it is hereby **ORDERED** as follows:

1. The Parent's denial of a FAPE claim from March 2018 through January 2019 is denied.
2. The Parent's denial of a FAPE claim from February 2019 through June 2019 is granted. The District is directed to fund 675 hours of compensatory education. The limitations, directions on how the Parent may use the bank of hours, the rate of reimbursement, along with the timeline for prompt payment set forth above is incorporated by reference as though fully set forth herein. All terms describing and limiting the use of the compensatory education are otherwise enforceable as part of this Final Order.
3. The District failed to offer the Student an appropriate ESY FAPE; therefore, the District is now Ordered to provide 202.5 hours of ESY FAPE. The limitations, directions on how the Parent may use the bank of hours, the rate of reimbursement, along with the timeline for prompt payment set forth above is incorporated by reference as though fully set forth herein. All terms describing and limiting the use of the compensatory education are otherwise enforceable as part of this Final Order.
4. The District is directed to contact either the Allegheny County Intermediate Unit or the Pennsylvania Department of Education to develop a plan to

correct the procedural violations described herein. The plan of correction should include necessary supports for personnel.

5. To ensure the procedural errors are not repeated, the District's plan of correction should include supports for professional development training on any or all of the following topics: 1. how to excuse mandatory and discretionary members of an IEP team from participation, 2. how to ensure mandatory and discretionary attendance and document attendance at IEP meetings, 3. how to conduct an MDR review, 4. how to determine and offer an ESY program, 5. how to prepare an ESY NOREP, 6. how to prepare a NOREP, and 6. how to amend, revise, redraft and rewrite an IEP, with or without a face-to-face meeting. I leave it to the District selected consultant to devise a proper plan of correction and training.
6. When the plan is developed, the District is directed to submit the plan to the Pennsylvania Department of Education. Consistent with its general supervisory authority, the Department will ensure all corrective action Ordered here is completed. In light of the current circumstances and the uncertainty of normal school operations, the District is directed to develop, implement and complete the plan of correction by December 17, 2021.
7. All other claims, defenses and counterclaims are now exhausted and dismissed with prejudice.

Date: December 17, 2020

s/ Charles W. Jelley, Esq. LL.M.  
ODR FILE #23894-2021 AS