

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

**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 21543-18-19**

**Child's Name:** I. K.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

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**Hearing Officer:** Charles W. Jelley Esq.      **Date of Decision:** August 23, 2019

## PROCEDURAL HISTORY

The Student<sup>1</sup> is a rising fourth (4<sup>th</sup>) grade school-aged child residing in the District. As a consequence of the instant disagreement, the Student currently attends a private school. The Parties agree the Student is a person with autism and a speech and language impairment within the meaning of the Individuals with Disabilities Education Act (IDEA). The Parties further agree that as a result of these disabilities, the Student is otherwise eligible to receive an individualized education program (IEP) and specially-designed instruction (SDI) in the least restrictive setting (LRE).<sup>2</sup>

In December 2018, believing the Student was not learning, the Parents withdrew the Student from the District and made a unilateral placement at a nearby private school. Prior to the withdrawal, the District made an offer of a free appropriate public education (FAPE). Before the District could fully implement the proposed FAPE, the Parents filed a due process Complaint demanding compensatory education and retrospective and prospective tuition reimbursement. The Parents contend as a result of multiple procedural and substantive violations, each offer of a FAPE from December 2017 to the present is not otherwise appropriate. The District at all times argues it complied with all substantive and procedural provisions of the IDEA; therefore, the District argues that the Parents' denial of FAPE claims, compensatory education and tuition reimbursement must be denied.

After reviewing all of the testimonial and non-extrinsic exhibits I now find for the District and against the Parents on their denial of a FAPE claims and the request

<sup>1</sup> In order to provide confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2). 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300.818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Due to the Parents' expert's serious medical condition the Parents' third party evaluation was delayed. Thereafter, due to multiple schedule conflicts the hearing exceeded the typical 75-day timeline. The Parties made multiple requests to extend the Decision Due Date; finding a good cause this hearing officer granted the Parties' joint requests.

<sup>2</sup> After carefully considering the record of this hearing in its entirety I now find that I can now draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the limited IDEA issues in dispute.

for appropriate relief in the form of compensatory education and tuition reimbursement.<sup>3</sup> A Final Order denying the Parents' request for appropriate relief follows.

### **ISSUE**

1. Whether the District's proposed offer of a free appropriate public education for second half of the 2017-2018 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to and award of compensatory education and/or other appropriate relief?
2. Whether the District's proposed offer of a free appropriate public education for the 2018-2019 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to compensatory education for one half of the school year and tuition reimbursement for the remainder of the school year and/or other appropriate relief?
3. If the District failed to offer a free appropriate public education, in the past, are the Parents entitled to prospective tuition reimbursement for the 2019-2020 school year? (NT pp.14-22).

### **FINDINGS OF FACT**

#### **THE INTERSTATE TRANSFER IEP**

1. Prior to enrollment in the Pennsylvania district, the Student was evaluated numerous times by various community-based agencies before Kindergarten (NT *passim*).
2. Prior to enrolling in the District, the Student attended the local intermediate unit (IU) early intervention program. While attending the IU program, the Student was evaluated for IDEA eligibility. The IU Evaluation Report (ER), from May 2013 lists the following circumstances, deficits and needs; (1) pragmatic language skills; (2) was highly sensitive to sounds and smells, (3) social interaction; (4) difficulty with mental flexibility; (5) self-regulation skills are deficits, and (6) the Student is not able to self-soothe. At times when overstimulated the Student experiences melt downs. The Parents and the IU staff agreed the Student needs to improve social language skills to verbally interact with adults and peers by greeting, engaging in on-topic conversational exchanges, and

<sup>3</sup> After carefully considering the record of this hearing in its entirety I now find that I can now draw relevant factual inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issues in dispute.

- answering questions." (P-6, page. 8) As a result of these and other clinical and educational reports, the Student was identified as a person with autism (NT *passim*).
3. While enrolled in the IU supported private school kindergarten, in Pennsylvania, reports from local provider of occupational therapy services found that the Student had difficulty with sensory processing and modulation, each of which contributed to delays not only in fine motor and self-care development but also interfered with participation in group activities, attention, social/skills and relations, language and overall behavior responses. The reports also note the Student has a significant delay in the use of social and pragmatic language (Exhibits P-4, 5).
  4. The Student's overall ability and intelligence has been tested by various professionals, all of whom administered a variety of technically sound standardized intelligence tests. As of October 12, 2017, on the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V) the Student earned a full -scale intelligence quotient of 74. On the Wechsler Individual Achievement Test Third Edition (WIAT-III) the Student's standard scores all fell in the Below Average range with a low of 72 in Basic Reading and a high of 82 in Mathematics. The Student's speech and language skills as measured on the Clinical Evaluation of Language Fundamentals Fifth Edition (CELF-5) were in the Below Average level. On the Peabody Picture Vocabulary Test Fourth Edition (PPVT-4) the Student's scores were in the Average range. The Student's scores on the Autism Diagnostic Observation Schedule Second Edition, (ADOS-2) all fell in the Moderate range for possible diagnosis as a person with autism spectrum disorder (NT p.28; NT pp.522-523; 549, NT p.221, S-11).
  5. The IU's Individual Service Plan (ISP) described learning needs related to socialization but also indicates "Student has made remarkable gains in the area of social skills. [Redacted] is compliant and rarely says no and rarely objects to a classroom demand. [Redacted] now completes both preferred and Non-preferred activities" (P-7, page 22).
  6. Upon enrolling in the District in first grade, the District completed a reevaluation, identified the Student as a person with autism and

- provided an IEP with five annual goals, nine forms of specially-designed instruction (SDI) and the related services of OT for 60-minutes per month and physical therapy (PT) for 60-minutes a month. The Student received learning support services on an itinerant basis for up to 20% of the school day (P-8).
7. At the conclusion of first grade, the family moved to a neighboring state. On or about October 26, 2017, the out of state district also found the Student eligible for special education services and offered an IEP (S-5).
  8. On November 3, 2017, the out of state District offered the Student an IEP (S-6). The IEP targeted the Student's social interaction skills and language needs. At the time of the out of state evaluation, the Student's social skills and self-regulation, verbal and behavioral controls did not significantly impede learning. Social difficulties and language needs were noted, provided SDIs and otherwise accommodated (S-6, page. 5-6). Except for 30 minutes of math and 30 minutes of language arts in a special education setting, along with 20 minutes of social skills two days per week, the out of state IEP, called for the Student to participate in the regular education classroom, in a neighborhood school, for nearly the entire school day (NT 311, 372).
  9. After receiving the Prior Written Notice (PWN), dated November 6, 2017, Parents approved the out of state IEP (S-6 p. 55).
  10. On December 18, 2017, the Parents returned to Pennsylvania. At the time the Student enrolled in Pennsylvania, despite only being implemented for only three weeks, the out of state November 3, 2017, IEP was the IDEA legally operative interstate transfer IEP (S-6).
  11. Upon enrollment, the Pennsylvania District, using the Pennsylvania IEP format, prepared a transfer IEP. After reviewing the out of state IEP the District offered, what it considered, comparable services to those in the out of state IEP (S-7; NT p.308, p.311, 372). After reviewing the out of state IEP, the District adopted the out of state's statement of the Student's then-current present level of educational and functional performance. The current District's proposed comparable services IEP included six goals statements, 13 forms of SDIs along with the related service of OT and speech and language therapy. The IEP called for the Student to receive Itinerant Learning Support services, at the neighborhood school (S-7; NT 308, 674).

12. To clear up the confusion about the content of the current District's comparable services IEP, the Parties agreed to participate in an informal meeting on January 2, 2018 (S-8; NT 374). The District proposed and the Parents accepted a comparable amount of special education support with a slight increase in direct special teacher-supported services as compared to the out of state IEP (S-9 p.33, NT p.380).
13. On February 19, 2018, the Parents approved the Pennsylvania District's Notice of Recommended Educational Placement (NOREP). The approval of the Pennsylvania NOREP ended the effect and applicability of the out of state IEP (NT *passim*).
14. The District then implemented the February 2018, IEP until the District could complete a comprehensive review of the Student's records, and finalize its most recent reevaluation (NT *passim*).
15. Upon return to Pennsylvania, the Student began attending school as a second-grader in the District (S-9). Initially, the Student adjusted well academically, socially and behaviorally (NT. p.26).
16. The February 15, 2018, IEP increased the amount of special education instruction from 19% of Student's day to 60% of [redacted] day (*Compare* S-9 p.35 to S-7 p.21). The IEP team increased the Student's language arts instruction from 30 minutes per day to 90-120 minutes per day, depending on that day's schedule (S-9 p.33). Special education math instruction was similarly increased from 30 minutes per day to 90 minutes per day. Social skills instruction was increased from 20 minutes two times per week to three times per week. *Id.*
17. By April 2018, the Student was described as getting upset about peer-to-peer social interactions and activities on the playground (NT. p.129).
18. In response to the increase in anxiety, the Student's regular education teacher contacted the guidance counselor about the observable changes in the Student's interactions with adults and peers (NT p.455). The staff noted and reported that sometime during Spring 2018, the Student started to engage in random acts of self-injurious behavior and started making statements such as, "I want to die" (NT pp.330; S-12). On or about this time the District offered and the Parents approved the District's request to complete a reevaluation (NT 517; S-11).

19. On April 3, 2018, the Parents contacted the teacher about the Student's negative interactions with classmates (P-10, pg. 17).
20. By April 4, 2018, the District requested and the Parents agreed to a functional behavioral assessment (FBA). The teachers noted and the Parents agreed that the Student was less compliant, more off-topic and more focused on self-injurious/destructive behaviors. A meeting to discuss the FBA process took place on April 4, 2018. At the meeting, the Parties agreed that the Student's behaviors interfered with and impacted learning (NT pp. 329-330, P-10, pg. 19).
21. The District's reevaluation report (RR) and a full FBA were completed and issued on April 9, 2018 (S-11 pp. 21-23). The FBA included multiple direct observations of the Student, Parental input and teacher input (NT 328, 388, 516-517). Key behavioral skill deficits identified in the FBA included but are not limited to the need to develop coping skills, self-regulation, identifying and expressing feelings, and social skills as targeted replacement behaviors (NT 517; S-11 p.22).
22. The RR and FBA targeted areas for replacement instruction, identified numerous antecedent, behavior and consequences strategies which were included in a Positive Behavior Support Plan (PBSP) (S-11 p.22). The IEP team then reconvened on April 9, 2018, and a new annual IEP was developed (S-10). The now updated April 2018 IEP included 14 annual goals, targeting reading, math, speech and language, social skills pragmatic language, 47 SDIs, including speech therapy, OT and a standalone PBSP. Some of the additional SDIs targeted problem-solving skills, expression of emotions, language skills, increased use of positive reinforcement strategies, along with the use of social stories to bridge the Student's perception of other and individualized learning needs (S-10 p.36). The Parents approved the IEP without objection or comment (S-10 p.53). Thereafter, progress monitoring for the second half of the 2017-2018 school year shows relatively steady upward progress on nearly all of Student's IEP goals, while, at the same time the Student's social skills and language needs continued to be an area of concern (S-22).
23. By the IEP meeting of April 9, 2018, the District staff began to express concerns about several disturbing episodes of self-

- injurious behavior and negative self-talking statements such as "I want to die" (NT p.330; S-10, pg. 16).
24. By April 9, 2018, the District described the Student's social/emotional behavioral functioning as follows: (1) Emotional concerns: There are times when the Student displays harmful behavior towards [redacted] such as punching [redacted] own hand when frustrated. There are times when [redacted] has shared thoughts out loud that are negative towards [redacted] such as 'I am so stupid,' 'no one likes me.'" (2) "Behavioral concerns: [redacted] has a hard time staying on task and following directions in a small group setting. [Redacted] consistently is talking, which can lead to distraction for other students." "Social concerns: [redacted] makes comments that are not relevant to the topic being discussed by [redacted] peers or in a lesson. This makes it hard for peers to connect to [redacted] interests" (S-11). At the end of the school year, another incident occurred when the Student overreacted to another peer's misunderstood social conduct (P-10, pg. 24).
25. The updated IEP included a goal-directed PBSP with 21 PBSP SDIs. The PBSP SDI interventions included small group instruction in social skills, including peer interaction skills, frequent reminders, reinforcement and modeling of appropriate feelings, social interactions and coping skills (P-10, S-12, S-10).
26. The PBSP also included a combination of "zones of regulation" approach and social skills streaming language role rehearsing strategy (S-10, NTpp.391-392, S-12, pg.18, S-10 p.47).
27. Academically the year ended on an upbeat note; however socially, emotionally and behaviorally, meaning the Student's ability to self-regulate, was trending downward (NT *passim*).

### **THE START OF THE THIRD GRADE**

28. On August 15, 2018, prior to the 2018-2019 school year, the Father wrote to the District stating: "The Student is completely dreading returning to school because of how Student was treated by numerous classmates." (P-10, pg. 23).
29. At the Parents' request the IEP team reconvened again at the start of



- the 2018-2019 school year (S-12 p.8, NT 337). While the Student seemed to be leaving school in a good mood the IEP team continued to see some behaviors that impeded learning (S-12 p.8, NT 336). At that point, the IEP was in effect for six weeks (NT 562).
30. As part of the review of the IEP, the team reviewed the Student's progress monitoring data from the end of second grade, (S-22 pp.1-8). Due to success in second grade, a number of IEP goals were revised. The reading comprehension, reading fluency, written expression (planning), and math computation goals had all been met (S-12 pp.8-10). New updated academic and behavioral goals were added to the IEP and approved by Parents without objection or comment (S-12 p.57). At the beginning of the third grade school year, the IEP team was working collaboratively and the Student initially had academic success; however, as the year came to an end social, emotional, behavioral self-regulation mishaps were a constant concern and source of home and school tension (NT *passim*).
  31. The August 30, 2018 IEP included 12 goals and 49 individualized SDIs along with additional supports including daily check-ins with the school counselor to address the Student's perseverations about social events; to reduce over-stimulation the team agreed to change to the car pick-up procedure and a referral to the IU to determine if the Student would benefit from Itinerant Autistic Support was made (S-12 p.8, 40). The observation by the autistic support teacher took place on October 1, and October 4, 2018 (S- 18).
  32. After reviewing the observation and the assessment data, collected by the IU Itinerant Autism Support teacher, the IEP team, including the Parents, concluded that the Student displayed a need for additional direct instruction in social thinking (including what is expected and unexpected, and perspective-taking, *i.e.*, pragmatic language concerns), and emotional self-regulation (S-18 p.4).
  33. The IU teacher recommended and the Parents agreed the Student would benefit from additional direct autistic support instruction. To get a new read on emerging behaviors and to potentially revisit the FBA and PBSP, the team agreed to schedule multiple observations by different individuals unfamiliar to the Student (including the District's board-certified behavioral analyst (BCBA) (S-15 p.50). During the meeting, the Parents unilaterally offered to pursue a private evaluation by a community behavioral health agency, and another meeting was

- planned to review the data once the observations and the third party evaluation were completed (S-15 p.50).
34. Throughout the fall term the Parents and the teacher used the home and school log to exchange updated information about the Student's school and home behavior. The Itinerant Autistic Support shared classroom data/information electronically with the Parents. For the most part, the Parents were pleased with the Student's academic achievements and at the same time were distressed about the Student's anxiety, peer relations problems and the escalating statements of self-harm/self-injurious behavior (NT 562-563).
35. The Student's records, as shared by the staff, show that the Student threatened self-harm or harm to others on the following dates: (1) September 18 (poking at eyes with a pencil, saying Student didn't deserve to live, no one cares about [redacted])." (2) September 24: burn [redacted] or hurt [redacted] with a knife; (3) October 17: "I wish I wasn't even living anymore." (4) October 18: (phone message. P-15, page 1); (4) "The Student said something to the effect of that I might as well die"; (5) October 24: I don't care about my life'; (6) October 29:"I'm going to suffocate myself with a trash bag." and other unspecified negative self-talk" (7) November 2: Student used a lot of negative self-talk and self-harm. (*i.e.*, scratching arm, biting, punching arm. At one point Student scratched and bit self-saying, "I'm not going to stop, you may as well restrain me."); (8) November 5: more self-harming behaviors. Scratching, punching [redacted] hand. "Student began scratching [redacted's] arm and said Student 'feels better after Student hurts [redacted] self.'" (9) November 26: Student bit own arm. At the end of the session Student bit [redacted] arm and said Student "wants to kill" a student.; (10) November 27: "scratched self-hard."; (11) November 28: The Student got very upset and scratched self.; (12) November 29: The Student responded by hitting own hand, scratching [redacted] arm, screaming and crying."; (13) November 30: The Student kept getting up and pushing [redacted] chair in and out. The Student was screaming scratching [own] arm and hitting self. The Student was grabbing pens out of my hands. (14) December 10 (phone message): "And The Student said something to the effect of that I might as well die then." (NT *passim*).

36. Thereafter two IEP revisions were made, without face-to-face IEP meetings, in October – Physical Therapy was added on October 15, 2018, and on October 29, 2018, the team added Itinerant Autistic Support services (S-14 p.2). The October 29, 2019, IEP updated the present levels and added additional goals social thinking and emotional regulation goals. To address the Student’s overall autistic support needs the IEP called for the Student to receive 240 minutes a month of direct instruction in social thinking and emotional regulation, as well as Autistic Support consultation for both the teachers and the staff for 60 minutes per month. Both IEP revisions were implemented by agreement of the Parties (NT *passim*, S-14, NT p.431- 432, S-14 p.46).
37. The data reviewed by the IEP team noted that between September 4, 2018, and November 30, 2018, the staff reported the upwards of 66 incidents of acts of self-injurious behavior, threats to harm self like wanting to die by suffocation, poke out an eye, jab objects into self, scratch self, or expression feelings of isolation, in the Student’s home and school behavior and communication log, P-12. Contrary to District policy, the District staff did not conduct a threat to self-risk assessment. Likewise, the staff did not issue a permission to reevaluate (NT *passim*, P-12).
38. On October 29, 2018, the District issued and the Parents approved a new NOREP adding the Itinerant Autistic Support along with targeted social and behavioral autistic support specific IEP goal statements (S-14 p.61).
39. On November 6, 2018, the Mother emailed the District stressing her concern that the District needed to find a way to help the Student deal with the negative peer-to-peer social interactions with another peer (P-12, pg. 116).
40. In response to the email on November 28, 2018, the Parties participated in another IEP meeting. During the meeting, the Mother reported the Student complained about acts of bullying and harassment (P-10, pg. 63). In response to the Mother’s statements, the District suggested and the Parents agreed to another behavior specialist observation (NT p.125).

41. The IEP team convened again on November 28, 2018, to address changes in Student's behavior – including but not limited to scratching, biting and attempts to self-injure along with a new peer-to-peer difficulty with another student (S-15 p.10). This meeting coincided with the end of the first marking period, which was the first *full* marking period since the District had implemented the April 2018 IEP (NT 688-689). The IEP team developed a multi-step plan on how to proceed (S-15 pp. 10-11).
42. When asked how long it should take effective strategies to stop the self-harming statements, the staff suggested that said that if the strategies the District was employing in the spring of 2017 and continuing in the fall of 2018 had been effective, those self-harming statements should have stopped by mid-October 2018 (NT p.72). The board-certified behavior analyst (BCBA) stated it would take up to six to eight weeks to determine if the adjustments to the existing behavior plan were taking hold (NT p.432).

#### **PEER TO PEER RELATIONSHIP PROBLEMS AND THE ROOM DIVIDER**

43. Beginning in second grade and continuing through third grade, the Student had multiple social peer-to-peer issues with and in particular with one student. The negative peer-to-peer interactions actions escalated and caused more statements of self-harm and self-injury (NTp.58, P-10 pg. 67).
44. In late November 2018, to manage the peer-to-peer issues, the special education classroom teacher decided to subdivide the special education classroom into two smaller size rooms using a flexible room divider. The room divider never went completely across the room and it was always possible to hear what was being said on the other side of the divider (P-10 p.67). The divider interventions began at the beginning of December 2018 (NT p.58).
45. Depending on the number of students in the classroom, the Student could be the only person on one side of the divider (NT Day Testimony 4 p.85).
46. The Student reported that the other students would occasionally come to the Student's side of the divider (NT *passim*). The modification to the classroom and the Student's contact with the

other students was not discussed at an IEP meeting, with the behavior specialist, the Parents, or the school psychologist. Additionally, no one collected any room divider specific baseline data before or after the Student was physically separated from the others students as to how, if at all the divider affected the frequency, intensity or the duration of the Student's peer-to-peer difficulties (NT *passim*). The room divider strategy changed the time the Student has contact with peers (NT *passim*).

47. On December 3, 2018, the Parents reported that "Our evening was spent trying to console the Student about conflicts with two other different students (P-10, p.65).

### **THE LEAD UP TO THE UNILATERAL PLACEMENT**

48. The Student's self-injurious acts, threats of self-harm, and misbehaviors increased from September 2018 through December 10, 2018 (NT p.137). By December 2018, threats of self-harming behaviors were taking place three or more times per week (NT *passim*).
49. On December 3, 2018, December 5, 2018, and December 6, 2018, the behavior specialist observed the Student. The observation noted a number of on and off-task behaviors. For example, on one occasion, the Student worked well with a peer and then on another, the Student had peer-to-peer problems. On December 6, 2018, the observer noted while four students were on one side of the divider, the Student was alone on the other side of the divider (S-19 p.3).
50. On the afternoon of December 10, 2018, Father received a call from the school guidance counselor, who left a message for him that stated as follows:

"Hello, [redacted father's name], this is [redacted staff member's name] from [redacted name of school]. It's about five of 3 on Thursday afternoon. Hey, I was just informed by Ms. [redacted teacher's name] that [the Student] has shared this afternoon, [Student] was upset. Apparently, because [Student] felt that nobody wanted to work with [redacted] in a group, but they are all doing individualized type of learning, and they do work in small groups. But Miss [redacted teacher's name] was trying to explain to [redacted] that it's not that nobody doesn't want to work with you, it's that you

each have individual work you have to accomplish. And the Student said something to the effect of that I might as well die then. So I have [redacted] here and I wanted to put [redacted] on the phone to explain it to you, but we're going to try [redacted] because I do need to physically talk with someone. I just gave [the Student] has the choice of calling you or, or mom and Student said to call you and plus I haven't spoken to you recently, anyway. So I'm going to try [redacted] and hopefully we'll get a hold of someone. If you can just please confirm you received my message by leaving me a message at [phone number redacted] I would appreciate it. Thanks so much. Bye-bye."

51. Immediately after the call, the Father left work and picked the Student up. Concerned about the Student's overall well-being, the Parents decided to withdraw the Student from the District and enroll the Student in the local Montessori school (NT p.64).
52. After withdrawing the Student from the District, the Parents took the Student to the local pediatrician who arranged for the Student to participate in two counseling [sessions] at the local hospital (NT *passim*).
53. The hospital staff advised the Parents to get additional services with a counselor with more specific training in autism (NT *passim*).
54. The teacher confirmed that towards the end of her time at the district, the Student was engaging in "unsafe behaviors" an average of three times per week (NT p.405). Towards the end of the time in the District, the Student was engaging in other "unsafe behaviors" on an average of three times per week. (NT p.440).
55. Aware of the District's timeline to collect additional data and the unchecked escalation in the Student's behavior, the Parents advised the District that they were going to be pursuing an outside placement. Disappointed with the proposed changes to the November 28, 2018, IEP the Parents also elected to get an outside evaluation (S-15, page 50).
56. Aware of the Parents' notice to obtain a third party independent evaluation the District staff stated that it would continue to observe the Student, record data and implement the last agreed-upon IEP

(S-15, page 50).

### **THE UNILATERAL PRIVATE PLACEMENT**

57. The classroom teacher at the Montessori school has been through a series of targeted training on educating students with autism through the local intermediate unit that served the Student (NT p.196).
58. The Student's school day is structured and the instruction is individually paced depending on the Student's daily needs. While the Student has some flexibility in how the Student self-schedules classwork during the day; the Student is ultimately required to work on the full curriculum like all other peers (NT p.183-185). The Student's individual work plan for each day was constructed by the teacher based on the Student's individual daily needs (NT p. 181-189).
59. The Montessori school evaluates reading needs using Fountas and Pennell rubric. While attending the Montessori school, the Student's reading level improved from level G to level P (NT p.189). Level G is a first-grade comprehension level. Level P is the beginning of fourth grade in independent reading. The Student's reading curriculum includes phonics and the Steck-Vaughn comprehension series (NT *passim*).
60. The Montessori school checks Student's progress on a daily basis (NT *passim*).
61. The Student follows the daily routine and works well within the Montessori routine. At the Montessori program, the Student is a self-starter and does the work without prompting (NT p.167).
62. Each day the Student subject spends time working on reading, math, phonics, science, geography, handwriting, appreciation, math, Spanish, grammar, music, art, appreciation, time, money (Exhibit P- 14).
63. Between January 2019 and May 2019, at Montessori school, the Student made academic, social and behavioral progress (NT pp.173-181).
64. When the Student started at Montessori in January 2019, the Student displayed a great deal of anxiety. For example, upon enrollment the Student talked self-talked a lot and continued a pattern of misinterpreting pragmatic language statements and peer-

- to-peer social situations (NT pp. 159-160). Since the Student started at Montessori, Student has become a different type of learner (NT pp. 65-66). For example, the Student very rarely needs tactile contact from the teacher upon arrival at school.
65. The Student has not engaged in self-injurious behavior like biting self or stabbing self with pens or pencils at the Montessori school (NT pp. 210-211).
  66. The Student regularly receives social skills training as part of the instruction provided to the entire class. The Student has become much better at resolving conflicts with peers (NT p.197). As of the last hearing session, the Student's mental state at school is much better. The Student has a sense of relief at being in a comfortable environment. The Student now communicates well with peers, has emerging friendships can laugh together. Within the Montessori environment, the Student is able to work independently (NT pp. 160-162).
  67. The Montessori teacher reported that between January 2019 and May 14, 2019, the Student engaged in only two incidents of self-harm. The Montessori teacher also noted that when the Student first arrived, the Student would overact and engaged in self-injurious behavior (NT pp.165-166, 201).
  68. The Montessori teacher explained that it is not difficult to identify the antecedent behaviors when the Student is becoming agitated. For example, the Student self-talks under breath, puts fingers in mouth, and chews on fingers and is "not settled." The Student was maybe chewing on a pencil, talking a lot and not able to focus (NT pp.205-206).
  69. The Montessori teacher is not trained in special education strategies or techniques (NT p.195). At the Montessori school, the Student receives instruction in the same regular education Montessori curriculum as all of the other students in the class. The curriculum at the Montessori school addresses the Student's need for direct instruction in the following areas: reading decoding; reading fluency; reading comprehension; written expression; math computation, concepts/application; social skills; coping skills; recognizing and understanding emotions in a social group with appropriate vocalizations, understanding pragmatic language, body language and perspective taking (S-16 p.30).



70. Although the Student has a pragmatic language need, requires speech and language therapy and physical therapy, the related services are not provided at the Montessori school(S-16 p.49, (NT p. 203). Although not daily at the private school, the Student receives reading and math lessons for 15 to 20 minutes (NT pp. 183-184, NT p.193). At times, lessons at the Montessori school are sometimes taught by peers (NT p. 183). In the District, the Student is scheduled to receive 90 minutes of instruction daily in a small group of 2-5 students (NT p. 303, 312). The District provides either 90 or 120 minutes per day of direct instruction in language arts (NT p. 383). That time was broken into 30 minutes of phonics instruction using the research-based Wilson Reading program, 30 minutes focused on comprehension, and 30 minutes focused on reading fluency. That reading instruction is provided in a small group of 3-5 students (NT p. 384).
71. The private school addresses self-regulation and coping skills on an ad-hoc basis only and consists solely of teachers talking with Student about what is upsetting; the strategy has reduced the frequency and intensity of the interfering behavior (NT 164, 166-167).
72. On January 25, 2019, the Parents paid the private school four thousand five hundred and thirty-eight (\$4,538.00) dollars for a half-year enrollment (P-13).

### **THE PRIVATE EVALUATION UPON WITHDRAWAL FROM THE DISTRICT**

73. On or about January 17, 2019, the Student was privately evaluated by a school psychologist. The District stipulated that the evaluator was an expert in school psychology, neuro- psychology and in counseling. The private evaluator is a level II certified school psychologist. The private evaluator has been employed as a school psychologist by two different school districts for over ten years and has performed between 60 to 80 evaluations a year, in each district. The private psychologist is a licensed professional counselor and performs psychotherapy and also provides cognitive behavior therapy (P- 2, 3; pgs. 212-215, P-1).
74. The evaluator's first meeting with the Student occurred on January 28, 2019, February 11, 2019, March 11, 2019, and March 18, 2019. Due to an illness, the private evaluation was issued on April 4, 2019 (NT pp. 217- 220, P-1).

75. The evaluator administered 15 different types of ability, achievement, behavioral, adaptive, emotional, social skills assessments, rating scales and/or checklists. On the Woodcock-Johnson Test of Cognitive Ability Fourth Edition the Student earned an overall full intelligence quotient of 66 in the impaired low average range. On the Delis Kaplan Executive Function System (D-KEFS) a measure of efficiently and effective utilization of intelligence indicated that the Student has significant weaknesses with processing speed, sequencing, mental flexibility plan and organization. On the Woodcock-Johnson Test of Achievement Fourth Edition (WJ-ACH IV), the Student's SS ranged from a low of 60 in Broad Math to a high of 91 in Writing Samples (P-1, NT pp.229-236).
76. On the Vineland Adaptive Scales Third Edition, which measures the Student's ability to function in social situations the Student scored at the 10<sup>th</sup> percentile. When feeling pressured the evaluator noted that the Student displayed behavioral tics or engaged in hand flapping. During the testing, the evaluator noted the Student tends to overreact to certain factors and under reacts to other factors in the environment like sounds. The Student is very limited in processing expressive language and understanding the intentions of people. Overall the Student scored at the 6<sup>th</sup> percentile in affect recognition and ability to understand the mental state of another person based on their facial expressions (P-1, NT pp.229-236).
77. On the Behavioral Assessment System for Children Third Edition (BASC-3) the father's ratings indicated that the Student has weakness in joining in social groups, making friends, making decisions, lacks creativity and has trouble working with others. On the same checklist, the Montessori teacher reported that the Student exhibits typical classroom behavior and a level of self-control similar to that of other children of the same age. The teacher also reported that the Student demonstrates rule-breaking behavior no more the others. The Father and the Montessori teacher both reported that the Student exhibits signs of depression, anxiety and internalizes problems (P-1, NT pp.229-236).
78. The Student's Gilliam Asperger's Disorder Scale (GARS) Parent and Autism Spectrum Rating Scales (ASRS) indicate that Student

- has difficulty using appropriate verbal and non-verbal communication for social contact, engages in unusual behaviors has difficulty relating to other children, has difficulty providing appropriate emotional response to people in social situations, engages in stereotypical behaviors, has difficulty tolerating changes in routine and overreacts to sensory stimulation (P-1, NT pp.229-236).
79. The evaluator confirmed the Student does not react favorably to physical contact, which in turn accounts for the peer-to-peer problems (P-1, NT pp.229-236).
  80. The evaluator noted the Student displayed deficits in working memory, planning and organization (P-1, NT *passim*).
  81. Overall the behavioral, social and emotional testing indicates the Student displays significant levels of anxiety and depression. The testing data also confirmed the Student has attention, concentration, behavioral, emotional, language, social and academic deficits (P-1).
  82. The evaluator spoke with Father and had the Father, but did not ask the Mother, to complete any rating scales (P-1, NT pp.265-266).
  83. Likewise, the evaluator did not speak to the District's teachers, or the guidance counselor, with whom the Student met on a daily basis. The evaluator did not provide or administer any teacher rating scales to determine levels of anxiety, behavioral concerns, or peer-to-peer difficulties (NT p. 265-268).
  84. On April 23, 2019, several months after the withdrawal, to assess the Student's then-current emotional well-being the private evaluator completed a clinical interview. The clinical interview was designed to gain insight into the Student's perspective about what happened before and since the transfer to the Montessori school. To assess the Student's emotional state, the evaluator administered the Trauma Symptom Checklist for Children (TSCC).<sup>4</sup> The TSCC includes two validity scales and six clinical scales. The Student reported symptoms consistent with Anxiety, Depression and Post-Traumatic Stress. The Student also endorsed

<sup>4</sup> The TSCC allows examiners to measure posttraumatic stress and related psychological symptomatology in children ages 8-16 years who have experienced traumatic events, such as physical or sexual abuse, major loss, or natural disasters, or who have been a witness to violence. <https://www.parinc.com/Products/Pkey/461>

At-Risk symptoms associated with Dissociation (memory loss) for certain time periods, events, people and personal information, a sense of being detached from self and emotion or perceptions of people and things around self. The data also indicated the Student had a distorted and unreal sense of what occurred (P-2).

### **PROGRESS IN THE DISTRICT, ACTS OF SELF-HARM AND THE DECREASE IN TIME IN THE LRE**

85. When the Student left the neighboring state, the Student was spending 81 percent of the day in the regular education classes. By the time the Student left the District in December 2018, the Student's time in the regular education class had been reduced to 38 percent of the day (S-16, pg. 53; S-7, pg. 21). By the time the Student left the District to enroll in the private school, the Student was in the special education classroom for all academic subjects, including social skills. The Student's only contact with non-special education peers occurred in gym, art, lunch and recess (NT p.312). The Student is fully included at the Montessori school.
86. The teachers agreed that because of the Student's anxiety and behavioral difficulties, the Student was going to have a harder time learning (NT p.441). On November 27, 2018, guidance counselor wrote: "In reviewing the current data from this school year, some additional supports and/or interventions will be needed; the data on some of [redacted] goals is [sic] trending down." (P-10, pg. 39). Later on November 28, 2018, the guidance counselor wrote: "We need to get additional supports in place ASAP." (P-10, pg. 39).
87. By December 2018, despite early success upon re-enrollment in the District in December 2017 by December 2018 the Student's progress monitoring, behavioral goal data were all trending in a rapid downward spiral (P-10).

### **CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 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, in this case, must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced

or in “equipoise.” *Schaffer*, supra, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *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 found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student’s program. I will, however, as explained below when and if necessary, give less persuasive weight to the testimony of certain witnesses when the witness fails to provide a clear, cogent and convincing explanation of how he/she evaluated the Student’s eligibility, designed the Student’s IEP, implemented the IEP or designed and participated the preparation of the prior written notice, or the NOREP.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. Based upon a variety of factors, I will now give the Parents’ expert’s testimony on recommended changes to the Student’s IEP less persuasive weight<sup>5</sup>. On the intertwined topic, about the appropriateness of each IEP I gave the Parents’ expert’s comments less weight than District’s witnesses’ testimony on the development of the goals, the design of the PBSP, the selection of the SDIs, the FBA, the related services, and the provided supplemental aids and services. See, *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000)(at times and in some ways local staff who are more familiar with the student and the local curriculum, can be better-qualified than third parties to gauge a student’s needs, individual circumstance and progress).

<sup>5</sup> In this particular instance, based upon record as a whole I gave persuasive weight to the testimony of the local staff who demonstrated the ability to cogently describe Student specific facts like: (1) the time, frequency/duration of contact with the Student; (2) the witness’s understanding of the Student’s educational/academic needs; (3) the witness’s understanding of the Student’s behavioral, attention, self-regulation and social skills needs; (4) the witness’s understanding of the Student’s reinforcement needs; (5) the Student’s behavior in the home/community; (6) the Student’s testing/assessment data, and (7) any individual Student specific circumstances discussed herein like the Student’s behavior upon enrollment at the private school.

## FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs or districts) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Districts meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. The *Endrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Endrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Endrew F.* In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137

S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B).

An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE, as the IDEA defines it, includes both "special education" and "related services." Id. § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." Id. § 1401(9)(D).

A school district may violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); *Andrew F.*, 137 S. Ct. at 999.

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, e.g., L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* 137 S. Ct. 1001, but the IDEA does not guarantee "the absolute best or

'potential-maximizing' education." *Rowley, Andrew F., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

## **THE BURLINGTON AND CARTER TUITION REIMBURSEMENT TEST**

To determine whether parents are entitled to reimbursement for their unilateral placement in a private school after refusing a public school's offered FAPE, courts apply the three-part *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) (hereafter *Burlington-Carter*) test. Under the *Burlington-Carter* test, the party seeking reimbursement relief must show: (1) The public school did not provide a FAPE; (2) Placement in a private school was proper; and (3) The equities weigh in favor of reimbursement. The parent must establish each of the three prongs of the *Burlington-Carter* test to prevail.

Thus, failure on any one of the prongs is fatal to a demand for reimbursement. Indeed, if the plaintiff fails to establish the first prong of the test, then the reviewing court may immediately end its analysis. *See, e.g., Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at \*15 (E.D. Pa. Aug. 14, 2017)* (applying the "*Burlington-Carter* test" to private school tuition reimbursement case)(stopping analysis after concluding that aggrieved student/parents had not established the first prong of the *Burlington-Carter* test). *See also, N.M. v. Central Bucks Sch. Dist.*, 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014)(same). To prove the first prong of the test—that the public school did not provide a FAPE—the party seeking relief must show that the public school failed to "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. "*Andrew*. With these principles in mind, I will now turn to an analysis of the testimonial, non-testimonial evidence, the facts and applicable law.

## **THE PARENTS' CLAIMS AND THE DISTRICT'S RESPONSE**

The Parents contend as a result of multiple procedural and substantive violations, the District's multiple offers of a FAPE were not appropriate. In particular, the Parents argue, that the District's slow reaction to the otherwise uncontested decline in the Student's social, emotional and behavioral skills is preponderant proof that the District cannot educate the Student in the LRE. The District at all times argues it responded to the Student's then-current needs. Furthermore, the District contends it complied with all applicable substantive and procedural regulations and requirements. The District next contends, assuming *arguendo*, the District's program and placement were inappropriate the private school is not an appropriate or proper program/placement. Finally, the District argues that even if its offer of



FAPE is not appropriate and the private school is appropriate; the equities favor the District. In particular, the District argues that the Parents' failure to provide the District with the required 10-days' notice prior to the unilateral placement; which they now contend, on the equities alone prong, assuming the Parents met the burden on prongs one and two, the tuition reimbursement claim should be denied.

For all of the following reasons, after reviewing all of the testimonial and non-testimonial extrinsic evidence, including the multiple offers of FAPE, from December 2017 through December 2018, including procedurally accurate PWN, NOREPs and the non-testimonial exhibits, on both sides, for all of the following reasons, I now find in favor of the District. A Final Order granting appropriate relief follows.<sup>6</sup>

### **THE DISTRICT'S OFFER OF A FAPE**

In a *Burlington-Carter* dispute, like this, provided the District offered a FAPE the *Burlington-Carter* tuition reimbursement analysis stops. For all of the following reasons, while I acknowledge the Student's ability to self-regulate declined from December 2017 to December 2018, at the same time, over the course of the nine months (January 2017 to May 2018 and then September 2018 to December 2018), the Student was enrolled in the District, the staff met with the Parents 11 times. At each meeting either the IEP team or the evaluation team updated the Student's then-current present levels, modified the academic and/or annual behavioral goals, updated the SDIs, reviewed the progress data and the shared the PBSP data. While the District is required to provide disabled students a FAPE, it is not required to, and the IDEA does not guarantee any particular outcome or any particular level of academic success. *See, Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Dorros v. District of Columbia*, 510 F. Supp. 2d 97, 100 (D.D.C. 2007). The Parents' argument here misunderstands the IDEA's FAPE-IEP process and equates the Student's behavioral regression to a *per se* FAPE denial.

*In Andrew F.*, the court held when a child is not fully integrated in the regular classroom and not able to achieve on grade level the IEP need not aim for grade-level advancement. "But his educational program must be appropriately ambitious

<sup>6</sup> On the following dates the District, after meeting with the Parents, prepared and offered the Parents an offer of a FAPE: (1) December 18, 2017 transfer IEP and NOREP dated December 19, 2017; (2) IEP dated January 2, 2018; (3) IEP dated February 15, 2018, and NOREP; (4) IEP dated April 9, 2018, PBSP dated April 9, 2018 and NOREP dated April 16, 2018; (5) Reevaluation Report dated April 9, 2018 and Prior Written Notice; (6) IEP revision August 30, 2018, PBSP dated April 9, 2018; (7) IEP revision dated October 15, 2018 and PBSP dated April 9, 2018; (8) IEP revision dated October 29, 2018 and PBSP April 9, 2018; (9) IEP revision dated November 28, 2018 and PBSP dated April 9, 2018; (10) IEP revision dated December 7, 2018 and PBSP dated April 9, 2018.

in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. Simply stated, while the goals may differ, every child should have the chance to meet challenging objectives. *Id.* "Now, as a result of *Endrew F.*, each child's educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives." *Questions and Answers on U.S. Supreme Court Case Decision Endrew F. v. Douglas County Sch. Dist.*, 71 IDER 68 (2017).

Thus, the fact that a student is not making instantaneous progress within months, days, or hours after the Parties agreed to the content of an IEP does not, in this instance, establish a *per se* denial of a FAPE. Although slow progress or no progress can be an indicator that the IEP is not reasonably calculated to produce meaningful progress, this dispute is not one of those instances. In this dispute once the District was aware of the Parents' concern about the Student's rate of progress, self-injurious behaviors, negative peer interactions and negative self-talk, the District undertook a series of procedural and substantive actions to reassess the Student, and recalculate a prescriptive plan of attack that would support a redesign of its offer of a FAPE on 11 different occasions.

Simply stated, in this particular instance, the District did not fall short of the *Rowley-Endrew F.* standard. When the record is viewed as a whole the evidence is preponderant that at all relevant times the District was responsive to the fluid changes in the Student's present behavioral, emotional and social levels of functional performance.

#### **THE TRANSFER AND FIRST GRADE IEP OFFERED A FAPE**

The comparable transfer services IEP included clearly defined present levels, measurable goals and related services. In less than a month after the District offered and the Parents accepted the transfer IEP, the District revised the transfer IEP and in its place offered an IEP that included multiple ambitious measurable goals targeting social language, math, listening comprehension, and reading. The SDIs included small group instruction, teacher modeling, direct instruction, and the use of a variety of attention, language and reinforcement strategies. When the IEP team met in April 2018 and again in August 2018, the Parents did not challenge or dispute the data; therefore, as the record currently stands, the Student mastered several of the goals. At the same time, the record demonstrates by April 2018 the IEP team was actively assessing the Student's emerging rates of negative self-talk and self-injurious behavior like self-hitting. The data collected as part of the FBA assisted in identifying antecedent behaviors, prevention strategies, suggested replacement behaviors and individualized positive consequence strategies. The

then-current RR and the FBA included Parental input, the data was shared with the Parents and then reviewed by the IEP team.

After reviewing the FBA data, the IEP team, including the Parents, jointly designed the PBSP. After carefully reviewing the record I now find the Parents failed to offer any substantive critical evidence challenging the Student's present levels of performance, the annual goals, the SDIs, the quarterly or end of year progress reports. Therefore, I now find that each IEP from December 2017 through June 2018 when offered was reasonably calculated to achieve meaningful educational benefit, along with significant learning with targeted strategies to teach the desired replacement behaviors. Granted for the remaining 40 to 60 days of the school year the Student had some behavioral ups and downs; that said, for the most part, the ups and downs did not adversely affect the Student's overall academic skillset and behavioral profile.

#### **THE AUGUST 2018 IEP OFFERED A FAPE**

After a short summer break, the Parents requested and the District agreed to reconvene the IEP team to discuss the Student's end of summer negative statements about returning to school. As a result of the August meeting the IEP team, including the Parents, agreed to make a series of short term changes like, modifying the car rider dismissal process to reduce noise, pairing the Student with a positive peer buddy during lunch, scheduled the observation by the IU Autistic Support teacher, and added a planned Student to staff checking time to share highlights of the day and discover emerging concerns. At the August IEP team meeting the team also reviewed the previous school year progress data and the first quarter report card and progress monitoring data. But for the emerging negative self-talking and behavioral concerns, the overall data indicated steady positive growth and learning. The August 2018 IEP updates reflected a data-driven choice to address the Student's needs and individual circumstances. Therefore, when the record from August 2018 to October 2018 is viewed as a whole, the Parents failed to offer any preponderant testimonial or non-testimonial extrinsic evidence that the Student was denied a FAPE. Accordingly, the Parents' claim for a denial of FAPE and demand for compensatory education from August 2018 to October 2018 is denied.

#### **THE OCTOBER IEP MEETINGS**

On October 15, 2018, and again on October 29, 2018, the IEP team with the consent of both Parties updated the IEP, without holding face-to-face IEP meetings. On October 15, 2018, Physical Therapy was added, and on October 29, 2018, the team added Itinerant Autistic Support services (S-14 p.2). The

October 29, 2019, IEP updated the present levels and added additional social thinking and emotional regulation goals.

To address the Student's overall autistic support needs the IEP now offered the Student 240 minutes a month of direct instruction in social thinking and emotional regulation, as well as Autistic Support consultation for both the teachers and the staff for 60 minutes per month. On October 29, 2018, the District issued and the Parents approved a new NOREP adding the agreed-upon Itinerant Autistic Support and the targeted autistic support specific goals (S- 14 p.61).

Although the Parents now complain that the October IEP revisions were insufficient they failed to produce preponderant proof describing a substantive or procedural fatal flaw or actionable defect. Although the Parents' expert was critical of the District's IEPs, the examiner did not provide preponderant cogent factual underpinnings to support the scope and breadth of his remarks. Therefore, for the following reasons, I gave his report and testimony less persuasive weight. First, the examiner did not observe the Student at either school. Second, the examiner did not communicate with any of the District staff who had day-to-day contact and knowledge of the antecedent and consequence strategies driving the Student's behavior. Third, the examiner did not ask the teachers to complete any checklist or rating scales to gauge the Student's behavior in the District. Fourth, the examiner did not appear to have a cogent understanding of the then existing regular or special education curriculum in the District or the private school. Fifth, the evaluator did not discuss the Student's behavioral needs with the District's psychologist, the behavioral specialist, the speech therapist, or the autistic support teacher. Sixth, the examiner failed to comment on the fact that the Student's WIAT achievement SS scores remained constant which according to standard testing practices, indicates, learning, growth and progress. Therefore, absent the otherwise relevant data and perspective of the local persons knowledgeable about the Student's present levels, the examiner missed an important opportunity to collect, evaluate and obtain a clear appreciation of the Student's otherwise fluctuating functional present levels that were supporting the underlying circumstances. Absent the above information, perspective and data I now find the examiner's remarks, while well-intended, were not factually grounded in a clear understanding of the pertinent facts, circumstances and Student specific needs.

The October present levels of performance were clear, the academic, social, language and behavioral goals were measurable. The proposed SDIs, when offered, were linked to the goals and each goal statement provided clearly

defined timelines when progress monitoring data would be shared with the Parents. The PBSP goals were measurable and the SDIs were otherwise appropriate. While I understand the serious nature of the Student's circumstances the annual goals and the SDIs were substantively appropriate when offered, Therefore, structurally, substantively and procedurally the District's IEPs complied with the IDEA's FAPE mandate found in *Rowley* and *Endrew F.*

Accordingly, to the extent the Parents relied upon the expert's testing and opinions, the Parents' denial of FAPE claims from August through October 2018 are now rejected.

### **THE NOVEMBER IEP AND THE UNILATERAL PLACEMENT**

The IEP team convened on November 28, 2018, to address the steady uptick in the Student's behavior – including negative self-talk, scratching self-hard and perseverating on remarks by and the negative interactions with other students. At the IEP meeting, with Parental input, the team openly discussed a working strategy to collect additional data about the negative uptick in self-injurious behavior and negative self-talk. For example, the plan called for multiple observations in December 2018 by the District's BCBA. The Parents, on the other hand, wanting to speed up the process, volunteered to pursue a private community based behavioral health evaluations. After discussing both strategies, the Parties agreed that another meeting was necessary to compare the data. The tangible results of the November IEP meeting included updated present levels of educational performance, measurable academic, social, language and behavioral goals, a PBSP, check-in time with the guidance counselor, a strategy to minimize random contact with peers, related services and behaviorally targeted SDIs. Like the previous IEPs discussed herein, the November SDIs were linked to the goal statements and the PBSP goals. Each measurable goal statement provided clearly defined timelines when progress monitoring data would be collected, reviewed and shared with the Parents.

While the Student's academic data was tracking upward, at the same time, the behavioral, social and emotional data was trending ever downward. To turn things around the IEP team developed a working plan to reduce the Student's self-injurious acts, threats of self-harm, and peer-to-peer conflicts all of which were contributing to the Student's anxiety, and lack of stability in the school setting. While the December 3, 2018, December 5, 2018, and December 6, 2018, observations noted a number of on and off-task behaviors, for the most part, the anecdotal data noted that the Student was

otherwise on task, interactive and responding to peers and the structure in the classroom.

Understanding the push-pull dilemma facing the Parents and ever mindful of the *Rowley* and *Endrew F.* FAPE standard, in light of the short time frame between the District's offer of a FAPE taking into account the Parents' concerns about the fluid nature of the Student's circumstances, I now find the proposed November 2018 IEP and the actions taken, in real-time, to revise, redesign and then implement the November IEP were individually and collectively reasonably calculated to provide a FAPE.

In sum, neither the Parents nor their expert offered any substantive testimony describing any actionable substantive defects in the then offered goals, SDIs, related services, supplemental aids, services, or supports. Simply stated, the Parents failed to muster sufficient evidence that the District failed to offer a FAPE-IEP that was reasonably calculated to reduce, minimize, or eliminate the Student's then current present functional levels of performance. *See, T.L. v. Lower Merion Sch. Dist.*, 68 IDELR 12 (E.D. Pa. 2016)(district acted appropriately when it sought to manage the behaviors through an array of positive behavioral interventions and other supports). Accordingly, I now find that at all times relevant the District's November 2018 IEP complied with the IDEA's FAPE mandate. Hence, the Student's denial of FAPE claims, compensatory education and tuition reimbursement claims for all school years at issue are also denied.

### **Conclusion**

In this instance, after reviewing the existing data and after giving careful consideration to the testimonial and non-extrinsic evidence, ever mindful of the *Rowley* and *Endrew F.* FAPE standard I now find the December 2017 IEP, the October 15, 2018, the October 28, 2018 and the November 2018 IEP each offered the Student a FAPE.

At all times relevant, each IEP included measurable goals, a PBSP, along with sufficient supplemental aids and services necessary and needed to enable the Student to participate, to the maximum extent appropriate, in the general and or special education curriculum in the LRE. Therefore, absent preponderant proof to the contrary, I now find the Parents failed to produce or provide the quantum, quantity, or weighty evidence necessary to prove the fact that the Student was denied a FAPE. Since I now find in favor of the District, I will not discuss the appropriateness of the private school or the equities.

### **Order**

**And now**, this 23rd of August 2019, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parents on all IDEA denial of FAPE claims for the 2017-2018 and 2018-2019 school year. Hence, the claims for compensatory education and tuition reimbursement are denied.
2. All other claims for violations of the IDEA and requests for appropriate relief including any other affirmative defenses are dismissed with prejudice.

Date: August 23, 2019

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