

*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**

**HEARING**

**ODR File Number:** 20384-17-18

**Child's Name:** B. T.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

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**Hearing Officer:** Charles W. Jelley Esq.

**Date of Decision:** 11/30/2018

## **Introduction and Scope of the Dispute**

The Parent filed the instant due process Complaint seeking compensatory education alleging an ongoing child find violation beginning in Kindergarten and continuing until the present. The Parent also asserts that once the Student was identified as needing specially-designed instruction, the District failed to provide a free appropriate public education (FAPE). The Parent's child find and denial of FAPE claims arise under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.<sup>1</sup> To remedy the alleged multiyear violations the Parent now seeks a global hour-for-hour award of compensatory education for each and every day the Student went to school from 2013 to the present. The District, on the other hand, argues that at all times relevant the District complied with all substantive and procedural requirements of the IDEA and Section 504.

For the following reasons, I find in part for the Parent and in part for the District.<sup>2</sup>

### **The Scope of the Child Find and Denial of FAPE Claims**

Shortly after the filing of the instant Complaint, the District filed a Motion to Limit the Scope of the Claims, contending that any violations more than two years before the filing of the Complaint were barred by the IDEA's two (2) year statute of limitations. After completing several sessions and conducting a fine grained analysis, this hearing officer made several factual findings, on the record, about the knew or should have known date that formed the basis of the instant Complaint. First, I determined, that the Parent either knew or should have known in February 2015, when the District exited the Student from special education speech and language support that she could file a due process claim about an alleged denial of a FAPE. The Parent did not file her speech and language claim until March 2018,

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<sup>1</sup> 20 U.S.C. §§1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§300.1 – 300.818. Due to the number of issues, the number of school years and the two different evaluations, the hearing was completed in 12 sessions. 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. The equitable remedy awarded herein compensates the Student for any and all violations of Section 504. Due to the number of issues and the number of school years involved, the Parties asked to file written closing statements.

<sup>2</sup> Due to circumstance beyond the control of the Parties and this hearing officer, including but not limited to multiple illnesses and scheduling conflicts, this Decision was reached beyond the traditional IDEA timelines. All extensions were granted at the request of the Parties. The delays were unavoidable. All of the above was documented on the record.

more than two years after the Parent either knew or should have known. Therefore, I now find that any speech and language claims prior to March 2017 are time barred.

Second, I found the Parent either knew or should have known in March 2017, when she received the District evaluation report (ER) results, that she could have filed another different child find and denial of FAPE action regarding the Student's behavioral needs and circumstance. For all of the reasons, stated in the record, I now find the Parent's behavioral child find and denial of FAPE claims pre March 2017 are timely filed. Simply stated, a reasonable Parent would have known at the time the Student was exited from services that she should have filed an action alleging a denial of speech and language services. Likewise, a reasonable parent would have known that once she received the result of the IEE evaluation that she could challenge the District's acts or omissions about the Student's need for emotional or autistic support. Using either the date of the District's evaluation report or the date of the IEE report the Parent's emotional support or autistic support child find and denial of FAPE claims were timely filed.

### **Statement of the Issues**

1. Was the Student denied a free appropriate public education in the Kindergarten grade, the 2013-2014 school year; and, if so, is the Student entitled to compensatory education?<sup>3</sup>
2. Was the Student denied a free appropriate public education in the 1<sup>st</sup> grade, the 2014-2015 school year; and, if so, is the Student entitled to compensatory education?
3. Was the Student denied a free appropriate public education in the 2<sup>nd</sup> grade, the 2015-2016 school year; and, if so, is the Student entitled to compensatory education?
4. Was the Student denied a free appropriate public education in the 3<sup>rd</sup> grade, the 2016-2017 school year; and, if so, is the Student entitled to compensatory education?

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<sup>3</sup> The Student's Section 504 denial of FAPE and autism child find claims are intertwined with the Student's IDEA claims; on the record the Parties agreed that the IDEA denial of FAPE standard is coextensive with the Section 504 requirements in this dispute. Therefore, I will apply the IDEA FAPE standard to resolve the overlapping Section 504 claims.

5. Was the Student denied a free appropriate public education in the 4th grade, the 2017-2018 school year; and, if so, is the Student entitled to compensatory education?
6. Did the District fail to provide the Student with a free appropriate public education from 1st grade through the present, with this denial of FAPE claim limited to speech and language services; and, if so, is the Student entitled to an award of compensatory education?

## **Findings of Fact**

### **Background**

1. During Kindergarten the District and the Parent agreed that the Student was in need of specially-designed instruction to address speech and language needs (S-1, S-2).
2. The District's "Instructional Referral" sheet completed by the home room teacher notes the Student is receiving speech services and also notes that the Student's behavior is "up and down" (S-4).
3. Neither the District nor the Parent provided any documentary evidence that the District provided the Parent with written speech/language progress monitoring reports as promised in the IEP. (See record)
4. The Kindergarten individual education program (IEP) team relied upon a single 2016 Goldman Fristoe test result to prepare the one speech and language present level of educational performance and achievement. The Student's present levels notes the Student earned a standard score (SS) of 79. The Intermediate Unit speech/language pathologist, who administered the testing, noted the Student had a "very short attention span" (S-1, S-2).
5. The Student's Kindergarten IEP included one speech/language goal and one single form of specially-designed instruction (SDI). The IEP called for the Student to receive 60 minutes of speech per week for a total of 27 hours per 180 days of school (S-2).
6. The record does not include the Notice of Recommended Educational Placement (NOREP) placing the Student into the program, a copy of the procedural safeguards or the initial evaluation report (See record).

7. To address the Student's "up and down" behavior, the Kindergarten teacher referred the Student for response to intervention (RTI) supports. The RTI team recommended that the Student use a visual behavioral chart to monitor behavior (N.T. 493-495).
8. The teacher implemented the RTI plan throughout the year (N.T. 504).

### **The Behavioral Incidents During the 2013-2014 Kindergarten School Year**

9. The first disciplinary referral occurred on September 16, 2013, when Student punched the Assistant Principal in the back, threw a [items] at other students, and was "very disruptive to the learning environment" (S-20, N.T. 69-71).
10. The second disciplinary referral occurred on September 20, 2013, when the Student picked up [a large item] and threw it at the door (S-20, N.T. 73).
11. On September 16, 2013, and September 20, 2013, the District's male guidance counsellor was called into the Kindergarten class for additional assistance regarding behavioral incidents with Student (S-20, N.T. 190-192). The guidance counselor noted that throwing [large items] is not considered typical Kindergarten behavior (S-20, N.T. 191-192).
12. During the month of September 2013, the Student received a total of four warnings, two recess detentions, and two disciplinary referrals, for a total of eight behavioral infractions out of the 19 days. *Id.*
13. Throughout October 2013, the Student continued to demonstrate significant social, emotional, behavioral, and executive functioning needs (S-3, S-20).
14. On October 2, 2013, Student told the teacher to "shut up" (S-3, N.T. 77).
15. On October 4, 2013, Student received recess detention for coloring all over the desk and throwing a pencil (S-3, N.T. 77).
16. On October 9, 2013, Student was suspended for an incident that occurred the previous day in which the Student threatened to punch the teacher, hit the teacher, and threatened to bring a gun into school to shoot and kill the teacher. Although the District's Director of Special Education confirmed that the District would "most definitely" evaluate a student demonstrating such behaviors, Student was not referred for a special education evaluation (S-3, S-20, N.T. 78-79).
17. On October 23, 2013, the District staff met with the Student's private provider of community based behavioral mental health supports to discuss

the Student's eligibility for Therapeutic Staff Support ("TSS") services in school. Shortly after the meeting, a full-time TSS worker began attending school with Student. The Student's TSS worker attended school with Student from October 2013 until the end of the year (N.T. 81, 341, 495).

18. In addition to the TSS worker, the Student also had a behavior specialist from the mental health agency, who provided services in the school (N.T. 495-496).
19. Student's mother testified that the TSS reported to her that Student's behavioral issues continued throughout Kindergarten and did not improve throughout the school year (N.T. 365-367).
20. On December 19, 2013, the Student hit another student (S-3, N.T. 81).
21. In January 2014, the Student received warnings on twelve (12) of the eighteen (18) school days (S-3, N.T. 81).
22. In February 2014, Student received warnings for misbehavior on eleven ("11") of the sixteen (16) school days (S-3, N.T. 82).
23. On February 12, 2014, the Student received a disciplinary referral for kicking another student and fighting with the Assistant Principal, who had to physically control the Student on the bus (S-20, N.T. 83-84).
24. On March 6, 2014, the Student was placed on the District's transportation disciplinary system (S-20, N.T. 85).
25. According to the disciplinary record, on March 20, 2014, the Student received several warnings, hit the teacher's hand, and threatened to punch the teacher's face into the wall (S-20, N.T. 86).
26. On May 13, 14, 15, 28, and 29 2014, the Student received warnings for misconduct (S-3, N.T. 89).
27. On May 27, 2014, the Student received recess detention for throwing a pencil and hitting things off another student's desk (S-3: N.T. 89-90).

### **The Kindergarten Teacher's Response to Intervention Strategy**

28. During Kindergarten the District implemented a "response to intervention" approach to address the Student's behaviors. The "response to intervention" strategy included a visual behavior chart on Student's desk; however, the teacher does not remember whether any other targeted interventions were also implemented as part of an overall "response to intervention" approach. The teacher was not aware if the desktop behavioral strategy was based upon

a research-based program or if the strategy was a tier one or two intervention (S-4, N.T. 493-494).

29. The Kindergarten regular education classroom-wide behavior plan involved a color system. It was revised for Student as follows: Before moving the Student to the next color in the classroom behavior plan, the Student was given three chances for each color for a total of nine chances before the Student would get to red, the most significant consequence (N.T. 504).
30. In September 2013, the Student engaged in behaviors that interfered with learning, and the staff used behavioral interventions 42% of the days the Student attended school that month (S-3, N.T. 65-66).
31. At the end of the Kindergarten school year, the teacher prepared and the Parent agreed to a speech and language only IEP (S-5).
32. The District's June 11, 2014, speech and language only IEP stated that the Student did not demonstrate any behaviors that impeded learning (S-5, N.T. 91).

### **The 2014-2015 1<sup>st</sup> Grade Year**

33. In 1<sup>st</sup> grade, the Student earned passing grades of A's and B's (N.T. 470).
34. The Student's 1<sup>st</sup> grade IEP included notations from the classroom teacher stating the Student is "doing great," "knows all letters and sounds," "can write and recognize the numbers 0-20" and knows all "sight words." (S-50).
35. The present levels of functional performance included progress statements describing the Student's articulation needs. The Parent input notes the student "often repeats words ... talks too fast and has problems with the "s" sound (S-5).
36. The IEP included two goal statements targeting articulation (S-5).
37. During 1<sup>st</sup> grade, the Student's speech services decreased from 60 to 45 minutes a week resulting in a net decrease of two hours [26 to 24] hours per 180 school days (S-5).
38. Although the IEP calls for trimester reporting of progress monitoring no other reports or data were produced (See record).

## **The Behavioral Incidents During the 2014-2015 1<sup>st</sup> Grade School Year**

39. In 1<sup>st</sup> grade, the TSS worker supported the Student's behavioral needs in the classroom (N.T. 479-480). The TSS worker accompanied the Student to school every day, while the Mobile Therapist (MT) frequently met with the Student, in school, to address negative social, emotional, and behavioral issues and circumstances (N.T. 370-371, 479-480). The Parent testified that during 1<sup>st</sup> grade the Student demonstrated emotional issues such as random crying, not wanting to be at school at all and instead wanting to be with the Parent (N.T. 369-370). The Parent recalled one instance when the 1<sup>st</sup> grade teacher contacted her and advised that Student's behavior of ripping papers resulted in her putting the Student in the hallway, at a desk, for 20 minutes (N.T. 374). During 1<sup>st</sup> grade, for the most part, the Parent communicated with the guidance counselor about the Student's troublesome negative peer interactions during recess (N.T. 336).
40. On September 4, 2014, at the beginning of the 1st grade school year, the District received information from the community mental health provider that the Student was diagnosed with autism, attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder. Although aware of the mental health diagnoses the District did not consider or offer to reevaluate the Student for special education supports. (S-22, N.T. 97).
41. On February 22, 2015, the District issued and the Parent agreed to a Notice of Recommended Educational Placement (NOREP) exiting the Student from Speech and Language services (S-7).

## **The Behavioral Incidents During the 2015-2016 2<sup>nd</sup> Grade School Year**

42. During 2<sup>nd</sup> grade, the Student continued to receive in school BSC, MT and TSS services (P-1, N.T. 344-345, 376, 464-465).
43. During 2<sup>nd</sup> grade, the teacher, the Parent, the Student's TSS and staff from the community behavioral health agency met to review the Student's treatment plan (N.T. 465-469).
44. At times, the District's guidance counselor was called to help support the Student and the teacher during several incidents of physically aggressive behavior (N.T. 203, S-3). On April 12, 2016, the Student received a recess detention for fighting with Student's sibling on the bus; this type of behavior had occurred before (S-20, N.T. 109-110).



45. In the Spring of 2<sup>nd</sup> grade the Student was suspended for two days for throwing a pencil and hitting the teacher in the face (N.T. 460, 463, S-20).
46. On May 11, 2016, another aggressive incident occurred when the Student threw [an item] at a peer (S-20, N.T. 110, 463).
47. Not listed in the Student's individual building level disciplinary file were the multiple in class misbehaviors that were managed by the classroom wide behavior system, which included recess detentions (S-20, N.T. 105, N.T. 467, 473).
48. The Student's 2<sup>nd</sup> grade report card indicated ongoing difficulties in listening, attention, following directions and being courteous to others (S-18 N.T. 468).
49. The record indicates that the Student was unable to build and maintain long term friendships (N.T. 333).

### **The Summer Before 3<sup>rd</sup> Grade Community Based Mental Health Evaluation**

50. On July 27, 2016, the summer between 2<sup>nd</sup> and 3<sup>rd</sup> grades, the Student, as part of a community based interagency review of current behavioral services, underwent a series of informal assessments. The report noted the Student continued to struggle with peer/adult social interactions in school and in the home (P-1).
51. The interagency team reported that the Student "shuts down when [redacted] does not get [redacted] way or when told no." Although, the community based mental health team did not include any standardized intelligence testing, achievement testing, speech testing, social skills testing, autism or attention hyperactivity check lists, the interagency team concluded the Student met the community based criteria to be identified as a person with "Autism Spectrum Disorder," (ASD) "Persistent Depressive Disorder," "Attention Hyperactivity Disorder, combined type" (ADHD) and a "Speech Disorder" (P-1). The report does not include or discuss the diagnostic instruments or the criteria used to reach the diagnostic conclusions (P-1).

52. The July 2016 mental health update noted the Student is easily upset, disrespectful, struggles with social interactions and does not understand reciprocal turn taking, blocks out sensory feedback, self stimulates, exhibits sensory and transition needs such as complaining about the tags in clothes, tight clothes, collars and how socks and shoes fit, and emits high-pitched screeches (P-1).
53. At the conclusion of the July 2016 interagency team meeting the team recommended 15 hours of TSS per week with 10 hours to be provided at school and five hours in the home (P-1).

### **The 2016-2017 3<sup>rd</sup> Grade School Year District Evaluations**

54. The District issued a Permission to Evaluate (PTE) in December of 3<sup>rd</sup> grade. On the first page of the December PTE, the notice states that the Parent refused to consent to the reevaluation; however, on the second page, above the signature line, the Parent checked the box and signed the PTE indicating “I give consent to the proposed initial evaluation.” Oddly, the first page of the PTE notes the Parent and the team agreed if the Student had one more behavioral issue the District would issue another PTE (S-8).
55. The District completed its reevaluation report (RR) that addressed only speech/language needs. The report notes that when the Student enrolled the District implemented the Student’s Early Intervention speech/language IEP. The report includes an overview of the Student’s classroom grades which were 100% in Reading, 99% in Phonics, and Satisfactory in Grammar; 100% in Spelling; and 100% in Math, 100%, Math Facts (S-6).
56. On March 1, 2017, the District completed an evaluation of the Student’s needs. The evaluation assessed the Student’s significant behavioral difficulties in school and on the bus. Believing that she did not consent to the evaluation, the Parent refused to provide any input into the evaluation report (S-10).
57. The evaluation report notes the Student was receiving community based behavioral health services as a person diagnosed with autism, attention deficit hyperactivity disorder, combined type, speech sound disorder and a rule out of depression (S-10).<sup>4</sup>

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<sup>4</sup> In DSM-5 a “rule out” does not mean that the diagnosis was ruled out – it means that further consideration needs to be given to either rule in (accept) or rule out (eliminate) the diagnosis.

58. The District knew the Student's community based treatment plan addressed anger management, frustration and following directions. The community based treatment plan also included a crisis management plan. The crisis management plan provides that if physical aggression lasted more than one hour, the caretaker should call the police (S-10).
59. Four of the six pages of the RR did not include any data or narrative statements describing the Student's needs. The two pages with teacher and Parent input do not include any norm referenced or informal measures of speech, language, grammar, academic achievement, intelligence level, a classroom observation, or behavioral checklists. The only subjective statement of progress provides that the Student "[redacted] is fine, [redacted] still mixes [redacted] pronouns at times (S-6).
60. During the time the Student was exited from IEP services the Student continued to receive community based mental health support in the form of a one-on-one TSS worker and BSC services at home and in the school (S-8).
61. Teacher input into the District's evaluation report noted that the Student was performing at grade level in reading, math, social studies and science with below grade performance in writing. The teachers reported anecdotally that the Student displayed social skills and anger management deficits (S-10).
62. The teachers completed a locally developed behavioral checklist noting that the Student had "Frequent" "negative peer interactions" and "teacher interactions." At the same time, the teachers reported that the Student acquired new information easily, retained information over time consistent with age and grade level peers, completed assignments according to directions, worked independently, completed work accurately, remained seated in class but needed repeated redirection (S-10).
63. On the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V), a standardized test of cognitive ability, the Student earned an average Full Scale standard score (SS) of 98. The Student's Verbal Comprehension Index, Visual Spatial index, Fluid Reasoning Index, and Processing Speed scores were all in the "Average" range; while the Working Memory Index score fell in the "Very Low" range (S-10).
64. The Student's Wechsler Individual Achievement Test-Third Edition (WIAT-III) Listening Comprehension, Receptive Vocabulary, Oral Comprehension, Oral Word Fluency, Early Reading Skills, Word Reading Skills, Pseudoword Decoding, Reading Comprehension, Oral Reading Fluency, Alphabet Writing Fluency, Essay Composition, Numerical Operation, Math Fluency Addition, and Math Fluency Multiplication scores all fell in the

“Average” ranges. The Student’s Math Fluency-Subtraction and Math Problem Solving scores fell in the “High Average” range. At the same time, the Student’s Sentence Composition score fell in the “Below Average” range, while, the Student’s Essay Composition score could not be scored because the Student refused to complete the subtest. Therefore, the evaluator could not calculate the Student’s “Written Expression Composite” score (S-10).

65. To assess the Student’s behavior and self-perception, the teacher and the Parent were asked to complete the Behavior Assessment System for Children, Second Edition (BASC-2) checklist. On 18 of the BASC -2 scales the teacher rated the Student as “Clinically Significant.” On five of the BASC-2 scales, the teacher rated the Student as “Average,” on three scales the Student earned scores at the “At Risk” level, while on one scale the teacher scores the subtest as “not applicable. (S-10). The Student’s BASC-3 Content Scales, which measure skill sets such as Anger Control, Bullying, Developmental Social Disorders, Emotional Self-control, Executive Functioning and Negative Emotionality were judged to be problematic in school in all settings. The Student’s Adaptive Skills and Clinical Scales suggest adaptability, social skills, leadership, study skills, functional communication, hyperactivity, aggression, depression attention problems, atypicality, and withdrawal behaviors were rated at either “Clinically Significant” or “At-Risk” (S-10). Consistent with the dispute over whether she consented to the completion of the evaluation, the Parent did not complete the BASC-2 (S-10).<sup>5</sup> In order to gather additional information regarding the Student’s emotional and behavioral adjustment in school, the teacher completed the Scale for Assessing Emotional Disturbance-Second Edition (SAED-2).<sup>6</sup> On the five SAED-2 subscales the Student earned two “Indicative” scores suggesting “Relationship Problems” and “Unhappiness or Depression” were problematic while “Inappropriate Behaviors,” were ranked as “Highly Indicative.” The two remaining categories, “Inability to Learn” and “Physical Symptoms or Fears” were rated as “Not Indicative” (S-10).

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<sup>5</sup> Scores in the Clinically Significant range suggest a high level of maladjustment. Scores in the “At-risk” range identify a significant problem that may not be severe enough to require formal treatment or identify the potential of developing a problem that needs careful monitoring.

<sup>6</sup> On the rating scale subtest of the SAED-2 a score of 13 or lower is not indicative of emotional disturbance; while a score of 14-16 is indicative of emotional disturbance and a scale of 17 is highly indicative of emotional disturbance.

66. When considering if the Student's behaviors could have been the result of a medical or psychiatric condition, the team checked the box "X Yes. According to records from the [redacted], [Student] is currently diagnosed with Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder, Combined Type." (S-10).
67. The District's evaluation team concluded the Student met the IDEA criteria to be identified as a person with emotional disturbance who also needed specially-designed instruction. While the evaluation team acknowledged the Student was medically identified as a person with autism, the team concluded that the Student did not find the autism was adversely affecting the Student's educational performance (S-10).

### **The 2016-2017 3<sup>rd</sup> Grade School Behavioral Incidents**

68. During 3<sup>rd</sup> grade, from September 26, 2016, through February 16, 2017, the Student had 17 behavioral incidents that impeded the Student's learning and disrupted the classroom. (S-10).
69. On more than one occasion the behavioral incidents included kicking, punching, and yelling lasting more than 20 minutes. During several of the episodes multiple staff members, including the school resource officer, used a variety of therapeutic, escorts and physical management techniques, including basket holds, to restrain the Student either in the classroom or in the hallways and on one occasion on a landing of stairs (S-10). As a consequence of the behavioral outbursts, the principal issued out of school suspensions (S-10).
70. Although the outbursts interrupted the classroom and affected learning, the Student still managed to earn solid "A and B" grades (S-10). The Student's Dynamic Indicators of Early Literacy Skills (DIBELS) assessment scores indicated grade level reading performance (S-10).

### **The March 2017 3<sup>rd</sup> Grade IEP**

71. The March 2017 IEP's present levels of educational performance included a summary of classroom grades, literacy skills, social and behavioral skills, circumstances and needs (S-11).
72. The behavioral present levels included the results of a functional behavioral assessment (FBA) including a clear description of the antecedent and consequence factors contributing to the behavior, a crisis plan and a working

hypothesis. The crisis plan called for the staff to call the next level supervisor if the behavioral incident lasted longer than 45 minutes. In the event, the outburst lasted longer than one hour the staff were instructed to call 911 and to request a safe transport to the emergency room for an inpatient behavioral evaluation (S-11).

73. The IEP also included a stand-alone “Positive Behavior Support Plan” (PBSP) with three goals targeting the Student’s behavioral, social and emotional needs and circumstances. The PBSP included 11 antecedent strategies and 12 consequence strategies (S-11).
74. The IEP included three different behavioral goals and 13 individual forms of specially-designed instruction (S-11).
75. At the conclusion of the IEP conference, the District issued and the Parent consented to the proposed program and placement described in the Notice of Recommended Educational Placement (NOREP) (S-11).
76. On four different occasions, the District reported the Student’s progress, to the Parent, on each of the three goals (S-13). At the end of 3<sup>rd</sup> grade, the report notes the Student mastered all three IEP goals (S-13).

### **The 2017 Independent Educational Evaluation**

77. The District and the Parent agreed to an independent educational evaluation to assist in determining the Student’s cognitive, academic, social, and behavioral, circumstances, needs and strengths. (S-15).
78. The independent evaluation includes a record review, parent/teacher input, academic testing, ability testing, behavioral, autism, emotional disturbance and ADHD checklists and executive functioning assessments (S-15).
79. The IEE evaluator administered the Scales for Assessing Emotional Disturbance, Second Edition (SAED-2) which assesses the five qualifying conditions for identification of emotional disturbance. The teachers’ overall SAED-2 quotient score of 90 rated the Student in the “Not Significant” range (S-15).
80. The Parent and two teachers completed a Social Skills Improvement System (SSIS) Rating Scales checklist. The SSIS–RS checklist assesses a student’s Social Skills, Competing Problem Behaviors and Academic Competence (teacher form only). The Parent rated the Student “Below Average” on three scales, “Above-Average” on six scales, “Well-Above Average” on one scale and “Average” on two scales. One teacher rated the Student “Below

Average” on two scales, “Above-Average” on two scales, and “Average” on nine scales. The other teacher rated the Student “Below Average” on one scale, “Above-Average” on one scale, and “Average” on ten scales (S-15). One teacher rated the Student’s “Academic Competence” as “Above Average” while the other rated the Student “Average” (S-15).

81. The Parent and two teachers each completed a Behavior Assessment System for Children, Third Edition (BASC-3) checklist. The BASC-3 measures problem behavior in the school and in the home environment. A T-score in the “Clinically Significant” range suggests a high level of maladjustment. Scores in the At-Risk range indicate either a significant problem that may not be severe enough to require formal treatment or a potential of developing a problem that needs careful monitoring. The Parent and one teacher rated the Student’s “Adaptability” at the “At-Risk” level; otherwise, the Parent and the two teachers agreed the Student scored “Average” on the remaining four scales (S-15). The Parent rated the Student “At-Risk” on the BASC-3 scales rating Hyperactivity, ADHD probability and Executive Functioning, while the teachers rated the Student as “Average” (S-15).
82. When the Parent completed the Conners 3 Behavior Rating Scale (Conners 3), she rated the Student’s impulsivity, defiance, aggression, peer relations, and conduct at the “Very Elevated” level while the teachers rated the Student as “Average” (S-15).
83. The two teachers completed the Gilliam Autism Rating Scale, Third Edition (GARS-3). The language arts teacher rated the Student in the “Very Likely” range, noting the Student required “Substantial Support”, while, the math teacher rated the Student in the “Probable” range indicating the Student required “Minimal Support” (S-15).
84. The Parent and the two teachers completed the Autism Spectrum Rating Scales (ASRS). Ratings on the “Total Score” scale indicate the extent to which the Student’s behavioral characteristics are similar to the behavior of youth diagnosed with ASD. The Parent’s “Total Score” pattern indicates the Student has symptoms directly related to the DSM-5 diagnostic criteria associated characteristics of ASD. The language arts teacher’s “Total Score” pattern indicates the Student is “not” exhibiting many of the characteristics directly related to ASD. The math teacher’s “Total Score” pattern indicates the Student has “few” behavioral characteristics directly related to ASD (S-15).

85. The Parent completed an Adaptive Behavior Assessment Systems, Third Edition (ABAS-3). The ABAS-3 provides a comprehensive, norm referenced assessment of adaptive skills. The Parent rated the Student “Low Average” on seven of the scales and “Average” on six scales. One teacher did not return the teacher ABAS-3 form, while the other teacher, rated the Student “Low Average” on two scales and “Average” on 9 scales (S-15).
86. In the area of adaptive skill, the Student was rated as having relative strength in communication, community use, home/school living, health and safety, leisure, and self-evaluation (S-15).
87. In the area of socio-emotional functioning, the evaluator noted variability in ratings across settings. While the Parent rated the student “At-Risk” in nine areas of concern, the teachers did not agree on the same at “At-Risk” criteria; they did agree the Student’s ADHD related behaviors met the criteria “At-Risk” (S-15).
88. In the area of ADHD related disability criteria, while the Parent’s T-scores fall in the “Probably met” to “Very Elevated” range; the teachers, on the other hand, did not rate the Student’s behaviors as “Very Elevated” (S-15).
89. The independent evaluator conducted a 30-minute observation of the Student during language arts class. The evaluator using the Behavioral Observation of Students in Schools (B.O.S.S.) collected data regarding the amount of time the Student spent on and off-task during an instructional activity. The observation was divided into 60 intervals, each made up of 15 seconds in length. Peer comparison data was collected every fifth interval as well as during teacher-directed instruction. Overall, the Student engaged in learning 90% of the time observed. The Student was actively engaged in learning 71% of the time observed. The Student appeared to be passively engaged in learning 19% of the time observed. Throughout the observation, the Student was off-task 16% of the time observed (S-15).
90. The evaluator administered the Parent and teacher form of the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2), to assess the Student’s inhibitory control, self-regulation and working memory. The scoring of the Parent’s BRIEF-2 checklist ratings indicates a pattern of highly unusual responses indicating the rater was responding in a haphazard manner. The Parent’s ratings of the Student’s cognitive and behavioral flexibility at the “Potentially Clinically Elevated” level is often associated with children diagnosed with “Autism Spectrum Disorder” (ASD). The teacher’s responses were reasonably consistent and otherwise valid. The



teacher rated the Student as having a good ability to adjust well to changes in the environment and people. The teacher rated the Student's working memory, inhibitory control, cognitive and behavioral flexibility as "Within Normal Limits." (S-15).

91. The Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV-COG) was used to assess a wide-range of general intellectual ability and specific cognitive skills in various processing areas. The Student's General Intellectual Ability (GIA) SS of 101 falls in the "Average" range (S-15).
92. The evaluator also administered the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2). The CTONI-2 is a norm referenced test that uses nonverbal formats to estimate the general intelligence of persons whose performance might be adversely affected by subtle or overt impairments involving language or motor abilities. The Student's general problem solving and reasoning functioning score fell in the "High Average" range. The Student's cognitive functioning on the pictorial index score fell in the "Average" range. The Student's overall cognitive functioning on the geometric index is in the lower end of the "Superior" range (S-15).
93. The evaluator used a combination of standardized tests to assess Student's verbal memory, rate of learning, oral reading, sentence reading fluency, reading fluency, sentence writing fluency and math facts. In all assessed areas the SS fell in the "Average" range (S-15) (S-15).
94. The Student's Woodcock Johnson Test of Achievement, Fourth Edition (Form B) (WJ-ACH-IV-B) math and reading SSs fell in the solid "average" to "High Average" range. (S-15).
95. In the area of the ASD ratings, the Parent ratings indicate symptoms that directly relate to the DSM-5 ASD diagnostic criteria (S-15). The teachers, on the other hand, indicated that the Student did not exhibit many of the associated feature/characteristics of ASD DSM-5 criteria. However, at the same time, on the GARS-3, one teacher rated the Student's behaviors in the "Very Likely" range of an ASD disorder with the Student requiring "Substantial Support" while the other teacher rated the Student in the "Probable" range of an ASD diagnosis with the Student requiring "Minimal support" (S-15).
96. After reviewing all of the test data, the independent evaluator made three recommendations/conclusions. First, the evaluator concluded the Student does meet the IDEA criteria to be identified as a person with autism. Second, the evaluator concluded the Student does not meet the IDEA educational criteria of a Student with an emotional disturbance. Third, the evaluator

concluded the Student does meet the IDEA criteria of educational classification of an other health impairment (S-15).

97. The Functional Behavioral Assessment (FBA) data showed that all the target behaviors were occurring at a high rate, almost every day. (S-15).
98. The District and the Parent agreed to an independent speech and language evaluation to assist in determining and clarifying the nature of the Student's speech/language needs, circumstance and strengths (S-15).
99. The Student's Social Language Development Test–Elementary: Normative Update (SLDT-E: NU) scores assessing language-based skills associated with social interpretation and interaction with friends ranged from Borderline Impaired or Delayed to Average (S-15).
100. The Student Clinical Assessment of Articulation and Phonology, Second Edition (CAAAP-2) assesses articulation and phonology. The CAAP-2 confirmed there is no evidence of a communication impairment in the area of sound production (S-15).
101. The Student's semantic skills were assessed using the Expressive One Word Picture Vocabulary Test (EOWPVT), the Receptive One Word Picture Vocabulary Test (ROWPVT) and subtests from the Comprehensive Assessment of Spoken Language, Second Edition (CASL-2). All of the Student's SS and percentile scores were in the solid "Average" range (S-15).
102. The Student's morphologic SS and percentile scores were "Average" (S-15).
103. The Student's syntactic SS and percentile scores ranged from "Average" to "Below Average" (S-15). The Student's pragmatic language skills SS and percentile scores range from "Borderline Impaired or Delayed" to "Average" (S-15).
104. After reviewing the data, the evaluator concluded that the Student does not have a speech and language disorder or need specially-designed instruction (S-15).

#### **The Student's March 2018 4<sup>th</sup> Grade IEP**

105. After reviewing the Student's progress reports, the 4<sup>th</sup> grade IEP team concluded that the Student no longer needed a PBSP (S-23).
106. The present levels of educational performance included a summary of the previous school year's progress reports, and District and state wide standardized testing. The IEP included one goal targeting self-control and 10 different forms of specially-designed instruction (S-23).

107. On May 16, 2018, beginning at approximately 10:30 am the Student had a meltdown that lasted until 12:30 pm. During the meltdown, the Student used profanity, kicked, hit and punched the staff. When verbal redirection techniques did not work, the classroom teacher, the guidance counselor and another teacher physically restrained the Student (S-20).

### **The 2018 Independent Occupational Therapy Evaluation**

108. On January 8, 2018, the Student participated in an independent occupational therapy evaluation. The occupational therapy evaluation included a review of the Student's records, standardized testing, teacher input, and Parent input and in-school observation (S-14).

109. To assess the Student's fine motor control and manual coordination in the area of written work, speed and dexterity with motor tasks the evaluator administered the Bruininks-Oseretsky Test of Motor Proficiency Second Edition, Fine Manual Control and Manual Coordination (BOT-2) subtest. The Student's Fine Manual Control and Manual Control SS were in the "Very Low" range (S-14).

110. The Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (BEERY VMI) is administered to identify individuals who may be encountering difficulties in visual-motor integration. The Student earned a SS of 72 which indicates the Student has difficulty in motor planning which negatively impacts organization and accuracy of written work and copying tasks (S-14).

111. The Test of Visual Perceptual Skills - 4th Edition (TVPS-4) is a comprehensive assessment of visual analysis and processing skills used for determining visual-perceptual strengths and weaknesses. The TVPS-4 assesses visual discrimination, figure ground, visual closure, and visual memory/visualization (S-14). The Student earned a SS of 117 indicating that in the assessed area the Student scored better than 50% of the children in the sample age group. Overall, the Student's visual motor integration is not likely to be contributing to any difficulty in the area of copying or writing tasks (S-14).

112. The evaluator administered the Child Sensory Profile 2 and the School Companion Sensory Profile as it relates to everyday sensory experiences. The results of the Child Sensory Profile 2 completed by the teacher and the Parent indicate the Student scored in the "just like the majority of other" in all, but one area of sensory processing. The Parent reported that the Student often gets frustrated and is sensitive to criticism, has strong emotional

outbursts and is easily frustrated. Overall the Student appears to have a sensory modulation difficulty that causes the Student to seek out sensory stimulation (S-14).

113. The evaluator used the Test of Handwriting Skills-Revised (THS-R) to gauge the Student's neurosensory integration skills when writing. The Student earned a THS-R SS of 98. The Student's SS points toward difficulties in legibility on timed assignments, slower processing speed, and slower copying speed. This profile will impact the Student's ability to take notes and complete timed tests (S-14).

114. Based upon the Student's assessment profile the occupational therapy evaluator recommended one 45 minute session of occupational therapy a week. The evaluator also recommended 11 forms of specially-designed instruction and two writing goals. (S-14).

## **General Legal Principles**

### **Burden of Proof**

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief *Schaffer v. West*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion rests with the Parent who requested this hearing. In IDEA disputes the hearing officer applies a preponderance of proof standard.

### **Credibility Determinations**

Hearing officers, as fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer now finds the District's witnesses and the Parent's testimony credible and essentially consistent with respect to the actions taken or not taken by the team in evaluating, instructing and reevaluating the Student's eligibility. I will, however, as explained below give less persuasive weight to the testimony of a witness when the witness failed to provide clear, cogent and convincing explanations of how he/she delivered FAPE to the Student.

## **Generally Applicable Legal Principles**

### **The District's Child Find Duty**

School Districts have a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statute." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c). Even if parents do not cooperate fully with a district's efforts to identify a student, districts still have a responsibility to identify students who are in need of IDEA protections. *Taylor*, 737 F. Supp. at 484. The IDEA child find duty does not demand that schools conduct a formal evaluation of every struggling student. A school's failure to identify a disability at the earliest possible moment is not *per se* actionable. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). However, once school districts have a "reasonable suspicion" the student is otherwise IDEA eligible, the district is required to fulfill its child find obligation within a reasonable time. *Id.* Failure to conduct a sufficiently comprehensive evaluation is a procedural and substantive violation of the district's "child find" obligation. Substantive child find violations can cause a denial of a FAPE. *D.K.*, 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). Therefore, an evaluation must be sufficiently comprehensive to assess all of the child's suspected disabilities. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4), (6). Simply stated, the child find trigger or starting point occurs when the school district has a reasonable suspicion that the child may be eligible under the IDEA. Once the child find duty is triggered, the district must initiate a comprehensive evaluation of the child within a reasonable period of time.

### **IDEA Comprehensive Assessment Criteria and Standards**

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c). Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially-designed instruction.

### **Emotional Disturbance as an IDEA Eligible Disability**

In order to qualify as a "student with a disability" under the IDEA, a student must meet the definition of one or more of the categories of disabilities. 34 C.F.R. § 300.8 (a)(1). Pursuant to the IDEA Part B regulations, 34 C.F.R. § 300.8(c)(4)(i) "emotional disturbance" means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance":

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- C. Inappropriate types of behavior or feelings under normal circumstances.
- D. A general pervasive mood of unhappiness or depression.
- E. A tendency to develop physical symptoms or fears associated with personal or school problems.

A student needs to exhibit only one of the five criteria under the definition of an emotional disturbance to potentially qualify for special education and related services under the ED classification, but the student must exhibit the criteria to "a marked degree" over "a long period of time." 34 C.F.R. § 300.8(c)(4)(i). While 34 C.F.R. § 300.8(c)(4)(i) states that a student with an emotional disturbance must manifest at least one of the identified characteristics described in subsections (A) through (E) "to a marked degree" for "a long period of time," neither the IDEA statute nor its regulations define how long a qualifying "long period of time" must be.

In *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989) OSEP stated that a generally acceptable definition of "a long period of time" can range from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. *See also R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007) (because a child made significant improvements in her classroom behavior once she adjusted to her placement, her inability to maintain peer relationships did not persist for a long period of time.). As for the "to a marked degree" criteria, OSEP has taken the position that it generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

### **Speech and Language Impairment as an IDEA Eligible Disability**

The IDEA defines a speech or language impairment as a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance. 34 C.F.R. § 300.8 (c)(11). The fact that a child has a speech or language impairment will not in itself make him eligible for IDEA services. To find the student IDEA eligible, the team must also determine the student also needs specially designed education and services to access the curriculum. 34 C.F.R. § 300.8(a)(1). In *Letter to Clarke*, 48 IDELR 77 (OSEP 2007), OSEP noted that whether a child with a speech-language impairment qualifies as a child with a disability under the IDEA will depend on more than academic performance. Noting that districts should use a variety of assessment tools, OSEP observed that a child's eligibility for services due to a speech or language impairment must be determined on a case-by-case basis.

## **Autism as an IDEA Eligible Disability**

Because the IDEA includes its own standard for autism eligibility, a medical diagnosis of autism does not in itself qualify a student for special education and related services. The IDEA defines autism as a developmental disability that affects verbal communication and social interaction. 34 C.F.R. § 300.8 (c)(1)(i). The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). Other characteristics of autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." Additionally, the IDEA offers the following guidance: "For a child to meet the IDEA's definition of autism, the eligibility team must determine that the child has: (1) impairments in communication; (2) impairments in social interaction; (3) patterns of behavior, interests, or activities that are restricted, repetitive, or stereotypic; and (4) unusual responses to sensory experiences. *Id.*

## **Section 504 Eligibility**

Under Section 504, the educational performance of a student with a disability, for example, speech impairment, need not be adversely affected to trigger eligibility. However, the impairment must either substantially impair a major life activity (e.g., speaking). In this example, speaking -- the ability to express oneself through oral communication -- is a major life activity. 34 C.F.R. § 104.3(j)(2)(ii). *See also Dear Colleague Letter*, 58 IDELR 79 (OCR 2012) (reminding districts that they must interpret the definition of a "disability" liberally when evaluating a student's Section 504 eligibility). Federal courts have frequently held that the standard of FAPE under Section 504 is similar to the standard of FAPE under the IDEA. FAPE under the IDEA and FAPE as defined in the Section 504 regulations are similar but not identical *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), *abrogated on other grounds by*, *A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007). In *Matula*, the 3d Circuit held that "there appear to be few differences, if any, between IDEA's affirmative duty and Section 504's negative prohibition." *See also Grieco v. New Jersey Dep't of Educ.*, 48 IDELR 74 (D.N.J. 2007, *unpublished*) (quoting *Matula*: "While the IDEA sets forth an affirmative duty to provide an appropriate education to disabled students, Section 504 of the Rehabilitation Act is



a 'negative prohibition against disability discrimination in federally funded programs.'”).

### **IDEA and Section 504 Eligibility Determination Standards**

Upon completion of the administration of assessments and other evaluation measures:

- (1) A group of qualified professionals and the parent of the child determine whether the child is a child with a disability, as defined in 34 C.F.R. §300.8 , in accordance with 34 C.F.R. §300.306 (b) and the educational needs of the child; and
- (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. 34 C.F.R. §300.306 (a).

A child must not be determined to be a child with a disability:

- (1) If the determinant factor for that determination is:
  - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in Section 1208(3) of the Elementary and Secondary Education Act);
  - (ii) Lack of appropriate instruction in math; or
  - (iii) Limited English proficiency; and
- (2) If the child does not otherwise meet the eligibility criteria under 34 C.F.R. §300.8 (a).

Each public agency, in interpreting evaluation data for the purpose of determining if a student is a person with a disability under 34 C.F.R. §300.8 must:

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 CFR § 300.306 (c)(1).

A district’s failure to consider relevant information about the student’s needs or individual circumstances in making an eligibility determination may, at times, result in a denial of FAPE. *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012).

## **State Behavioral Programing and Restraint Standards**

### **§ 14.133. Positive behavior support**

(a) Positive, rather than negative, measures must form the basis of behavior support programs to ensure that all students and eligible young children shall be free from demeaning treatment, the use of aversive techniques and the unreasonable use of restraints. Behavior support programs must include research based practices and techniques to develop and maintain skills that will enhance an individual student's or eligible young child's opportunity for learning and self-fulfillment. Behavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques. When an intervention is needed to address problem behavior, the types of intervention chosen for a particular student or eligible young child shall be the least intrusive necessary. The use of restraints is considered a measure of last resort, only to be used after other less restrictive measures, including de-escalation techniques, in accord with subsection (c)(2).

(b) Notwithstanding the requirements incorporated by reference in 34 CFR 300.34, 300.324 and 300.530 (relating to related services; development, review, and revision of IEP; and authority of school personnel), with regard to a child's behavior, the following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*Aversive techniques*—Deliberate activities designed to establish a negative association with a specific behavior.

*Behavior support*—The development, change and maintenance of selected behaviors through the systematic application of behavior change techniques.

*Positive behavior support plans*—A plan for students with disabilities and eligible young children who require specific intervention to address behavior that interferes with learning.

A positive behavior support plan shall be developed by the IEP team, be based on a functional behavior assessment, and become part of the individual eligible young child's or student's IEP. These plans must include methods that utilize positive reinforcement and other positive techniques to shape a student's or eligible young child's behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards.

#### *Restraints*

- (i) The application of physical force, with or without the use of any device, for the purpose of restraining the free movement of a student's or eligible young child's body.
- (ii) The term does not include briefly holding, without force, a student or eligible young child to calm or comfort him, guiding a student or eligible young child

to an appropriate activity, or holding a student's or eligible young child's hand to safely escort her from one area to another.

(iii) The term does not include hand-over-hand assistance with feeding or task completion and techniques prescribed by a qualified medical professional for reasons of safety or for therapeutic or medical treatment, as agreed to by the student's or eligible young child's parents and specified in the IEP. Devices used for physical or occupational therapy, seatbelts in wheelchairs or on toilets used for balance and safety, safety harnesses in buses, and functional positioning devices are examples of mechanical restraints which are excluded from this definition and governed by subsection (d).

(c) Restraints to control acute or episodic aggressive or self-injurious behavior may be used only when the student is acting in a manner as to be a clear and present danger to himself, to other students or to employees, and only when less restrictive measures and techniques have proven to be or are less effective.

(1) The use of restraints to control the aggressive behavior of an individual student or eligible young child shall cause the school entity to notify the parent of the use of restraint and shall cause a meeting of the IEP team within 10 school days of the inappropriate behavior causing the use of restraints, unless the parent, after written notice, agrees in writing to waive the meeting. At this meeting, the IEP team shall consider whether the student or eligible young child needs a functional behavioral assessment, reevaluation, a new or revised positive behavior support plan, or a change of placement to address the inappropriate behavior.

(2) The use of restraints may only be included in a student's or eligible young child's IEP when the following conditions apply:

(i) The restraint is utilized with specific component elements of positive behavior support.

(ii) The restraint is used in conjunction with the teaching of socially acceptable alternative skills to replace problem behavior.

(iii) Staff are authorized to use the procedure and have received the staff training required.

(iv) There is a plan in place for eliminating the use of restraint through the application of positive behavior support.

(3) The use of prone restraints is prohibited in educational programs. Prone restraints are those in which a student or eligible young child is held face down on the floor.

(4) The use of restraints may not be included in the IEP for the convenience of staff, as a substitute for an educational program, or employed as punishment.

(5) School entities shall maintain and report data on the use of restraints as prescribed by the Secretary. The report shall be reviewed during cyclical compliance monitoring conducted by the Department.

(d) Mechanical restraints, which are used to control involuntary movement or lack of muscular control of students when due to organic causes or conditions, may be employed only when specified by an IEP and as determined by a medical professional qualified to make the determination, and as agreed to by the student's parents. Mechanical restraints shall prevent a student from injuring himself or others or promote normative body positioning and physical functioning.

(e) The following aversive techniques of handling behavior are considered inappropriate and may not be used by agencies in educational programs:

(1) Corporal punishment.

(2) Punishment for a manifestation of a student's disability.

(f) School entities have the primary responsibility for ensuring that positive behavior support programs are in accordance with this chapter, including the training of personnel for the use of specific procedures, methods and techniques, and for having a written policy and procedures on the use of positive behavior support techniques and obtaining parental consent prior to the use of restraints or intrusive procedures as provided in subsection (c).

### **Compensatory Education**

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.<sup>7</sup> Compensatory education should place the child in the position in which he/she would be but for the IDEA violation.<sup>8</sup>

Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child.”<sup>9</sup> The child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *Id.*

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<sup>7</sup> *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)).

<sup>8</sup> *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015). IEPs are forward looking and intended to “conform [] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job.”

<sup>9</sup> *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

The case law currently provides three different approaches to calculate an award of compensatory education. In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a “complete” make whole remedy favoring qualitative relief for the entire period of the violation. *G.L.*, 802 F.3d at 626. The second approach is called the “hour for hour approach. In the “hour-for-hour” approach the hearing officer award hours as the basis of relief. *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996). In the third approach generally referred to as an “equitable” calculation, the hearing officer upon review of the record as a whole calculates the appropriate relief. *Id.*

As an all encompassing equitable remedy, compensatory education is intended to provide more than “some benefit” or for that matter “meaningful educational benefit and significant learning.”<sup>10</sup> Under either approach, the factors included in crafting a stockpile of compensatory education relief hinges on student specific facts and circumstances, including but not limited to, projecting how much progress the student might have shown if he or she had received the required special education services, the student’s age, ability, past achievement, stage of learning, unmet needs, present levels of functioning in all areas of suspected disability, projected current progress on the IEP goals, service hours missed, service hours provided and the student’s current ability and achievement levels.

Therefore, whether the hearing officer applies the “make whole”, “equitable” or “hour for hour” approach, the calculation requires some record based factual evidence about the type, frequency, intensity and amount of services either missed or needed to place the student in the same position he or she would have occupied but for the LEA’s violations of the IDEA.<sup>11</sup> Also after *GL* and *MC*, the parents must establish when the District either “knew or should have known” the child was not receiving FAPE.<sup>12</sup>

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<sup>10</sup> *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015).

<sup>11</sup> *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra* (the parent, as the moving party, has the burden of “propos[ing] a well-articulated plan that reflects the student’s current education abilities and needs and is supported by the record.”); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciolo, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012) (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

<sup>12</sup> *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

Assuming a finding of a denial of FAPE, the District, on the other hand, following *M.C.* must produce evidence on what they suggest is the length of time, otherwise known as the reasonable rectification period, the district should have taken to put the child back on the correct path. *Id.* The reasonable rectification period is a factual determination. *Id.* Therefore, whether the parent proves a *Reid* “make whole” approach, the equitable approach or the *MC* “hour for hour” approach, the award must be supported by the factual record taken as a whole. *Id.* With these principles in mind, I will now turn to the analysis of the instant child find, denial of FAPE dispute and calculate the equitable relief.

### **Overview, Discussion and Analysis of All Claims**

Upon filing a due process Complaint, the Parent as the moving party accepted the burden of proof to establish the fact that the District failed to complete a comprehensive evaluation and educate the Student in all areas of suspected disability. First, the Parent contends that multiple warning signs existed such that the staff should have suspected, in addition to speech/language impairment, another IDEA disability such as autism or emotional disturbance. Second, the Parent contends the District erred when it exited the Student from IDEA based speech and language services. Third, the Parent argues that the District’s evaluation team did not carefully consider the IEE evaluator’s findings identifying the Student as a person with autism and/or a speech and language disorder. Fourth, the Parent argues that even if the District properly evaluated the Student in 4<sup>th</sup> grade, any supports provided thereafter failed to meet the Student’s behavioral/speech needs and circumstances. To remedy the alleged substantive and procedural violations, the Parent seeks an hour-for-hour award of compensatory education for each day the Student attended school since 2013.

To the extent the Student misbehaved, the District argues, it provided a series of intensive early intervening services [*aka* RTI interventions] along with other regular education supports to address the Student’s misbehaviors, social and learning needs. The District further contends, to the extent any misbehaviors did reoccur, once assessed, the Student’s programmatic needs are indicative of the five identified characteristics of a child with emotional disturbance, not autism, as described at subsections 34 C.F.R. §300.8(c)(4)(i)(A) through (E) and/or 34 C.F.R. §300.8 (c)(1)(i) or a speech and language disability. The Parties do however agree the Student is a person with an other health impairment in need of specially designed instruction.

After studying a variety of factors, such as the Student’s grades, standardized test scores, school behavior records, discipline logs, public and private evaluation reports, absenteeism, regular education intervention summaries, and the history of

physical restraint, I now find the District did commit a child find violation that denied the Student a FAPE. At this same time, I also find the Parent failed to meet her burden of proof on the issue that the Student is a person with autism and/or speech/language disability. Finally, I find the IEPs provided before and after the Student was identified as a person with an emotional disturbance were inappropriate. For the reasons expressed below, since the Parent did not challenge the Student's passing grades and promotion from grade to grade, the compensatory education remedy is circumscribed to address the loss of a chance to receive a FAPE in all areas of the Student's behavioral, social and emotional needs.

### **The Record As a Whole Does not Support the Parent's Autism Contention**

While at times the Student's behaviors might match up with the characteristics of autism, namely, (1) impairments in communication; (2) impairments in social interaction; (3) patterns of behavior, interests, or activities that are restricted, repetitive, or stereotypic; and (4) unusual responses to sensory experiences, the record, when viewed as a whole, does not support the Parent's contentions that the Student is a person with autism. While the IEE evaluator administered the BASC-3, the SSIS-RS, the GARS-3, the Conners-3, the BRIEF, the SAED-2, the ASRS, and an ABAS-3 the rating scales when viewed as a whole do not preponderantly prove the Parent's autism contention. While the Parent's ratings indicated symptoms that directly relate to the DSM-5 ASD diagnostic criteria (S-15), the teachers' ratings and direct observations, on the other hand, indicate just the opposite. On the GARS-3, one teacher rated the Student's behaviors in the "Very Likely" range of an ASD disorder with the Student requiring "Substantial Support" while the other teacher rated the Student in the "Probable" range of an ASD disorder with the Student requiring "Minimal Support" (S-15). Likewise, the IEE evaluator noted the SAED-2, which assess the five qualifying characteristics associated with emotional disturbance are somewhat inconsistent with the earlier SAED-2 results in the District's evaluation. To support the IEE evaluator's autism finding the combined the Student's variable ASD scores the inconsistent checklist rankings in combination with the community based mental health medical diagnosis of autism to reach the bootstrapped conclusion of an IDEA autism disability. While neither party disputes the medical diagnosis of autism, the medical diagnosis alone or for that matter in conjunction with the variable checklist scores do not satisfy the IDEA's or Section 504 eligibility criteria.

The community based evaluation, while helpful in making the ASD medical diagnosis does not shed any light on how the DSM-5 ASD disability is adversely affecting the Student's education. Likewise, neither the IEE evaluator nor the community based mental health professionals mention Section 504's two prong eligibility requirements. Accordingly, this lack of preponderant proof in

combination leads me to find the Parent did not carry her burden of proof as to an IDEA or Section 504 child find claim with regard to autism.

On the other hand, the District's testing, the discipline record, the restraint history, the failed RTI interventions and the IEE results confirm that on multiple occasions each year the Student exhibited an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers," displayed "inappropriate types of behavior or feelings under normal circumstances" and exhibited a "general mood of unhappiness" 34 C.F.R. 300.8(c)(4)(i). Therefore, I agree with the District the Student is a child with an emotional disturbance. That said, the District's evaluation, unreasonably delayed, once completed was inadequate. Furthermore, as described herein the insufficient evaluation led to the creation of a series of inappropriate IEPs.

### **The District Should Have Reevaluated the Student**

When the Student enrolled in the District, the District and the Parent agreed the Student was IDEA eligible as a person with a speech and language disability. Thereafter the District was obligated to provide this IDEA eligible Student with certain procedural and substantive protections, including but not limited to a comprehensive evaluation in all areas of unique need and a FAPE. For this Student, beginning in Kindergarten, a comprehensive evaluation should have included multiple measures of the Student's behavioral, social and emotional needs. Once the needs were identified the District should have provided individualized instruction to address behavioral/learning needs. Once the program was developed the District then should have progress monitored the data and provided the Parent prior written notice about any offered or refused services. The prior written notice should have provided the Parent with the option of initiating due process proceedings, if and when the parties disagreed about the Student's evaluation, program or placement. As illustrated herein, in this instance, the District failed to meet these basic IDEA requirements, for this Student.

The evidence is preponderant that the District either knew or should have known in the Spring of the Kindergarten school year that the Student needed an additional evaluation to determine if the Student was also a person with autism or a serious emotional disturbance. The frequency, intensity and severity of the Student's behaviors clearly placed the District on inquiry notice of the need to reevaluate the Student. From September 2013 to May 2014, the Student had upwards of 41 behavioral incidents. On more than one occasion the behavioral incidents included kicking, punching, yelling, swearing and throwing objects, and sometimes lasted more than 20 minutes and in some instances for more than an hour. The discipline record, the testimony and the teacher notes about the outbursts describe how



multiple staff members, including the school resource officer, used a variety of therapeutic holds, escorts and physical management techniques, such as basket holds, to physically restrain the Student either in the classroom or in the hallways and on one occasion on a landing of stairs (S-10). Luckily no one was physically hurt. Oddly enough by 3rd grade, when the Student was evaluated for the same misbehaviors that prompted the physical restraints in Kindergarten that continued through 4<sup>th</sup> grade, the District found the Student was IDEA eligible. For this hearing officer, the record is preponderant that on more than one occasion spanning three plus years the District had multiple warning signs that should have caused the Student to be evaluated. Accordingly, the Parent has established the first element of a child find claim.

### **The Delay in Evaluating the Student was Unreasonable**

Beginning in Kindergarten and continuing through 4<sup>th</sup> grade the District provided ongoing regular education and RTI interventions/supports. Despite three plus years of regular education interventions like the class wide behavior program, the desktop behavior chart, the guidance counselor supports, the TSS, BSC and MT, the Student's pattern of behaviors remained persistent, problematic and impeded learning. The RTI interventions, coupled with the community mental health supports, did not interrupt or manage the ongoing pattern of misbehavior. After looking at the discipline log, the restraint notes and the RTI data, it is obvious that the Student's lack of self-control adversely affected the Student's social, emotional and behavioral learning. While fully aware of the pattern of misbehavior the District did not evaluate the Student.

The staff readily acknowledged, contrary to the state regulations, during Kindergarten and 1<sup>st</sup> grade when the Student had an IEP, the IEP team did not meet with or provide the Parent with prior written notice about the need to have an IEP meeting. The applicable regulations are clear that when staff restrained an IDEA eligible Student, the staff should have immediately met to review the two and sometimes three person physical restraints. The failure to hold an IEP meeting created a series of procedural and substantive violations, which either individually or collectively denied the Student a FAPE. First, the failure to convene an IEP team meeting led to the failure to conduct a reevaluation including an FBA that could have led to the creation of a goal based SDI intensive positive behavior support plan, or, in the alternative, a change of placement. Second, the failure to conduct the reevaluation and the FBA, for several years, even assuming restraint was necessary, denied the Student the benefits of a positive behavior support plan including the teaching of socially acceptable alternative skills to replace problem behavior. Third, the failure to hold the IEP meeting resulted in a series of programs, interventions and strategies that failed to incorporate a targeted plan to "eliminate the use of restraint

through the application of positive behavior support.” 22 Pa. Chapter §14.133 *et seq.* Taken as a whole these multiple substantive IDEA evaluation violations denied the Student a FAPE from the Spring of the Kindergarten year through the present. As discussed more fully below, these ongoing substantive and procedural evaluation violations contributed to the denial of a FAPE, which now requires an award of compensatory education.

### **The Behavior Plans Were Inadequate and Inappropriate**

Courts in this circuit have held that a protracted failure to evaluate and to offer an IEP to a student reasonably suspected of having a disability is a denial of a FAPE. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012) (a school district commits a procedural/substantive violation of the IDEA when it improperly delays an evaluation). In *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 2014 WL 4092389 (M.D. Pa. Aug. 18, 2014), the student exhibited signs of an emotional disturbance throughout seventh- and eighth-grade school years, including depression, self-injurious behavior, frequent visits to the guidance counselor and nurse, poor academic performance, and absenteeism. 2014 WL 4092389. The *Jana K.* court found, when like here, a school district offers a student specific services, such as RTI interventions, to improve performance but fails to refer the student for a special education evaluation, the district can be found responsible for an ongoing denial of a FAPE. *Id.* In *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) *abrogated on other grounds by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007), the Third Circuit held that a delay of six months between notice and referral for an evaluation constituted a violation of the school district's child find duties. Likewise in *O.F. ex rel. N.S. v. Chester Upland School District*, 246 F. Supp. 2d 409, 417-418 (E.D. Pa. 2002), the court found when the district was on notice that the student likely had a disability, waited until the following month to refer the student for an evaluation and then failed to complete a comprehensive evaluation until some 13 months later the student was denied a FAPE. Simply stated once a school district is on notice of a likely disability, it must evaluate the student within a "reasonable time." *D.K.*, 696 F.3d at 250 (*quoting Ridley*, 680 F.3d at 271).

In Kindergarten, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grades the teachers repeatedly used the same interventions that did not work. In fact, several of the failed RTI interventions were also included in the later developed IEPs as SDIs. On more than one occasion under the guise of positive strategies, the staff implemented informal and formal behavior plans that used negative consequences, such as detentions, suspensions and taking away recess. While the Student's report card stated the Student did not meet expectations for working cooperatively with others, although fully aware of the on-on-one TSS, BSC and MT supports implemented in the school, no one suggested an FBA. The repeated use of the ineffective RTI behavioral strategies

over the course of three plus school years interfered with the Student's right to a comprehensive evaluation and denied a FAPE.

By the Spring of Kindergarten year, in 2014, after 41 behavioral incidents, the child find warning lights were alternating between yellow and red. By 4th grade, the blinking lights turned solid red. By the Fall of 4<sup>th</sup> grade, bells, whistles and sirens began to sound. Yet none of the teachers could cogently explain why they delayed giving the Parent a PTE. As a consequence of the delay in evaluating the Student, in all areas of suspected disability, the Student was denied a full educational opportunity goal and the parallel opportunity to receive a FAPE for several years.

### **The IEP Behavioral Goals Are Not Ambitious or Challenging**

It is axiomatic that an IEP premised upon an incomplete and inappropriate evaluation is *per se* inappropriate. See ODR #01481-1011 KE and ODR No. 01589-1011 KE (Hearing Officer Ford December 2010). Therefore, when the ER RR, IEP and the IEE results are viewed as a whole, I now find by a preponderance of the evidence that the District failed to offer the Student a FAPE that addressed the Student's behavioral needs.<sup>13</sup> In light of the Student's average ability and achievement, the behavioral goals, SDIs and criteria for success are not ambitious or challenging. While the progress reports suggested the Student was making progress, the raw data suggests the opposite. For example, during 3<sup>rd</sup> grade, from September 26, 2016, through February 16, 2017, the Student had 17 behavioral incidents that impeded the Student's learning and disrupted the classroom. (S-10). On more than one occasion the behavioral outbursts included kicking, punching, and yelling which at times lasted for more than 20 minutes. The notes of the outbursts and the testimony further describe several episodes when multiple staff members, including the school resource officer, used a variety of therapeutic holds, escorts and physical management techniques, including basket holds, to restrain the Student. As a consequence of the outbursts on more than one occasion, the principal issued out of school and /or in school suspensions (S-10). Despite the severity and frequency of the outbursts, the progress monitoring reports indicate the Student mastered the goal. These two competing facts - mastery of the goal versus 17 outbursts lasting upwards of 20 minutes and restraint are mutually irreconcilable. When viewed as a whole the IEP progress monitoring does not match the contemporaneous discipline records, the report cards, the RR, the IEE, the restraint summaries or the classroom communication calendar/log. Therefore,

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<sup>13</sup> See also, *A.W. v. Middletown Area Sch. Dist.*, 115 LRP 4105 (M.D. Pa. 01/28/15) (holding that the district denied FAPE to a teenager with an anxiety disorder by taking 13 months to evaluate the student and develop an initial IEP).

the record is preponderant that the Student did not make behavioral progress from Kindergarten to the present.

Accordingly, I now find the District denied the Student a FAPE when it prepared and implemented multiple IEPs that were inadequate, insufficient and inappropriate; therefore, an appropriate Order of compensatory education follows.

### **The Speech, Language and Communication Dispute**

The Parent contends the District failed to identify, locate and evaluate the Student as a person with speech, language, communication disability. The District, on the other hand, contends the Student does not have any speech or language needs. The applicable regulations require that all the assessment methods, protocols and materials used to assess a student's eligibility must be "valid and reliable" and "administered by trained and knowledgeable personnel." 34 C.F.R. § 300.304(c)(1).

In *Letter to Clarke*,<sup>48</sup> IDELR 77 (OSEP 2007), the Office of Special Education Program (OSEP) noted that whether a child with a speech -language impairment qualifies as a child with a disability under the IDEA will depend on more than academic performance. Noting that districts should use a variety of assessment tools, OSEP commented that a child's eligibility for services due to a speech or language impairment must be determined on a case-by-case basis. OSEP and the case law are clear that if a student can make himself /herself understood and communicate effectively despite a speech impairment, as opposed to a disability, then the student's educational performance is not considered to be adversely affected by the impairment.<sup>14</sup>

In *Lassen View Union Elementary School District*, 55 IDELR 87 (SEA CA 2010), the ALJ noted that whatever speech language difficulties the student continued to have, the difficulties were not curtailing performance. To determine if the student's education was adversely affected the hearing officer, in *Lassen View Union Elementary School District* relied upon the Student's good grades, ability to

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<sup>14</sup> See, e.g., *Weymouth Pub. Schs.*, 21 IDELR 578 (SEA MA 1994) (noting that a 10-year-old student with a frontal lisp was ineligible under the IDEA because he was capable of communicating effectively); *Downers Grove (IL) Grade Sch. Dist.* 58, 1 ECLPR 271 (OCR 1992) (determining that a 4-year-old with hoarseness and accompanying phonation breaks secondary to a medical diagnosis of bilateral vocal nodules was not eligible based on age-appropriate speech and language skills) and *Van-Far R-1 Sch. Dist.* 11 ECLPR 96 (SEA MO 2014) (concluding that a child was not eligible for IDEA services due to an alleged voice impairment because his voice was within normal limits for his age and only exhibited a slight rasp).

participate in classroom discussions, and the ability to appropriately and effectively communicate with peers and adults.

The Student's speech and language claim here centers around a factual disagreement about the Student's pragmatic language abilities. After reviewing the record as a whole, I find that the Parent failed to produce a preponderance of the evidence that the Student's speech, language, and pragmatic language deficits are adversely affecting the Student's speech or language. After administering a host of speech and language assessments the Parent's IEE speech and language evaluator did not definitely conclude the Student has a speech and language disability. Instead, the IEE evaluator recommended that IEP team review the evaluation. The IEE evaluator also made a series of SDI "suggestions" for the IEP team to review provided that the team found the Student was IDEA eligible. The IEE evaluator did not find a speech "need." The Parent did not offer any preponderant evidence that the IEP team did not give the IEE evaluation due weight or that the failure to include speech and language goals or SDI's failed to provide a FAPE. In short, the IEE speech/language testing does not reflect that the Student exhibits an articulation impairment, language impairment, pragmatic language or a voice impairment that adversely affects a child's educational performance. 34 C.F.R. § 300.8 (c)(11).

When the unchallenged passing grades are combined with the two multifaceted speech language assessments the record does not show that the Student's articulation, expressive, receptive, or pragmatic language abilities are adversely affecting the Student's education. When the District's evaluation is coupled with the IEE results, the evaluation and the IEP teams clearly had the benefits of a comprehensive evaluation of the Student in all areas of suspected disability.

### **Compensatory Education is the Appropriate Relief for the Child Find Claim**

The Parent did not offer any testimony or exhibits on the scope of or the measurement of the requested relief. Likewise, the District did not offer any testimony on the *M.C.* reasonable rectification period.<sup>15</sup>

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<sup>15</sup> See, *Jackson-Johnson v. D.C.*, 2015 U.S. Dist. LEXIS 53909 \*28 (D.D.C. Mar. 30, 2015) (hearing officer can order evaluation to develop the record to make a fact-specific inquiry essential to determine what, if any, compensatory education would be appropriate); *Phillips v. District of Columbia*, 736 F. Supp. 2d 240, 55 IDELR 101 (D.D.C. 2010) (action remanded to hearing officer with instructions to determine what, if any compensatory education would be appropriate to ameliorate the denial of a FAPE); *Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010(same)); 34 C.F.R. §300.508(d).

Despite these gaps in the proofs, I now find when the record is reviewed as a whole sufficient facts exist to support an equitable calculation and award of compensatory education.

In this particular instance, I find that the District either knew or should have known the Student was IDEA eligible as a person with an emotional disturbance by the Spring of Kindergarten. I also find using the applicable regulations as a proxy to approximate the rectification period had the District completed a comprehensive evaluation and offered an IEP, the reasonable rectification period, in this particular instance, is the same 80-day window the District would have had to offer an IEP a NOREP and IEP. *See*, 22 Pa Code § 14.131(a)(6).

### **The Equitable Calculation of the Appropriate Relief**

The IEP calls for the Student to receive behavioral supports in all regular education classes provided by the regular education teacher throughout the school day. At the same time the IEP approximates that the Student should receive direct special education support and services provided by a special education teacher 20% or less each day. The typical school year is 180-days long and provides 990 hours of instruction. As explained below, applying the equitable maximum that every right has a remedy, and after modifying the hour-for-hour approach, I will now award a total of 939.5 hours of compensatory education.

Using the 990 hour figure, as provided for in the school code, as the base amount of time the Student should have attended school each year, then dividing that amount by the IEP promised Itinerant Instruction for 20% of the school day, I will now award 198 hours compensatory education for each year the Student was denied a FAPE (990 hours divided by the IEP promised Itinerant Instruction for 20% of the school day = 196 hours per year of direct instruction from the special education teacher). Then using the 196 hours a year of direct special education contact as a the base amount of compensatory education for school year at issue times the number of years the Student did not receive a FAPE, in this instance four and a half (4.5) years, (Spring of 2014 though Fall of 2018 the number of years the Student did not receive a FAPE) the base number of compensatory education is 882 hours.

The Parent also claims that in light of the frequency of the behaviors coupled with the lack of progress the District should have provided some type of extended school year services (N.T. 16). Again based upon my understanding of the Student's disability, the frequency, intensity and the severity of the behaviors I will equitably award an additional 150 hours of extended school year services for the instruction (7.5 hours a week for 5 weeks totaling 37.5 hours for each summer session x 4 years missed years of summer sessions totaling 150 hours) the District

did not provide extended school year services. This equitable finding does not imply that going forward the District must provide extended school year services; I leave that question to the future IEP teams to decide after looking at all of the applicable extended school year factors.

The record is also preponderant that the regular education staff, with the assistance of the resource officer disciplined the Student upwards of 60 plus times, equitably estimating the time of each interaction and the time the team spent in reviewing the interaction; I will also award an equitable sum of 27.5 hours.<sup>16</sup> This equitable amount is grounded in wording of the IEP which provides that the staff were to provide specially-designed instruction throughout the day. Finding that they interventions/strategies/SDIs failed, this additional amount of compensatory education is awarded to make the Student whole for the time the regular education staff spent in managing the Student's behaviors all of which the District's psychologist stated were a manifestation of the Student's disability.

Accordingly, the grand total of compensatory education time is 1059.5 hours before the reduction for the reasonable rectification. After reducing the global award by the reasonable rectification period, and adding the three awards together, the Student is awarded the sum of 939.5 hours of compensatory education.

## **Conclusion**

In this instance, after reviewing the existing data and after giving due weight to all of the testimony as described above, I now find the District failed in Kindergarten to identify the Student as a person with a disability in need of specially-designed instruction. I also find the District failed to provide the Student with a FAPE once evaluating the Student later in 4<sup>th</sup> grade through the present. An appropriate Order follows. The Parent's remaining speech and language and autism related child find claims are denied.<sup>17</sup> All other claims and defenses are also denied.

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<sup>16</sup> Over the course of the 5 school years, the Student was disciplined over 60 plus times and restrained upwards of six times. The record provides that for the most part the behavioral outburst lasted upwards of 20 minutes with some lasting over an hour. Therefore, combining the discipline incident with the restraint and then multiplying that number by an equitable average of 25 minutes totals 1,650 minutes divided by 60 minutes = 27.5 hours.

<sup>17</sup> The remedies awarded herein for the IDEA violations are coextensive with remedies otherwise available for any and all violations under Section 504. Accordingly, no further relief was awarded.

## Order

**And now**, this 30<sup>th</sup> day of November 2018, it is hereby **ORDERED** as follows:

1. I now find the District violated its child find obligation by failing to identify the Student as an IDEA eligible Student with an emotional disturbance during Kindergarten. I also find the IDEA violations described herein denied the Student a FAPE under Section 504. Any and all relief granted herein will remedy any and all equitable Section 504 child find or denial of FAPE claims.
2. To remediate the denial of a FAPE and child find claims the Student is awarded 939.5 hours of compensatory education. Once notified about the name(s) of compensatory education provider, the District is Ordered to pay the full market rate costs for the Student to participate in the compensatory education services. The compensatory education service(s) may take place in either in the Student's county of residence or surrounding counties, in Pennsylvania. The Parent is free to identify or substitute additional future providers of compensatory education services as she deems necessary to implement this Order.
3. The prevailing full market rate cost for the compensatory education services shall not exceed the prevailing rate in the community or location where the services are provided. To prevent any error in the account balance of hours remaining after payment for compensatory education services, the District is Ordered to notify the Parent in writing four times a year about number of remaining unused hours.
4. The Parent's IDEA and Section 504 speech and language denial of FAPE and child find claims, after the Student was properly exited from special education, are dismissed and denied with prejudice.
5. The Parent's IDEA and Section 504 autism child find and denial of FAPE claims are dismissed and denied with prejudice.
6. All other denial of FAPE, child find or claims for appropriate relief are dismissed and denied with prejudice. Likewise all other affirmative defenses or counterclaims are dismissed and denied with prejudice.

Date: November 30, 2018

s/ Charles W. Jelley, Esq. LL.M.  
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