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 Due Process Hearing Officer Final Decision and Order

CLOSED HEARING

ODR No.
21655-18-19

Child's Name:
M.J.

Date of Birth:
Redacted

Parents:
Redacted

Counsel for Parents:
Kimberly Caputo, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Local Education Agency:
Donegal School District
1051 Koser Road
Mount Joy, PA 17552

Counsel for the LEA:
Shawn Lochinger, Esquire
331 Butler Avenue
New Britain, PA 18601

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
03/13/2020

Introduction

This special education due process hearing concerns the educational rights of a student (the Student).[1] The Student is a former student of the School District (District). This hearing was requested by the student's parents (the Parents) against the District.

The parties agree that the Student is a child with a disability as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*, and that the District was, for the period of time in question, the Student's local educational agency (LEA).

The Parents allege that the District denied the Student a free appropriate public education (FAPE) for the period of time that the Student was enrolled in the District. That period includes the summers between school years. The Parents also allege that they were denied an opportunity to meaningfully participate in the development of the Student's special education program. The Parents demand compensatory education to remedy these violations.

The District denies the Parents' claims and argues that a portion of their claims are time-barred by the IDEA's statute of limitations.

[1] Except for the cover page, identifying information is omitted to the extent possible.

As explained below, I find several flaws in the District's approach to special education and their process for developing the special education program for the Student in this case. However, those flaws measured against the District's substantive obligations do not yield a substantive denial of the Student's rights. I am compelled, therefore, to find in the District's favor.[2]

Issues

The issues presented for adjudication are:

1. Is any portion of the Parents' claims time-barred?
2. Did the District violate the Student's right to a FAPE during the period of the Student's enrollment, including the summers between school years?
3. Did the District violate the Parents' right to meaningfully participate in the development of the Student's special education program.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must 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). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243

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[2] This is not an invitation to procedural sloppiness or willful ignorance of IDEA mandates. The District's errors in this case are of the type that yield substantive violations more often than not. My analysis, of course, in no way depends on what typically happens, but is limited to consideration of the facts of this case.

(3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

This does not mean that I assign equal weight to all testimony. Hearsay, no matter how fervently believed by the witness, cannot form the basis of this decision. Further, in this case, some witnesses testified as to their understanding of the District's legal obligations. Nearly all District employees who testified in this way evidenced serious misunderstandings of the District's legal obligations. From a credibility perspective, however, those misunderstandings are irrelevant. I judge the District's actions. Those actions either comport with the Student's rights or they do not. Each employee's understanding of the law is, therefore, not relevant.

Statute of Limitations

The District's Motion

At the outset of this case, I alerted the parties that I would accept evidence relevant to the District's statute of limitations defense throughout

the proceedings, as opposed to pre-hearing process, because the Student was no longer enrolled in the District. *See, e.g.* NT at 12.

The Parents filed their complaint on January 16, 2019 and filed an amended complaint on March 29, 2019. The amendment primarily concerned the District's response to the Parents' request for records. As the underlying FAPE and participation claims are the same in both the original and amended complaints, January 16, 2019 is the controlling date for the District's motion. The District seeks to exclude all claims arising before January 16, 2017.

The Student enrolled in the District for kindergarten in the 2015-16 school year. The District moves to exclude the entire 2015-16 school year (all of kindergarten) and the 2016-17 school year through January 16, 2017.

Statute of Limitations and Case Law

The IDEA's statute of limitations is found at 20 U.S.C. § 1415(f)(3)(C), which states:

> *A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.*

If parents raise a complaint within two years of the "knew or should have known" or KOSHK date, the statute of limitations imposes no bar on recovery. *G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601 (3d Cir. 2015).

The G.L. decision was groundbreaking, and there has been vigorous debate about what factors establish the KOSHK date since that decision was issued. My own analysis on this issue has developed over time and is

currently informed by *E.G. v. Great Valley Sch. Dist*., No. 16-5456, 2017 U.S. Dist. LEXIS 77920 (E.D. Pa. May 23, 2017). Prior to the *E.G.* case, I concluded that the IDEA meant what it said: the KOSHK date came when parents knew or should have known of the action forming the basis of their complaint. Said differently, I looked to when parents knew what the school was doing. The E.G. case affirmed this definition of the word "action," but held that something more is needed to start the two-year clock. The court held that the statute of limitations begins to run when parents know or should know both of the school's actions and of the alleged violations. *Id* at *21-22.

Knowledge of the action and knowledge of the violation "can happen on the same day or be spread over months or years." *Id* at 22. Further, I cannot make a blanket KOSHK determination for the entire case. Rather, through a fine-grained analysis, I must determine the KOSHK date for each alleged violation. *Id* at 22-23.

Other cases show how to determine when the Parents knew or should have known of each alleged violation. Courts have applied what has been characterized as the "IDEA's discovery rule" to "focus[] on clear action or inaction by a school district sufficient to alert a reasonable parent that the child would not be appropriately accommodated." *Brady P. v. Cent. York Sch. Dist.,* No. 1:16-CV-2395, 2018 U.S. Dist. LEXIS 43230, at *19-20 (M.D. Pa. Mar. 16, 2018) citing *B.B. by & through Catherine B. v. Del. Coll. Preparatory Acad.*, No. 16-806, 2017 U.S. Dist. LEXIS 70245, 2017 WL 1862478, at *3 (D. Del. May 8, 2017); *Solanco Sch. Dist. v. C.H.B.*, No. 5:15-CV-02659, 2016 U.S. Dist. LEXIS 104559, 2016 WL 4204129, at *7 & n.10 (E.D. Pa. Aug. 9, 2016); *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 600 (M.D. Pa. 2014).

The "reasonable parent" standard highlights the potential delay between a school's "clear action or inaction" and the parents' understanding

that the "child would not be appropriately accommodated." *E.G. v. Great Valley* at *22-23. Moreover, the inquiry calls for consideration of what conclusions about the child's education a reasonable parent could draw from the information at hand. The standard does not require parents to be educators or legal scholars. The clock does not run from when parents come to understand their legal rights. Instead, the clock runs from when reasonable parents are able to conclude that their child's needs are unmet.

Facts Concerning the KOSHK Date[3]

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. Regarding the KOSHK date, I find as follows:

1. The Parents and the District were in constant communication with each other about the Student from before the Student's enrollment through January 17, 2017.[4] *See, e.g.* P-1, P-2, P-3, P-4, P-5, P-7, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18, P-19, P-20, P-21, P-22, P-23, P-24, P-25, P-26, P-27.
2. The communications between the Parents and the District placed the Parents on notice of the Student's academic progress and serious behavioral incidents. *Id.*
3. The communications between the Parents and the District also placed the Parents on notice of what the District was and was not doing in response to the Student's academics and behaviors. *Id.*

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[3] I deviate from ODR's typical style by breaking my findings of fact into separate sections that flow from the issues presented.

[4] This level of communication continued, but I address only the period that the District moves to exclude in this section.

4. During the period of time from the start of the 2015-16 school year to January 16, 2017, the Student had several serious behavioral incidents. *Id.* Those behaviors escalated during the 2016-17 school year and included elopement, class disruptions, stealing, and eating an item out of the trash. *See, e.g.* P-20.
5. Through those same communications, the Parents presented information about the Student and expressed their belief about what services would appropriately meet the Student's needs. *Id*.

Statute of Limitations Analysis

I find that claims arising before January 16, 2017 are barred by the IDEA's statute of limitations.

Under the current standard established by case law, I must determine when a reasonable parent knew what the District was and was not doing, and when a reasonable parent would know that the Student's needs were unmet. In this case, the Parents' had near contemporaneous knowledge of the District's actions and inactions as they occurred. The Parents appreciated the seriousness of the incidents, were knowledgeable about the recommended interventions for the Student's diagnoses, shared that information with the District, and understood the extent to which the District would and would not do what they requested.

The statute of limitations notwithstanding, the District argues in the alternative that it did not violate the Student's rights during this period of time. For purposes of analysis, I assume that the District's actions and inactions constitute a denial of FAPE. Consequently, the Parents both knew what the District was doing and were able to determine that the Student's needs were unmet as events occurred. This is true both for the Parents in this case, who are knowledgeable and communicative, and for a "reasonable parent" under these circumstances.

I will not consider whether the District violated the Student's rights between the start of the 2015-16 school year through January 16, 2017. This does not mean, however, that events occurring during that period of time are irrelevant to the remaining claims. The District's knowledge of the Student grew during this period of time, and that knowledge informs the District's obligations to the Student from January 16, 2017 through the Student's disenrollment from the District.

FAPE Claims

The FAPE Standard

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students

capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

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 its 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 Parents are the party seeking relief and must bear the burden of persuasion.

Facts Concerning FAPE Claims: January 16, 2017 Though the End of the 2016-17 School Year

Regarding the FAPE claims running from January 16, 2017 through the end of the 2016-17 school year, I find as follows:

1. The 2016-17 school year was the Student's 1st grade year.

2. The Student entered 1st grade with an IEP that the District characterizes such IEPs as a "speech and language only" IEP, or a "speech only" IEP, or a "speech IEP," or something other than an "academic IEP."[5] *See* NT 119, 337, 435, 612, 615, 656, 720, 969; S-12.

3. Characterizations notwithstanding, the Student's IEP provided 30 minutes per cycle of Speech Therapy in a small group. The IEP also included 18 individual Occupational Therapy per school year (30 minutes per session). S-12.

4. The IEP had a writing goal, an expressive language goal, and a speech articulation goal. S-12.

5. By January 16, 2017, the Student had engaged in several behavioral incidents. While those incidents were infrequent, they were severe in nature and upsetting to the Parents. *See above.*

6. By January 16, 2017, the District and the Parents were in frequent communication about the Student's behaviors. *See above*.

7. By January 16, 2017, the Parents had told the District that the Student, who experienced trauma in early childhood before being adopted by the Parents, was diagnosed with Reactive Attachment Disorder (RAD). P-11.

8. By January 16, 2017, the District explained to the Parents that RAD was not an educational diagnosis and would continue to provide services under the Student's "speech only" IEP.

[5] As discussed below, there is no such thing as a "speech only" IEP.

9. The Student was occasionally seen by the School Counselor. This was not a service drafted into the Student's IEP, but rather is a service available to all children regardless of disability status. *See, e.g.* S-54.
10. During the District's holiday recess, the Student changed medication. There was also a change in the Student's TSS (an aide provided by a third-party agency) and the Student's services at home. S-54.
11. Upon return from the holiday recess, the Student's behaviors improved generally, and the Student did not exhibit the troubling behaviors that were present during the first half of the 2016-17 school year. S-54.
12. The Student's behavioral improvement was temporary. The particular, troubling behaviors from the first half of the 2016-17 school year did not return. However, the Student's overall behavioral presentation deteriorated. By March 2017, the Student was frequently noncompliant and not amenable to redirection. *See, e.g.* S-54.
13. Academically, by March 2017, the District did not believe that retention (repeating 1st grade) was necessary, but that the Student could benefit from summer instruction. S-54, P-28, P-41.
14. On March 9, 2017, the District invited the Parents to an IEP team meeting. The meeting was scheduled for March 23, 2017. S-18.
15. Around this time, the Parents asked the District to evaluate the Student. *See, e.g.* S-20.
16. On March 20, 2017, the District sought the Parents' consent to evaluate the Student via a Reevaluation Consent form. The District issued the form in response to the Parents' request for an evaluation and information shared by the Parents concerning RAD. S-20.

17. On March 23, with the evaluation pending, the Student's IEP team (including the Parents) met. This was the meeting for the March 9, 2017 invitation. At the meeting, the District proposed continuing the Student's IEP without any changes. The District issued a Notice of Recommended Educational Placement (NOREP) offering to continue the IEP. S-19.

18. The Parents refused to sign the NOREP. S-19, S-21. As a result, the prior IEP continued.[6]

19. On the evening of May 3, 2017, the Parents took the Student to a hospital as a result of a serious behavioral incident at home. The Parents reported this to the District the next morning and explained that the Student was not admitted because the hospital did not have an available bed. P-45

20. On May 16, 2017, the District completed its reevaluation report. The District found that the Student is a child with an emotional disturbance. The District also concluded that the Student was not a child with a Speech or Language Impairment because the Students had mastered all speech goals. S-23.

21. Around May 19, 2017, the Student was hospitalized following an out-of-school behavioral incident. The Student remained hospitalized through the end of the 2016-17 school year. *See, e.g.* NT 1806.

22. The District took no formal action based on the information generated in the reevaluation report (2017 RR) until the start of the 2017-18 school year.

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[6] Since the District was proposing a continuation of the current IEP, under the particular circumstances of this case, the result would be the same whether or not the Parents signed.

FAPE Discussion: January 17, 2017 Though the End of the 2016-17 School Year

There is no such thing as a "speech only IEP."

While the District's understanding of its legal obligations is not relevant, drawing a distinction between IEPs and "speech only IEPs" frequently yields violations. A child may qualify for special education under any of the disability categories recognized by the IDEA. Those categories are used for determining eligibility and for no other purpose. Once a child is found to be a child with a disability, the LEA's obligation is to evaluate the child and draft an IEP that satisfies the FAPE standard set forth above. The child's category does not require the LEA to provide any particular service. The child's category also does not prohibit the LEA from providing any particular service. The disability category does not determine what special education a child can or cannot receive.

The distinction between eligibility criteria and substantive FAPE obligations is important. Children can have needs that are not captured by a diagnosis, and a diagnosis does not necessarily establish a child's needs. Two hypothetical examples illustrate this point:

First, a child with a reading disability may have a Specific Learning Disability and no other classification for eligibility purposes. If that child routinely becomes frustrated by his or her inability to read, that child may require some behavioral supports in order to receive a FAPE. The LEA need not change the child's eligibility classification in order to provide behavioral supports.

Second, a child with Autism Spectrum Disorder (ASD) may have ASD and no other classification for eligibility purposes. That diagnosis and classification say almost nothing at all about what services the child needs in order to receive a FAPE. If the child requires Speech Therapy, the LEA need

not separately classify the Student as a child with a Speech or Language Impairment to provide Speech Therapy.

In both examples, the children's needs drive the children's placement. The children's disability category does not drive the placement.

In this case, evidence establishes that the District would not add behavioral goals to the Student's IEP without a change in the Student's disability classification because the IEP was a "speech only" IEP. Evidence also establishes that the District viewed a reevaluation as the only mechanism by which the Student's eligibility could change. *See,* NT 969.

The District is half-right. The District is correct that IEP services should flow from evaluations, and that a reevaluation is the proper mechanism to change the Student's eligibility category. Unfortunately, the District's position that the Student's disability classification limited the services that the Student could receive is both wrong and evidences a misunderstanding of core IDEA principles.

My task, however, is not to determine whether the District understands its IDEA obligations. My task is to determine whether the District violated the Student's right to a FAPE. I judge the District by its actions, not its understanding of the law.

The District acknowledges the seriousness of Student's behaviors in the first half of the 2016-17 school year (the portion that is time-barred). The District argues that these behaviors are attributable to the Student's adjustment from a half-day kindergarten program to a full-day 1st grade program. The District further argues that the behaviors were typical of children making such adjustments, and that the frequency, intensity, and duration of those behaviors did not trigger further action. The Parents, of course, argue the opposite. While the Parents do not present evidence supporting claims that the Student's most serious behaviors were frequent,

they argue that the Student's behaviors were shocking and dangerous. They argue that the Student's behaviors, combined with the Student's RAD diagnosis, should have prompted the District to take action.

I accept the District's argument concerning the frequency of the Student's behaviors. The troubling behaviors that the parents highlighted throughout these proceedings can fairly be described as isolated incidents.

I reject the District's argument that those behaviors were typical of students transitioning from kindergarten to 1st grade. Elopement, serious classroom disruptions, and eating from the trash are not typical behaviors.

As a result of the incidents during the first half of the 2016-17 school year, the District discussed the Student at meetings and was keeping an eye open for the Student's behaviors. The District also provided counseling, although not as a part of the Student's IEP. The District argues that these actions were sufficient at that time. The Parents argue that the District should have proposed a reevaluation at a minimum. Both of these arguments are somewhat off point. My task is not to evaluate what the District could have done. My task is to determine what the District did, and square that action with the Student's rights.

In this case, from January 16 through the end of the 2016-17 school year, the Student did not engage in any serious behavioral incidents. Frequency notwithstanding, the record of this case shows that the Student's troubling behaviors during the first half of the 2016-17 school year were not present during the second half of that school year. Further, from January 16, 2017 through March 2017, the Student's behaviors had improved. Given the elimination of the Student's most troubling (even if isolated) behaviors and the Student's overall behavioral improvement, I find that the District's decision to not propose an evaluation did not violate the Student's rights.

The District acknowledges that the situation changed in March 2017. The Student was frequently noncompliant, and general education interventions that had worked to that point were no longer effective. Frequent communication between the District and the Parents gave the Parents enough information to become concerned. To address their concern, the Parents requested an evaluation.

The Parents argue that the District should have requested an evaluation before their own request. I disagree. The parties agreed to evaluate the Student when it became clear that an evaluation was needed. That is what the IDEA requires. To hold otherwise would force parents and schools to race to be the first to file paperwork whenever an evaluation is necessary. The IDEA presumes a degree of cooperation between parents and schools, not a rush to complete paperwork in anticipation of future legal claims. More importantly, the substantive result is the same: a child who needed a revaluation received a reevaluation.

The District took no action between the completion of the 2017 RR on May 16, 2017 and the end of the 2016-17 school year. The fact that the school year was nearly over makes the District's inaction understandable, but not defensible. At this point in time, the District knew that the Student required services beyond what the Student was receiving and, through the 2017 RR, had a good idea of what services the Student needed. Even though the school year was ending, nothing prohibited the District from convening the Student's IEP and offering new services. After all, emotional support is a *service* not a *place.*

The Student's hospitalization, however, does provide a defense for the District. The fact that the school year was ending is not a defense but the fact that the Student was not available for instruction is a defense. The chronology is worth reiterating. The 2017 RR was completed on May 16, 2017. Three days later, the Student was hospitalized and remained in the

hospital though the end of the 2016-17 school year. The Student did not come to school and, therefore, could not have received the benefit of any IEP changes. Even if the District had immediately revised the IEP as recommended by the 2017 RR, that would have made no substantive difference because the Student was not present to receive the benefit.

Again, I only judge the District's actions and inactions relative to the Student's rights. I do not judge what the District could have done. The record supports a finding that the District had actual knowledge that the Student was not receiving a FAPE from May 16, 2017 through the end of the 2016-17 school year. Despite the fact that the school year was ending, the District could have taken action to revise the IEP but did not do so. That failure, however, did not result in substantive harm because the Student was hospitalized and not available for instruction from May 19 through the end of the 2016-17 school year. Consequently, the Student is not owed compensatory education for any period of time from January 17, 2017 through the end of the 2016-17 school year.

Extended School Year – Legal Standard

LEAs are required to determine if children with disabilities need an extended school year (ESY) in order to receive a FAPE. While ESY can occur any time a school is closed, ESY is typically occurs in the summer.

Pennsylvania regulations establish seven factors that LEAs must consider when making ESY determinations (*See* 22 Pa Code § 14.132):

1. Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

2. Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
3. Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
4. The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
5. The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
6. The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
7. Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

ESY Summer 2017 – Facts and Discussion

There is no dispute that the District determined that the Student did not qualify for summer ESY during the 2015-16 school year. That determination is reflected in the Student's IEP that was current at the start of the 2016-17 school year. The District extended that decision into the IEP that would have continued the Student's starting IEP (offered while the evaluation was pending). The District did not separately offer ESY for summer 2017 through a NOREP or IEP revision.

The Parents did not present preponderant evidence related to any of the seven factors articulated above. Rather, they argue that the District never truly completed an ESY analysis when finding that the Student was not eligible for ESY. The Parents are correct that the District continued a prior ESY determination when the IEP team met on March 23. There is no evidence that the District reconsidered its ESY determination after the 2017 RR was completed on May 16, 2017.

I accept the Parents' argument that the District did not conduct an ESY analysis. That does not, however, prove that the Student was entitled to ESY in the summer of 2017, or prove what the Student should have received, or prove what remedy the Student is owed. The record in this case shows flaws in the District's process but does not establish the Student's entitlement to ESY in the summer of 2017. Therefore, I deny the Parents' claims concerning ESY in the summer of 2017.

Facts Concerning FAPE Claims: 2017-18 School Year (2nd Grade)

1. On September 5, 2017, the Student's IEP team convened to review the 2017 RR and revise the Student's IEP. *See e.g.* S-25.
2. At this point, the District had concluded that the Student was a child with an Emotional Disturbance and that the Student exhibited behaviors that impeded the Student's learning or that of others. S-25.
3. The District drafted a new IEP for the Student. The new IEP included goals for physical writing (e.g. letter formation); content writing (e.g. grammatically correct sentences); following directions; keeping hands, feet, and objects to self; remaining in the assigned area; and "using kind words with an inside voice." S-25.

4. For program modifications and specially designed instruction (SDI), the IEP offered small group writing and math instruction in a learning support classroom, verbal praise and reminders of incentives, use of "first-then" directions, daily behavioral check-ins with a Learning Support teacher, and crisis response support if needed. S-25.
5. For related services, the IEP offered four Speech and Language Therapy sessions per school year (30 minutes per session), and 18 Occupational Therapy sessions per school year (30 minutes per session). S-25.
6. The IEP offered an itinerant level of Learning Support, meaning that the Student would be educated with in general education classrooms with nondisabled peers except when receiving academic instruction in a Learning Support classroom and during individual OT sessions. S-25.
7. A Positive Behavior Support Plan (PBSP) was attached to the IEP. The PBSP tracked the behavioral goals in the IEP, provided antecedent strategies to help prevent the Student's behaviors, and consequences based on the Students behaviors. S-25.
8. Regarding antecedent strategies, the PBSP did little more in substance than call for teachers to redirect the Student and remind the Student of behavioral objectives. S-25.
9. Regarding consequences, the PBSP called for the Student to earn rewards for positive behavior by earning stars on a chart. S-25.
10. The events immediately following the September 5, 2017 IEP team meeting likely explain why a NOREP for the September 2017 IEP is not in evidence. There is no dispute however, that the District implemented the September 2017 IEP with the Parent's knowledge and consent for the majority of the 2017-18 school year.

11. On September 8, 2017, the Parents informed the District that the Student was hospitalized following a serious behavioral incident at home. P-60.

12. On September 13, 2017, the Parents informed the District that the Student was scheduled to be released from the hospital on September 20, 2017. P-60. The Student was released and returned to school around that time.

13. During the 2017-18 school year, the District sent daily behavioral logs to the Parents and the Parents communicated with the Student's teachers frequently. *Passim.*

14. Discipline alerts and discipline service logs indicate that the Student exhibited no significant behavioral incidents in during the 2017-18 school year. P-94, P-95, S-55. Daily logs reflect that the Student's behavior was far from perfect. The Student called out frequently and was sometimes noncompliant but, generally, the Student was amenable to basic redirection. *Passim – see, e.g.* S-55, S-56.

15. Academically, the Student met grade level expectations as assessed by teachers and reported on report cards. S-51. Those assessments are consistent with objective reading assessments that placed the Student at a benchmark level on most probes. S-81.

16. The Student's primary teacher took maternity leave during the 2017-18 school year. This absence was planned at the start of the school year. The Parents voiced their preference for the District to place the Student with a teacher who was not scheduled for an absence during the school year. That request was denied, and the District contemporaneously expressed its opinion that the teacher who was scheduled for maternity leave and that teacher's replacement were the right teachers for the Student. NT *passim.*

17. Nothing in the record indicates that the shift from one teacher or another resulted in any substantive change in the Student's academic or behavioral progress. *Passim*.

18. On May 1, 2018, the District invited the Parents to an IEP team meeting. That meeting convened on May 9, 2018. S-27.

19. During the May 9, 2018 meeting, the IEP team revised the Student's present education levels to reflect the Student's progress during the 2017-18 school year. All other aspects of the IEP remained the same, including the District's determination that the Student did not qualify for ESY in the summer of 2018. S-28.

FAPE Discussion: The 2017-18 School Year

Compared to the record as a whole, a small amount of evidence was presented concerning the Student's 2nd grade year. Nothing in the record constitutes a preponderance of evidence that the District violated the Student's right to a FAPE.

This is not meant to trivialize the Parents' legitimate concerns. The Student was hospitalized at the start of the school year, and it was reasonable for the Parents to be on high alert. The fact that this hospitalization was not connected to in-school behaviors should not change the Parents' level of care about what happens in school.

I question the usefulness of a constant flood of data showing every imperfection in the Student's behavior. I suspect that torrent of information was draining on both parties and prompted some amount of perseveration on smaller incidents. However, as with the District's internal legal analysis, the Parents' level of concern is not a factor in the analysis. Rather, I look to the record of the District's actions and the Student's responses to those actions. In doing so, I find no FAPE violation.

ESY Summer 2018 – Facts and Discussion

The facts concerning the Parents' summer 2018 ESY claims are substantively identical to the facts their summer 2017 ESY claims. In both instances, the District carried over an ESY determination from a prior IEP with any serious analysis. In both instances, there is no preponderant evidence that the Student required ESY services. My analysis, therefore, is the same. Absent proof of a need for ESY services, any flaw in the District's process was procedural and not substantive. Therefore, the Student is not owed compensatory education for a denial of FAPE occurring in the summer of 2018. I deny the Parents' 2018 ESY claim for this reason.

Facts Concerning FAPE Claims: 2018-19 School Year (3rd Grade)

1. The Parents obtained a private Psychoeducational Evaluation of the Student in June 2018. The private evaluation included a review of records, an in-school observation that occurred on June 1, 2018 (the very end of the prior school year), an interview of the Student, input from the Parents, and several rating scales. Portions of some standardized cognitive and achievement tests were also administered. S-30.

2. The private evaluator noted consistency between the private testing and prior testing by the District. S-30.

3. Cognitively, the private testing revealed that the Student is predominantly of average intelligence despite some individual results in the below average range. S-30.

4. Academically, the private testing revealed that the Student was in the average range as compared to same-age peers in reading and writing, but below average in math. S-30.

5. Behaviorally, the Parents and a teacher rated the Student's behaviors on standardized rating scales. The Parents' ratings showed a higher level of concern that the teacher's level of concern. The private evaluated commented that the Student's behaviors were more concerning at home than at school. Nevertheless, the teacher's ratings indicated difficulty with attention, frequent disruptions, and problems with planning (executive functioning). S-30.
6. The private evaluator recommended that the Student receive two periods of special education support per day with small group instruction for 45 to 60 minutes focusing on math. The private evaluator also recommended conducting a Functional Behavioral Assessment (FBA) at the start of the 2018-19 school year. S-30.
7. The Parents shared the private evaluation with the District. The Parties discussed the report and agreed to implement the Student's IEP in September 2018 and gather behavioral information as recommended by the private evaluation. The parties formalized this agreement through a NOREP dated September 4, 2018. S-33.
8. The District collected behavioral data in part by asking teachers to complete informal ratings of the Student's behavior. The District then convened the Student's IEP team on September 24, 2018. S-35, S-36.
9. The District drafted an IEP for the September 24, 2018 IEP team meeting. According to that document, the Student was already placed in an emotional support classroom (not a learning support classroom) for two periods per day to receive writing instruction and help in math. S-40.

10. Although not reflected in any prior NOREP, including the September 4, 2018 NOREP, the record as a whole indicates that the Student shifted from a learning support classroom to an emotional support classroom with the Parents' knowledge when the Student changed school buildings for 3rd grade. *Passim.*

11. Comparing the September 2018 IEP to the May 2019 IEP, information about the Student's current levels of performance was updated. The goals were reduced to two: a writing goal that measured the Student's performance against a 3rd grade rubric, and a self-regulation goal measured by the Student's daily points sheet (a behavior tracking log). S-40.

12. Comparing the special education program in the September 2018 IEP to the May 2018 IEP, time in a special education setting shifted from learning support to emotional support and increased from 30 minutes per day to two, 30-minute sessions per day (one focused on writing and the other on math). S-40.

13. The PBSPs attached to the September 2018 IEP and the May 2018 IEP are substantively similar. S-40.

14. The District issued the September 2018 IEP with a NOREP. The Parents signed and returned the NOREP on October 10, 2018. On the NOREP, the Parents checked boxes and wrote comments to indicate that they were giving the District permission to implement the September 2018 IEP while simultaneously expressing their belief that the IEP was insufficient for not incorporating all of the recommendations in the private evaluation. S-38.

15. On November 6, 2018, the District revised the IEP to correct an error in the description of the type of support that the Student was receiving. *C/f* S-40 at 15, S-41 at 15.

16. The District issued a NOREP on December 7, 2018, proposing to discontinue speech and language support for the Student. At this time, according to the Student's IEP, the Student was already not receiving speech and language support. Regardless, the Parents did not sign and return the NOREP and, after 10 days, the District formally discontinued speech services. *See* S-43.
17. Some portions of the Student's writing curriculum were delivered using computers. No preponderant evidence suggests that the Student ever used computers for inappropriate purposes in school. Regardless, the Parents were concerned that the Student would use computers inappropriately, and aske the District to stop all of the Student's computer use in school. The Parent made this request on January 11, 2019 and the District complied. *See* S-45.
18. On January 15, 2019, the Student received a disciplinary referral for (redacted). *See, e.g.* P-94.
19. On January 29, 2019, the District used a checklist promulgated by its local Intermediate Unit to determine the Student's qualification for ESY services in the summer of 2019. The District completed the checklist indicating that the Student exhibited none of the seven factors suggesting a need for ESY. S-46.
20. On February 14, 2019, the Student lost recess privileges for (redacted.) P-95.
21. On February 14, 2019, the District invited the Parents to an IEP team meeting. The meeting was scheduled for February 27, 2019. S-47.
22. During the February 27, 2019 meeting, the District proposed revisions to the September 2018 IEP. Revisions included an update to the Student's present education levels, goals, SDI, and PBSP. S-49.

23. Comparing the goals in the February 2019 IEP and the September 2018 IEP: the writing goal remained the same, the self-regulation goal increased its mastery level from 85% to 90%, a math computation goal was added, and a math fluency goal was added. S-49.

24. The math computation goal called for the Student to demonstrate mastery of 1st grade math computation skills on a timed assessment. S-49.

25. The math fluency goal called for the Student to demonstrate mastery of 2nd grade math skills on a timed assessment. S-49.

26. The modifications and SDI in the February 2019 IEP were significantly increased. Of note, the SDI now included direct instruction in an emotional regulation program, particular services and programs to address reading and math difficulties, and particular accommodations recommended in the private evaluation. S-49.

27. The February 2019 IEP also increased the amount of time that the Student would spend in a special education classroom by ten minutes per day. That time was specifically designated to work on reinforcing positive behaviors and skills learned in the emotional regulation program. S-49.

28. Some testimony suggests that the Student had already been exposed to the emotional regulation program before the February 2019 IEP. However, the February IEP is the first document offering that service in a systematic way with time set aside for that instruction. S-49.

29. The February 2019 IEP also increased supports for school personnel tasked with implementing these new interventions. S-49.

30. On February 25, 2019, the District proposed the February 2019 IEP with a NOREP. S-48.

31. On March 11, 2019, the Parents rejected the NOREP, commenting that the February 2019 IEP does not provide a FAPE to the Student. The Parents did not explain their conclusion on the NOREP. S-48.

32. The Student started the emotional regulation program indicated in the February 2019 IEP. *See* S-50. There is some ambiguity in the record about whether the District considered the February 2019 IEP to be approved 10 days after the NOREP was issued, or the Parents consented to the service outside of the NOREP process. There is no dispute, however, that the Student participated in the program.

33. As part of the Student's treatment for RAD, the Student can only accept food provided by the Parents.[7] The District lets students take extra food from its cafeteria. On March 13, 2019, the Student attempted to take extra food and was stopped by District personnel who were aware of the Student's food restrictions. The Student then became dysregulated, (redacted). District personnel called the Parents when they were not able to calm the Student. One of the Parents came to school and calmed the Student. *See, e.g.* P-95[8]

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[7] The Parent's testimony provides a comprehensive description of why the Student must only receive food from the Parents. *See, e.g.* NT 1916-1917. Neither party disputes the importance of this intervention.

[8] Some ambiguity notwithstanding, P-95 contains two entries for this incident, one dated March 13 and the other March 14. The incident occurred on March 13.

34. Following the incident on March 13, the District reconvened the IEP team. The District decided at that time to not propose changes to the Student's program, as the Student had just started in the emotional regulation program. The parties also agreed that the Parents would provide snacks for the Student in school. The parties also agreed that the Student had mastered the math computation goal and that the goal should be revised. S-50.

35. The District revised the math computation goal so that mastery would be assessed against 2nd grade materials. S-50.

36. On April 8, 2019, the Student (redacted.) A teacher followed the Student, but the Student ran and hid. The District then contacted the Parents and police. (Redacted.) The Parents had arrived at school by that point. *See, e.g.* S-55.

37. The cafeteria incident and the elopement incident were the only two substantial behavioral incidents during the 2018-19 school year. These stand apart from a small number of other incidents that also warranted a disciplinary referral (e.g. taking hand sanitizer). The Student's baseline level of behavior (being off task or non-compliant, but easily redirected) was substantively similar to the 2018-19 school year.

38. The Parents and Student moved out of the District at the end of the 2018-19 school year, terminating the District's status as the Student's LEA.

FAPE Discussion: The 2017-18 School Year

With the exception of the two significant behavioral incidents in March and April 2019, the Student's behavioral presentation was similar to that in the prior school year. As such, the Student's actual behavior in school was not a signal to the District that additional supports were needed. The same is true of the private evaluation. The private evaluation, for the most part,

confirmed information that was already available to the District. Looking at the Student's behaviors, there is no preponderant evidence establishing that the District denied the Student a FAPE from the start of the school year through March 13, 2019.

The seriousness of the Student's behaviors on March 13 and April 8, 2019 cannot be understated. The danger caused by a student becoming violently dysregulated in school is matched only by the danger that such behavior poses to the dysregulated student. The danger of a 3rd grade student eloping off of school grounds is obvious. In both cases, however, the District had no reason to expect either occurrence before they happened. The Student had gone for nearly a school year without incident in the cafeteria and had not attempted elopement since 1st grade. Similarly, in both instances, the District's response was appropriate and consistent with IDEA mandates. The parents were called in and, after the cafeteria incident, the IEP team discussed whether changes were needed. The decision to not make changes because a new program had just started was reasonable.

Limiting the analysis to behavior, there is no preponderant evidence that the District denied the Student a FAPE. All of the District's actions were reasonably calculated to provide a FAPE at the time they were completed.

The analysis is more complicated when looking at the Student's academic performance. Both the District's own testing and the private evaluation suggest that the Student is capable of grade-level work. At the end of 2nd grade (2017-18) all reports indicated that the Student was performing at grade level with the assistance provided through the Student's IEP. Then, more than halfway through 3rd grade, the IEP proposed math goals targeting the 1st and 2nd grade level. The distinction is jarring at first, but ultimately makes sense.

The academic shift in the February 2019 IEP targeted the Student's specific areas of weakness: applications and fluency. The problem was not that the Student did not understand how to do math or was unable to do math. The problem was that the Student had not reached an acceptable level of automaticity. Changes in the IEP both reflected that problem and offered a solution. And it was working. Between February 27, 2019 and March 13, 2019, the Student had mastered a math goal. That goal was then revised to push the Student to a higher level.

In sum, I find that all of the District's offers were reasonably calculated to provide a FAPE when they were made. The Student is not entitled to compensatory education for the 2018-19 school year.

Meaningful Parental Participation

All of the evidence in this case supports a finding that the Parents were given an opportunity to meaningfully participate in the Student's IEP development.

I agree with the Parents that simply providing a forum at an IEP team meeting is insufficient. The IDEA requires more. Parents do not simply have a right to talk; the LEA has an obligation to listen. The LEA, however, has no obligation to agree. An LEA's refusal to implement a parent's request, therefore, does not necessarily establish a denial of meaningful parental participation.

In this case, the entirety of the record establishes the near constant communication between the Parents and the District. The District was responsive to the Parents' input – both during the official IEP development process and throughout each school year in question. There is no evidence in the record supporting the Parents' claims that their right to participate was denied in any way.

<u>ORDER</u>

Now, March 13, 2020, it is hereby **ORDERED** as follows:

1. The Parents' claims arising before January 16, 2017 are barred by the IDEA's statute of limitations.
2. The District's ESY determination for the summers of 2017 and 2018 constitute procedural IDEA violations as the District made no individualized, contemporaneous determination of the Student's need for ESY.
3. The Parents substantive ESY claims are denied because the Student's entitlement to services during the summers of 2017 and 2018 is not established by preponderant evidence.
4. All of the Parents remaining FAPE claims are denied for the reasons stated above.
5. The Parents' meaningful participation claim is denied for the reasons stated above.

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

<u>/s/ Brian Jason Ford</u>

HEARING OFFICER