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

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Number:
23501-19-20

Child's Name:
R. W.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Charles W. Jelley Esq.

Date of Decision:
10/28/2020

INTRODUCTION

This special education due process hearing was requested by the Parent, on behalf of the Student, against the District.[1] The Student has a variety of disabilities, including Dyslexia, Oppositional Defiance Disorder, Attention Deficit-Hyperactivity Disorder, Emotional Disturbance, and Anxiety. The Parent contends the District failed to provide the Student with an appropriate education in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.,* during the moths of September, October, November 2019 and part of January 2020. At all relevant times, the District, on the other hand, argues it complied with all procedural and substantive requirements of the IDEA.

There are very few relevant outcome-determinative facts in dispute. This is not surprising, given the short time frame from September 2019 to January 2020. Despite the apparent lack of any substantive factual disagreement, all evidence — both documents and testimony — was carefully considered. I make findings of fact, however, only as necessary to resolve the IDEA issues before me. Further, there was some overlap between the Parent's exhibits and the District's exhibits. In those instances, I refer to only one copy of the document. Consequently, not every document entered into evidence is referenced herein. The factual statements in this Decision constitute the written findings of fact required and conclusion of law required by the IDEA and state law. (20 U.S.C. § 1415(h)(4), 22 PA Code Chapter 14.162).

For the reasons discussed below, I find in favor of the District.[2]

[1] The Parents claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 CFR §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.,), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

[2] After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make

STATEMENT OF THE ISSUES[3]

1. Did the District deny the Student a free appropriate public education when the Student went home early after being restrained? If yes, is the Student entitled to compensatory education?

2. Did the District deny the Student a free appropriate public education when the Student went home, after being restrained, without homework? If yes, is the Student entitled to compensatory education?

3. Did the District deny the Student a free appropriate public education when it failed to provide homebound instruction? If yes, is the Student entitled to compensatory education?

4. Did the District deny the Student a free appropriate public education by not identifying the Student vision needs? If yes, is the Student entitled to compensatory education? (N.T., pp.6-18).

FINDINGS OF FACT

THE STUDENT ENROLLS IN THE DISTRICT

1. Prior to the 2019-20 school year, the Student was enrolled in and attended a local charter school. (N.T., pp.264-266, S-5).

2. In a reevaluation performed by the charter school, the Student was determined eligible for special education services under the primary disability category of Emotional Disturbance with secondary disability categories of Other Health Impairment related to a diagnosis of Attention Deficit Disorder and a Specific Learning Disability in reading. The charter school reevaluation noted behavioral health diagnoses of Oppositional Defiance Disorder and Separation Anxiety Disorder. (N.T., p. 266, P-1, P-2 and S-28).

3. On August 21, 2019, an individual education program (IEP) team meeting was convened with a Parent in attendance. The Parent requested that Student be

Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issue(s) in dispute.

[3] At the beginning of the hearing, the issues were clarified consistent with *J.W. v. Fresno Unified School Dist.,* 626 F.3d 431, 442-443 (9th Cir. 2010), *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. While on the record Parent's counsel conceded that the Parent was not challenging the design or the implementation of the October 2019 IEP during the school day. (N.T., pp.16-18).

assigned to an approved private school. Because Student's IEP from the charter school did not support a restrictive placement, the team determined that the Student would commence the school year with an educational placement at a local elementary school. At the same time, the District proposed and the Parent approved a reevaluation. (N.T., pp.81-83; pp. 64-266; Exhibits S-5, S-28 and S-29).

THE STUDENT WAS PHYSICALLY RESTRAINED IN SEPTEMBER AND OCTOBER

4. On or about August 21, 2019, the Parent and the District staff met to discuss the Student's enrollment. Initially, the mother asked the District to place the Student in an approved private school. After reviewing the transfer school records, the Parties agreed the Student would attend a local neighborhood school receive Supplemental Emotional Support for part of the school day. The District offered and the Parent agreed to conduct a reevaluation. (S-27)

5. Prior to enrolling and after enrolling in the District, the Student participated in the Wilson Reading Program for decoding and fluency instruction and the Wonders curriculum for the other aspects of the reading curriculum. (S-28). The mother requested and the District agreed to provide Wilson reading instruction.

6. On September 18, 2019, the Student entered the school with the Parent at approximately 11:00 am. The Parent requested to speak with the Principal concerning the presence of the Director of Elementary Education at the school. According to Parent, the presence of the Director of Elementary Education causes the Student to suffer anxiety. The Student was present during the meeting, the Student became withdrawn during the meeting. The Principal and Parent encouraged the Student to put it aside, go to class and have a positive day. After the conversation was completed, the Parent left the school and the Student was moved to a chair in the front office hallway to wait for the Principal to escort the Student to class. When the Principal returned to the area, the Student was

found in a conference room under a sink, in a nearby room, [engaging in self-injurious behavior]. The Parent was contacted and returned to the school. The Student remained escalated and departed with Parent. (N.T., pp.24-28, p. 86; N.T., pp.194-198, 202-204, P-8).

7. On September 20, 2019, the Student became escalated after having an item taken. However, the Student was offered a variety of supports but was unable to de-escalate. The interaction escalated into the Student [engaging in disruptive behavior]. After being moved to a "calm down" room, the Student attempted to [engage in self-injurious behavior]. Once the Student began to [engage in self-injurious behavior], the Principal physically restrained the Student. The Parent was contacted and took the Student home at the Principal's request at 2:30 pm (N.T., pp. 29-31, P-8, S-4, and S-6). The scheduled end of the student day was 3:45 pm. (N.T., p. 192, N.T., pp. 205-208, Exhibit P-8).

8. On September 23, 2019, the Student was restrained for [self-injurious behavior]. Following the restraint, the Student de-escalated and finished the school day. (Exhibit S-6).

9. On or about on September 25, 2019, the Parent notified the District that the Student was diagnosed with a concussion. (N.T., p.83; Exhibit S-8). On or about October 4, 2019, the Parent furnished the District with a physician statement verifying the concussion diagnosis and instructions that "No trauma to the head or risk of trauma to the head." (N.T., p. 83; N.T., pp. 208-210, Exhibit S-8).

10. After the concussion diagnosis on September 25, 2019, the Student experienced difficulty completing a school day both due to emotionality issues and the symptoms of the concussion. The physiological symptoms of the Student's concussion included fatigue. (N.T., pp. 88-89, 97).

11. On September 27, 2019, the Student became escalated and engaged in potentially self-injurious behavior involving [redacted]. By the intervention of

the teacher, the Principal, the mother and the Student's family-based clinician, who were attending a meeting in the building, the Student was successfully de-escalated. Shortly after the mother and the clinician left the school, the Student's behavior escalated. When the Student's [self-injurious behavior] reoccurred, the Principal restrained the Student. The office contacted the mother, the mother returned to the school, when the Student de-escalated the Parent took the Student home at 1:30 pm. The District did not assign homework to the Student on that date and the Parent did not request work for the Student to complete at home. (N.T., pp.172-174, pp.210-214, p. 238, S-4 and S-6).

12. On September 18, 20, and 27, 2019, the Student was physically restrained for [self-injurious behavior]. On each occasion, the mother was called to help de-escalate the Student. On this occasion, like before the mother took the Student home, no homework was requested or sent home. (N.T., p.170, P-8).

13. On each occasion, when the Student was restrained, the District, in writing, provided the Parent with an "Incident Report" describing the restraint and invited the Parent to participate in an IEP meeting. On each occasion, the Parent and the District mutually agreed to waive the necessity of having an IEP meeting to discuss the IEP, the restraint or the need to modify the IEP. (P-8, p.1-13).

14. On or about October 11, 2020, the parties met and agreed on an IEP. The agreed on IEP called for the Student to receive instruction in reading, math and social, and coping skills in the Emotional Support Classroom. (N.T., p 158, S-28).

15. The Student received instruction in the subjects of science, social studies, music and computers in other regular education classrooms, with academic and behavioral forms of specially-designed instruction (SDI) supports. The IEP included multiple goals targeting reading, writing, behavior, self-regulation, coping and math. The IEP also provided that in the event the Student

behavioral self-regulation impeded participation in the regular education classroom, the regular education subjects would be taught in the Emotional Support Classroom. (N.T., pp.158-159).

16. The October 2019 IEP includes several pages of detailed forms of academic and behavioral SDI. In addition to the SDIs, the IEP called on the staff to check on the Student's emotional state at 9:30 am, 10:30 am, 11:20 am, 12:20 pm, 1:15 pm and 2:15 pm each day. (S-28, p.13). Additional checks could be added as needed. *Id.* The IEP listed specific positive antecedents, behavior and consequences (ABC) for appropriate and inappropriate behavior. *Id.*

17. The ABC behavioral portion of the IEP included a "Crisis" plan detailing when and how the staff should use physical restraint to prevent self-injurious behavior like [redacted]. (S-28).

18. On a typical day, when the Student was present, the Emotional Support classroom included a teacher and five students. The classroom included a designated calming down area called "Alaska." The cooldown space was a room within the Emotional support classroom. The walls were concrete; the floor was carpeted, the room included mats, a beanbag chair and a regular school chair. The walls of the room were not padded. (N.T., pp.212-215).

19. Since the Students' behavioral issues often were connected to starting and/or completing a task, the special education teacher did not regularly assign homework. (N.T., pp.159-160).

20. Classwork not completed during the school day resumed on the following school day. (N.T., pp.159-160).

21. In subjects other than reading, the special education teacher, at times, would send homework assignments. The IEP states that incomplete homework can be completed during the school day in either the emotional support or the regular education classroom. The IEP also states that the Student would not miss recess due to incomplete homework assignments. (N.T., p 162, S-28

p.36). The IEP neither includes nor excludes homework. *Id.* The SDIs included a provision that the Student's grade would not be reduced if work was sent home and not returned. (S-28 p.36).

22. During the months of September and October, the mother never requested that more work be sent home for the Student to complete. (N.T., p. 163).

23. The emotional support teacher was responsible for administering literacy and math instruction and assisted with direct instruction of social and coping skills. (N.T., p.158).

24. Initially, the Student grades ranged from 100% Reading: 100% Math, 34% and in Science 81% Social Studies; as the year went on, the Student's grades went down. (Ex. P-4).

25. At times the Student often exhibited anxiety over separation from mother. To accommodate the Student's anxiety, during the school day, the Student was permitted to communicate with the mother via text messaging on an iPad while in school. On several occasions, if the Student was significantly escalated, the Parent was contacted and came to the school to assist in de-escalating the Student. (N.T., p. 167-169, P-10).

26. At times a common antecedent to Student exhibiting negative behaviors was the direction to complete non-preferred academic tasks. On days the Student was restrained and left school early, the special education teacher did not believe it was appropriate to assign the Student academic work to complete at home. The purpose of the Student being released early was to facilitate de-escalation and coping skills. (N.T., p.170, S-28).

27. The special education teacher maintained an overall caseload of eleven students. (N.T., pp. 157, 170-172).

28. On October 9, 2019, Student was referred to the school nurse after complaining about not feeling well and asked to go home. After examination by the school nurse, the Student was sent back to the emotional support

classroom. After returning to the class, the Student became agitated by not being permitted to leave school. The Student's behavior then escalated. The Student [engaged in disruptive behavior] and attempted [self-injurious behavior]. When de-escalation techniques failed, the principal restrained Student to prevent [self-injurious behavior]. The Parent was contacted and took the Student home at 1:05 pm. The District did not assign homework to the Student on that date and the Parent did not request work for the Student to complete at home. (N.T., pp. 176-177, 214-217, P-8, S-4 and S-6).

29. On October 10, 2019, Parent attended a meeting, at the school, with the special education teacher and an educator from the Allegheny Intermediate Unit to provide input for the functional behavioral assessment (FBA). During the meeting, the Parent inquired about Student's status and asked that for Student to be brought to the conference room. The Student was taken out of an assembly to attend the meeting. When the Student entered the room, the Student and the staff expressed a concern that the noise from the assembly was distracting the Student. The Parent then decided to take the Student home. The Parent did not request and the teacher did not offer to send home academic work for the Student to complete at home. (N.T., pp.174-176; Exhibit S-30).

30. On October 11, 2019, the Parent provided a second note from the Student's physician stating the Student had a concussion. The report recommended that the Student reduce "cognitive (thinking) load" and attend school for half days during the week of October 14-18, 2019. Thereafter the Student should "then attempt to resume full days as tolerated." In accordance with the physician's instruction, the Student attended school half days during the week of October 14-18, 2019. (N.T., pp.218-222, S-8).

31. During the weeks of October 14-18 and October 21-25, the District did not assign homework to Student and Parent did not request work for Student to complete at home. (N.T., pp.177-179, pp. 218-220, S-8). During the week of

October 21-25, 2019, the District attempted to gradually extend the duration of Student's school day. On October 21, 22 and 24, 2019, the Student was unable to complete a full school day, expressed signs of fatigue, refused to do work and was released early. On October 23, 2019, Student completed a full school day. On October 25, 2019, the Student was absent from school. (N.T., pp. 91-92, N.T., pp. 177-179, pp.218-222, S- 4 and S-9).

32. On October 29, 2019, the Student became escalated and failed to respond to supports offered by the emotional support teacher. The Principal placed the Student into restraint when the Student engaged in [aggressive behavior]. The Parent was contacted and took the Student home at 2:00 pm. The District did not assign homework to the Student on that date and the Parent did not request work for the Student to complete at home. (N.T., pp.179-181, 222-224, P-8, S-4 and S-6).

THE NOVEMBER REQUEST FOR FULL-TIME HOMEBOUND AND THE REEVALUATION REPORT

33. On November 1, 2019, the Student was restrained for [destructive behavior] and attempting self-injurious behaviors. Following the restraint, the Student de-escalated and finished the school day. (N.T., pp. 180-181, pp.224-225, P-8, S-4 and S- 6).

34. On November 4, 2019, Parent emailed the District to advise that Student's treating physician was about to issue a third note recommending full-day medical homebound instruction due to Student's concussion and other acts of self- injurious behaviors. (Exhibit S-10).

35. On November 7, 2019, Student's treating physician completed a Physician's Statement Regarding Need for Homebound Instruction. The form recommended that Student receive 25 hours of homebound instruction for a period of eight weeks due to continued concussion symptoms. (N.T., pp. 225-226, S-11).

36. At the time the homebound form was completed, the Parent either prior to or

after the physician signed the homebound form added a notation to the physician's statement that the Student should receive 25 hours of homebound instruction per week. Since Student had exhibited difficulty completing a full school day following the concussion diagnosis in early October, the District doubted the recommendation; nonetheless, relying on the notation for 25 hours of instruction, the District posted the supplemental homebound teacher assignment for 25 hours per week of homebound instruction. No staff member responded to the posting. (N.T., pp. 65-66, pp. 226-229; pp. 269-272, S-11, and S-12).

37. On or about November 8, 2019, the District completed and provided the Parent with a copy of the reevaluation report. The report includes Parent and teacher input along with input from the school guidance counselor, the occupational therapist and the District psychologist. The report included multiple norm-based standardized assessments, checklist and achievement data. The report included an observation of the Student, a summary of the findings from a functional behavioral assessment (FBA) and a review of the Student's then-current positive behavior plan. (S-29).

38. On November 13, 2019, the Principal met with the Parent to discuss arrangements for Student's homebound instruction. At that meeting, the Parent indicated that 10 hours per week of instruction would be more appropriate. (N.T., pp.229-231, S-13). Following that meeting, the District disseminated a revised posting to school staff for a supplemental assignment of providing 10 hours per week of homebound instruction. No staff member responded to the posting. (N.T., pp.231-232, S-14).

39. While the District was soliciting teachers to accept the supplemental assignment of providing homebound instruction, the Principal coordinated the collection of school work from the Student's teachers to be completed while on homebound. Materials were received and provided to the Parent. (N.T., pp.181-182, p.187, pp.232-234, S-15).

40. When no District teacher accepted the second posting of a supplemental assignment of providing homebound instruction, the District engaged a third-party provider to provide 10 hours per week of one-on-one instruction to Student at its facility consisting of 3 hours per week of reading instruction (using a multi-sensory, Orton-Gillingham/Wilson approach), 3 hours per week of math instruction, 2 hours per week of social studies instruction and 2 hours per week of science instruction. (N.T., pp.133-138, pp.147-150, pp.234-235, pp.274-276, S-17).

41. The dates and times on which the Student was to receive instruction at the private facility were to be scheduled directly between provider and Parent. (N.T., pp.133-138, pp.147-150, pp.234-235, pp. 274-27, S-17). At no time did the District cancel any homebound session or direct the private provider to provide less than 10 hours of instruction per week to Student. (N.T., pp. 150-152, pp.277-280, S-21).

42. The District provided the private provider with Student's IEP. Regular education materials were collected from Student's teachers and provided to the provider for use in Student's instruction. At no time, in November 2019, did the Parent or provider express to the District that insufficient work materials had been provided. (N.T., pp. 187, pp.234-235, pp. 275-277, S-17, and S-18).

43. During the November 2019 period of full-time homebound instruction, the Student was invited and came to the school building for music, computer class, occupational therapy, participated in Lunch Bunch and attended a holiday party. (N.T., pp. 105-106, pp. 235-236, S-18).

44. The Student completed only seven hours of instruction at the private provider and was unable to complete instructional sessions beyond 60 minutes in duration. (N.T., pp. 103-105, S-18 and S-21). The private provider could not schedule the Student for back to back hours of instruction. *Id.*

THE JANUARY 2020 DEMAND FOR COMPENSATORY EDUCATION

45. On January 9, 2020, Parent emailed the District stating that the Student was owed compensatory education. The Parent's January 2020 "Demand" contended due to the limited hours of instruction received by the Student during the eight-week period of homebound instruction; the Student was denied a FAPE. On January 10, 2020, the District's Director of Pupil Services, responded stating that, since only 7 hours of the intended 80 hours of instruction were used, the District would continue to fund the unused 73 hours of homebound instruction at the private provider. The District never admitted a denial of a FAPE and the Parent's Demand did not calculate the number of compensatory education hours allegedly owed for the months of September, October, November, December or January. (N.T., pp 107-109, pp. 280-281, pp.307-308, S-20).

THE PARTIES AGREE THE STUDENT SHOULD ATTEND AN APPROVED PRIVATE SCHOOL AT PUBLIC EXPENSE

46. The Student's reevaluation was completed on November 8, 2019; the reevaluation team recommended and the Parent and the District agreed the Student's then current needs required placement at an approved private school. (N.T., pp. 281-282, S-29).

47. The District proposed that Parent, with the support of the District's social worker, tour several different approved private schools; the Parent, however, requested only to visit and meet with one provider. On November 18, 2019, the Parent visited an approved private school. The following day, the Parent informed the District that she did not believe that school to be appropriate for Student. (N.T., pp. 281-287, S-16 and S-27).

48. After visiting several approved private schools during the month of December 2019, the District and Parent agreed on a private school. (N.T., p.119, pp. 266-267, pp.285-289, S-19, S-22 and S-30).

49. On January 6 and 7, 2020, before the Student was placed at the approved private school, the Student returned to the Emotional Support class for half-

days. Thereafter, the Parent decided not to send the Student back to school. (N.T., pp.106-107). When informed of the Parent's Decision not to send the Student back to school, the Director of Special Education reached out to the Parent and informed her that the District would continue to pay for additional hours of instruction at the private provider, pending the Student's placement at the private school for instruction. Parent scheduled four sessions with the private provider, for school day sessions, for a total of six hours of instruction. (N.T., pp.119-120, S-21).

50. On January 13, 2020, the District issued and the Parent signed a Notice of Recommended Educational Placement (NOREP) indicating her approval of such placement. (N.T., 119, pp. 266-267, pp.285-289, S-19, S-22 and S-30).

THE INDEPENDENT VISION EVALUATION

51. The November 9, 2019 reevaluation report included a "Learning Media Assessment." The assessment called for the Student to read a series of passages at the 4th and 5th-grade level using large and regular. The Student's scores were unremarkable and did not show a need for enhanced or enlarged font size. (N.T., pp.121-122, N.T., p.290, S-16).

52. The November 9, 2019 reevaluation report included a "Learning Media Assessment." The assessment called for the Student to read a series of passages at the 4th and 5th-grade level using large and regular. The Student scores were unremarkable and did not show a need for enhanced or enlarged font size. (N.T., pp.32-34)

53. By email on November 19, 2019, following a vision evaluation completed by Student's optometrist, Parent informed the District of her belief that Student's vision was impacting the Student's education. The examination conducted by Student's optometrist was a medical examination. After reviewing the report, the District responded by offering and the Parents consented to a functional vision evaluation coordinated through the Allegheny Intermediate Unit (AIU. (N.T., pp.121-122, N.T., p.290, S-16). On January 13, 2020, the Parent

provided the District a signed consent for such an evaluation. (N.T., pp. 290-291, S-23).

54. On February 19, 2020, the AIU completed a functional school-based vision evaluation. A report of the vision evaluation was issued on March 2, 2020. The results of the evaluation were unremarkable. The examiner found the Student was able to access the curriculum at near and at a distance. The evaluation demonstrated the Student did not need large print to learn. The report also concluded that the Student did not need specially designed vision instruction. (N.T., p.124, N.T., pp. 291-294, S-24).

55. At no time did any of the Student's teachers express any concern that the Student's vision was adversely impacting [Student's] education. (N.T., pp. 289-290; Exhibit S-16).

APPLICABLE LEGAL PRINCIPLES

WITNESS CREDIBILITY

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *See also, generally, David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, all witnesses testified credibly. All answered questions to the best of their abilities, were explicit in what they could and could not recall, and sought clarification when appropriate.

It bears repeating that the facts of this case are not truly in dispute. Rather, the parties disagree about the District's legal obligations and whether those obligations were satisfied by the District's actions.

THE FILING PARTY SHOULDERS THE BURDEN OF PROOF

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Guardian is the party seeking relief and must bear the burden of persuasion in order to obtain relief.

IDEA CHILD FIND IS AN AFFIRMATIVE DUTY

School Districts have a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statute."[4] The IDEA child find duty does not demand that schools conduct a formal evaluation of every struggling Student. A school's failure to identify a disability at the earliest possible moment is not *per se* actionable. *D.K. v. Abington Sch. Dist*., 696 F.3d 233, 249 (3d Cir. 2012). However, once school districts have a "reasonable suspicion" the Student is otherwise IDEA eligible, the district is required to fulfill their child find obligation within a reasonable time. *Id.* Failure to conduct a sufficiently comprehensive evaluation is a procedural and substantive violation of the district's "child find" obligation.

Substantive child find violations can cause a denial of a FAPE. *D.K*., 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). Therefore, an evaluation must be sufficiently comprehensive to assess all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34

[4] *Ridley Sch. Dist. v. M.R*., 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a), (c).

CFR §300.304(c)(4), (6). Simply stated, the child find trigger or starting point occurs when the school district has a reasonable suspicion that the child may be eligible under the IDEA. Once the child find duty is triggered, the district must initiate a comprehensive evaluation of the child within a reasonable period of time. Both of these triggers, the "reasonable suspicion" and the "reasonable time to evaluate" a student is an issue of fact.

THE IEP PROCESS, THE IEP MEETING, THE IEP DOCUMENT AND FAPE

The IDEA, obligates local education agencies (LEAs or districts) to locate, identify, evaluate and provide students with an appropriate education, in the least restrictive setting, with children who are not otherwise eligible for special education. 20 U.S.C. §1412.

"Special education" means specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including (1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education. 34 CFR § 300.39 (a)(1). "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction – (1) to address the child's unique needs resulting from the disability; and (2) ensuring the child's access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency. 34 CFR § 300.39 (b)(3).

The term related services includes: (1) speech-language pathology services or any other related service, if the service is considered special education rather than a related service under state standards; (2) travel training; and (3) vocational education. 34 CFR § 300.39. To be eligible for IDEA services, the Student must have a recognized IDEA disability which adversely affects the Student's education. 34 CFR §300.8. The unique needs of a student with a disability may encompass more than a mastery of academic subjects. Unique

needs are broadly construed to include academic, social, health, emotional, behavioral, physical, transition, and vocational needs, all as those needs relate to the provision of preschool, elementary, and secondary education services.

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the court held that the IDEA FAPE requirement is met by providing personalized instruction and support services in an IEP that is reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed.

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

An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i). An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). 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. (1982).

WHEN ARE PROCEDURAL AND SUBSTANTIVE VIOLATIONS A DENIAL OF FAPE

A school district may violate the IDEA in several ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*,

626 F.3d at 432 (citing Rowley, 458 U.S. at 206-07); *Endrew F.*, 137 S. Ct. at 999.

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

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," *Endrew F*. 137 S. Ct. 1001, but the IDEA does not guarantee "the absolute best or 'potential-maximizing' education."[5]

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* court concluded that "the IDEA demands … an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d at 352.[6] Therefore, as *Endrew, and Rowley*, make it clear, the IEP must be responsive to the child's identified educational needs and individual circumstances. See, 20 U.S.C. § 1414(d); 34 CFR § 300.324.

[5] See, *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1043 (3d Cir. 1993) (recognizing that IDEA does not entitle a child to the best education available, but only one reasonably calculated to provide him or her with a meaningful educational benefit).

[6] Long standing Third Circuit case law interpreting the IDEA before *Endrew* is still controlling and otherwise applicable. *Dunn v. Downingtown Area Sch. Dist. (In re K.D.)*, 904 F.3d 248 (3d Cir. 2018).

INSTRUCTION IN THE HOME VS. HOMEBOUND INSTRUCTION

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 CFR §300.115(a). That continuum must include "instruction in regular classes, special schools, *home instruction*, and instruction in hospitals and institutions." 34 CFR § 300.115(b)(1), 34 CFR § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each Student can receive FAPE. *See* 34 CFR § 300.114.

In addition to the IDEA requirements, Pennsylvania draws a distinction between medically requested "homebound instruction" and "instruction in the home." Medical requested homebound instruction is a regular education service for children both with and without disabilities who cannot come to school on a temporary basis. Instruction in the home, on the other hand, (is) the location where a student can receive special education and related services, described in a student's IEP.

Homebound instruction is governed as part of Pennsylvania's regular education compulsory attendance regulations, 22 Pa. Code § 11. Specifically, schools may excuse a student's nonattendance for a period that may not exceed three months for "urgent reasons." 22 Pa Code § 11.25(a). The term "urgent reasons" is strictly construed and is established by "satisfactory evidence of mental, physical, or other urgent reasons." *Id*. When an "urgent reason" is established, the school may provide homebound instruction for up to three months. 22 Pa Code § 11.25(b). When a student receives homebound instruction, the school may count the Student for attendance purposes and is reimbursed by the Pennsylvania Department of Education (PDE) for the services. *Id.* Schools can request extensions of the three month period, but PDE must reevaluate the Decision to place a student on homebound instruction every three months. *Id*. Schools must also adopt policies "that

describe the services that are available to students who have been" placed on homebound instruction. 22 Pa Code § 11.25(c). Those policies "must include statements that define the responsibilities of both the district and the student with regard to these services." *Id*. Although the distinction between homebound and instruction in the home is legally clear, at times, they may overlap when students with disabilities require homebound, as recommended by a physician and instruction in the home, as determined by the IEP team.

DISCUSSION, ANALYSIS AND CONCLUSIONS OF LAW

PARENT'S STATEMENT OF THE CLAIMS AND THE DISTRICT'S RESPONSE

The Parent makes a three-part intertwined denial of FAPE argument. First, she argues that on ten (10) occasions from September 2019 through December 2019, the Student was denied a FAPE. The Parent further contends when the Student went home early and the teacher did not provide the Student with homework the Student was denied a FAPE. Second, she contends the Student was denied FAPE during the half-day and/or full-day periods of homebound instruction in October and November 2019. Third, and finally, she argues the District violated its "child find" obligation by failing to evaluate and then offer the Student SDIs and goal statements for what she contends is an alleged vision impairment/need. The District, on the other hand, contends that at all times relevant, they provided a FAPE. Finally, the District states the Student should take advantage of any unused hours of homebound time.

THE EARLY DISMISSALS AND FAILURE TO PROVIDE HOMEWORK

Parent's counsel stated and the hearing officer confirmed, without modifying the issue statement, that the Parents were not making any claims for any failure to implement the IEP during the school day; therefore, claims related to the use of or the need to use restraint, during the school day are now waived. The Parent's claims that the District denied the Student a FAPE on multiple occasions when the Student was sent home from school early,

without homework, after being restrained, is denied as stated. While stated as two distinct independent claims - *i.e.*, (1) sending the Student home and (2) the failure to provide homework - for discussion purposes, I view the use of the restraint, the failure to provide homework and the early dismissal as one single transaction. Recognizing that IDEA disputes should be resolved on substantive grounds, I will move forward and discuss the merits of these two intertwined claims.

EARLY DISMISSAL AND THE FAILURE TO PROVIDE HOMEWORK

First, the Parent's statement of the issue, the exhibits and the testimony did not challenge the annual goal statements, or the use of physical restraint on an as-needed basis, or the behavioral or academic SDIs as offered; therefore, I start my analysis with the Parent's concession that the IEP as offered was otherwise appropriate.

Second, the IEP included specific language on when and how the staff would restrain the Student. The record is clear the Parent was aware of, consented to and approved of the use of physical restraint when the Student was a danger to himself/herself or others. The record is preponderant that [self-injurious behavior] is a danger to self and others necessitating immediate intervention.

Third, the IEP does not require the teachers to provide the Student with homework on full days or early dismissal days. In fact, the IEP includes a specific "no penalty SDI" that makes homework optional.

Fourth, the District followed the applicable state regulations when they offered to have an IEP meeting to review the appropriateness of the IEP and the use of the restraint on no less than ten (10) occasions. The record is abundantly clear that on ten occasions (10), the Parent declined an IEP meeting to discuss the current claims. Recognizing that the waiver of the IEP meeting could be seen as a procedural issue, I will continue to address the Parent's claims as a substantive denial of a FAPE.

Fifth, the record is clear that the Parent never requested homework at the time of any of the early dismissals or, for that matter, when the Student had a good day; therefore, I now find the record is preponderant the completion of homework was not part of the delivery of the Student's instruction or a unique need.

Sixth, the evidence is preponderant that when the special education teacher did send work home, oftentimes, the work was not returned. The record is preponderant that the failure to return homework was not a problem as not returning homework was otherwise excused in the SDIs. Therefore the failure to provide homework on the days the Student was dismissed early is a non-starter as the Parent failed to provide preponderant proof that not providing homework is a standalone FAPE violation. As for the issue of the early dismissals, that claim requires further substantive analysis either as a change in placement claim or a failure to implement the last agreed on IEP claim.

THE USE OF RESTRAINT AND THE EARLY DISMISSALS

In light of the severity of the self-injurious behavior and the District's lack of involvement with the Student, I understand the need for constant real-time communication. Placing the first-hand observations of the witnesses' testimony in context and understanding the violent nature of the Student's self-injurious behavior, the question for me then becomes, did the District's actions or inactions amount to a violation of the Student's FAPE rights and/or did the District fail to implement the Student's IEP.

For all of the following reasons, in this unique instance, I now find the District did not deny the Student a FAPE, interfere with the Parent's procedural or substantive IDEA rights, or fail to implement the IEP.

THE 10 EARLY DISMISSALS WERE NOT A CHANGE IN PLACEMENT

First, assuming the District did ask the mother to take the Student home, the early dismissals did not result in a disciplinary change or a substantial change in the Student's placement. A disciplinary change in placement can

occur in three instances. First, when a series of removals totals more than ten (10) school days in a school year. Second when the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals. Or third, when because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another results in a change in the Student's placement. 34 CFR §300.536.

The Student went home early on ten (10) occasions, for what appears to be less than one half-day of a school day for each early day dismissal. Five of the early dismissal occurred in September, three occurred in October and two occurred in November. After reviewing the record, I now find the ten (10) half-day early dismissals, at most, total five (5) full six-plus hour school days. While the total number of dismissals is right on the bubble and the behavior causing the dismissal – [redacted]- is the same in each instance, the record is clear that the number of early dismissals does not equal ten (10) full school days. On one reported occasion, the Student was able to self-regulate and return to class. Therefore, I find the early dismissals were not a change in placement. The record is unclear as to how many times the staff was able to interrupt the antecedent behaviors leading to [self-injurious behavior] which in turn kept the Student in school.

While the ten (10) early dismissals are troubling, as it may form a pattern, the record is clear the Student managed to attend school for 22 out of 32 school days [August through mid-November] without restraint. When the total number of 2019-2020 early dismissal days is compared to the previous school years attendance, the early dismissal data is interesting. During the 2018-2019 school year, the Student was dismissed early on 14 occasions, while in the 2017-2018 school year, the Student missed 17 days.[7] Using this data as a working baseline, the total number of early dismissals in 2019-2020 is

[7] In 2017-2018 the Student had 14 early dismissals and in 2018-2019 the Student had 17 early dismissals S-2 p.6 and p.9

relatively constant across the school years. Based on the multiple offers to hold an IEP conference, in conjunction with a careful review of the dismissal trend line, I now find the evidence is preponderant that the District did not change the Student's placement, violate the Parent's or the Student's substantive or procedural due process rights. Accordingly, the claim, as stated is denied.

As for the Parent's implied failure to implement the IEP claim relying on *Melissa v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006) (unpublished), I now find the District did not deny the Student a FAPE. In *Melissa v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006) (unpublished), the court established a two-pronged standard to make out a failure to implement an IEP claim. To prevail here, the Parents must show that the District failed to (1) "implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure," and (2) "such that the disabled child was denied a meaningful educational benefit."[8]

[8] A failure to implement claims is distinct from a *Rowley* or *Endrew* failure to offer a FAPE claim. While I understand that *Melissa v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006) is an unpublished, non-precedential decision and otherwise not controlling decision; I find the court's acceptance of a materiality and benefit *Rowley/Endrew* benefit analysis persuasive when compared to per se or contractual like approach. In *Melissa*, the Third Circuit's reliance on similar holdings in *Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d at 341-48. (5th Cir. 2000) and *Houston Independent School District v. VP. ex rel. Juan P.,* 582 F.3d 576, 587- 88 (5th Cir. 2009) (focusing on the substantive *Rowley*/Endrew benefit test in combination with materiality of the implementation failure) is further indicia of persuasiveness. *Contra, Van Duyn ex rel. Van Duyn v. Baker School District 5J.*502 F.3d 811 (9th Cir. 2007) (adopting a materiality procedural failure only approach) with *R.E. v. New York City Department of Education* 694 F.3d 167, 186 (2d Cir. 2012) and *Sytsema ex rel. Systema v. Academic School District No. 20,* 538 F.3d 1306, 1315 (10th Cir. 2008) (adopting a *per se* contract like procedural approach). *See,* Perry A. Zirkel and Edward T. Bauer, *The Third Dimension of FAPE Under the IDEA: IEP Implementation*, 36 J. Nat'l Ass'n Admin. L. Judiciary 409 (2016) (fn.38 and 39 collecting cases in the Third Circuit) (available at: http://digitalcommons.pepperdine.edu/naalj/vol36/iss2/1).

The evidence is preponderant that although the Student left early on several occasions, the District implemented the agreed on IEP. The teacher provided the reading instruction, the teacher implemented the behavioral strategies and SDIs, and the Student received the agreed on related services. The District completed the reevaluation, the FBA data was collected, updated SDIs were discussed then implemented, with Parental consent, and the AIU vision evaluation was completed in a timely fashion. After reviewing the Student's then-existing record, the District offered and the Parent accepted a revised IEP along with a placement at an approved private school. Understanding that all of these events were accomplished in a short time frame from August to December and applying the two-factor test in *Melissa*, I now find the District offered and implemented an IEP that was reasonably calculated to provide a FAPE. Once on notice of the Student's ever-changing present levels, the District responded in a reasonable time, completed the reevaluation/FBA, revised the IEP and worked with the Parent to find another placement. Therefore, I now find the early dismissals, in this instance, do not rise to level of a failure to implement the IEP claim. Applying *Rowley, Endrew* and *Melissa*, I now find, the District, at all relevant times implemented the agreed on IEP. I further find that any and all changes or interruptions in the delivery of the services were *de minimis* in nature. Accordingly, I now find against the Parent and in favor of the District.

THE HOMEBOUND CLAIMS ARE MISPLACED

Disputes about a school's compliance with Pennsylvania's regular education homebound regulations that do not implicate an offer of a FAPE are outside of my limited IDEA jurisdiction. I have no authority to determine whether the half-day or full-days of homebound instruction violated the IDEA, when the record does not link the homebound instruction dispute to a substantive or procedural IDEA violation. Even assuming IDEA jurisdiction, no evidence was presented to support the need for in-person instruction by a special education

teacher in the Student's home as a necessary component of FAPE during the months of October, November, December, or January. Additionally, no evidence was presented as to any substantive or procedural errors in reaching the agreement about the location, duration or need for medical homebound instruction. The mother presented the physician's note, the District posted the position, when no one applied for the position, mother participated in a meeting with the Principal and then had ongoing calls with the Director of Special Education to arrange for the services. When the District could not fill the homebound position, the second time, the District and the Parent agreed the Student would receive homebound instruction from a third-party provider. The District provided the private provider with Student specific regular education materials and a copy of the IEP. The mother and the private provider arranged and scheduled the dates for and the length of each session. The District has continuously stated, before and after the filing of the due process complaint, that the Student can use the remaining bank of unused homebound hours as the Parent wishes.

As a regular education service, the Parent is reminded that homebound instruction is governed as part of Pennsylvania's regular education compulsory attendance regulations, 22 Pa. Code § 11 and not Chapter 14 or the IDEA rules. In this particular instance, the approved request for homebound instruction is an agreement between the Parties that the Student is medically excused from compulsory school attendance. Based on this record I now find the medically-based homebound services, at issue here, are not related to the Student's IDEA disability. Accordingly, I now find the Parent has not met her burden of proof; therefore, I now find in favor of the District and will deny the Student's and the Parent's IDEA homebound claims.

THE CHILD FIND CLAIMS ARE MISPLACED

The November 2019 reevaluation report included a "Learning Media Assessment." The Student's media assessment scores were unremarkable and otherwise average. The November 2019 reevaluation team, including the Parent, determined the Student did not then show a need for enhanced or enlarged font size or vision services. Thereafter, the Parent presented the District with a private vision assessment conducted by an optometrist. After reviewing the report, the District offered and the Parent consented to school-based functional school-based vision evaluation. The evaluation was performed by the local IU vision support specialists. The functional school-based vision evaluation scores do not indicate the Student needs either large print to learn. The functional school-based vision evaluation scores do not indicate the Student has a vision need or that the Student needs SDIs or personalized vision supports to learn. The functional school-based evaluation included input from the Parent and considered the private testing data. The Parent did not present any evidence challenging the results of the functional school-based vision evaluation. Therefore, absent preponderant proof to the contrary, I now find the Parent failed to meet her burden of proof regarding the Student's need for vision supports. Absent preponderant proof to the contrary, an appropriate Order in favor of the District, follows.

ORDER

Now, October 28, 2020, in accordance with the accompanying memorandum, it is hereby

ORDERED that the Parent's claims are **DENIED** and **DISMISSED.**

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is also **DENIED** and **DISMISSED**.

/s/ Charles W. Jelley
HEARING OFFICER
ODR FILE #23501-1920 KE