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

OPEN HEARING

ODR File Number:
25203-21-22

Child's Name:
A.H.

Date of Birth:
[redacted]

Parents:
[redacted]

Counsel for Parents
Brett Swanson, Esq.
Montgomery Law
1420 Locust Lane
Philadelphia, PA 19102

Local Education Agency:
Garnet Valley School District
80 Station Road
Glen Mills, PA 19342

Counsel for the LEA
Gabrielle Sereni, Esq.
Raffaele Puppio
19 W. Third Street
Media, PA 19063

Hearing Officer:
James Gerl, CHO

Date of Decision:
January 5, 2022

Pennsylvania Special Education Hearing Officer Final Decision and Order

BACKGROUND

The parents filed a due process complaint alleging a number of violations of IDEA. The parents contend that the school district did not conduct a timely functional behavioral analysis of the student; that the school district denied a free and appropriate public education to the student by not timely adopting an appropriate behavioral intervention plan; that the school district committed a procedural violation of IDEA by failing to permit the parents to meaningfully participate in the process; that the school district violated IDEA by utilizing restraints upon the student; that the school district denied a free and appropriate public education to the student after they withdrew the student from public school and during the student's stay in the hospital; and that the school district denied a free and appropriate public education to the student by failing to place the student in a residential educational placement. I find that the school district violated IDEA by failing to timely conduct a functional behavioral analysis of the student and by failing to adopt an appropriate behavioral intervention plan for the student while the student was attending school in the district. I find in favor of the school district on all other issues.

PROCEDURAL HISTORY

The prehearing phase of this case featured an unusually large number of contentious prehearing motions. Counsel for the parties were generally not able to work together to resolve their numerous prehearing disputes.

The parents requested an in-person hearing. The school district objected to an in-person hearing. The hearing officer decided to convene an in-person hearing over the objection of the school district. 34 C.F.R. § 300.515(d). The hearing was conducted in two full-day, in-person sessions. Despite an extremely voluminous record, the parties agreed to only a small number of stipulations of fact, which unduly protracted the hearing and the decisional process.

Eight witnesses testified at the hearing. Thousands of pages of exhibits were admitted into evidence, many of which were not relevant to any issue. Parent Exhibits P-1 to P-41 and P-43 to P-55 were admitted into evidence. The school district Exhibits S-1 through S-84 were admitted into evidence. Because of the unwieldy and extremely voluminous nature of the documentary evidence in this case, the hearing officer informed counsel at the hearing that only the page numbers of exhibits that were cited specifically in the parties' post-hearing briefs would be considered in reaching the decision in this case. Counsel acknowledged at the hearing that they understood that instruction. Exhibit pages that were not cited in the post-hearing briefs were not considered.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as

presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

The due process complaint, as explained and clarified at the prehearing conference in this matter, presents the following issues:

1. Whether the parents have proven that the school district committed an evaluation violation of IDEA by failing to conduct a timely functional behavioral analysis for the student?

2. Whether the school district denied a free and appropriate public education to the student by failing to develop a behavioral intervention plan for the student?

3. Whether the parents proved that the school district violated IDEA by inappropriately using restraints on the student?

4. Whether the parents have proven that the school district committed a procedural violation by denying the parents meaningful participation in the student's education?

5. Whether the parents have proven that the school district denied a free and appropriate public education to the student after the parents

withdrew the student from public school and during the time that the student was confined to the hospital?

6. Whether the parents have proven that the school district denied a free and appropriate public education to the student by failing to make a residential placement for the student?

FINDINGS OF FACT

Based upon the parties' stipulations of fact, I have made the following findings of fact:

1. The student is [an elementary aged] student of the school district but is currently residing in the hospital since May 2, 2021. The student's parents reside within the school district's boundaries.

2. The student first entered the school district [redacted] in September of 2019 after moving from another state.

3. The parents report that the student was adopted [redacted] when two years old. Very little is known about the student's biological parents. It is believed that the student spent the majority of the time before the adoption in a crib. The parents report that the student was likely not socialized as well as neglected and force-fed.

4. The student is a nonverbal student with [redacted] and autism spectrum disorder.

5. The parents report that the student has also been diagnosed with [redacted], nonverbal cognitive delays, oropharyngeal dysphagia, an oral aversion, cysts of the brain, congenital heart anomaly, asthma and esophageal reflux disease (GERD).

6. In October 2019, the student underwent an eye examination and was found to have high myopia. The parents report that the student has high myopia in both eyes.

7. Throughout the student's entire time in the school district, the student has been fed through a G tube.

8. The student has historically engaged in and continues to engage in severe self-injurious behaviors, including head banging, hitting self in the head and eyes, and biting.

9. The student's previous out of state school district used [protective devices] to keep the student safe from self-injurious behaviors, and the use of the [protective devices] was reflected in the student's previous IEP that the parents approved.

10. The student's initial evaluation report by the school district was completed on October 24, 2019. The student was identified as being eligible for special education with a primary disability category of multiple disabilities.

11. The parents report that they have not used the [protective device] on the student at any time after removing the student from school on March 19, 2021.

12. In April 2021, the student's parents were advised by the behavioral services agency providing services through their medical insurance to take the student to a hospital in order to seek out additional support.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact: [1]

13. The student [redacted]. The student has the best laugh and the best smile. The student loves to sing and dance and clap. (NT 534 – 535)

14. [redacted]

15. The [protective device] prevents the student from hitting the student in the head or face. The [protective device] was provided to the school district by the parents while the student attended school in the school district. (NT 67-68. 123-124; S-82; S-80; S - 29)

16. [redacted] (NT 67-69, 123-124; S-82; S-80; S - 29)

17. In the previous school district in another state, the student's IEPs noted that the student's self-injurious behaviors interfere with the student's learning. The student wore the [protective devices] while attending school in the previous state. (P – 2; NT 422-423)

18. After the parents moved to the school district, in November 2019, the student's IEP team met and determined that the student's behaviors did not impede the student's learning. This IEP and subsequent IEPs do not include a positive behavior support plan and are not based on a functional behavioral analysis of the student and the IEP goals do not address the student's self-injurious behaviors. The student's IEPs mentioned

[1] (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

the student's [protective devices]. The parents approved each of these IEPs. (P-6, P-21; S-38; NT 65 – 66, 123 – 125, 498 – 505)

19. The IEP currently offered to the student by the school district is dated April 30, 2021. The most recent notice of recommended educational placement from the school district for the student is dated August 15, 2021. (P-14, P-30; NT 116 – 118)

20. In February and March 2020, the occupational therapist of the school district was able to work with the student for about five to ten minutes at a time without the [protective device] and without any self-injurious behaviors. (NT 705 – 706, 281)

21. Because of the closure of schools due to the COVID pandemic, the student's school was closed on March 13, 2020. At that time, the school district offered virtual learning for the student with some live sessions and related services. The parents rejected the district's offer. (NT 160 – 162)

22. During the COVID school closures, the student blinded the student as a result of self-injurious behaviors. In August 2020, the student had surgery to correct vision loss due to self-injurious behaviors. (P-22, P-36; NT 490 – 493)

23. The student returned to in-person instruction after the covid closure on September 21, 2020. (NT 162)

24. The district's board certified behavior analyst observed the student and began the creation of a [protective device] titration plan in February 2021. At a March 16, 2021 IEP team meeting, the student's IEP team agreed to conduct a functional behavioral analysis. A Permission to Evaluate for the functional behavioral analysis of the student was issued on March 19, 2021. The parents signed the PTE giving consent for the FBA on March 21, 2021 at 2:04 pm. (P-12, P-36; S-28; NT 174, 141 - 142)

25. The school district's board certified behavior analyst did not have experience with students who engage in self-injurious behaviors. As a result, the BCBA consulted a professor from her training concerning such matters. (NT 175 – 176)

26. In approximately February and March 2021, the parents complained to the school district about the use of the [protective device]. The parents insisted that the[protective device] be taken off after the student arrived at school for the entire school day and not placed back on the student until the bus ride home. (S-33; NT 114 – 116)

27. The student was not safe at school when the [protective device] was removed without having in place a behavior plan designed to gradually introduce replacement behaviors for the self-injurious behaviors. (S-35; NT 114 – 116, NT 697 - 714)

28. The parents asked all of the student's doctors to provide the school district with a note stating that it was safe for the student to attend school without wearing the [protective device]. The doctors declined to write such a note. (NT 42 – 42, 122, 166-138; 434 – 435, 510)

29. On March 11, 2021, the school district received a long email correspondence from the non-attorney advocate acting on behalf of the parents. The communication contained numerous references to legal authority. After the communication from the non-attorney advocate, the school district invited its attorney to attend IEP team meetings involving the student. (S-68; P-36; NT 135 – 137)

30. On March 21, 2021 at 7:36 pm, the student's mother sent an email to one of the student's physicians stating in part that the school district is "…refusing to do an FBA, positive behavior support plan…" (P -16; NT 142)

31. The parents removed the student from school in the district on March 19, 2021. (P-36; NT 163)

32. On March 23, 2021, the parents filed a state complaint with Pennsylvania Department of Education concerning the school district's use of the [protective device] and failure to develop a positive behavior support plan based upon functional behavioral analysis. The investigator found the school district to not be in compliance because the student had no positive behavior support plan or behavior goals and because of the use of the [protective device]. (P-20, P-21)

33. After the parents removed the student from school in the district, the school district offered to provide services to the student. The parents allowed the student to receive one occupational therapy session, but refused additional occupational therapy sessions, as well as any speech language therapy, physical therapy or consultative services. The parents refused a Permission to Reevaluate the student to conduct a comprehensive medical evaluation by an area hospital that specializes in children with needs similar to the student's needs. (S-28; P-16; P-29; NT 118 – 122, 141 – 142)

34. The student was admitted to the hospital on May 2, 2021. The reason for the hospitalization was self-injurious behaviors and caregiver burnout. The parents did not inform the school district that the student had been hospitalized. The school district learned about the hospitalization approximately two weeks later. (NT 118 – 119, 140, 491 – 492; S-44)

35. On May 2, 2021, the student's mother told a hospital social worker that she was at wits end and that she is not able to keep the student safe at home because of the student's self-injurious behaviors. (S-83)

36. In May of 2021, the parents discontinued consent for all evaluations by the school district, including the agreed FBA, until after the proposed day school program had begun. (NT 120 – 121)

37. On May 14, 2021 Children and Youth Services, which had been informed of the student's situation by hospital staff, told the hospital social worker that the student's needs could not be appropriately met at home, where the student would be at risk of neglect, and would create continued risk to the safety of the student and others in the home. The agency told the student's parents that if residential care could not be arranged, the student would be placed in foster care. (S-83; NT 475 -479)

38. On May 17, 2021, The student's mother asked the hospital social worker not to share the social worker's notes with the school district. (S – 83)

39. The hospital had planned in June and July of 2021 to release the student beginning on July 6, 2021, so that the student could go home and attend a day school program pursuant to a school district Notice of Recommended Educational Placement that had been approved by the parents. The parents told hospital staff that they did not want the student to be discharged because such discharge would make their legal claim for residential placement through this due process proceeding less likely to succeed. The hospital did not discharge the student on July 6, 2021 as planned. (S – 83; S – 38; NT 406, 483)

40. The hospital later recommended that the student be placed in a residential treatment facility for psychiatric and medical reasons. The recommendation was made by a group of people that did not include any person trained as an educator. (S-83; NT 121-122)

41. The student did not wear the [protective device] at all while in the hospital. The student engaged in numerous self-injurious behaviors while in the hospital, including the following: On May 27, 2021, the student caused a bruise to the right lower ear area and scratches. An incident on July 7, 2021 caused a large bruise near the eye which later became infected. On July 14, 2021, the student's self-injurious behaviors resulted in a large bruise on the student's forehead. (S-82; P- 35; S -75; NT 341, 362, 402 – 403, 488 – 489)

42. During an observation of the student in the hospital while a parent or caregiver was sitting next to the student at all times, the caregiver or parent was only able to block approximately 10% of the attempts by the student to hit the student's face or eyes. (NT 632; S – 80; S-82)

43. The school district asked the parents for permission to speak to the student's doctors in the presence of the parents. The parents refused to let the district staff speak with the student's doctors. (NT 144-145, 475 - 476; 506 -507; S - 33 P - 29)

44. On July 22, 2021, the psychologist/board certified behavior analyst who evaluated the student after having been recommended by the school district recommended a program for the student's treatment involving the adoption of replacement behaviors for the self-injurious behaviors, as well as a residential treatment plan under the care of a psychiatrist. The evaluator stated that the medical management and physical health concerns related to his recommendations are physical health issues and not behavioral or school related issues and that the evaluator's recommendations were beyond the requirements of a free and appropriate public education. (S-51)

45. On August 6, 2021 the managed care agency denied a residential treatment facility for the student because the hospital did not

show that the student had a medical need for a residential treatment facility. The managed care agency did approve forty five days of 24-hour behavioral health services- applied behavior analysis. The ABA services were not provided because the behavioral services agency could not find staffing. (S – 55; S – 83; NT 345)

46. On October 18, 2021, the managed care agency denied the parents' appeal and again denied the request to have the student approved for a residential treatment facility. The agency concluded that the student's behavioral needs can be managed appropriately with supports in the home and the classroom. The agency denied the request for a residential treatment facility for this and other reasons. (S-71; S – 83; NT 345-346)

47. The school district's expert board certified behavior analyst/ school psychologist conducted a functional behavioral analysis upon the student from October 1, 2021 to October 8, 2021 and determined that the student's educational and behavioral needs could be met in a school setting. (S-80; NT 698 – 703)

48. The function of the student's self-injurious behaviors is not sensory, as the school district had previously concluded. The true function of the self-injurious behaviors exhibited by the student is either to receive attention from adults or else to receive access to preferred items or activities. (S-80; NT 678 – 685)

49. The school district's expert psychiatrist evaluated the student on October 28, 2021 and recommended that the student's educational and behavioral needs be met in a school- based program with a high teacher-to-student ratio, an ABA trained teacher, ongoing consultation with a BCBA to provide and evaluate a behavior plan and a 1:1 paraprofessional who would be able to implement the behavior plan. (S-75; NT 566 – 567)

50. To appropriately meet the student's educational and behavioral needs, the student's IEPs must include a positive behavior support plan that is guided by a board-certified behavior analyst who is experienced in working with students with self-injurious behaviors. One of the purposes of the positive behavior support plan should be to teach the student replacement behaviors gradually over time in a small, structured setting and in a painstaking manner in order to ensure that the student's self-injurious behaviors are eliminated or substantially reduced. The plan should gradually wean reliance on the [protective device] over time. The plan should include a one-on-one paraprofessional under the direct supervision of the board-certified behavior analyst. The plan should be a part of a "kitchen sink" IEP that includes all appropriate related services, specially designed instruction and accommodations. (NT 688 – 714, 288 – 289; S - 80)

51. The student does not require a residential placement for educational reasons. A residential placement for the student is not the least restrictive environment that is appropriate to meet the student's educational needs. (S – 55; S – 71; NT 120 – 121, 114, 566 – 567, 698 - 703; S – 75; S – 80)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as "IDEA"): an identification violation, an

evaluation violation, a placement violation or a failure to provide a free and appropriate public education. IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. ___, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

3. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, supra; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

4. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

5. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, supra; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

6. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. The child must be assessed in all areas related to the suspected disability on an initial evaluation. The evaluation must be comprehensive. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14-123.

7. Where a student with a disability has behaviors that impede the student's learning or the learning of others, the student's IEP team must consider the use of positive behavioral interventions and supports and other strategies to address those behaviors. IDEA § 614(d)(3)(B)(1); 34 C.F.R. § 300.324(a)(2)(i); 22 Pa. Code § 14-133; Sean C. by Helen C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Penna. 2017); Lathrop R-II Sch. Dist. v. Gray ex rel. DG, 611 F. 3d 419, 54 IDELR 276 (8th Cir. 2010).

8. Under certain circumstances, the inappropriate use of restraints or seclusion may constitute a denial of a free and appropriate public education. See, DF by AC v. Collingswood Borough Bd. of Educ., 694 F. 3d 488, 59 IDELR 211 (3d Cir. 2012). See also, *Seclusion and Restraints in Public Schools* (GAO 2009).[2]

[2] gao.gov/assets/gao-09-719t.pdf

9. IDEA requires that a parent of a student with a disability be afforded meaningful participation in the IEP process and in the education of the student. DS & AS ex rel DS v. Bayonne Bd of Educ, 602 F.3d 553, 54 IDELR 141 (3d Cir 4/22/10); Fuhrmann ex rel Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1036, 19 IDELR 1065 (3d Cir. 1993); MP by VC v Parkland Sch Dist, 79 IDELR 126 (ED Penna 2021); 34 C.F.R. § 300.501. See, Deal v. Hamilton County Bd of Educ, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); JD v. Kanawha County Bd of Educ, 48 IDELR 159 (S.D. WVa. 2007).

10. If a placement in a residential program is necessary to provide special education to a child with a disability, the program must be provided at no cost to the parents by the school district. 34 C.F.R. § 300.104. A school district is required to fund a residential placement for a student with a disability when residential placement is necessary for educational purposes. Munir ex rel. OM v. Pottsville Area School District, 723 F. 3d 423, 61 IDELR 152 (3d Cir. 2013). See also, Kruelle v. Newcastle County School District, 642 F. 2d 687, 552 IDELR 350 (3d Cir. 1981).

11. A school district must "...to the maximum extent appropriate, (ensure that), children with disabilities... are educated with children who are non-disabled and that special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code § 14.195)

12. The Third Circuit has ruled that the least restrictive environment requirement is a substantive requirement of IDEA. Oberti v. Board of Education, 995 F.2d 1204, 19 IDELR 908, @n. 18 (3d Cir. 1993).

13. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (n. 11) (2009); Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch Dist, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010); School District of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area School District, 71 IDELR 87 (N.D. Penna. 2017). See Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Education, Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA W.V. 2009). The conduct of the parties is always relevant when fashioning equitable relief. CH by Hayes v. Cape Henlopen Sch Dist, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010). See, Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. 2005).

14. Compensatory education is one remedy that may be awarded to parents when a school district violates the special education laws. In general, courts, including the Third Circuit, have expressed a preference for a qualitative method of calculating compensatory educational awards that addresses the educational harm done to the student by the denial of a free and appropriate public education. GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority, 802 F. 3d 601, 66 IDELR 91 (3d Cir. 2015); Gwendolynne S by Judy S and Geoff S v West Chester Area Sch Dist, 78 IDELR 125 (ED Penna 2021); see Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005). In Pennsylvania, in part because of the failure of special education lawyers to provide evidence regarding harm to the student caused by the denial of FAPE, courts and hearing officers have frequently utilized the more discredited quantitative or "cookie cutter" method that utilizes one hour or one day of compensatory

education for each day of denial of a free and appropriate public education. The "cookie cutter" or quantitative method has been approved by courts, especially where there is an individualized analysis of the denial of FAPE or harm to the particular child. See, Jana K. by Kim K v. Annville Sch. Dist., 39 F. Supp. 3d 584, 53 IDELR 278 (M.D. Penna. 2014).

15. The parents have proven that the school district failed to conduct a timely functional behavioral analysis of the student and that the school district denied a free and appropriate public education to the student while the student was attending class in the school district by failing to develop and implement an appropriate behavioral intervention plan to address the student's self-injurious behaviors.

16. The parents have not proven that the school district denied a free and appropriate public education to the student by utilizing inappropriate restraints.

17. The parents have not proven that the school district denied a free and appropriate public education to the student by denying the parents meaningful participation in the student's education.

18. The parents have not proven that the school district denied a free and appropriate public education to the student after the parents removed the student from public school and/or while the student was in the hospital.

19. The parents have not proven that the student needed a residential placement for educational reasons. A residential placement is not the least restrictive environment for this student.

DISCUSSION

I. Merits

1. Whether the parents have proven that the school district committed an evaluation violation by failing to conduct a timely functional behavioral analysis and whether the parents have proven that the school district denied a free and appropriate public education to the student by failing to develop a positive behavior support plan?

These two related behavior issues are discussed together. The parents contend that the school district violated IDEA by failing to conduct a functional behavioral analysis for the student and then failing to develop a behavior intervention plan for the student. The school district contends that the student's behaviors did not interfere with the student's learning.

This case is extremely sad. Both parties have carved out highly unreasonable positions while a severely disabled child stays in a hospital bed. Perhaps even more alarming is the fact that the record reflects that before this dispute, the parties worked well together in the collaborative manner expected of school districts and parents in order to successfully educate children with disabilities. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). That is no longer the case.

The parents demanded that the school district immediately remove the student's[protective device] at all times during the entire school day. This position is unreasonable because it is most certainly not safe for the student to do so. The student, during the entire relevant timeframe, has engaged in serious and extreme self-injurious behaviors. The student punches self in the face and eye and has caused serious injuries, including blinding self. The student cannot be made to suffer injury in order to prove a point.

The school district, on the other hand, has insisted that the student's behaviors do not impede the student's learning. The school district's position defies logic and uses circular reasoning to reach its conclusion. If a student must wear a [protective device] at school because of self-injurious behaviors, it is obvious that the student's behaviors are interfering with the student's learning. As the district's own expert BCBA/school psychologist testified credibly and persuasively, the goal of any good program would be to teach the student skills that would allow the [protective device] to be safely removed. A student should not be forced to wear a [protective device] at school all day, every day where there is likely a way to gradually and systematically introduce replacement behaviors that would allow the eventual removal of the [protective device]. The school district's position is equally unreasonable.

Although a local education agency is not necessarily required to conduct a functional behavioral analysis or to develop a behavior intervention plan for every student with a disability who exhibits problem behaviors, it is required to adequately address behaviors that interfere with learning. Here the student's IEPs did not adequately address the student's self-injurious behaviors.

The school district's continual use of the [protective device] without a behavior plan designed to gradually remove it clearly interfered with the student's learning. Significantly, the school district did not even know the function of the student's self-injurious behaviors. School district staff testified that the function of the problem behaviors was sensory or automatic in nature. As the parents' brief correctly points out, however, the school district was mistaken with regard to the function of the student's behaviors. The district's own expert witness testified candidly that the

functions of the student's problem behaviors were not sensory. If the school district had conducted a timely functional behavioral analysis, it would have yielded this most important information much earlier, and that would have paved the way for an appropriate behavior plan.

The school district did not agree to conduct a functional behavioral analysis for the student until March 16, 2021. The parents consented to the FBA at first, but then promptly withdrew consent. The school district finally conducted the functional behavioral analysis from October 1 through October 8, 2021. The functional behavioral analysis concluded that the student's self-injurious behaviors were not sensory, as had been previously hypothesized by the district, but that the function of these behaviors was attention seeking or for access to preferred items. The fact that the school district's IEPs for the student were based upon an incorrect assumption concerning the function of the self-injurious behaviors demonstrates that the school district should have conducted the functional behavioral analysis much earlier.

At the hearing in this case, the school district called as an expert witness the board-certified behavior analyst/school psychologist who conducted the functional behavioral analysis of the student. The expert testified that, given the unique needs and individual circumstances of this student, the student requires a "kitchen sink" IEP bundle of services that includes, in addition to a number of related services, a positive behavior support plan designed and guided by a board-certified behavior analyst who is experienced working with students who engage in self-injurious behaviors, including replacement behaviors for the self-injurious behaviors to be phased in gradually and systematically over time as the [protective device] is increasingly removed over time. Although the expert witness also testified

that the school district IEPs did adequately address the student's problem behaviors, it is clear from the testimony of this witness that, during the time that the student was at the school district, the student required a positive behavior support plan similar to the one described by the expert witness. The student needed such a positive behavior support plan then and now and will also need one in the future. Because of the lack of an appropriate behavior plan, the school district IEPs were not reasonably calculated to achieve meaningful progress in light of this student's unique individual circumstances. The need for an appropriate behavior plan for the student was confirmed by the report of the school district's expert psychiatrist.

The testimony of the school district expert board-certified behavior analyst/school psychologist and the school district expert psychiatrist was more credible and persuasive than the testimony of other witnesses concerning this issue. The testimony of said experts was credible and persuasive because of the demeanor of the various witnesses, the candid content of the testimony, as well as the impressive qualifications, education, experience and training of said experts.

The parents have proven that the school district committed an evaluation violation by failing to conduct a timely functional behavioral analysis of the student's self-injurious behaviors. The parents have also proven that the school district denied a free and appropriate public education to the student by failing to properly address the student's problem behaviors in the student's IEPs.

2. Whether the parents have proven that the school district denied FAPE to the student by using mechanical restraints or by requiring the use of a [protective device]?

The parents contend that the school district violated the state statute concerning the use of mechanical restraints. The school district contends that it did not violate the statute. The [protective device] provided by the parents does not appear to be used to control involuntary movements or lack of muscular control, and, therefore, is not a mechanical restraint as defined by 22 Pa. Code § 14-133(d). It should be noted that the parents provided the school district with the [protective device] at issue, and the parents also approved the student's IEPs and agreed to the NOREPs that included the use of the [protective device]. The [protective device] is not a mechanical restraint.

In addition, the parents have not shown that the district's failure to comply with their demand that it immediately remove the [protective device] denied FAPE to the student. In February of 2021, the parents made the unreasonable demand that the student's [protective device] be removed for the entire school day. This position by the parents was unreasonable because the student would not be safe without the [protective device] until the student learned the replacement behaviors described by the school district expert board-certified behavior analyst/school psychologist. The student repeatedly injured self when the [protective device] was removed. Such injuries included swelling and severe bruises that became infected and event blindness. The credible and persuasive testimony of the school district expert board-certified behavior analyst/school psychologist was that the student was successful in hitting the student approximately 90% of the time when the [protective device] was removed, even when an adult was sitting right next to the student attempting to block the punches.

It is significant that when the student's mother asked the student's medical providers to provide a letter to the school district stating that the

student would be safe without the [protective device] for the entire school day, each of the medical providers refused to do so. The student's mother testified that this was because of liability issues. In other words, the student's medical providers were not persuaded that the student would be safe for an entire school day if the [protective device] was immediately removed. The parents' position that the school district should have removed the student for the entire school day prior to the implementation of the positive behavior support plan is unreasonable and would potentially subject the student to additional serious injuries. There has been no showing that the refusal to remove the [protective device] completely before the student was taught replacement behaviors for the self-injurious behaviors interfered with the student's educational benefit.

The parents have not proven that the school district denied a free and appropriate public education to the student by failing to immediately stop using the [protective device]. Except to the extent that these matters were discussed in the section of this decision on behavior issues above, the parents have not proven any other violations involving the use of the [protective device].

3. Whether the parents have proven that the school district committed a procedural violation of the Act by failing to permit the parents to meaningfully participate in the process?

The parents contend that the school district denied them meaningful participation in the process by involving the school district lawyer in the IEP proceedings. The school district contends that the participation of their

lawyer was appropriate and necessary given the legalistic and antagonistic tone of communications from the parents' non-attorney advocate.

The parents' brief cites Appendix A to the IDEA federal regulations in support of their argument. Appendix A to the federal regulations deals with excess cost calculations. The cited authority does not support the parents' contentions concerning any issue presented by the due process complaint.

It is true as parents' brief argues that the federal Office of Special Education Programs generally discourages the attendance of attorneys at IEP team meetings. However, the parties do have the right to invite to an IEP team meeting individuals who have knowledge or special expertise regarding the child, including a lawyer. The determination as to whether a particular individual has knowledge or expertise is left up to the parent or public agency who invited the individual to the meeting. See, Letter to Andel, 67 IDELR 156 (OSEP 2016). Accordingly, the parents have not proven any violation of the special education laws or regulations. Moreover, it would appear that the school district was justified in inviting a lawyer to attend IEP team meetings after receiving lengthy correspondence from an advocate that was legalistic in nature.

More importantly, the parents have not proven that they were unable to meaningfully participate in the IEP team process for the student. The record reflects that the parents were invited to and did attend numerous meetings regarding the student and that they participated very actively in all decisions concerning the education of the student.

There is no basis in the evidentiary record to conclude that the parents were denied a meaningful opportunity to participate in the educational process regarding the student. The parents' argument is rejected.

4. Whether the parents have proven that the school district denied a free and appropriate public education to the student from the time the parents removed the student from the school district on March 19, 2021 to the present?

The parents contend that the school district continued to deny a free and appropriate public education to the student after the parents removed the student from the school district on March 19, 2021. The parties have stipulated that the student was admitted to the hospital on May 2, 2021. The school district contends that it provided a free and appropriate public education to the student from March 19, 2021 to the present.

The record evidence makes it clear that the parents refused services during this time frame. The school district first attempted to provide services to the student in the home, but the parents declined these services. After one occupational therapy session, the parents refused all services from the school district. The parents also refused to permit a comprehensive medical evaluation by an area hospital that specializes in children with needs similar to the student's needs. Significantly, the parents also worked with hospital staff to preclude a planned release of the student from the hospital to a day school program.

The parents cannot refuse to permit the school district to educate the student and then claim that the school district inappropriately educated the student. By declining services, the parents prohibited the school district from providing a free and appropriate public education to the student. The parents lack standing to claim that services were inappropriate when the parents prevented the student from receiving the services.

Moreover, the record evidence reveals that at this point this school district was developing an appropriate program. The district proposed an FBA which had been planned until the parents revoked their previous consent. When the parents once again consented to the evaluation, the school district promptly conducted a functional behavioral analysis of the student and determined the true functions of the student's self-injurious behaviors. The school district also engaged its expert board-certified behavioral analyst/school psychologist, who testified at the hearing concerning an appropriate positive behavior support plan for the student involving replacement behaviors to replace the self-injurious behaviors as a part of a "kitchen sink" approach to an IEP. It is clear that the school district was providing an appropriate program to the student during this time frame.

Even assuming, *arguendo*, that the school district's program did not provide FAPE during this timeframe, it would not be equitable to provide relief for any such violation because the ability of the district to provide FAPE was impaired by the obstructive and non-cooperative behaviors of the parents in refusing and thwarting services and in denying evaluations. Fundamental fairness would preclude any relief for such hypothetical violations.

To the extent that the testimony of the witnesses was discrepant, the testimony of the school district witnesses was more persuasive and credible than the testimony of the parents' witnesses with regard to this issue. This credibility determination is based upon the demeanor of the witnesses, as well as the factors outlined in the next section. It is concluded that the school district provided a free and appropriate public education to the student from March 19, 2021 to the present.

5. Whether the parents have proven that the school district has denied a free and appropriate public education to the student by failing to make a residential placement for the student?

The parents contend that the school district denied a free and appropriate public education to the student by failing to arrange a residential placement for the student. The school district contends that the student does not require a residential placement.

The parents have not proven that the student needs a residential placement for educational reasons or for any other reason. The parents argued that the hospital at which the student is currently a patient is recommending a residential placement, but the evidence in the record is clear that the hospital intended to release the student beginning on July 6, 2021 to the student's home with a day school program after the parents approved a Notice of Recommended Educational Placement. The hospital's notes demonstrate, however, that the student's parents did not want the discharge to occur and told hospital staff that it would be more difficult to obtain a residential placement for the student through the due process hearing if the hospital discharged the student pursuant to the plan for July 6, 2021. After the parents objected to the hospital's discharge plan, the hospital did not release the student as planned on July 6, 2021. Instead, the hospital then recommended a residential treatment facility for psychiatric and medical reasons. The documentary evidence makes it very clear that the parents and at least some hospital staff were working together to attempt to engineer a residential placement at school district expense. It is also significant that the parents did not call the treating psychiatrist or any doctor from the hospital to testify at the due process hearing.

The parents also cite the written report of the psychiatrist/board certified behavior analyst who evaluated the student upon the recommendation of the school district. The report of this evaluator, however, makes it clear that the program that he was recommending went way beyond the requirements of the student's education or a free and appropriate public education. A fair reading of the report of this evaluator does not allow a conclusion that the evaluator recommended a residential placement for educational reasons. The evaluator did not testify as a witness at the hearing.

It is also damning to the parents' case for a residential placement that the parents refused to let the school district speak with the student's doctors or to allow a comprehensive medical examination by qualified medical providers. The parents also asked hospital staff not to share their notes with the school district. The parents' "hide the ball" mentality with regard to refusing to share information about the student's condition with the school district, coupled with their scheme to have the hospital not release the student in July as it had planned to do, demonstrate that the student really does not need a residential placement.

The agency that makes determinations regarding residential treatment facilities on behalf of the parents' private insurance company and the county concluded that the student could be returned home and educated in a school. The denial of the parents' appeal of the ruling is further evidence that the student did not require a residential placement.

The school district, on the other hand, called two expert witnesses who testified credibly and persuasively that the student does not require a residential placement. The school district's expert psychiatrist testified credibly and persuasively that the student could be educated successfully in

school. The school district's expert board-certified behavior analyst/school psychologist also testified credibly and persuasively that the student could be educated in school and live at home. The credibility of the district's expert witnesses was enhanced because of their impressive education and experience in the area of educational placement and services.

The weight of the most credible and persuasive evidence in the record requires a conclusion that the student's educational and behavioral needs can be met in a school setting with the proper supports and an appropriate behavior plan. Accordingly, because the student does not need a residential placement, such a placement would clearly be inconsistent with the least restrictive environment mandate of the IDEA.

The parents' post-hearing brief makes reference to the fact that the school district referred to the cost of a residential educational placement. If the parents had proven that the student needed a residential placement for educational reasons or that the student's educational needs were necessarily intertwined with other needs requiring a residential placement, these comments by school district staff would have been very disturbing and a serious problem for the school district's case. Because a fair reading of the evidence in the record requires a conclusion that the student did not require a residential placement, however, the disturbing statements by school district staff concerning the cost of the residential placement do not affect the outcome of this case.

The testimony of the school district staff and school district experts concerning this issue was more persuasive and credible than the testimony of the student's parent and witnesses testifying on behalf of the parents. This conclusion is made because of the demeanor of the witnesses, and the qualifications of the expert witnesses, as well as the fact that the parent's

testimony contained a number of contradictions and other problems, including the following: Significantly, the documentary evidence showed that the student's mother requested that the hospital not go ahead with a discharge plan that would have the student go home and return to a day program school on July 6, 2021. The parents' representations to the hospital staff concerning this point are inconsistent with the representations made in the parents' testimony concerning the student's educational and behavioral needs. The collusion between the parents and hospital staff to engineer a school district-funded residential placement contradicts the parents' position concerning this issue. In addition, the documentary evidence shows that the student's mother told the student's pediatrician that the school district was refusing to do a functional behavioral analysis of the student after the parents had already approved a Permission to Evaluate giving their consent for a functional behavioral analysis of the student by the district. Also, the parents' complaint alleges that the parents are able to keep the student safe at home without restraints despite the fact that the student had seriously injured the student striking the head and eye area approximately two weeks before the due process complaint was filed. There are numerous other discrepancies between the documentary evidence and the mother's testimony concerning the ability of the family to keep the student safe without the [protective device]. Moreover, the student's parents requested that the hospital social worker not share the social worker's medical notes with the school district, and the parents refused to permit the student's doctors to speak to district staff. The attempt to prevent the school district from learning the true facts concerning the student's medical condition also severely undermines the parent's credibility.

It is concluded that the parents have not proven the student needs a residential placement for educational purposes or that a residential placement is necessary for any reasons.

II. Relief

The parents have proven an evaluation violation because the school district failed to conduct a timely functional behavioral analysis of the student. The record reflects that the school district did eventually conduct a comprehensive functional behavioral analysis of the student by the well-qualified board-certified behavior analyst/school psychologist who testified as an expert witness for the school district. No further relief is necessary with regard to this issue.

The more significant violation that the parents proved involves the denial of a free and appropriate public education because the school district IEPs did not contain a positive behavior support plan designed to gradually remove the student's [protective device] in order to teach the student replacement behaviors that reduce or eliminate the self-injurious behaviors that the student was engaging in. The period of denial of FAPE began after the school district reasonably should have developed a behavioral intervention plan for the student. A functional behavioral analysis should have been conducted within 30 days of the student's beginning in the school district. An appropriate positive behavior support plan should have been developed by the school district utilizing a board-certified behavior analyst who had experience and training with regard to students who engage in self-injurious behaviors, as described more fully in the testimony of the school district's expert witness board-certified behavior analyst. The school district should have developed a positive behavior support plan that was appropriate for the student within 60 days of the student enrolling in the school district.

Accordingly, the beginning of the denial of FAPE is 60 days after the student enrolled in the school district. The end of the period of denial of FAPE is March 19, 2021, when the parents removed the student from school and began refusing services for and evaluations of the student. It is noted that the period of denial of FAPE includes the period of time when school was closed due to the covid pandemic. Because the school district had not conducted an FBA or developed an appropriate behavior plan during this period of time, however, the student was denied FAPE in both the in-person and the virtual classrooms. The denial of FAPE to the student included any period of either virtual or in-person instruction during this timeframe.

The appropriate compensatory education remedy is one full day of compensatory education for each school day during the period of denial of FAPE. Although the qualitative compensatory education calculation is more fair and more directly addresses the harm caused by a denial of FAPE, there is no evidence in the record by either side concerning the appropriate qualitative calculation of compensatory education. Accordingly, the hearing officer must utilize the widely discredited quantitative compensatory education method based upon an individualized determination of the student's unique circumstances and individual needs, especially in view of the self-injurious behaviors. In this case, one full day of compensatory education per day of denial of FAPE should adequately compensate the student for the denial of FAPE.

The other important component of the remedy involves an appropriate positive behavior support plan, which will require a rewriting of the student's IEP. The behavior plan should be consistent with the components of the plan and IEP as outlined and described by the testimony of the school district's

expert board-certified behavior analyst/school psychologist and the report of the school district's expert psychiatrist.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The school district is ordered to provide one full day of compensatory education to the student for each school day during the period of denial of FAPE, as described above. The award of compensatory education is subject to the following conditions and limitations:

a. The student's parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device for the student's educational and related services needs;

b. The compensatory education services may be used at any time from the present until the student turns age twenty-one (21); and

c. The compensatory services shall be provided by appropriately qualified professionals selected by the parents. The cost to the school district of providing the awarded days of compensatory education may be limited to the average market rate for private providers of those services in the county where the district is located; and

2. The school district is ordered to convene the student's IEP team, within thirty days of the entry of this decision, and to amend the student's IEP so that it becomes a "kitchen sink" IEP that includes an appropriate

bundle of services, including a positive behavior support plan designed and guided by a board-certified behavior analyst who is experienced working with students who engage in self-injurious behaviors, including replacement behaviors for the self-injurious behaviors to be phased in gradually and systematically as the [protective device] is increasingly removed over time. One of the purposes of the positive behavior support plan should be to teach the student replacement behaviors gradually over time in a small, structured setting and in a painstaking manner in an attempt to eliminate or substantially reduce the student's self-injurious behaviors. The plan should include a specific plan to gradually wean reliance on the [protective device] over time. The student should have an ABA trained one-on-one paraprofessional who will implement the behavior plan under the direct supervision and guidance of the board certified behavior analyst. The IEP should be implemented in a small, structured setting with a high teacher to student ratio. At least one of the student's teachers should be ABA trained.

3. The parties may adjust or amend the terms of this order by mutual written agreement signed by all parties and counsel of record; and

4. All other relief requested by the instant due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: January 5, 2022

James Gerl

James Gerl, CHO
Hearing Officer