

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: 21383-18-19

Child's Name: G. R. **Date of Birth:** [redacted]

Parent:
[redacted]

Counsel for Parent

Pro Se

Local Education Agency:

Reading School District
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Hearing Officer: Charles W. Jelley Esq.

Date of Decision: 09/06/2019

PROCEDURAL HISTORY

The Student¹ is a rising ninth (9th) grade soon to be tenth (10th) grade high school-aged Student who resides in the District. At the current time, the Parent (Mother) is seeking appropriate relief in the form of an out of District program and placement in a nearby public school, compensatory education, and an updated evaluation. The Parties agree the Student is a person with a disability, including an “other health impairment” (OHI) and a speech and language impairment within the meaning of the Individuals with Disabilities Education Act (IDEA). The Parties disagree about the nature of other alleged existing IDEA disabilities and associated eligibility for services. The Parent contends the Student is a person with autism, the District, on the other hand, contends the Student is a person with an emotional disturbance. The Parties do however agree the Student, is otherwise eligible to receive a free appropriate public education (FAPE) through an individualized education program (IEP) including specially-designed instruction (SDI) in the least restrictive setting (LRE).²

In short, the Parent contends as a result of multiple procedural and substantive violations, each offer of a FAPE upon re-enrollment in the District to the present, is not otherwise appropriate. The District at all times argues it complied with all substantive and procedural provisions of the IDEA; therefore, the District argues that the Parent’s denial of FAPE claims, compensatory education and prospective placement claims should be denied.

¹ In order to provide confidentiality and privacy, Student’s name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2), 20 U.S.C. §§ 1400-1482.

² The Parents claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (T. p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Due to multiple schedule conflicts and the need to accommodate the Parent’s the hearing exceeded the typical 75-day timeline. The Parties made multiple requests to extend the Decision Due Date, finding a good cause this hearing officer granted the Parties joint requests.

After reviewing all of the testimonial and non-testimonial extrinsic exhibits for all of the following reasons, I now find for the District and against the Parent.³ A Final Order granting the District's request for appropriate relief and denying the Parent's claims follows

ISSUE

1. Whether the District's proposed offer of a free appropriate public education for the 2016-2017 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to an award of compensatory education and/or other appropriate relief?
2. Whether the District's proposed offer of a free appropriate public education for the 2017-2018 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to an award of compensatory education and/or other appropriate relief?
3. Whether the District's proposed offer of a free appropriate public education for the 2018-2019 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to an award of compensatory education and/or other appropriate relief?
4. Whether on two occasions, after the Student reenrolled in the District, the District completed a comprehensive evaluation of the Student in all areas of unique needs; if not, is the Student entitled to an independent evaluation at public expense?

FINDINGS OF FACT AND RELEVANT BACKGROUND

1. Student a mid-teen aged rising tenth grader, who resides in the District ("the District"). (T-22:5-7). On April 29, 2016, the parties entered into a Settlement Agreement through which Parent waived all claims against the District through the commencement of the 2017-2018 school year in exchange for the District's funding of Student's placement in lieu of FAPE at a private school for the 2015-2016 and 2016-2017 school years. (S-1; T-409:7-8).
2. Student attended the private school through the end of the 2015-2016 school year when Parent, prior to the end of the school year, stopped sending Student

³ After carefully considering the entire record, including the testimonial and non-testimonial exhibits, of this hearing in its entirety I now find that I can now draw relevant factual inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issues and relevant law in dispute.

to school to “save both of [their] mental health.” (T-378:14-16).

3. Thereafter the Parent then enrolled Student in a cyber charter school in August 2016. (T-411:1-3).

THE RETURN TO THE DISTRICT DURING THE 2016-2017 SCHOOL YEAR

4. In December 2016, the Student, due to an alleged failure to participate in its cyber program, was involuntarily terminated from participation in all cyber school services and supports. (T-378:25-379:1; -411:9-11; S-2 at 58).
5. On December 15, 2016, prior to leaving charter school, the charter school completed a comprehensive evaluation of the Student’s needs. Thereafter, the charter school issued an Addendum, including the results of a functional behavioral assessment (FBA) on January 12, 2017. The report and Addendum make up a 60-page evaluation report. The report included Parental input and notes that upon enrollment the Student’s then-existing records indicated that Student was IDEA eligible due to a diagnosis of attention deficit hyperactivity disorder (ADHD) and a secondary disability of specific learning disability in the areas of reading comprehension, math problem solving and written expression. The report notes that in 2012, a private evaluator concluded the Student no longer met the criteria as a person with autism. The report goes on to state that prior to enrollment the Student received full-time emotional support serves, including de-escalation techniques, nonviolent physical intervention techniques, and a modified regular curriculum in reading and math in an all handicapped private school. The report included the results of the Woodcock-Johnson Test of Cognitive Ability-Fourth Edition (WJ-IV Cog), the Woodcock-Johnson Tests of Academic Achievements-Fourth Edition (WJ-IV-Ach), the Behavior Assessment System of Children Second Edition (BASC-2), Parent and Self-Ratings, the Behavior Rating Inventory of Connors-Third Edition (Connors-3), Parent and Self-Report, and the Autism Diagnostic – Revised (ADI-R) (S-2).
6. On the WJ-IV Cog the Student earned a General Intellectual Ability Full Scale Intelligence Quotient standard score (SS) of 64, in the Very Low range (S-2). On the WJ-IV-Ach, the Student earned three Very Low scores, eight Low Average scores, seven Low scores and one Average score (S-2).
7. On the BASC-2 the Student’s self-ratings indicated Clinically Significant difficulties in the area of somatization, and At-Risk difficulties in the area of attending school, atypicality, and attention problems. The mother, on the

other hand, rated the Student's behavior as Clinically Significant for depression, atypicality, adaptability, activities of daily living and the overall internalizing problems and behavioral symptoms composites. Mother also rated the Student as At-Risk for aggression, anxiety, somatization, attention, problems, functional communication and overall externalizing and adaptive skills composites (S-2).

8. On the BRIEF-2, the Student's self-ratings concerns were noted on the following measures: behavioral aware of functioning in social settings, adjust well to changes in the environment, people, plans or demands, and reacts to events appropriately. The Parent's BRIEF-2 ratings indicated, on the other hand, that the Student had weakness in working memory, inattention, problems with planning, organizing, and self-regulation.
9. On the Conners-3, the Student's mother's ratings were consistent with poor concentration/attention, makes careless mistakes, may be easily distracted, may demonstrate some hyperactivity/impulsive behavior and struggles with academics (S-2).
10. On the ADI-R, a measure of 93 autism-related items focusing on three functional domains of language/communication, reciprocal social interactions, restricted, receptive, and stereotypical behaviors and interests, the mother's scores indicated the Student did not meet the cutoff benchmark scores for identification as a person with autism. For example, the Student's empathetic nature, interest in friendship and range of facial expressions did not support a diagnosis of autism. The record also established that the Student has a documented history of a speech and language concerns which at times affected the Student's overall scores. The Student's speech and language score indicated a moderate impairment for overall language (S-2, P-77).
11. The Student's OT assessment included the Berry –Buktenica Test of Visual-Motor Integration (VMI). The Student's VMI scores indicated below-average skills in visual-motor integration and visual perception and very low motor scores. The Student's Sensory Profile (SP-2) scores indicate the Student possesses a variety of sensory differences in terms of the way in which the Student processes and responds to various forms of sensory input. For example, the Student misses certain sensory input more than non-disabled persons. After reviewing the then existing data, the cyber school evaluation team concluded that Student's learning needs are better explained by a finding of an intellectual disability, or global developmental delay. The team also concluded that the Student displayed weakness in

reading skills, reading fluency, and mathematics calculations. At the same time, the report indicates the Student possesses a variety of sensory differences in terms of the way in which Student processes and responds to various forms of sensory input. Finally, the team also concluded the Student required OT, behavioral, and speech and language supports. (S-2).

12. The mother did not dispute the charter school's evaluation report findings or file a request for due process; instead on or about January 20, 2017, Parent reenrolled Student in the instant District. (S-4; T- 412:13-2.1).
13. On February 3, 2017, the District completed a reevaluation of Student based on a review of the then-existing record information from the previous evaluations, including a recently completed evaluation conducted by the charter school. Since the charter school evaluation was less than 60 days old and included extensive cognitive and achievement measures, behavior rating scales, a speech and language evaluation, an occupational therapy ("OT") evaluation, and a functional behavior assessment the District, without protests from the Parent accepted the charter school evaluation results. (S-2; S-5).
14. The District team after reviewing the existing data concluded the Student was IDEA eligible as a person with an OHI, rejected the finding of an ID, and instead concluded the Student was a person with a speech and language impairment. The team also concluded the Student demonstrated a variety of academic, behavioral, sensory and language needs, which required specially-designed instruction and the related services of OT and speech therapy (S-5).
15. On March 27, 2017, the District developed an IEP for Student. (S-6). Parent participated in that meeting and received a copy of the District's proposed IEP. (T-413:15-414:3). The IEP included five measurable goals, 9 SDIs, along with the related services of OT and speech and language therapy (S-6).
16. On April 18, 2017, the District emailed to Parent a Notice of Recommended Educational Placement ("NOREP"), recommending Student's participation in a supplemental emotional support program at [a District middle school] for the remainder of the 2016-2017 school year and at [a District high school] for the commencement of the 2017-2018 school year. Parent rejected the proposed program and refused to sign the NOREP. (P-2 at 21-22; S-7).
17. The District's recommendations for services were otherwise comparable with the last program provided to Student by the District, prior to the

placement at the private school and the recommendations contained in the charter school's evaluation. As offered the proposed IEP and reevaluations, offered a package of services, targeted to address the Student's history of behavioral health, social, emotional, language and academic difficulties and the corresponding recommendation for services and supports to address Student's difficulties related to social, emotional and behavioral functioning. (S-2 p. 2, 50; S-5 p. 8).

18. At the same time, the District also offered Parent the opportunity for Student to attend an approved private school (APS). Parent toured the private school with Student but declined the District's offer. (P-2; T-415:1-19).
19. Following Parent's rejection of the private placement, the District offered the possibility of Student attending another APS, but Parent did not express any interest in following up on this possibility. (S-8).
20. From the time the mother reenrolled Student in the District until the end of the 2016-2017 school year, Parent did not send Student to school, despite the District's offer of an appropriate placement for Student. (T-416:19-23).
21. On June 23, 2017, Parent notified the District that she and Student had moved to a nearby district some time ago. (P-2 at 25).
22. However, at no point, after they moved to the nearby District did Student attend school in that school district. (T-426:21-23).

THE 2017-2018 SCHOOL YEAR

23. Parent and Student moved back to the instant District in August 2017. (T-425:13-15).
24. Although enrolled, the Parent did not send Student to school at any time from September 2017 through January 2018. (T-429:16-19).
25. On October 31, 2017, the District issued Parent an Invitation to Participate in an IEP meeting to discuss possible changes to Student's current IEP at a meeting on November 8, 2017. (S-9; T-103:22-104:4).
26. On November 8, 2017, the District issued Parent another Invitation to Participate in an IEP meeting to discuss possible changes to Student's IEP on November 29, 2017. (S-10; T- 104:9-23).
27. On November 29, 2017, the District held an IEP meeting. (T-100:14-21).
28. At the time of the IEP meeting, the Student was still not attending school. (T-108:9-11).

29. During the IEP meeting, Parent suggested that she was interested in Student attending a life skills support program in a nearby district. (T-100:21-24; -107:1-7).
30. The District's special education supervisor cogently explained that it was not typical for the District to place one of its students in another public school district when the District believed it could educate Student in the District. When the special education supervisor asked Parent why she wanted Student to attend school in the nearby district instead the mother stated rationale that the "demographics" at the nearby district were different than they were at the proposed program and placement at the intermediate high school. (T-101:5-9; -107:8-18).
31. Following the November 29, 2017, IEP meeting, the District issued Parent a proposed IEP and NOREP for Student recommending placement in a full-time life skills support program at the intermediate high school, in the District, through the end of the 2017-2018 school year; then the Student would move to the District high school at the commencement of the 2018-2019 school term. (S-11 at 35; S-13; T-107:19-23).
32. Based on the IEP team discussion at the November 29, 2017, meeting about the Student's then-existing present levels, after considering the Parent's suggestion about life skills support, the IEP team determined that the District's life skills support program rather than District's autism support would better support the Student's acquisition of functional academic, language, social and behavioral skills (T-108:2-8).
33. As compared to the District's then-existing emotional and autistic support programs, the District's life skills support program provides smaller class sizes, a functionally-based academic curriculum, which the team, which included the Parent, concluded was a support the Student needed. (T-111:11-13).
34. The team also noted in the IEP that because the District had "not had access to assess [Student] with any curriculum-based assessment or the ability to collect data within a school-based placement", a present level data including, but not limited to: academic, and functional levels of performance, an additional FBA, speech and other relevant data would be collected once Student began school. The team expected "that a new IEP would be presented within the first 6 weeks of school attendance." (T-108:18-25; T-109:1-2; T-110:1-25; S-11 at 14, 22-28).

35. Following the IEP meeting, the special education supervisor attempted to follow-up with Parent, but mother indicated that she did not want to talk to him because she believed that the special education supervisor had laughed and otherwise snubbed her during the IEP meeting. (T-111:24-112:9).
36. On December 18, 2017, Parent emailed the District's special education teacher, copying the special education supervisor and requesting a reevaluation of Student for "all assessments and evaluations were conducted by the charter school in December 2016, including a comprehensive intellectual disability assessment and evaluation, a comprehensive Asperger's and autism assessment and evaluation." (P-2 at 32). This was Parent's first request for such a reevaluation of Student. (T-112:14-21).
37. The special education supervisor advised Parent that he would issue the Permission to Reevaluate Evaluate (PTRE) to address intellectual disability and autism assessments. (T-113:20-24).
38. On February 1, 2018, following multiple communications regarding the specific assessments to be employed, the District issued a PTRE to Parent proposing a reevaluation to include a review of Student's records, Parent input, teacher input, measures of cognitive functioning, measures of academic achievement, and measures of social-emotional functioning including behavior rating scales for autism. (S-15; T-114:15-115:5).
39. Although Parent also requested an OT and speech evaluation, the supervisor relying on the cyber school assessment from January 2018, explained to the Parent that these two particular reevaluations would not be necessary since the data collected by the charter school was still current. The cyber school data and the information gleaned from the evaluation was later incorporated into the District's reevaluation report. The District informed the Parent if she still wanted a speech and/or OT reevaluation after the District completed its evaluation, the District would consider issuing another PTRE for those specific evaluations. (P-2 at 49; T-57:4-21; T-58:4-11; T-59:18-25).
40. Parent then consented to the District's proposed reevaluation to review Student's cognitive functioning, measures of academic achievement, and measures of social-emotional functioning, including behavior rating scales for autism on February 20, 2018. (S-15 at 4; T-115:11-17).
41. In April 2018, the District issued another PTRE to include an FBA in the reevaluation. (S-16; T-115:18-116:17).

42. On April 17, 2018, the District's Home and School Liaison emailed Parent, notifying her that the special education supervisor would contact her to set up a meeting about getting Student back to school. (S-29 at 1; T-132:9-18).
43. Following up on the Home and School Liaison email from the day before, on April 18, 2018, the special education supervisor emailed Parent, himself, requesting a time for him and Student to meet with Parent and Student the following week. (S-29 at 3; T-132:22-25).
44. Parent responded to special education supervisor's email that same day but did not follow up on the request for a meeting and instead indicated that she wanted all assessments and evaluations to occur at the school. (S-29 at 4; T-133:12-24).
45. On April 23, 2018, the special education supervisor sent Parent another email informing her that the evaluation would be assigned to a psychologist by the end of the week but that in the meantime, he would like to assist with trying to get Student back to school. (S-29 at 7).
46. Parent responded to special education supervisor's email but again failed to follow up on the request to help get the Student back to school. (S-29 at 7).
47. On May 10, 2018, the special education supervisor again emailed Parent, reinforcing his concern that Student was not in school. The special education supervisor emphasized, "I would still like to meet with [Student] to see what we can do to help [Student] feel more comfortable. We really cannot [sic] keep [Student] out of school while waiting for an evaluation." The special education supervisor again asked Parent how he could help Student return to school and provided a list of mental health resources in the community that might be able to assist Student with Student's anxiety. (S-29 at 20; T-134:1-9).
48. Parent's response to special education supervisor's email did not offer any constructive suggestions about the impasse and instead demanded that the requested evaluations be completed. (S-29 at 20).
49. In total, Student attended school for only one (1) day for the entire 2017-2018 school year (T-441:19-22).
50. On May 14, 2018, the District's school psychologist contacted Parent and advised her that she had been assigned to do Student's reevaluation and that she was working on coordinating a testing location. (S-29 at 22).

51. The District's psychologist is a Pennsylvania Department of Education and nationally certified school psychologist, who is also a licensed psychologist and a licensed behavioral specialist (T- 276:6-11).
52. Parent responded to the psychologist's email, asserting that the testing should occur in her home, contradicting her prior desire to have the testing administered at school. (S-29 at 23).
53. On May 22, 2018, the psychologist interviewed Parent and evaluated Student at their residence. (T-281:2-3).
54. Parent advised the psychologist that Student exhibited difficulty paying attention which is indicative of executive dysfunction. (T-281:18-23).
55. The psychologist noted an ongoing history of behavioral health issues. (T-282:19-283:2).
56. The District's reevaluation included the following assessments: the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5), the Universal Nonverbal Intelligence Test, Second Edition (UNIT-2), the Developmental Neuropsychological Assessment, Second Edition, the Kauffman Test of Educational Achievement (KTEA), the Behavior Assessment for Children, Third Edition (BASC-3), and the Scale for Assessing Emotional Disturbance, Second Edition. (S-17).
57. The psychologist administered all of the assessments as per the maker's instruction and was experienced in assessing students with intellectual disabilities, learning disabilities, autism spectrum disorder, emotional disturbance and other health impairments (T-326:23-25, T-327:1-9, T-326:23-25).
58. As the Student was not in school, the psychologist was unable to do any curriculum-based or classroom-based assessments. (T-295:19-24). On May 29, 2018, Parent then sent the supervisor of special education an email, complaining that the District had not reevaluated Student for OT or speech, despite the fact that she had previously agreed to the assessments that the District had proposed for Student's reevaluation, and neither OT nor speech were included. (S-29 at 88-89).
59. On May 31, 2018, supervisor of special education again explained to Parent that because the previous charter school evaluations were otherwise comprehensive, valid, the District did then see a need to evaluate those areas

again. (T-59:18-25; P-2 at 49; S- 29 at 88).

60. On June 7, 2018, the District issued Parent an Invitation to Participate in an IEP meeting on June 14, 2018, to discuss possible revisions to Student's IEP. (S-18).
61. On June 8, 2018, Parent emailed the District indicating that the IEP meeting could not take place until the OT and Speech evaluations occurred. (S-29 at 86).
62. The special education supervisor responded to Parent's email on June 12, 2018, indicating the District's desire to proceed with the IEP meeting and assured Parent that both the OT and Speech therapists would be present to discuss services and schedule a time to reevaluate Student, if necessary. (S-29 at 86).
63. After receiving the special education supervisor's response, Parent advised him that an IEP meeting on June 14 would not work for her because she "need[ed] time to digest what was provided." (S-29 at 94; T-135:22-24).
64. On June 13, 2018, Parent emailed the special education supervisor, requesting a new date and time for the IEP meeting, proposing the following week. (S-29 at 101). She sent a formal request the following day. (S-29 at 108).
65. Over the next several weeks, the District and Parent exchanged multiple emails about rescheduling the IEP meeting. (S-29 at 112, 117, 128, 144, 154, 166, 174, 195).
66. After confirming a date with Parent, on August 23, 2018, the District issued her an Invitation to Participate in an IEP meeting on August 24, 2018. (S-21; T-142:17-20).
67. Although an IEP meeting was held on August 24, 2018, the team was not able to review either the reevaluation report or draft IEP at the meeting because Parent demanded that more information be added to the reevaluation report. Specifically, Parent wanted to add pages from past reevaluation reports and information from Student's mental health providers. (T-143:13-144:8).
68. The District granted Parent's request to postpone the meeting again until the reevaluation report could be amended to include the entire history of additional information; however, at the same time, the special education supervisor explained that because the school year was fast approaching, the District needed to provide an educational placement for Student. (T-145:1-

7).

69. On August 28, 2018, the District issued Parent a NOREP proposing Student's placement in a full-time life skill support program at the District's own high school. (S-23; T- 145:1-7).
70. Parent did not return the NOREP or send Student to school at the beginning of the 2018-2019 school year. (T-436:10-25).

The June 2018 Evaluation

71. After the Parent disapproved the June 2018 evaluation the parent provided and the District included additional Parent input. Thereafter the District reissued a revised June 2018 evaluation which then included a comprehensive history of the Student's evaluations since 2006. The 30-page report summarized a 12-year history of evaluations noted the following details:
- i. Prior to re-enrolling in the District, the Student attended five different schools.
 - ii. Private behavioral health records note diagnoses of bipolar disorder, autism, obsessive-compulsive disorder, depression, auditory hallucinations, tantrums, auditory hallucinations, and self-injurious behavior.
 - iii. In second grade, a private psychologist ruled out an autism disorder and instead opined based upon low frustration tolerance and language-based difficulties the Student met the IDEA eligibility criteria of ADHD-OHI and developmental language disorder mixed receptive-expressive-speech language impairment.
 - iv. Signs of an ID were noted on eight evaluations reports from 2006 through 2014. Testing in 2018 indicated overall performance was falling in the either the "Below Expected" range or the "Below Average" range.
 - v. Assessments of intellectual functioning from 2010 through 2018, also indicated SS ranging from a high of 76 in 2010 to a low of 65 in 2017. All of the Student's full-scale IQ scores on all eight assessments fell in the low range.
 - vi. Beginning in 2006 through the present the Student's speech and language educational profile as assessed on 18 different occasions noted a mixed receptive-expressive language disorder. Fifteen of the assessments noted a mild to significant language impairment,

while on two occasions, the Student's testing profile did not indicate a need for speech supports.

- vii. From 2010 through 2018, on a variety of 11 technically sound assessments, identified the Student as a person with an OHI.
- viii. In 2003, 2006 and 2008, the Student was identified as having an overall developmental delay.
- ix. From 2008 through the present, the Student's treating physicians have prescribed and the Student has taken over 20 different medications to manage the Student's multiple behavioral health issues.
- x. The Student's achievement profile from 2011 through the present indicates SS from 70 to 80 range of achievement. Since average achievement scores cluster at a SS of 100, the Student's SS are below average.
- xi. The Student's BASC-2 ratings in 2016 indicated difficulty in adjusting to change, poor attention, often makes careless mistakes and struggles with academics. Updated BASC-3 testing as calculated per Parent and Student self-ratings indicated weaknesses in adaptive functioning, executive functioning, emotional instability, poor focus, careless mistakes and difficulty following directions.
- xii. Ratings in 2012 on the ADOS indicated the Student did not meet criteria for identification as a person with autism. 2016 testing on the ADRI-R also indicated the Student did not meet criteria to be identified as a person with autism. While the mother's scores in 2018 ratings on the ASRS noted that although the Student displayed some behaviors consistent with an autism spectrum disorder, the Student's overall data set including the self-monitoring data, indicated that weaknesses in executive functioning, cognitive abilities, inattentions explain the Student's ASRS scores. Overall the team found the Student did not meet criteria to be identified as a person with autism.
- xiii. Likewise, the Student's ratings by the mother on the Scale for Assessing Emotional Disturbance 2nd Edition (SAED-2) indicate a significant number of factors for identification as a person with an emotional disturbance. At the same time from 2011 through 2017, in six evaluation reports, the records noted the Student at one time met criteria for diagnosis as a person with autism.
- xiv. OT testing data over time indicated sensory processing deficits

and weakness that were not related to autism.

- xv. Results of a functional behavioral assessment in 2016, indicate that when a demand is placed on the Student, the Student will become noncompliant, get off-task. When low attention is given from adults, the Student will wander off-task to receive attention. Oftentimes when demands are placed upon the Student, the Student will exhibit refusals and noncompliance to escape the task demands.
- xvi. The evaluation team concluded the Student needed to improve academic skills in reading, writing, math problem solving, math computation, written expression, self-regulation, self-monitoring, coping, improve visual-motor integration, motor coordination, visual perception, in-hand manipulation, sensory sensitivity, speech and language skills, social, emotional and behavioral regulation.
- xvii. Speech and language testing data over time indicated multiple speech and language deficits and needs.
- xviii. Based on all the information gathered during the reevaluation process, the psychologist recommended and the District members of the team agreed, that the Student's primary disability category was Other Health Impairment and the Student's second disability category was Emotional Disturbance. (S-17 at 22-24, S-2, S-S-5, P-2, P-3, P-4, P-5, P-6, P-8, P-71 P-76, P-77, P-78, P-79. P-80, P-81, P-82, P-83, P-84, P-85, P-86).

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- 72. On September 6, 2018, Parent sent the psychologist multiple records from a variety of community-based health care provider and other data and records that she wanted the District to include, consider and analyze as part of the Student's IDEA eligibility report. (S-29 at 251).
- 73. On September 9, 2018, Parent sent the psychologist an email asking that her report also include Student's medication history from the past 10 years into the report. (S-29 at 256).
- 74. On September 10, 2018, the psychologist emailed a final copy of the Student's revised reevaluation report to Parent. (S-29 at 266).
- 75. On September 27, 2018, the special education supervisor emailed Parent informing her that the District's draft IEP was complete and requesting dates and times that she would be available for an IEP meeting. (S-29 at

269; T-146-1:5).

76. On October 4, 2018, the special education supervisor emailed Parent a copy of the draft IEP and an Invitation to Participate in an IEP meeting on October 11, 2018. (S-24; S-29 at 277). Parent acknowledged receipt and asked the special education supervisor to mail her a hard copy as well because she did not have a printer at home. (S-29 at 277; T-146:20-147:7). The special education supervisor volunteered to personally deliver the documents to Parent's residence the following day so that she would have the document sooner than she would if he mailed it. (S-29 at 277; T-62:10-21).
77. On October 9, 2018, the District held another Student Attendance Improvement Plan (SAIP) meeting and issued a SAIP for Student. Parent refused to participate, stating that Student was not attending school because of her pending lawsuit. (S-25; T-147:19-148:10).
78. The IEP meeting was held on October 11, 2018, reviewed the updated reevaluation report, including the multiple records, data and information provided to the Parents. (T-149:8-21). At times, the psychologist [copied] and inserted the Parent's input verbatim from the documentation the Parent provided. (S-17 at 3-9; T-431:15-20; T-283:18-284:4).
79. Thereafter upon reviewing the data and the IEP proposed a full-time placement in a life skills support program at the high school in the District. The special education supervisor indicated that this placement would allow the Student to focus on functional skill development. The life skills support program at the high school has seven (7) classrooms of 15 students or less. Generally speaking, the life skills program focuses on different skill areas like transition from school to work skills, academics, behavioral, emotional, language/communication skills and social needs. Students in the Program freely move between classes. In addition, the program provides a research-based curriculum for English and Language Arts (Read 180 and System 44) and for math (Connecting Math). All academic instruction occurs in small groups of four or five students. Student would be placed in a class with students who have similar academic performance levels. The life skills program is staffed by special education teachers, a transition coordinator, various related service providers, such as occupational therapists, physical therapists, and mental health or licensed clinical social workers, all of whom have the ability to

provide services through either a push in or a pull-out model. Depending on future individual student needs, a personal care assistant could be added to support the Student in the life skills classroom and the general classroom. (S-19 at 29; T- 154:7-158:6; -334:5-23).

80. The District's IEP also proposed that Student would receive occupational therapy and speech and language therapy as related services. (S-19; T-153:23-25, P-77).
81. The District's IEP also proposed that Student would receive a functional behavioral assessment within 60-days upon Student starting school. The behavioral assessment data would then lead to the development of a positive behavior support plan. In the interim, Student would receive behavioral interventions as provided in the IEP under program modifications and specially designed instruction. (S-19; T- 153:10-21).
82. During the October 11, 2018, IEP team meeting, Parent again asked about the opportunity for Student to attend school at the nearby district; the District again explained that this was not considered as the District members of the team believed that the proposed IEP and placement could provide programming in the LRE (T-150:2-5).
83. The special education supervisor offered and the Parent agreed to take a tour of it so that she could observe the program (T-150:6-9; T-158:7-12). At the conclusion of the walking tour, the Parent indicated that she would review all of the information she had and get back to him about her thoughts. (T-158:13- 18).
84. On October 12, 2018, the District issued a NOREP for Student's placement in the life skills support class at the high school in the district. (S-27; T-159:14).
85. Parent did not approve the District's proposed IEP, nor did she send Student to school for the remainder of the 2018-2019 school year. (S-27 at 3; T-439:12-15).
86. The District offered to fund an independent educational evaluation ("IEE") and/or a placement at an approved private school; however, the Parent refused both suggestions. (T-339:6-10).
87. Parent continues to request that the District place Student at [her preferred school]. (T-339:23- 340:3; -347:7-18).

CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer*, supra, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student’s program. I will, however, as explained below when and if necessary, give more or less persuasive weight to the testimony of certain witnesses when the witness either failed to or in the alternative provided a clear, cogent and convincing explanation of how he/she evaluated the Student’s eligibility, designed the Student’s IEP, implemented the IEP or designed and participated in the preparation of the prior written notice, or the NOREPs’ proposed actions, inactions or refusals. For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others.⁴

⁴⁴ This hearing officer gave persuasive weight to the testimony of the certain individuals who demonstrated the ability to cogently and clearly describe Student-specific facts like: (1) the witness’s understanding of the Student’s educational, health, behavioral, academic needs, present levels and the then current and available data profile/sets; (2) the witness’s understanding of the Student’s intertwined behavioral, attention, self-regulation, health and social skills needs, circumstances and deficits; (3) the witness’s understanding of the Student’s then current behavioral and integrated health related circumstances all of which impact the Student’s then current IDEA disabilities; (4) the Student’s behavior in the school, the home and the community; (5) the Student’s testing, assessment and behavioral health profile/data, and (6) any individual Student-specific circumstances discussed herein like the Student’s responses to sensory,

FREE APPROPRIATE PUBLIC EDUCATION

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

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

behavioral and health related circumstances prior to and upon enrollment and return to the District

offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

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

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

causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* 137 S. Ct. 1001, but the IDEA does not guarantee "the absolute best or 'potential-maximizing' education." See, *Rowley, Andrew F., The Student K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

THE DISTRICT'S CHILD FIND DUTY

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

IDEA ELIGIBILITY CRITERIA AND ASSESSMENT PROCESS

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use

any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B).

And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c).

Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1).

In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially-designed instruction.

EMOTIONAL DISTURBANCE IS AN IDEA DISABILITY

In order to qualify as a "student with a disability" under the IDEA, a student must meet the definition of one or more of the categories of disabilities. 34 C.F.R. § 300.8(a)(1). Pursuant to the IDEA Part B regulations, 34 C.F.R. § 300.8(c)(4)(i) "emotional disturbance" means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance"(A)An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B). An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A

general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

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

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

AUTISM IS AN IDEA DISABILITY

The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3 that adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(1)(i). Other characteristics of autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. §300.8(c)(1)(i). A student does not qualify as a child with autism if his or her educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. §300.8(c)(1)(ii). At times IEP and evaluation teams are called upon to make difficult judgments as to which circumstance, conditions and diagnoses are IDEA disabilities. ⁵

⁵ *See, e.g., Joanna S. v. South Kingstown Pub. Sch. Dist.*, 69 IDELR 179 (D.R.I. 2017) (upholding an IEP team's determination that the student's severe anxiety was his most significant

Parents and district oftentimes need to be reminded that a medical diagnosis of autism will not in itself entitle a student to receive special education and related services. To meet the IDEA's definition of autism, the student's disability must have an adverse effect on his/her educational performance.⁶ When it comes to the speech and language prongs, not every child who has difficulties with communication, social interaction, or change will be eligible for IDEA services as a child with autism. Numerous hearing officers have upheld determinations that behaviors such as throwing tantrums, refusing to listen to instructions, and speaking frequently about a particular subject are not always indicative of a finding of autism *See, e.g., Newark Unified Sch. Dist.*, 48 IDELR 171 (SEA CA 2007) (finding that a 4-year-old boy who had tantrums, spoke in a loud voice, and had some difficulties playing with other children was exhibiting behavior that was typical of children his age); *Los Altos Sch. Dist.*, 48 IDELR 25 (SEA CA 2007) (determining that a preschooler's behavior and social interaction were fairly typical for a child his age); and *In re: Student with a Disability*, 58 IDELR 85 (SEA WV 2011) (holding that although the student exhibited some behavioral problems in school, those behaviors were not markedly different from those of his peers). A student does not qualify as a child with autism for purposes of the IDEA simply because he/she exhibits some traits of autism outside of the educational setting. *See, e.g., Vista Unified School District*, 10 ECLPR 70 (SEA CA 2013); *Arlington Indep. Sch. Dist.*, 60 IDELR 267 (SEA TX 2012); *Pickerington Local Sch. Dist.*, 10 ECLPR 72 (SEA OH 2012); *La Mesa-Spring Valley Sch. Dist.*, 109 LRP 54643 (SEA CA 08/20/09); and *Clear Creek Indep. Sch. Dist.*, 6 ECLPR 46 (SEA TX 2008).

Recognizing the difficult task that evaluation and IEP teams face, teams should not ignore behaviors suggesting that a child has autism. Districts have an affirmative duty to locate, identify, and evaluate children suspected of having disabilities identified in the IDEA -- including autism. 34 C.F.R. §300.111(c)(1). If a district suspects a child has an autism spectrum disorder and needs special education, it should seek consent for an evaluation. The failure to evaluate the child properly and in a timely manner may amount to a denial of FAPE.⁷

disability). At the same time, a district should consider the student's autism-related needs when developing his IEP. *See, e.g., D.L. v. St. Louis City Pub. Sch. Dist.*, 118 LRP 28132 (E.D. Mo. 07/02/18) (holding that a Missouri district denied FAPE to a fourth-grader with an emotional disturbance when it developed an IEP that failed to address his autism-related sensory needs).

⁶ *See, e.g., In re: Student with a Disability*, 114 LRP 43641 (SEA IL 08/04/14); *District of Columbia Pub. Schs.*, 12 ECLPR 69 (SEA DC 2014); *Victoria Indep. Sch. Dist.*, 10 ECLPR 12 (SEA TX 2012); and *In re: Student with a Disability*, 58 IDELR 85 (SEA WV 2011).

⁷ *See, e.g., Orange Unified Sch. Dist. v. C.K.*, 59 IDELR 74 (C.D. Cal. 2012) (A preschooler's unresponsiveness and need for frequent prompting during a speech and language assessment as

Other Health Impairments are an IDEA Disability

Students with an OHI can be identified as IDEA eligible, provided that they have limited strength, vitality, or alertness. At some students may have a heightened alertness to environmental stimuli. In either case, the OHI must adversely affect the child's educational performance. 34 C.F.R. § 300.8(c)(9), See, *In re: Student with a Disability*, 119 LRP 18518 (SEA MO 05/03/19) (finding that the student's behavior was typical of kindergartners and did not impact his educational performance; hence the child was ineligible under the IDEA.). In most cases, a student's average or better grades or the ability to be redirected will establish that, despite an ADHD diagnosis, the OHI condition does not adversely affect educational performance.⁸

COMPENSATORY EDUCATION AS APPROPRIATE RELIEF

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.⁹ Compensatory education should place the child in the position they would have been in but for the IDEA violation.¹⁰

well as reports that he was not toilet-trained, did not make eye contact, and had a vocabulary of zero to three words should have prompted a California district to evaluate the child for autism).

⁸ See, *C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, unpublished) (where grades and test scores showed that the student continued to perform despite the ADHD diagnosis the student's condition didn't adversely affect educational performance); *San Lorenzo Unified Sch. Dist.*, 116 LRP 7340 SEA CA 02/09/16) (a student who sometimes became inattentive or hyperactive and was able to successfully return to the task at hand, with redirection, was not adversely affected); *District of Columbia Pub. Schs.*, 115 LRP 16786 ((SEA DC 02/02/15) (because his grades and test scores remained satisfactory, despite impulsive behavior a middle schooler with ADHD was not IDEA eligible under the category of OHI), *District of Columbia Pub. Schs.*, 64 IDELR 123 (SEA DC 2014) (the student's ADHD did not negatively impact his educational performance where the student's psychoeducational evaluation determined that the student had no difficulty completing grade-level work in reading, math, and written language); and *Norwalk Bd. of Educ.*, 73 IDELR 163 (SEA CT 2018) (the fact that a student was at or exceeding academic benchmarks by the end of kindergarten helped show that his Connecticut district correctly found him ineligible under the IDEA)

⁹ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

¹⁰ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job.”

Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child.”¹¹

A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *Id.*

With these firmly established applicable IDEA legal principles in mind, I will now turn to an analysis of the Parents’ claims, applicable defenses and the multiple requests for appropriate relief.

ANALYSIS AND CONCLUSIONS OF LAW

THE PARENT’S CLAIMS AND THE DISTRICT’S RESPONSE

The Parent contends as a result of multiple procedural and substantive violations, the District’s multiple offers of a FAPE, when offered, were not appropriate. In particular, the Parent argues that the District does not understand the Student’s history of autism. Furthermore, she argues that the District’s academic evaluations are fundamentally flawed. As a consequence of this misunderstanding, the Parent contends the IEPs are not otherwise appropriate in light of the Student’s unique learning needs and circumstances. Finally, she argues that the proposed action to identify the Student as a person with an emotional disturbance is misplaced. The District, on the other hand, contends that at all times relevant it complied with all applicable substantive and procedural evaluation, assessment and IEP regulations and requirements. Simply stated, the District contends the Parent’s FAPE, assessment claims and compensatory education claims are misplaced.

For all of the following reasons, after reviewing all of the testimonial and non-testimonial extrinsic evidence proffered on both sides, I now find in favor of the District and against the Parent. A Final Order in favor of the District denying the Parent’s denial of FAPE, compensatory education, and IEE claims follows.

THE DISTRICT’S 2017 EVALUATION WAS COMPREHENSIVE AND APPROPRIATE

Although the Parent made broad claims challenging the evaluations, the record does not support her claims or suggested conclusions. Consistent with the IDEA evaluation criteria prior to completing its evaluation, the District staff reviewed the then-existing December 2016 and January 2017 data set, as explained in the 60-page charter school evaluation report. In combination, the two evaluations included a “variety of assessment tools and strategies,” which in combination determined whether the Student had a disability and whether the Student’s disability adversely

¹¹ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

affected the Student's education. The two evaluations included behavioral assessments, ability testing, achievement testing, an FBA, OT, speech and language, autism-specific rating scales, executive functioning, measures of attention, ADHD, DSM-5 data and measures of emotional skills.

The initial recommendations regarding IDEA eligibility and the determination of educational need were made after the evaluation team considered multiple measures of educational need. 20 U.S.C. § 1414(b)(2)(B). The record is also preponderant that each assessment administered, measured and reviewed, by a team of knowledgeable persons, including the Parent, was "technically sound" to gauge the Student's eligibility and also assessed how each suspected disability adversely affected the Student's performance. Each assessment protocol was administered, reviewed and summarized in the report and conveyed to the Parent in an otherwise understandable manner. All the assessment methods, protocols and materials were otherwise "valid and reliable" for their intended purpose and each assessment was "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, the individualized assessment tools either confirmed or ruled out the Student's potential disabilities identified the student's individual learning circumstances and assisted the team in determining whether and to the extent the Student needed supports, accommodations and SDIs. The District's report carefully discussed the relative contribution and effects of the Student's cognitive, language, sensory and behavioral circumstances. See, 20 U.S.C. § 1414(b)(2)(C).

For example, the Parent's ratings confirmed atypical responses and a general pervasive mood of unhappiness or depression. (Compare BASC-2, BASC-3 and SAED-2 responses, with S-17, S-2, S-5, S-17, P-87). Accordingly, the record is preponderant that the District's 2017 evaluation was a comprehensive assessment of the Student in all areas of suspected disability.

THE MARCH 2016-2017 AND THE 2017-2018 OFFERS OF A FAPE

The March 2017 IEP included objective statements of the Student's then-current present levels educational performance. The present levels provided detailed data about the Student's reading, math, emotional, behavioral, sensory, speech and language needs. The present level baseline data supported the development of the annual goals and the annual goals provided for a detailed schedule to assess, analyze, and report progress to the Parent. The SDIs advanced the acquisition of the goals and are scheduled to be provided through the school day. The IEP calls for the Student to receive OT supports to address the Student's sensory needs, while at the same time, the Student's speech and language needs are also fully supported. Accordingly, in light of the clarity of the present level in combination

with the annual goals and the plan to supplement and refresh the IEP once the Student began to attend I now find the March 2017 IEP was reasonably calculated when offered to provide a FAPE.

When the Student did not attend school, the District made a second offer of a FAPE, which consistent with the Parent's input targeted life skills instruction. The November 2017 IEP included eight measurable annual goals, SDIs, OT and speech and language support. This time the IEP called for the Student to receive life skills support at the [high school] and then the following year the Student would move to a life skills class at the [high school]. Granted, while the mother's concerns that the lack of school records, predating the Student's attendance at the District funded private school, are genuine, her predetermined insistence that the Student be educated outside the District at a placement of her choice is not supported by the record. Even assuming *arguendo*, her belief that the Student is a person with autism for IDEA purposes was correct, she failed to produce preponderant proof as to how, based upon that belief, the IEP was fundamentally flawed. The present levels were clear, the goals were measurable, the SDIs supported the goals and the related services were otherwise sufficient. Therefore, based upon the then-existing data available, in light of the unique circumstances of the Student not returning to school, I now find the 2017-2018 IEP was reasonably calculated when offered. Simply stated, although the Parent rejected the IEP, she failed to produce preponderant evidence describing either a procedural or substantive error. Therefore, the Parent's denial of FAPE claims and request for compensatory education is denied.

THE DISTRICT'S NEXT EVALUATION AND THE STUDENT'S SCHOOL RECORDS

A central theme throughout the course of the dispute is the Parent's genuine belief that absent acknowledgment and understanding of the Student's autism diagnosis and its effect upon the Student's learning, the teachers will fundamentally misunderstand the Student's needs. Acting upon this core belief, the Parent rejected the November 2017 IEP and requested a reevaluation. To remedy the misunderstanding, the mother then provided the District with over 70 plus educational, medical and behavioral health records dating back to the Student's preschool years. The mother then created a detailed spreadsheet that listed, by year and provider, the Student's medical, behavioral health and educational diagnosis, test score and the source of the data, *i.e.*, an IEP, ER or medical report. Although the District's objective testing was completed, the District accepted, analyzed and summarized roughly 12 years of historical educational, behavioral and medical data. In June 2018, the District provided the Parent with another report which at times incorporated the Parent's input in verbatim fashion.

After studying, comparing and analyzing the Parent's spreadsheet exhibit, at P-87, to the District's evaluations, IEPs and the charter school evaluation, for all of the following reasons, I now find the Parent's testimonial and non-testimonial evidence, data and arguments, do not support the Parent's overlapping contentions that, upon re-enrollment and continuing to the current time, the Student's testing profile aligns with the IDEA eligibility criteria associated with autism.

First multiple ratings as early as 2012 on the ADOS, then on the ADI-R in 2016, and the ASRS, in 2018, all of which are valid, recognized and technically sound autism-specific measures, noted that although the Student displayed some behaviors consistent with an autism spectrum disorder the Student profile did not line up with the IDEA autism-related criteria. Second, contrary to the IDEA autism-related eligibility criteria, the fact that the historical data indicated the Student would engage with peers and adults when combined with the valid rating scale data cuts against the Parent's autism contentions.

Third, the Parent never explained why when the Student was enrolled in second grade and the private psychologist ruled out an autism disorder and instead opined that the Student met the criteria of ADHD, a form of an OHI, and displayed signs of a developmental language disorder-mixed receptive-expressive type, the Parent then never challenged the examiner's findings or the District's reliance on the same. Additionally, the Parent never explained why she did not challenge the charter school evaluation that reached the same conclusion.

Fourth, when the variety of 12 or more technically sound assessment instruments are viewed as a whole, including the Student's own self-monitoring data, along with the Parent's multiple ratings, over time, the data profile indicates weaknesses in executive functioning, cognitive abilities, inattention, coupled with the Student's overall mixed and expressive language deficits. The testimonial and the non-testimonial extrinsic evidence preponderantly and cogently explains the District's overall finding that while the Student may meet the medical, behavioral and/or clinical criteria for autism, the existing school-based and community data set does not match up with the IDEA criteria to be identified as a person with autism. The same battery of tests does, however, trend favorably towards a finding of a language disorder, an OHI, ED and an ID. (compare and contrast the data at S-2, S-7, S-17 and P-87 with the definitions at 34 CFR §300.8(c)(4)(ii) [emotional disturbance], 34 CFR §300.8 (c)(9) [other health impairment], 34 C.F.R. §300.8(c)(6)[intellectual disability] and 34 CFR §300.8 (c)(11) [speech impairment].

Fifth, the Student's ratings by the mother on the SAED-2 indicate a significant number of factors trending away from autism and towards identifying the Student as a person with an emotional disturbance.¹²

Sixth, while the OT testing data indicates sensory processing deficits and weakness, all of which were targeted for IEP services, the OT data profile does not fit the typical autism spectrum deficit-based needs model. Simply stated, contrary to the mother's contentions, the OT data, when viewed as a whole does not support a finding that the Student exhibits unusual responses to sensory experiences" related to autism. See, 34 C.F.R. §300.8(c)(1)(i).

Seventh, the results of the functional behavioral assessment in 2016, indicate that when demands are placed on the Student, the Student will become noncompliant, and get off-task. While at the same time, the Student either seeks adult attention or engages in escape motivated behavior. Granted while in the past, the Student has engaged in self-injurious behavior, the FBA data at the cyber school and the District did not pick up on any autistic-like patterns like engagement in repetitive activities and/or stereotyped movements. See, 34 C.F.R. §300.8(c).

Eighth, while the Student's data profile indicates functional academic skills deficits in reading, writing, math problem solving, math computation, written expression, self-regulation, self-monitoring, coping, visual-motor integration, motor coordination, visual perception, eye-hand manipulation deficits, sensory sensitivity, speech and language skill deficits, social, emotional and behavioral regulation deficits, the team concluded and the record supports a finding that all of the above were not attributed to or related to autism. See, 34 C.F.R. §300.8. Even assuming *arguendo*, the Student's profile fits an autism eligibility determination, the proposed IEPs targeted all of the above skill deficits. The evidence is preponderant that the autism label, in this particular instance, would not add anything to the IDEA need, skill deficit, goal-based SDI mix.

Ninth, the private behavioral health records note differential and rule out diagnoses of bipolar disorder, obsessive-compulsive disorder, depression, auditory hallucinations, tantrums, auditory and self-injurious behavior. Although this constellation of behavioral health conditions, at times, overlaps with IDEA eligibility determination of autism, in this particular instance, these behavioral

¹² A student does not qualify as a child with autism unless the student's educational performance is adversely affected primarily because the child has an emotional disturbance. 34 §CFR 300.8(c)(1)(ii). See, e.g., *Joanna S. v. South Kingstown Pub. Sch. Dist.*, 69 IDELR 179 (D.R.I. 2017) (upholding an IEP team's determination that the student's severe anxiety was his most significant disability).

health conditions cut against an IDEA finding of autism as the overall data set does not indicate that autism is interfering, related to or impeding learning.¹³

Tenth, while signs of an ID were noted on eight evaluations reports from 2006 through 2014, the recent testing in 2018, like those in the past, supports a finding that the Student's full-scale ability falls in either the "Below Expected" range or the "Below Average" range, with SS ranging from a high of 76 in 2010 to a low of 65 in 2017, taken as a whole this profile and the associated data sets do not favor a finding of autism.

Eleventh, the BASC-2 and the BASC-3 testing combined with the SAED-2, premised upon the results of the Parent and the Student's self-ratings, indicate weaknesses in adaptive functioning, executive functioning, emotional instability, poor focus, careless mistakes and difficulty following directions, all of which, in this instance, cut against a finding of autism and favors the previous private evaluator's 2012 OHI eligibility finding.¹⁴

Twelfth, aware of the above profile, the Parent did not offer any expert testimony identifying any fundamental flaws with the administration, selection, or scoring of the assessments. After reviewing the record, I now find the mother either conflated or misunderstood the differences between the IDEA definition of autism and the medical and/or clinical definitions.¹⁵ Therefore absent preponderant proof, to the contrary, I now find the above fact pattern favors a finding, on behalf of the District and against the Parent on the IDEA autism eligibility dispute.¹⁶ This fact-finding, however, does not end the FAPE analysis for the 2018-2019 school year.

¹³ See, *Encinitas Union Sch. Dist.*, 60 IDELR 82 (SEA CA 2012) (noting that the evaluation of a child with autism was appropriate because the district used 12 different assessments to gauge the student's expressive and receptive speech and language abilities, to determine if he had any pragmatic language deficits, and to determine if he was articulating his speech at a developmentally appropriate level).

¹⁴ A student does not qualify as a child with autism if his educational performance is adversely affected primarily because the child has an emotional disturbance. 34 CFR §300.8(c)(1)(ii). See, e.g., *Joanna S. v. South Kingstown Pub. Sch. Dist.*, 69 IDELR 179 (D.R.I. 2017) (upholding an IEP team's determination that the student's severe anxiety was his most significant disability).

¹⁵ A medical diagnosis of autism will not in itself qualify a student to receive special education and related services. To meet the IDEA's definition of autism, the student's disability must have an adverse effect on her educational performance. See, e.g., *In re: Student with a Disability*, 114 LRP 43641 (SEA 08/04/14); *District of Columbia Pub. Schs.*, 12 ECLPR 69 (SEA DC 2014); *Victoria Indep. Sch. Dist.*, (SEA TX 2012); and *In re: Student with a Disability*, 58 IDELR 85(SEA WV 2011).

¹⁶ The identification of the disability itself is just one of the two main elements of an evaluation under the IDEA; the identification of a resulting need for special education and related services is the other, an aspect that cannot be investigated in a medical diagnosis. *Joint Policy*

THE 2018-2019 [HIGH SCHOOL] IEP IS APPROPRIATE

The proposed IEP included detailed present levels which were linked to objective data-based needs. The goals were measurable and included a predetermined schedule highlighting times when progress would be measured and reported to the Parent.

The IEP included goal-based SDI's along with targeted related services and a PBSP. The proposed location and the level of services, when offered, were reasonably calculated to enable learning in the LRE at a public school in the District. While the Student's transition needs are not fully defined, the class size and rotating class schedule at the high school would offer the Student many of the experiences otherwise offered to other typical high school students.

Two factors stand out in the testimony about how the District responded to the Parent's input and the Student's unique needs. First, the director of special education's testimony about the District's willingness to explore additional private placements out of the District, after the nearby school never responded to the District inquiry about a possible joint venture, indicates a willingness to find an appropriate path to ensure the Student was successful. Second, the District's willingness to pay for a private evaluation to resolve the autism, OHI, ID, OT and speech and language dispute also evidences the District's commitment to engage in a flexible, interactive process and a willingness to ensure the Student received the benefits of a comprehensive assessment in all areas of suspected disability. These factors and other fact-based reasons described herein now lead me to find in favor of the District and against the Parent.

CONCLUSION

At all times relevant, since the Student reenrolled up to and including the present, the District appropriately evaluated the Student in all areas suspected disability. Furthermore, each IEP, when offered, based upon the then-existing data set, offered a FAPE, within the meaning of the IDEA, as explained in *Rowley* and *Andrew F.* as applied in this Circuit. Accordingly, for all of the reasons set forth herein, the Parent's claims are denied; an appropriate **ORDER** follows.

Memorandum, 18 IDELR 1116 (OSERS 1991). *See also, In re: Student with a Disability*, 58 IDELR 85 (WV 2011) (noting that although a student was diagnosed with autism, the diagnosis alone was insufficient to make the student eligible for IDEA services).

ORDER

And now, this 6th of September 2019, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parent on all IDEA denial of FAPE, identification and evaluation claims arising during or related to the 2016-2017, 2017-2018 and 2018-2019 school year. Hence, the Student's claims for compensatory education and a prospective placement at a nearby District are denied.
2. All other claims for violations of the IDEA and requests for appropriate relief including any other affirmative defenses not otherwise addressed herein are dismissed with prejudice.

Date: September 6, 2019

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