

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer Final Decision and Order

CLOSED HEARING

ODR File Number:

21295-18-19

Child's Name:

A.M.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Local Education Agency:

Wallingford-Swarthmore School District
200 S. Providence Road
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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

6/28/19

INTRODUCTION AND PROCEDURAL HISTORY

The Parties agree the Student is an elementary age pupil who resides with the Parents in the Wallingford Swarthmore District (District). The Parties further agree, the Student is a person with autism and is otherwise eligible for specially-designed instruction within the meaning of the Individuals with Disabilities Education Act (IDEA) eligible.¹The Parents' due process Complaint raises two issues. First, the Parents contend the District failed, to provide the Student, with a free appropriate public education (FAPE), as required by the IDEA, in sixth grade. Second, the Parents contend, [redacted] For all of the reasons that follow, I find in part favor of the District on the Parents' IDEA claim [redacted]. An appropriate Order granting appropriate relief follows.²

ISSUES:

1. Did the District offer and provide the Student with a free appropriate public education within the meaning of the IDEA during sixth grade? If

¹ The due process request was made pursuant to 20 U.S.C. §§ 1400-1482 of the IDEA and its implementing regulations codified in 34 C.F.R. §§ 300.1- 300.818 and the parallel state regulation found at 22 PA Code Chapter §§14.101 *et seq.* [redacted].

² I carefully considered the record of this hearing in its entirety. After reviewing the record and the exhibits, I now find that I can make credibility determination necessary to make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the IDEA denial of a FAPE issue or in the alternative [redacted]. Hearing Officer Exhibit # 1 (HO #) is a copy of the hearing officer's opening statement. References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number.

the District did deny the Student, a free appropriate public education is the Student entitled to an award of compensatory education?

2. [redacted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth Grade IEP

1. On or about February 16, 2016, at the conclusion of the Student's fifth grade school year, the IEP team proposed and the Parents agreed that starting in sixth grade [the 2016-2017 school year] the Student would spend more time in regular education with supports, services, specially-designed instruction (SDI) and accommodations (S#22).
2. The fifth to sixth grade IEP included a language arts goal, a math goal, a social skills/pragmatic language goal, an auditory processing goal, multiple social skills goals, speech therapy and occupational therapy services (S#22).
3. The annual goals, in the IEP, were measurable, the present levels of education performance were clear and each goal statement included a preset schedule to observe, measure and report progress. To support the Student in regular education and during the time with the special education teacher, the IEP included upwards of 11 different forms of specially-designed instruction (SDI). For example the SDIs called for the Student to receive frequent sensory breaks, structured social cognition activities, structured practice to improve problem solving, opportunities to self-monitor speech and social communications, structured practice to learn important visual details during social communications, extended time to take tests, practice to promote pragmatic language development and age appropriate responses to social language cues and interactions (S#25).

4. The February 2016, fifth to sixth grade IEP called for the Student to participate in an extended school year (ESY) summer school program including direct instruction in reading four days per week, for five hours per day, for one month (S#25, S-26, S-27).
5. The team recommended and the Parents agreed that by the end of fifth grade [June 2016] the Student's personal care assistant (PCA) would be faded out. The District offered and the Parents agreed that beginning in February 2016 of fifth grade and continuing until June 2016, of fifth grade, the Student would receive three 30-minutes sessions per week of special education learning supports in the resource room, one 30-minute session per week of speech therapy and consultative Occupational Therapy (OT). Thereafter, the District offered and the Parents agreed that beginning in September of sixth grade [2016-2017 school year], the Student would spend more time with non-disabled peers throughout the school day. The District offered and the Parents agreed that during sixth grade the Student would receive 30-minutes of speech one time per week, consultative OT for 15-minutes a month, weekly "Lunch Bunch/social skills class" a "Connection Class/learning support" for 22 minutes per day (S#22, S-23).³ The IEP also provided the Student could have frequent sensory breaks, opportunities for movement through the day, group and individual counseling, frequent sensory breaks, access to a question space an opportunity to take extended tests (S-17, S-20, and S-25).
6. At the conclusion of the February 2016 fifth grade to the sixth grade IEP meeting, the District provided the Parents with prior written notice,

³ Lunch Bunch is a social skills learning activity proctored by the guidance counselor. Connection Class was the name given to the class period the Student was scheduled to go the special education class.

in the form of a Notice of Recommended Educational Placement (NOREP). The NOREP described the proposed changes to the Student's fifth grade IEP and explained how the District would provide the Student with more time in regular education, implement the sixth grade IEP goals, referenced the SDIs, and provide social skills practice/support from the guidance counselor counseling, occupational therapy (OT) and the speech/language services (NT pp. 374-386, S#25, S-26, S#28).

7. The Student attended 15 out of the 19 ESY 2016-2017 summer sessions. The ESY staff collected data and reported the data to the Parents (S#27). They ESY data indicated steady growth (S-27).
8. At the conclusion of fifth grade, the Student was promoted to sixth grade. The end of year report card indicated the Student earned As and Bs (NT *passim*, S-26, S-27, S-28).

The October 2016 IEP Meeting

9. In the fall of 2016, the teacher sent the Student's IEP home, in the Student's homework binder, in an unsealed and unmarked envelope. After reading the IEP, the Student became anxious about being a person with a disability, the goals in the IEP and the SDIs. The Parents informed the teacher and the assistant principal about the Student's feelings, the emerging anxiety and requested the staff pay extra attention to the Student's concerns (NT *passim*, NT pp.54-60, 341-343).
10. Beginning in mid-September and continuing through December of 2016, of the sixth grade, the Parents learned that the Student was anxious in school, talked out in class, displayed inappropriate interactions with peers and adults, had problems concentrating in

school, and began to display executive functioning skill deficits like completing and turning in homework (NT pp.37-44).

11. Believing that the Student's concentration and executive functioning concerns were related to the Student's autism diagnosis and the emerging anxiety, the Parents requested and the District agreed to schedule an IEP team meeting (P-4, NT. pp.37-44, S##31-33, S#38)
12. On or about October 17, 2016, the Parties met and reviewed the Parents' concerns and suggestions for additional SDIs. While the team rejected several of the Parents' requests, the IEP team did revise the IEP made changes to the Student's present levels of educational performance, updated the Parents' IEP input statement, updated the statement describing the Student's executive functioning deficits and updated/modified the then existing SDIs (SD#30). For example, the SDIs' now included the use of an "exit ticket", visual reminders, a designated homework folder, an opportunity for extra support after school, the use of metacognitive strategies to promote concentration and reduce anxiety statements, allowing the Student to access the locker during class time, clear rubrics for major assignments with evaluation criteria, and homework SDI allowing for a one day grace period to turn in all assignments (SD#38 p.14-16, P-4, NT. pp.37-44, S##31-33).

The November 17, 2016, IEP Meeting

13. On or about November 17, 2016, the IEP team met to review the Student's progress. Prior to the November 17, 2019, IEP meeting, the Parents forwarded an email raising two new concerns. First, the Parents complained that the Student was missing music lessons due to performance issues in language arts and social studies classes. Second, the Parents expressed concerns that although they asked for

an IEP meeting, the previous meetings lacked the formality of an IEP meeting (NT *passim*).

14. During the meeting, the IEP team offered and the Parents agreed to modify the Student's present levels of educational performance and the SDIs. To improve learning, concentration and behavior the SDIs were updated to include the following strategies, a chunking strategy was added to group related concepts, the use of an "exit ticket" was updated to summarize classroom work that was initiated and homework expectations, the grading rubric for major assignments was updated, the staff also agreed to encourage the Student to take frequent sensory breaks, additional sensory activities like Velcro strips were attached under the Student's desk, the SDI's now included targeted one-on-one time with guidance counselor to work through feelings of anxiety and social interactions, small group instruction in [foreign language class] was an option, the staff agreed to remind the Student when to participate in [music] class, and the Student was encouraged to use online notes when the Student missed class due to participation in [redacted] music class (S#38 p.4, NT pp.384-408).
15. Also, during the IEP meeting, the IEP team offered and the Parents agreed to increase the Student's time with the speech therapist, while the time with the learning support special education teacher stayed the same. Once the IEP/SDI revisions were agreed upon the regular education, staff were updated and began to implement the changes in all classes (NT *passim*).
16. Through the months of October, November and December the Parents and the teachers exchanged multiple emails about the Student's social, emotional, and behavioral troubles, completion of homework assignments, classroom performance/behavioral issues and the

Student's test and quiz scores (P## 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, S-22, 2-29, S-30-34).

17. Late in November 2016, the Parents told the teachers that they believed the strategy of having the Student, stay in from recess and stay after school to complete all missed work was taking a toll of the Student's well-being. In one, email, the Parents told the teachers "[Redacted] is breaking down about having to "fix" classwork [not completed during the day] at night..." [Redacted] also has to go after school every day this week to work on things that were not completed on done incorrectly in class." P#9 p.1).
18. Beginning in November 2016 and continuing throughout the remainder of the school year, to improve classroom performance, teach perspective taking, improve social/pragmatic language cue recognition, and decrease the Student's blurting out answers to questions the staff began to use the "Think it Through" sheets and other visual aids, like "Red and Green" cards (P#10, 12, 13, 14, 18, 19, 20, 22, 23, NT 57-62).⁴
19. The Student's November 2016, IEP progress monitoring states the Student was making satisfactory progress on all IEP goals. Likewise, the Student's report card grades were in the solid A+ to B range. The progress monitoring report and report card grades did not address the

⁴ The "Think it Through" sheets required the Student to answer a series of questions, wherein the Student was expected to describe how the Student could have better handled a particular social situation. The "Red Card Green Card" strategy was a visual aid initiated to teach mindfulness, reduce blurting out responses and/or teach perspective taking. The Parents contend that these SDI strategies and others were causally connected and directly contributed to the Student's anxiety.

severity or frequency of the emerging anxiety, social, emotional, or behavioral concerns (P#10).

The January 2017 Request to Reevaluate

20. After a review of the existing data, upon returning from winter break, the IEP team decided and the Parents agreed to complete a comprehensive reevaluation of the Student's educational, behavioral, emotional, language, sensory and speech needs and circumstances. To collect real time antecedent, behavior and consequence data the team recommended and the Parents approved the use of functional behavioral assessment (FBA) to gather the data (S##37-47).
21. On or about February 17, 2017, the District provided the team with a copy of the reevaluation report (RR). After being in school for more three quarters of the school year, the Student's grades were in the solid A+ to B range. For example, in [foreign language class], the Student earned a B- plus while in Social Studies, the Student earned an A+. The comments note the Student is "Never absent" and "never late." The teachers reported and the Parents agreed that by February 2017, the Student continued to have difficulty in managing socially appropriate classroom situations with peers and adults, staying focused and completing assignments (S#43 pp.6-7).
22. The FBA notes intermittent inappropriate behaviors like blurting/talking out in class, generalized non-compliance and off task behaviors like excessive pencil tapping (P#28). Overall the examiner/observer noted that the Student engages in inappropriate behavior to gain attention and "spotlight" the disruptive behaviors (SD#38 pp. 8-10, P#28).
23. The RR summarized the Student's scores on the Woodcock Johnson III Test of Achievement Form C, (Woodcock Johnson). The Student's

Woodcock Johnson achievement score ranged from the very advanced, standard score (SS) of 158 at the 99.5 percentile in reading fluency to an average score of 100 at the 50th percentile in writing fluency.

Overall on the Woodcock Johnson, the Student earned three very advanced standard scores (SS); nine advanced SS, two advanced to average scores and two average scores. Six of the Student's SS were at the 99th, five other scores were above the 99th percentile, one score was at the 75th percentile and three scores were between the 50th and the 52nd percentile (S#43 p.13).

24. As part of the RR, the speech therapist administered three different speech and language assessments. On the Social Language Development Test-Adolescent, a measure of the Student's ability to make social interpretations and to interact appropriately with peers, the Student scored within the below average range with SS ranging from 75 to 90. This type of SS profile indicates the Student struggles to understand and react to the social nuances in language. For example, when asked what the phrase "barking up the wrong tree," meant, the Student response indicated a dog was barking at a tree; when provided feedback about what the phrase actually meant, the Student, in a surprised voice, responded "I'm shocked, this is sarcastic news" (S#43 p. 16).
25. On the Social Thinking Dynamic Assessment Protocol, as an assessment of social and pragmatic language, when the therapist asked the Student a series of interview type questions the Student's pattern of responses demonstrated that while the Student could formulate grammatically and syntactically correct sentences, oftentimes the questions and response were inappropriate for the situation or the audience (S-43 pp.16-17).

26. On the Pragmatic Language Profile of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), which assesses the Student's understanding of appropriate verbal and nonverbal pragmatic language in a functional setting, the Student earned a scaled score of 1. Persons who earn a scaled score of 1 almost never appropriately begin, maintain, or end topics of conversations or maintain eye contact (S#43 pp.18-19).
27. After reviewing the existing data and without performing any new specific assessment protocols, the OT reported that the Student displayed sensory deficits that required OT sensory based supports, frequent sensory breaks and ongoing OT services (S#43 p.20).
28. The RR examiner/evaluator then administered the Social Skills Improvement System (SSIS). The SSIS rating scales enables targeted assessment of individuals and small groups to help evaluate social skills, problem behaviors, and academic competence. On the SSIS the Student's earned a score of 90, at the 28th percentile in the average range. The examiner noted that due to the Student's pattern of responses, the SSIS score of 90 should be viewed with caution.
29. On the Beck Youth Inventories, a set of five scales assessing depression, anxiety, anger, disruptive behavior and self-concept, the Student earned a SS of 58, which indicates a mild level of anxiety (S-43).
30. On the Behavior Assessment Scale for Children, Third-Edition (BASC-3) assessing broad areas like externalizing behaviors, internalizing behaviors and behavior symptoms, the Student earned a composite Externalizing Problematic Behavior subscale T-Score of 56 at the 79th percentile. The Student's T-score falls in the at-risk range for hyperactivity or aggression. On the Internalizing Problematic Behavior

subscale, the Student earned a composite T-score of 65, which suggests an elevation in feelings of anxiety, depression and somatization (S-43).

31. On the Behavior Assessment System for Children, Third Edition (BASC-03) School-Related Problematic Behavior subscale, the Student earned a significant subscale T-score of 71 at the clinically significant range. Adaptive behavior was assessed across five broad areas, adaptability to new situations, social skills, leadership skills, activities of daily living/study skills and functional communications.
32. Based upon the mother's endorsement on BASC-3 School-Related Problematic Behavior subscale, the mother rated the Student as displaying moderate rates of anxiety. The Mother's rating relates to the Student's interaction in the school environment and how those interactions affect the Student's ability to self-regulate (S-43).
33. The Student's overall BASC profile is consistent with a diagnosis of autism spectrum disorder (S#43 pp.23-25).
34. After summarizing the then existing data, the RR concluded with a series of 17 teaching/learning, speech, OT and behavioral recommendations/SDIs including but not limited to the following: (a) a PCA to provide a consistently implemented positive behavior support plan, (b) scheduled sensory breaks with access to private space for emotional regulation and sensory breaks, (c) development of a positive behavior support plan, (d) access to a computer for writing assignments, (e) group and individual counseling, including weekly sessions and daily check-ins to work on social skills coping skills, and emotional regulations, and (f) continued speech therapy (S#43 pp.27-28).

35. The Student's January 2017, Progress Monitoring report indicates steady growth and satisfactory progress across all goals and the regular education curriculum (S#38).

The February 15, 2017, and the March 29, 2017, IEP Meeting

36. On February 15, 2017, the IEP team, including the Parents met from 7:45 am to 9:15 am to revise the IEP; realizing that more time was needed to develop the IEP the team agreed to reconvene on March 29, 2017. On March 29, 2017, the IEP team once again reviewed the then existing classroom data, progress monitoring data. After reviewing the RR, the team also decided to include all of the assessment data from the RR into the present levels of the IEP. After reviewing and discussing all of the data, the team then decided and the Parents agreed to continue the IEP goals addressing reading comprehension and the math goal to solve multi-step problems. The speech therapist recommended and the Parents agreed to reduce the IEP speech and language goals from seven language based goals to two goals targeting pragmatic/social language goals. After reviewing the FBA data, the team recommended and the Parents agreed to add a positive behavior support plan (PBSP), with the antecedent, replacement behavior, and consequence data as a new standalone SDI. The team decided and the Parents agreed to increase the SDIs from the previous 17 to 27 (S-42, S-43, S-46). The IEP team then discussed and the Parents agreed the Student was eligible to receive ESY services (S-46).
37. On February 15, 2017, the District issued a NOREP describing the changes to the IEP, including, a detailed offer for ESY program. The ESY offer included speech therapy two times per week, OT services

one time a week and a social skills class two times per week. The NOREP also described the changes to the school year IEP including but not limited to an increase in OT time, an increase in speech therapy time, learning support to address the academic concerns and the additional of autistic support services to target the social, emotional and behavioral needs (S-53, S-46).

38. The Parent returned the NOREP on May 4, 2019, and requested an informal conference. On or about May 23, 2019, the District held an IEP meeting. At the IEP meeting the District reviewed the Parents' specific concerns about the Student's anxiety, the "Think it Through" sheets, the "exit ticket," "Red card Green Card" SDIs and discussed the additional SDIs targeting attention, completion of homework assignments, reduction of anxiety, small group instruction, the PBSP, the speech therapy, OT support, the ESY program, the social skills intervention, participation in band class, the Student's desire to take a foreign language, the regularly scheduled contact with the guidance counselor, the IEP academic goals and the Student's participation in the regular education classroom(S-53, S-46).
39. At the conclusion of the May 2017 IEP meeting, the District issued and the Parents agreed to a revised NOREP approving the IEP with the caveat that due to a conflict with [music] camp the Student would not attend the entire ESY program (S-55, S-56, S-57). When the meeting ended, the Parents accepted the IEP and the District began to implement the May 2017 IEP for the remainder of the school year ((NT *passim*, S-55, S-56, S-57).
40. At the end of sixth grade, the District provided the Parents with a copy of the Student's report card and IEP progress monitoring data. The Student earned one grade of A+, four grades of B+, and one B. The teacher comments, on the report card state the Student "works well

independently, “strives for excellence” and is “respectful and cooperative”(S-59). The special education teacher reported that the Student knew all of the math formulas and earned a grade of 100% on a formula quiz. The speech therapist reported although the Student needed “reminders” to make eye contact the Student’s pragmatic language skills were improving (S-62). The speech therapist also reported the Student was engaged and working diligently on the new IEP goals (S-61). The reading teacher reported the Student’s reading quiz scores were improving (S-62). Overall the Student’s behaviors were trending upwards and the Student was making steady progress in all areas of unique need (S-62). As expected, the Student was promoted to seventh grade (NT *passim*).

[Section Redacted]

41. The Parents filed the instant Complaint on October 11, 2018. The initial hearing session was cancelled to allow the Parties additional time to discuss a resolution. Additional sessions were scheduled and cancelled when Parents’ counsel had a family emergency; thereafter, the Parents discharged the attorney and proceed *pro se*. Five sessions were scheduled after which the Parties made oral closing statements. Due to scheduling conflicts, the Decision Due Date was extended for a good cause upon the Motion of the Parties (NT *passim*).

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF IN IDEA [redacted] DUE PROCESS HEARINGS

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party

seeking relief *Schaffer v. 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 rests with the party, who requested the hearing. In IDEA disputes, the hearing officer applies a preponderance of proof standard.

CREDIBILITY DETERMINATIONS

Hearing officers, as fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer now finds the District's witnesses and the Parents' testimony credible and essentially consistent with respect to the actions taken or not taken by the team in evaluating, instructing and reevaluating the Student's eligibility. I will, however, as explained below, 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, implemented the Student's IEP, or monitored the Student's progress.

GENERAL IDEA EVALUATION AND FAPE PRINCIPLES

The IDEA was enacted to ensure that all children with disabilities have access to "[a] free appropriate public education (FAPE). *H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.*, 873 F.3d 406, 408 (3d Cir. 2017). A FAPE consists of specially-designed instruction that meets the unique needs of a disabled student. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 755-56 (3d Cir. 1995). A FAPE also requires that children with disabilities are educated in the least restrictive environment (LRE) so that, to

the maximum extent possible, children with disabilities are educated in the same school as their nondisabled peers. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995). The primary mechanism for delivering a FAPE is through an IEP. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 65 (3d Cir. 2010). An IEP is a written program that outlines the child's level of functioning, sets forth measurable goals, describes the specially-designed instruction (SDI) and related services to be provided, and establishes objective criteria for evaluating progress. *C.H.*, 606 F.3d at 65.

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 a disability special education and related services "in conformity with the [child's] individualized education program." *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." *Rowley*, 458 U.S. at 206-07); see also *Andrew F.*, 137 S. Ct. at 999.

Violations of the IDEA are categorized either as procedural or substantive. A procedural violation occurs when a district fails to abide by the IDEA's procedural 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. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017), but the IDEA does not guarantee "the absolutely best or 'potential-maximizing' education." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). The measure and adequacy of an IEP can only be determined as of the time it is offered to the Student, [a.k.a. "the snapshot rule"] and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). In Pennsylvania, when disagreements arise about a FAPE a due process hearing is held before an impartial hearing officer whose decision is final and binding on the parties. 22 Pa. Code Chapter 14 *et seq.* Any party aggrieved by the hearing officer's final order may appeal the decision in either federal or state court. 20 U.S.C. § 1415(i)(2).

DISCUSSION AND ANALYSIS

THE PARENTS' IDEA CLAIMS AND THE DISTRICT'S RESPONSE

The Parents contend the Student was denied a FAPE, in sixth grade, when the IEP team failed to take into account the Parents' input describing

how an increase in the Student's anxiety interfered with the Student's education. The Parents point to multiple events, like the Student's reading of the IEP or the implementation of the "Think it Through" sheets as either causing or increasing the Student's anxiety. Simply stated, they contend the behavioral/anxiety related SDIs in the IEP did not work and/or proximately caused a denial of or substantially interfered with the Student's FAPE. The District argues that at all times relevant they offered and provided a FAPE. As the District modified the Student's IEP, at the Parents' request, on several occasions, I will review each offer of a FAPE for substantive and procedural compliance with the applicable legal IDEA standards.

While I agree with the Parents that many of the events they complain about did in fact occur, I disagree with their factual and legal conclusions that any of the complained of events denied the Student an IDEA FAPE. Therefore, for all of the following reasons, I now find in favor of the District on all IDEA claims. [redacted]

THE DISTRICT OFFERED AND PROVIDED THE STUDENT WITH A FAPE IN FIFTH AND SIXTH GRADE

At the conclusion of fifth grade, the District proposed and the Parents agreed that the Student no longer needed the support of a one-on-one aide. The proposed IEP included objectively stated the Student's present levels of education, included measurable goals and a schedule to monitor progress. The sixth grade IEP also included 11 different SDIs. The SDIs included frequent sensory breaks, structured social activities, structured practice to improve problem solving, opportunities to self-monitor speech and social communications and structured practice to learn important visual details during social communications. The proposed IEP included specific SDIs and instruction to promote pragmatic language development and age appropriate responses to social language cues. All of the SDIs and goals were

individualized; the goals were ambitious and the present levels and the goals targeted the Student's then known needs and circumstances.

The District also offered and the Parents agreed the Student should attend the District's four week ESY program. The ESY goals were individualized and targeted the Student's needs. The progress reports issued at the closed of the fifth grade school year and the ESY progress reports indicate the Student made steady and meaningful progress across all areas of unique need. The fifth grade end of year regular report card grades and progress monitoring data corroborate the Student's meaningful progress, with and without SDIs in the regular classroom.

At the conclusion of the fifth grade to sixth grade IEP conference, the District provided the Parents with prior written notice describing the proposed changes to the Student's IEP, the SDIs and related services. The Parents agreed to the proposed changes and the Student was promoted to sixth grade.

After reviewing the transcript and after studying the fifth to sixth grade IEP goals, the SDIs and the then available progress monitoring data I now find the proposed sixth grade IEP was reasonably calculated, when offered, to provide the Student a FAPE in the least restrictive setting. At all times relevant from February 2016 through September of 2016, the District complied with all relevant IDEA and state substantive and procedural requirements. Therefore, the Parents IDEA based denial of FAPE claim is denied.

THE OCTOBER 2016 AND NOVEMBER 2016 IEP REVISIONS AS OFFERED AND IMPLEMENTED PROVIDED A FAPE

In the fall of 2016, the teacher sent the Student's IEP home, with the Student, in the Student's homework binder, in an unsealed and unmarked envelope. After reading the goals and the SDIs, the Student became anxious

about being a person with an autistic disorder. The Parents informed the teacher and the assistant principal about the Student's feelings, the emerging anxiety and requested the staff pay extra attention to the Student's concerns. Thereafter beginning in mid to late September and continuing through December of 2016, of sixth grade, the teachers reported and the Parents agreed the Student was anxious, struggled to maintain focus, talked out in class, displayed inappropriate interactions with peers and adults, and had difficulty completing and turning in homework. Believing that the Student's concentration and executive functioning concerns were related to the Students' autism diagnosis and the emerging anxiety, the Parents requested and the District agreed to schedule multiple IEP team meetings. In mid-October 2016 and then again in November 2016 the Parties met, reviewed and updated the Student's then current IEP. Although the IEP team rejected several of the Parents' suggestions, the IEP team did revise and the Parents agreed to changes describing the Student's present levels of educational performance, updated the Parents' input/concerns, updated the statement describing the Student's executive functioning deficits and modified several of the SDIs.

To ensure the Student was learning how to plan and complete assignments, a designated homework folder was added, the SDIs were updated to include the use of visual reminders and the staff also offered to provide extra support after school. For the first time, the SDIs' included metacognitive strategies to promote concentration and reduce anxiety like statements. To decrease the Student's emerging anxiety, the Student was encouraged and permitted to go to the locker during class time to check for missing homework. To reduce test anxiety, the teachers at the Parents' request began to use clear rubrics for major assignments with evaluation criteria. Finally, to reduce anxiety/stress, the SDI's included a one day grace period to turn in all assignments. I now find the October 2016 and

November 2016 IEP changes were procedurally and substantively responsive to the Student's present levels, circumstances and unique needs.

Assuming *arguendo*, the teacher's inadvertent disclosure of the IEP is a procedural violation, once known the multiple revisions to the IEP, thereafter, negated the error. 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.* at 592 F.3d 953. While I acknowledge, an error occurred, in light of the Student's grades, the changes to the IEP/SDIs, I now find the Parents failed to muster preponderant evidence that the Student suffered a deprivation of "educational benefits." Likewise, I also find while an error occurred the error did not seriously infringe upon the Parents' opportunity to participate in either the IEP or FAPE process. When the record is viewed as a whole, I also find the error does not rise to a substantive violation of the IDEA. At all times relevant, the District, revised its offer of FAPE taking into account the Student's then known and existing needs and circumstances.

While I agree with the Parents that the "Think it Through" sheets in hindsight were ineffective, the case law warns the Parties and this hearing officer that the insight gained from the arm chair of a "Monday Morning" quarterback is not the applicable FAPE standard. When formulating an IEP, the "snap shot" view not the argued for hindsight view is the applicable standard. See, *Rowley* and *Endrew*. The SDIs, the goals, and the PBSP were responsive to the Student's then existing needs. The related services of speech therapy and OT supported the acquisition of measurable IEP goals. The staff were trained, were aware of each IEP revision and implemented each agreed upon IEP as designed.

At all-times relevant from September through November, the District and the Parents openly communicated about their shared vision to improve

the Student's circumstances. The description of the Student's present levels and the goals were measurable and responsive to the Parents' concerns and the Student's needs. The IEP team openly accepted and acted upon the Parents' input. Contrary to the Parents' position, the progress reports, the advancement to the next grade and the honor roll report card grades prove the student received a benefit. While sixth grade presented the Student with numerous social skills and pragmatic language challenges, the revisions to the IEP promptly targeted SDIs, modifications, services and interventions/goals to address the Student's then current needs and circumstances. IEPs are not expected to produce "the absolutely best or 'potential-maximizing' education" therefore, based upon a review of the existing data, available at the time the IEPs were proffered, and I now find the District provided the Student a FAPE in the LRE. See, *Rowley, Endrew F. and Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). Accordingly, the Parents' denial of FAPE claim is denied.

THE JANUARY 2017 IEP MEETING AND THE JANUARY REEVALUATION

Upon returning from winter break and after reviewing the existing data, the IEP team offered and the Parent agreed to collect supplemental normed referenced assessment and behavioral data. Consistent with the applicable standards, the comprehensive reevaluation included an individualized assessment of the Student's academic performance and included Parent/teacher input, a classroom observation, updated speech/language test results and an OT review of the records. The District offered and the Parents also agreed that the team should complete an FBA and collect Parent and teacher behavioral rating data.

The results of the FBA note intermittent inappropriate behaviors like blurting/talking out in class, non-compliance and excessive pencil tapping

interfered with the Student's learning. The norm referenced ability testing, on the other hand, indicated average to "very above average" performance. Although the achievement testing indicated strong reading and math performance, the team recommended and the Parents agreed the Student would benefit from targeted math and reading supports. The RR data collection/assessment process and testing included a variety of assessment tools. The assessments were administered and scored according to the test makers instructions. The RR included the Parents' input and the testing was completed in a timely fashion; therefore, I now find the reevaluation was a comprehensive assessment of the Student's needs in all areas of suspected disability.

THE MARCH 2017 IEP WAS APPROPRIATE

On March 29, 2017, after reviewing the RR data, the team again modified the IEP, this time targeting reading comprehension and solving multi-step math problems. The team also decided, after reviewing the Student's speech data, to reduce the number of speech and language goals from seven goals to just two goals. The two new goals targeted pragmatic language, while the PBSP, with the antecedent, replacement behavior, and consequence strategies targeted blurting out. The new SDIs addressed the social, emotional, and anxiety related behavioral concerns. The IEP included supports from the autistic support teacher, the guidance counselor and increased the role of the OT and sensory breaks. The IEP team discussed and the Parents agreed the Student was eligible to receive ESY services.

The IEP team recommended and the Parents agreed that the revised IEP should include a targeted PBSP with antecedent, replacement and positive consequence strategies to address the social, emotional/anxiety and pragmatic language needs. The RR provided the IEP team with academic, behavioral, social and emotional baseline data that enabled the IEP team to

establish clear present levels of performance and measurable goals. Although the Parents argue the Student was experiencing high levels of anxiety, the Beck, the BASC and the SSIS indicated the opposite. The Mother's own RR input stated that the Student was experiencing a "moderate" not high level of anxiety. The Mother's rating, in conjunction with the other data, seriously undermines the Parents' anxiety based denial of FAPE arguments. Contrary to the Parents' contentions, the FBA and the behavioral checklists did not confirm the Parents' causation arguments that the source of the anxiety was the "Think it Through" sheets and/or the reading of the IEP. The working hypothesis in the FBA and the PBSP and the subsequent data instead linked the Student's blurting out, anxiety and social problems to attention seeking and pragmatic language difficulties. Curiously, the Parents never explained why they agreed with the working hypothesis in the FBA and the PBSP about the source of the anxiety yet continued to cling to the SDI or the teacher disclosure anxiety based arguments. The FBA and the Parent/teacher behavioral rating data provided the IEP team with measureable baseline data to design an individualized PBSP.

The Woodcock Johnson achievement data added additional perspective on how the Student's autism was limiting the Student's day-to-day academic performance in math and reading. The speech data and IEP goals offered the team specifics on how to address the Student's autism related pragmatic language social skills needs. The RR provided and the IEP team incorporated many, if not all of the 17 recommended SDIs/accommodations.

In response to the Student's academic, speech/language, sensory and episodic emotional and anxiety concerns the reevaluation/IEP team offered and the Parent agreed to add 17 SDIs interventions/strategies to address the Student's then current, academic, speech, sensory, behavioral/anxiety related needs. In short, the team decided and the Parents agreed that the

Student needed to learn how to manage the day-day-to-day nuances of social encounters and pragmatic language.

The subsequent NOREP thoroughly described the changes to the IEP, including, an offer for ESY supports, including speech therapy two times per week, OT one time a week and social skills class two times per week. The NOREP also described the changes to the school year IEP including but not limited to an increase in OT time, an increase in speech therapy time, learning support to address the academic concerns and the additional of autistic support services to target the social, emotional and behavioral concerns. When the Parents returned NOREP, some three months later, and requested an additional meeting, the team promptly met to discuss the Parents concerns. The evidence is preponderant the revised IEP addressed the specific concerns set forth in the RR. The team discussed and the Parents approved the SDIs targeting attention, completion of homework assignments, small group instruction. The offered SDIs and services like the PBSP, the speech therapy, the OT support, the ESY program, the social skills intervention with the guidance counselor, participation in band class, the Student's desire to take a foreign language and the targeted academic goals offered the Student a FAPE in the LRE.

At the conclusion of the IEP meeting, the District issued and the Parents agreed to a revised NOREP approving the IEP with the caveat that due to a conflict with [music] camp the Student would not attend the entire ESY program. When the meeting ended, the Parents accepted and the District began to implement the May 2017 IEP.

Several weeks after the IEP meeting, at the end of sixth grade, the District provided the Parents with a copy of the Student's report card and IEP progress monitoring data. The report card states and the Parents agree the Student earned one grade of A+, four B+ grades and one B. The report card grades establish that the Student, despite the social skills deficits and

pragmatic language problems made the honor roll. The teacher comments state the “works well independently, “strives for excellence and is “respectful and cooperative” (S-59).

The special education teacher reported that the Student knew all of the math formulas and earned a score of 100% on a math quiz. The speech therapist also reported although the Student needed “reminders” to make eye contact the Student’s pragmatic language skills were improving. The speech therapist also reported the Student was engaged and working diligently on the new goals. The reading and the math teacher reported the Student’s quiz and test scores were improving. Overall, by the end of the year, the Student’s social skills were trending in a positive direction and the Student was making steady progress in all areas of unique need. Accordingly, I now find the District offered and provided the Student a FAPE.

[Section Redacted]

CONCLUSION

At all times relevant during the Student’s sixth grade year the District offered and provided the Student with a FAPE. The Parents’ IDEA denial of FAPE claim and request for compensatory education is denied. [redacted]

ORDER

AND NOW, this 28th day of June 2019, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows.

1. The Parents’ claims that the District denied the Student a FAPE, within the meaning of the IDEA, during sixth grade are **DENIED**. Parents claim for compensatory education is also **DENIED**.
2. [redacted]

It is **FURTHER ORDERED** that any claims not specifically addressed by this Decision and Order are denied and dismissed

Date: June 28, 2019

Charles W. Jelley, Esq.LL.M
Special Education Hearing Officer
ODR File # 21295-18-19