

*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**

**ODR No.**

26336-21-22

**CLOSED HEARING**

**Child's Name:**

J.S.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

08/26/2022

## **Introduction and Procedural History**

This special education due process hearing concerns the educational rights of a student (the Student).<sup>1</sup> There is no dispute that, currently, the Student is identified as a child with disabilities as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

On March 24, 2022, the Student's parents (the Parents) initiated this matter by filing an expedited due process hearing request with the Office for Dispute Resolution (ODR), naming the Student's public school district (the District) as the respondent. The District was and is the Student's Local Educational Agency (LEA) as defined by the IDEA.

In their complaint, the Parents raised four issues. One of those issues was whether the District could expel the Student. That issue was heard on the IDEA's expedited timeline as was resolved at ODR No. 26270-21-22. While the decision speaks for itself, I found that the District could not expel the Student. The three remaining issues were heard on the IDEA's regular timeline and are resolved through this decision and order.

The first of those issues concerns a period of time during which the District determined that the Student was not a child with a disability. When the Student was in elementary school, the District found that the Student was a child with a disability and provided special education. When the Student was in middle school, the District reevaluated and concluded that the Student had a disability but was not in need of special education. The District did not provide special education to the Student after reaching this conclusion. Then, after a behavioral incident in high school, the District reevaluated again and determined that the Student is a child with a disability. The Parents claim that the Student was always a child with a disability and should have received special education in accordance with an Individualized Education Plan (IEP). The Parents demand compensatory education for the period when the District did not provide special education to the Student.

The District raised a statute of limitations defense to this issue, but both parties agreed that the same evidence that resolves the statute of limitations also establishes liability. Statute of limitations and liability evidence were presented together for that reason.

The second issue is the Parents' demand for tuition reimbursement. After the District threatened expulsion, the Parents placed the Student in a private

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<sup>1</sup> Except for the cover page, identifying information is omitted to the extent possible.

school (the Private School). The Parents demand reimbursement for the Student's tuition at the Private School.

The third issue concerns what placement is appropriate for the Student going forward. The District has proposed a therapeutic out-of-district placement for the Student. The Parents have rejected that offer and demand an itinerant level of emotional support at the District's high school.

### **Issues**

At the start of the non-expedited portion of this hearing, I stated my understanding of the issues presented for adjudication. Both parties confirmed my statement. NT 38-39. The issues in this matter are:

1. Did the District violate the Student's IDEA rights during the period when it did not provide special education after concluding that the Student was not a child with a disability?
2. Must the District reimburse the Parents for the Student's tuition at the Private School?
3. Which of the parties' competing placement options is appropriate for the Student going forward?

### **Findings of Fact**

The parties filed joint stipulations of fact for this due process hearing. Citation to those stipulations reference the stipulation number, not the page number, in the parties' document (e.g. Stipulation 1).<sup>2</sup>

I reviewed the record in its entirety. I make findings of fact, however, only as necessary to resolve the issues before me. I find as follows:

#### ***[redacted] School Years***

1. The 2010-11 school year was the Student's [redacted] year. The Student enrolled in the District for [redacted]. *Stipulation 5.*
2. The 2011-12 school year was the Student's [redacted] year. *See stipulation 1, 5.*

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<sup>2</sup> As usual, citation to the parties' exhibits are S-# and P-#, respectively, and citation to the transcript is NT #.

3. The 2012-13 school year was the Student's [redacted] year. See *stipulation 1, 5*.
4. The 2013-14 school year was the Student's [redacted] year. See *stipulation 1, 5*.
5. During the 2013-14 school year, the District evaluated the Student to determine eligibility for special education. The District noted that, "despite numerous interventions [Student] continued to display disrespectful, inappropriate and disruptive behaviors toward peers and adults." S-2 at 2; Stipulation 6. At that time, during unstructured times, the Student would engage in a variety of inappropriate behaviors, such as pointing at peers using fingers in a "gun" action, throwing food at peers, and yelling loudly.
6. Through the evaluation, the District and Parents determined that the Student was a child with a disability in need of special education under the IDEA disability categories of Other Health Impairment (OHI) and Emotional Disturbance (ED). The OHI finding was related to impairments in the Student's attention and executive functioning and the ED finding was related to the Student's oppositional and defiant behavior. S-2, P-2.
7. After the evaluation, the Student received special education in accordance with an IEP. P-3.
8. The 2014-15 school year was the Student's [redacted] year. See *stipulation 1*.
9. The 2015-16 school year was the Student's [redacted] year. See *stipulation 1*.
10. During the 2015-16 school year, the Student's IEP team was concerned about the Student's increasing anxiety, executive functioning problems, and school absences. The IEP team referred the Student for a reevaluation. The reevaluation was completed the following school year after the Student transitioned to the District's middle school. See S-2.

***[redacted] 2016-17 [redacted]***

11. The 2016-17 school year was the Student's [redacted] year and [redacted]. See *stipulation 1*.

12. The District conducted the evaluation recommended the year prior and issued a reevaluation report on November 14, 2016 (the 2016 RR). S-2.
13. The 2016 RR included a brief review of the Student's IEP. S-2 at 2.
14. The 2016 RR noted that the Student had over 50 absences during the prior school year. S-2 at 3. *See also*, P-8.
15. The 2016 RR included information provided by the Parents during meetings with the District during the 2016-17 school year before the 2016 RR was complete. S-2 at 3.
16. The 2016 RR included a Conners-3 Parent Report. The Conners-3 is a standardized rating scale in which people who know the Student rate the Student's behaviors related to focusing and impulse control. Both parents rated the Student, but their results were inconsistent with each other. The Student's mother's ratings placed the Student in the Elevated or Very Elevated range in all domains except for Learning Problems and Conduct Problems. The Student's father's ratings placed the Student in the Very Elevated range for Conduct Problems (a DSM-V diagnostic category) but within normal limits for the Student's age in all other categories. S-2 at 3-4.
17. Despite the significant discrepancies between the Parents' ratings, the District's evaluator opined that the Parents' ratings on the Conners-3 revealed that "[b]oth parents are in agreement that [Student] has problems that very often impact [upon Student's] academic performance." S-2 at 4.
18. The Student's Reading teacher and Social Studies teacher also completed the Conners-3. The Reading teacher rated the Student in the average range in all domains. The Social Studies teacher, however, rated the Student in the Very Elevated range for Defiance/Aggression, Emotional Liability, and Oppositional Defiant Disorder. S-2 at 8.
19. The Student also completed the Conners-3 self-report. The Student's self-ratings placed the Student in the average range across all domains except for hyperactivity (a DSM-V category). The Student self-rated in the High Average range for hyperactivity.
20. Both Parents also rated the Student using the Behavior Rating Inventory of Executive Function (BRIEF). The BRIEF is a standardized rating scale in which people who know the Student rate the Student's

behaviors related to executive functioning skills. As with the Conners-3, there were significant differences between both Parents' ratings. The Student's mother's ratings showed Above Average needs in many domains, resulting in Above Average needs in index scores and the Global Executive Composite. The Student's father's ratings showed no elevated needs. S-2 at 4-5.

21. The Student's Science teacher and Math teacher also completed the BRIEF. Both teachers rated the Student in the average range across all domains except for the Science teacher, who rated the Student in the Above Average range in the Monitor sub-domain which is part of the Metacognition Index. Index scores and the Global Executive Composite for both teachers all fell in the average range. S-2 at 9.
22. The Student also completed a self-rating using the BRIEF. The Student's self-ratings were in the Average range in all domains. S-2 at 13.
23. Both Parents also rated the Student using the Achenbach Child Behavior Checklist, which purports to assess social and emotional functioning. On the Achenbach, a "Clinically Significant" rating warrants immediate intervention while an "At Risk" rating warrants further monitoring. Neither Parents' ratings placed the Student in the Clinically Significant range in any domain. The Student's mother's ratings placed the Student in the At Risk range for Depressive Problems, Oppositional Defiant Problems, and Conduct Problems. The Student's father's ratings placed the Student in the At Risk range for Somatic Problems. S-2 at 5.
24. The District's evaluator opined that the Parents' ratings on the Achenbach revealed that both "are in agreement that [Student] does not have problems with anxiety and focusing/hyperactivity." S-2 at 6. This opinion is related exclusively to the Achenbach and is not reconcilable with the Student's mother's rating on Conners-3 or the BRIEF. S-2.
25. The Student's Reading teacher and Social Studies teacher both completed the Achenbach. Both teachers rated the Student in the average range across all domains. S-2 at 10.
26. The Student also completed a self-rating using the Achenbach. The Student's self-ratings placed the Student in the Average range across all domains. S-2 at 13.

27. The 2016 RR also included a summary of the Student's test scores on District-wide and State-wide academic assessments through the date of the report. S-2 at 6-7.
28. The 2016 RR also included the report of an in-class observation of the Student. The observation occurred on September 21, 2016. The observer concluded that the Student was attentive 93% of the time, compared to classmates who were attentive 97% of the time. However, the observer noted several instances where the Student required prompting – more so than classmates – for focus, attention, and behaviors related to executive functioning (i.e. taking out materials, putting materials away, responding to checks for understanding). On the other hand, the Student volunteered to answer questions and provided correct answers. S-2 at 7.
29. The 2016 RR also included a teacher rating of the Student using what appears to be a District-made scale. Not all teachers responded to all questions, and the District's evaluator did not draw conclusions based on that rating. S-2 at 7-8.
30. The 2016 RR relates an incident on October 24, 2016. The District sent personnel (the Student's Emotional Support teacher and a social worker) to the Student's home with the Student refused to go to school. The Student refused, despite this intervention. S-2 at 8.
31. The 2016 RR included a summary of a clinical interview of the Student. S-2 at 14-15.
32. The 2016 RR included a Functional Behavioral Assessment (FBA), which was completed by an IU-employed BCBA. The BCBA hypothesized that the Student exhibits disruptive behaviors because of self-regulation and organization deficits in order to avoid, escape, or delay difficult academic and social situations. However, during the FBA, the BCBA observed no disruptive behaviors. S-2 at 15, 23-34.
33. Taking all of the findings of the 2016 RR into consideration, the District's evaluator wrote (S-2 at 18):<sup>3</sup>

[Student] is a youngster who had emotional and behavioral issues in elementary school for which

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<sup>3</sup> It is not my typical practice to quote extensively from documents in evidence. In this instance, the two paragraphs written by the District's evaluator completely summarize the District's interpretation of the 2016 RR, the information communicated to the Parents, the actions that the District took after the 2016 RR, and the reason for those actions.

Emotional Support services were initiated. At this point, [Student] does not demonstrate behaviors in the school setting that impede [Student's] learning or the learning of others. [Student's] problems at school at this time are related solely to [Student's] failure to attend school on a regular basis. When [Student] is in the building, [Student's] behavior is within the normal range for a student of [Student's] age. [Student] is completing much of the work missed due to ... absences and ... is performing well on assessments, with the exception of Science, which is the class [Student] has missed most often because it meets the first period of the day. [Student] is not demonstrating the need for Emotional Support services at this time. [Student] does not qualify for special education services under any of the disability categories. [Student] does not have a Specific Learning Disability; [Student's] academic performance is consistent with ... cognitive ability and ... is meeting grade level expectations. [Student] does not qualify under the category of Other Health Impairment; teachers see no evidence of focusing and/or executive functioning deficits in the school setting.

Based on the information gathered and reviewed for this Reevaluation, [Student] should exit from special education services. [Student's] problems with attendance and any issues related to self-regulation, such as frustration with being presented with non-preferred tasks or inter-personal demands, can be addressed through the regular channels available to all students – meeting with ... school counselor, the school social worker, or the school wellness counselor.

34. The District's evaluator marked the 2016 RR to indicate that the Student had a disability but did not require specially designed instruction and, therefore, was no longer eligible for special education. S-2 at 18.
35. On December 8, 2016, the District and Parents discussed the 2016 RR during an IEP team meeting. The Parents did not approve the 2016 RR at that time. The same day as the meeting, the District issued a Notice



of Recommended Educational Placement (NOREP), exiting the Student from special education. The Parents approved the NOREP on December 20, 2016. S-2 at 21, S-3.

36. While the record does not include preponderant evidence of an exact number, there is preponderant evidence to find that the Student continued to have significant attendance problems for the remainder of the 2016-17 school year. The District offered to connect the Parents with third party agencies that could provide support at home to have the Student come to school. The Parents declined those services, relying instead on private providers, and withholding consent for the District to communicate with those providers. *See, e.g.* S-4 at 2.

***[redacted] 2017-18 [redacted]***

37. The 2017-18 school year was the Student's [redacted] year. *See stipulation 1.*
38. The Student's attendance problems continued from the 2016-17 school year through the 2017-18 school year such that by the end of the third quarter of the 2017-18 school year, the Student had missed 27 days of school (17 unlawful and 10 excused with doctors' notes). By then, the Student had also accumulated 64 tardy arrivals, four days of out of school suspension, one day of in school suspension, and three early dismissals. These numbers do not reflect the fourth quarter of the 2017-18 school year. S-4 at 2, 9.
39. In the latter part of the 2017-18 school year, the Parents asked the District to reevaluate the Student to determine if the Student was eligible for special education. At this point, the Parents had separated and, although they had no formal custody agreement, they shared legal and physical custody of the Student and jointly requested the evaluation. *See, e.g.* S-4 at 2.
40. The District reevaluated the Student and issued a reevaluation report on May 17, 2018 (the May 2018 RR). S-4.
41. While the May 2018 RR was pending, the District and both Parents met again about the Student's attendance. During the meeting, the District again offered to connect the Parents with third party agencies to provide in-home assistance. The Parents responded that they would consider the offer. S-4 at 2.

42. The May 2018 RR included a review of the Student's records, including both prior evaluations. S-4 at 2-3.
43. The May 2018 RR included reports of individual interviews with both Parents. S-4 at 3-5.
44. The May 2018 RR included a re-administration of the Conners-3. This time, the discrepancy between both Parents' ratings was even wider. The Student's father's ratings placed the Student in the Average range in all 12 domains. The Student's mother's ratings placed the Student in the Average range in only three domains. Three other domains were in the Elevated range and four others were in the Very Elevated range. Notably, the mother's highest ratings were in Inattention, Defiance/Aggression, and Oppositional Defiant Disorder. S-4 at 5.
45. The Student's English and History teachers both completed the Connors-3 as well. The History teacher rated the Student in the Very Elevated range in all domains except for Learning Problems (Elevated) and Executive Functioning (Average). In contrast, the History teacher rated the Student in the average range for all domains except for Defiance/Aggression, Conduct Disorder, and Oppositional Defiant Disorder. These ratings prompted the evaluator to remark that the "teachers are in agreement that [Student] has significant problems with defiant and aggressive behavior, and that [Student] does not struggle with executive functioning skills deficits." S-4 at 10.
46. The Student also completed the Connors-3 self-report. As in 2016, the Student's self-ratings were all in the average range. S-4 at 14.
47. The May 2018 RR included a re-administration of the BRIEF, but the District used the second edition of that assessment (BRIEF-2). On this assessment, the discrepancy between the Parents' ratings was even more pronounced. The Student's father's ratings placed the Student in the Average range across all sub-tests, index scores, and the Global Executive Composite. The Student's mother's ratings placed the Student in the Average range on only two sub-tests. All other sub-tests, index scores and the Global Executive Composite were in the Clinically Elevated range. S-4 at 6.
48. The Student's Science and Latin teachers both completed the BRIEF-2 as well. Both teacher's ratings were more similar to the mother's ratings than the father's ratings, placing the Student in the "Potentially Clinically Elevated" or "Clinically Elevated" ranges nearly across the board. The evaluator concluded that the ratings from both teachers

suggest that the Student has significant difficulty with inhibiting thoughts and behaviors that can interfere with work, significant problems regulating emotional responses, and significant problems with working memory and organizing work materials. S-4 at 11.

49. The Student completed the BRIEF-2 self-assessment as well. As in 2016, the Student self-rated into the Average range across the board. S-4 at 14.
50. The May 2018 RR included a re-administration of the Achenbach Child Behavior Checklist. As with other ratings, the Student's father rated the Student in the average range across the board. The Student's mother's ratings placed the Student in the average range in all domains except for ADHD Problems (At Risk) and Oppositional Defiant Problems (Clinically Significant). S-4 at 7.
51. The Student's Science and Math teachers both completed the Achenbach as well.<sup>4</sup> The Science teacher rated the Student in the Clinically Significant range for Depressive Problems, Somatic Problems, and Oppositional Defiant Problems; the At Risk range for ADHD Problems, and the average range for all others. The Math teacher rated the Student in the At Risk range for Oppositional Defiant Problems and Conduct problems, and in the average range for all others. The District's evaluator explained that this showed agreement between the teachers that the Student demonstrates oppositional and defiant behavior, including arguing, breaking rules, talking back to staff, and stubbornness. S-4 at 12.
52. The Student also completed an Achenbach self-report. The Student's self-report in 2018 was different from the self-report in 2016. This time, the Student self-rated in the At Risk range for Oppositional Defiant Problems (the Student noted arguments and disobedience at both school and home) and in the Clinically Significant range for Somatic Problems (aches, pains, nausea, vomiting, stomach aches, and occasional eye and skin problems). S-4 at 14.

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<sup>4</sup> It strikes me that the Science teacher's ratings on the BRIEF-2 and the Achenbach are similar to each other. The District's evaluator seemed to mix the grouping of teachers across each assessment. There is no way to know if the same teacher would have provided similar ratings across all assessments, and this single sample is not preponderant evidence. This mixing of teachers across assessments and the discrepancies between raters within the school environment is unusual in my experience, but neither party challenges the validity of the test results. Rather the parties reach different conclusions about what the evaluations mean in terms of the Student's rights and the District's obligations.

53. The May 2018 RR included an in-class observation of the Student. The Student was on task, required no prompting, frequently volunteered to answer questions and did so correctly, provided correct answers when called on, and engaged in behaviors that were appropriate for that class. S-4 at 8.
54. For the May 2018 RR, the Student's teachers provided input both narrative and through a survey like the teacher survey in the 2016 RR. Six out of eight teachers reported that the Student had a need in class work completion, using time effectively, and disrupting class. Five out of eight teachers reported problems with staying on task and following class routines. The only areas in which teachers reported no needs were class participation (when present) and extra time for tests. S-4 at 9.
55. The May 2018 RR included a review of standardized District and State-wide academic assessments and some classroom assignments. None of these showed academic problems. However, the organization of Student's writing assignments fell from the Advanced range in February of 2017 to the Basic range in September of 2017 and remained basic through February of 2018. S-4 at 13.
56. The May 2018 RR included a clinical interview with the Student. S-4 at 16-17. During the interview the Student acknowledged that somatic symptoms and staying up late at night resulted in poor attendance and adverse educational consequences. The Student was unable to think of solutions to these problems. *Id.*
57. The May 2018 RR included an FBA but, unlike the prior FBA, the 2018 FBA was based exclusively on a review of records, did not include an observation, and was not conducted by a BCBA. S-4 at 17.
58. The District's evaluator summarized the information gathered as part of the May 2018 RR, reviewed the Student's strengths and needs and, as in 2016, concluded that the Student was a child with a disability but not in need of special education. S-4 at 18-22.
59. More specifically, the District's evaluator considered whether the Student qualified for special education as a child with ED, OHI, or a Specific Learning Disability (SLD). The evaluator concluded that the Student is not a child with an OHI or SLD based on the IDEA's definitions of those terms. Regarding ED, the evaluator wrote:

[Student's] behavior is consistent with the diagnosis of Oppositional Defiant Disorder. This is most appropriately considered a form of social maladjustment and not an emotional disturbance and as such, [Student] does not qualify for special education services under the category of Emotional Disturbance.

60. The Student's mother signed an Evaluation Team Participation form and checked a box on that form to indicate agreement with the 2018 RR. The Student's father also signed the form to indicate his participation but did not check boxes to indicate agreement or disagreement with the 2018 RR. S-4 at 25.
61. The District issued a NOREP confirming that it found the Student ineligible for special education. Technically, the NOREP was the District's recommendation for the Student to remain in regular education. The Student's father approved the NOREP on June 11, 2018. S-5.
62. By the end of the 2017-18 school year, the Student had failed English and Social Studies, and attended summer school earn credit for those classes. See, e.g. P-19 at 4.
63. In July 2018, the Parents retained a private psychologist to evaluate the Student. The private psychologist evaluated the Student and issued a report dated August 10, 2018 (the 2018 Private Report). P-19. The 2018 Private Report included a review of the Student's educational records, including the May 2018 RR, information provided by the Parents, an interview with the Student, and new psychological testing targeting the Student's "Personal Adjustment." See P-19 at 2. While the private psychologist's report and recommendations were based in part on that testing, the results of individual tests are not reported. P-19.
64. In addition to noting the Student's difficulties in school, the private evaluator commented on the "significant amount of tension in the ... household" attributable in part to the Parent's "different approaches and views on how best to handle [Student's] challenges." P-19 at 5.
65. The 2018 Private Report found that the Student includes diagnoses of generalized anxiety disorder, moderate unspecified depressive disorder, ADHD, and ODD (all ICD or DSM 5 diagnoses). P-19 at 12.

66. The private psychologist noted the Student's difficulties in multiple settings and concluded that "Overall, [Student's] inability to manage emotions effectively, insufficient social skills, and over reactivity are interfering with ... functioning at home, school, and socially." P-19 at 12.
67. The 2018 Private Report included several recommendations, the first of which was Family/Individual Psychotherapy with goals to build an effective home structure for the Student that, at the time of the evaluation, was lacking. The second recommendation was medication management. The third recommendation was group Dialectical Behavioral Therapy (DBT) for the Student to "enhance ... emotional regulation, social skills, and coping skills." The fourth recommendation was for school support (discussed below). P-19 at 13-14.
68. Regarding the recommendation for school support in the 2018 Private Evaluation, the private psychologist recommended that the Parents share the report with the District and wrote:

In the most recent school evaluation, [Student] was diagnosed with oppositional defiant disorder. While [Student's] symptoms and behaviors are consistent with ODD the underlying factors that contribute to these behaviors and ... school avoidance indicate the presence of anxiety and mood dysregulation disorders. The presence of these underlying factors should qualify [Student] for special education services under the category of emotional disturbance. In addition, [Student] was diagnosed with ADHD, hyperactive-impulsive type by the school district in [the] initial evaluation, which would also qualify [Student] for special education services under Other Health Impairment. Furthermore, it is important that the [Parents] partner with the school district to work together to address [Student's] school avoidance.

69. The record does not reveal an exact date, but the Parents provided a copy of the 2018 Private Report to the District either in the summer of 2018 or at the start of the 2018-19 school year. See S-6.

***[redacted] 2018-19 [redacted]***

70. The 2018-19 school year was the Student's [redacted] year. See *stipulation 1*.

71. After the Parents shared the 2018 Private Report with the District, the District proposed another reevaluation to determine eligibility for special education. The reevaluation report was completed and provided to the Parents on October 30, 2018 (the October 2018 RR). S-6.
72. The October 2018 RR included a repetition of the same rating scales administered as part of the May 2018 RR. The results of the new testing was substantively similar, even if not identical, to the prior testing. A similar split between the Parents appeared with the Conners-3, although the Father's scores were elevated in comparison to the prior testing, with Restlessness/Impulsivity and ODD now falling into the Very Elevated range. C/f S-4 at 5, S-6 at 7-8.
73. Different teachers completed the Conners-3 for the October 2018 RR then the May 2018 RR, and at a different time in the school year. In the October 2018 administration, the Student's math teacher rated the Student in the average range across all domains. The Student's science teacher found elevations in Hyperactivity and Emotional Liability and rated the Student in the Very Elevated range for Defiance/Aggression and ODD. S-6 at 13.
74. The same pattern was seen in the Parents' ratings on the BRIEF 2, although the Father's rating for Shift rose from the Mildly Elevated to Possibly Clinically Elevated range. C/f S-4 at 6, S-6 at 8.
75. Different teachers completed the BRIEF 2 for the October 2018 RR then the May 2018 RR, and at a different time in the school year. The Student's history teacher rated the Student in the average range in all domains. The Student's English teacher rated the Student as Mildly Elevated, Potentially Clinically Elevated, or Clinically Elevated in most domains, resulting in Clinically Elevated ratings in the Behavioral Regulation Index, the Emotional Regulation Index, and the Global Executive Composite. S-6 at 14.
76. The Parents' scores on the Achenbach came into closer alignment with each other, and Parents rated the Student in the At Risk (Mother) and Clinically Significant (Father) ranges for Oppositional Defiant Problems. C/f S-4 at 7, S-6 at 9.
77. Different teachers completed the Achenbach for the October 2018 RR then the May 2018 RR, and at a different time in the school year. The Student's history teacher rated the Student in the average range in all domains. The Student's English teacher rated the Student in the At

Risk range for ADHD problems, ODD Problems, and Conduct Problems. S-6 at 15.

78. On the District's in-house teacher checklist, the Student's teachers rated fewer problems than in the prior evaluation. However, the checklist asks about needs like homework completion and need for extra time on tests. For the May 2018 RR, teachers completed the checklist at the end of the school year. For the October 2018 RR, teachers completed the checklist in September. C/f S-4 at 9, S-6 at 12.
79. The Student's self-ratings on the Conners-3, BRIEF 2, and Achenbach were substantively identical in the May 2018 RR and the October 2018 RR. C/f S-4 at 14, S-6 at 17; S-4 at 14, S-6 at 18; S-4 at 15, S-6 at 19.
80. As part of the October 2018 RR, the District's evaluator considered whether the Student qualified for special education as a child with an Emotional Disturbance, and found that the Student did not so qualify. The evaluator commented on improved attendance during summer school, improved structure at home, and wrote (S-6 at 27):

There is no evidence in the school setting to substantiate the presence of anxiety and depression fueling oppositional and defiant behavior. There is every reason to believe that [Student] has been doing better overall, in terms of behavior and attendance, because [Student] has decided that doing so is in [Student's] best interest. ... The evidence indicates that [Student] has control over much of [Student's] behavior and that [Student] is not acting out because [Student] is anxious, depressed, or unable to control [] impulses.

81. As part of the October 2018 RR, the District's evaluator considered whether the Student qualified for special education as a child with an Other Health Impairment, and found that the Student did not so qualify. The District's evaluator noted the ADHD diagnosis in [redacted] grade, but concluded that evaluations in [redacted] grade showed that the Parents and teachers were not in support of that diagnosis. In context, I take that to mean that different rater's answers on various rating scales were not in agreement with each other – there is no evidence that anybody but the District's evaluator disputed the Student's ADHD diagnosis. The October 2018 RR makes no mention in this section of the ADHD diagnosis in the 2018 Private Report. The District's evaluator wrote (S-6 at 27):



Certainly, there are times when [Student] is not focused in class and [Student] does not complete assignments in a timely manner, suggesting poor organization and time management. However, [Student] has always done well in the subjects [Student] enjoys, and [Student] appears very focused and organized in those classes. [Student's] inattentiveness and disorganization is more likely a function of variations in [Student's] interest and desire a consequence of a neuro-biological disorder like ADHD.

82. Following the October 2018 RR, the District issued an NOREP for the Student to remain in regular education. The Parents approved that NOREP on January 1, 2019.

***[redacted] 2019-20 [redacted]***

83. The 2019-20 school year was the Student's [redacted] year. See *stipulation 1*.
84. The Student's attendance significantly improved during the 2019-20 school year. The Student was absent for eight days and tardy only three times. P-71. The Student had no disciplinary infractions resulting in suspension during the 2019-20 school.
85. On March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. See *stipulation 7*. I take judicial notice that, on April 9, 2020, that order was extended through the end of the 2019-20 school year.
86. From the fall of 2019 through the school closure, District personnel noticed the Student's troubling demeanor. On one occasion, the Student's Spanish teacher noted that the Student looked on the verge of tears, was difficult to understand, and requested to go to the guidance counselor. P-69. This prompted the District to coordinate efforts to monitor the Student. While no teacher reported disciplinary, attendance, or academic problems (a low F in Algebra had significantly improved), teachers were "Absolutely concerned" about the Student's "down," "sad," and "lethargic" behaviors coupled with an increasing lack of interest in school. See P-73.
87. By January 2020, the Student would space out in school, speak in a whispered voice, and at least once appeared as if in a daze in the cafeteria. See S-40, P-68. This prompted the District's guidance counselor to email the Student's teachers to coordinate and report the

Student's behaviors. *See, e.g.* S-40. The District did not propose a evaluation or reevaluation at this time. *Passim.*

88. For reference, March 24, 2020 is the start of the period that the District agrees is within the IDEA's statute of limitations.
89. By the end of the 2019-20 school year, the Student's grades were all in the B to A+ range, including honors-level academics. P-71 at 2.

***[redacted] 2020-21 [redacted]***

90. The 2020-21 school year was the Student's [redacted] year. *See stipulation 1.*
91. During the 2020-21 school year, the Student did not engage in any behaviors warranting disciplinary suspension. *Passim.*
92. Unfortunately, with the return to in-person instruction, the Student's attendance again became an issue. The Student had 21 absences during the 2020-21 school year. P-71.
93. Starting in January 2021, the Student's Math teacher began noticing and reporting concerns about the Student's behavior. In documents written at that time, the Math teacher described the Student's behaviors as impulsive and disrespectful. By January 22, 2021, the Math teacher reported an escalation in the Student's behaviors, concluding "Something isn't right here." P-68 at 14.
94. Around the same time, the Math teacher also said that he submitted a START referral, but there is no record of a START referral in the record of this case. *See* S-13.
95. In early March 2021, the Student brought a kunai-shaped plastic object into school.<sup>5</sup> The District did not impose discipline. Both parties agreed that the object was inappropriate in school, and that the Student could use a fidget spinner instead. *See* P-68 at 26.
96. On March 10, 2021, the Math teacher again inquired as to the status of his START referral. Again, there is no record of either a START referral

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<sup>5</sup> At no point did the parties describe the object as kunai-shaped. A photo of the object appears at P-68 at 26. A kunai is a martial arts weapon originally derived from sharpened farming tools. The version that the Student brought to school looks like a small dagger with a short handle with a loop at the base.

or the District taking any action based on the Math teacher's inquires. P-68 at 29.

97. On March 11, 2021, the Math teacher wrote concerns about the Student, including oppositional defiance, an inability to understand the perspective of others, poor attendance, poor work completion, and missing tests.
98. By the end of the 2020-21 school year, the Student's grades had declined sharply in English and Math. While other grades remained in the B- to A+ range, the Student earned a D+ in Honors English 2 and failed Honors Pre-Calculus. P-71 at 1.

***[redacted] 2021-22 [redacted]***

99. The 2021-22 school year was the Student's [redacted] year. *Stipulation 1.*
100. On October 8, 2021, Student's school counselor submitted a START referral for Student. This is not the START referral referenced by the Math teacher in the 2020-21 school year. Rather, this was a new referral prompted by the Student's failing grade in Spanish, lack of work completion in Math, and disruptive behaviors in both of those classes. S-16.
101. While the START referral was made in October 2021, the record is silent as to what action the District took, if any, as part of the START process. *Passim.*
102. On Saturday, November 13, 2021, the High School Principal was killed in a car accident. The record, taken as a whole, supports a finding that the Principal was much beloved, and that his death was a shocking tragedy for the school and the entire community. The record is silent as to what relationship, if any, the Principal had with the Student. *Passim.*
103. On Tuesday, November 16, 2021, the Student's History and Spanish teachers both submitted disciplinary referral forms. The History teacher submitted a discipline form because the Student left class to use the bathroom and did not return. The History teacher wrote "[Student] does this type of thing all the time." The Spanish teacher wrote, "[Student] was talking loudly during class. Moved from desk to desk. Refused to leave the other students alone even when asked by them. [Student] took out his yo yo and started playing." S-17.

104. On Wednesday, November 17, 2021, the Student's Spanish teacher submitted another disciplinary form, reporting behaviors like those the Student exhibited in Spanish class the day prior. S-17.
105. On Thursday, November 18, 2021, the Student spent the school day in the guidance counselor's office except for gym and lunch. P-68.
106. On Friday, November 19, 2021, the Student's History and Math teachers both submitted disciplinary forms. The History teacher reported that the Student left class without permission. The Math teacher did not write out the basis of the discipline. S-17.
107. November 19, 2021, was the Student's last day at the District's high school. School was closed on Monday, November 22, 2021, for the Principal's funeral. Between November 19 and 22, 2021, the Student suffered a Bipolar I manic episode with severe psychotic features. The Student's behavior during the episode, the District's educational and disciplinary response thereto, and the Student's post-episode educational placement changes are discussed in the expedited decision and order. ODR No. 26270-2122-KE.
108. The Student's manic episode, among other things, prompted the District to evaluate the Student. The District construed this as an initial evaluation and completed an evaluation report on March 11, 2022 (2022 ER).<sup>6</sup> S-40.
109. Following the manic episode, the Student briefly attended asynchronous online instruction funded by the District. The Parents then enrolled the Student in a private school that provides all teaching one-to-one (1:1) (the 1:1 School). NT 409, 412-413. *See also* ODR 26270-2122-KE.
110. From February 28, 2022, to March 4, 2022, the Student received one lesson per day at the 1:1 School. NT 430-431.
111. At the Parents' request the 1:1 School modified its program to be more like a traditional school experience. All teaching remained 1:1. The Student received good grades, but continued to struggle with attendance and lateness. *See, e.g.* P-58.

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<sup>6</sup> There is no issue concerning the timeline for this evaluation. *See* ODR No. 26270-2122-KE concerning the Student's availability for and amenability to testing.

112. There is no record of the Student receiving emotional support of any kind, or instruction in executive functioning skills while attending the 1:1 school. *Passim*.
113. The 2022 ER was conducted by a different District evaluator (the District evaluations in Middle School were all conducted by the same evaluator). S-40.
114. The 2022 ER included information provided by the Parents by interview and email, and information submitted by a private psychiatrist and a private psychologist who had started working with the Student. S-40.
115. The 2022 RR included a comprehensive review of school records, including information from the START process and input from school personnel. S-40.
116. The 2022 RR included a "Test Behavior and Informal Interview" with the Student two sessions. During this time, the Student was "hyper and grandiose for a substantial part of the first session." From the same section (S-40 at 13):

At school, [Student] thinks that [Student] has been a "model student. The problem was with the teachers. I wasn't disruptive in any of the classes." When asked about multiple school district evaluations in the past, [Student] said, "They were interested in me." [Student] reports that [Student] "only had trouble with two teachers; you have to set teachers straight if they are wrong. The problem isn't with me."

117. The 2022 ER included a standardized, normative assessment of intellectual ability (WISC-V). The Student's Full Scale IQ was in the High Average range. S-40 at 15.
118. The 2022 ER included rating scales used to assess the Student's ability to process information (the VMI and a re-administration of the BRIEF-2 self-assessment). The Student scored in the Average range on the VMI, but on the BRIEF-2, the Student's scores were elevated. S-40 at 17-20.
119. The 2022 ER included a Developmental Neuropsychological Assessment using the NEPSY-II. The Student scored in the average to high average range. S-40 at 19-20.
120. The 2022 ER included a test of academic achievement (WJAT-IV). The Student scored poorly on some portions of the test, but was also

uncooperative, did not complete portions of the test, and made comments such as "I know your motivations." The evaluator concluded that the WJAT-IV scores are not reflective of the Student's actual knowledge. See S-40 at 20-21.

121. The 2022 ER included tests of social and emotional functioning including the ASRPI (a self-report for adolescents) and the BASC-3 (prior testing used the BASC-2, it is not clear from the record when the BASC-3 became available). S-40 at 22-25.
122. On the BASC-3, both parents rated the Student in the *Average* range across all domains except for the Mother's rating for Withdraw in the At Risk range. S-40 at 23. The Parents wrote to clarify, however, that their ratings reflect their observations of the Student's behaviors before the manic incident, not at the time that they completed the BASC-3. S-40 at 24-25.
123. Three teachers also completed the BASC-3. All three teachers rated the Student in the At Risk or Clinically Significant ranges across multiple domains. Anxiety was the only domain in which all three teachers rated the Student in the Average range. S-40 at 26-27.
124. The 2022 ER incorporated the results of a Speech/Language evaluation completed by a Speech Pathologist on February 10, 2022. S-40 at 29-38.
125. The 2022 ER incorporated a psychiatric evaluation conducted by a District-retained psychiatrist. S-40 at 39-53. The Psychiatrist diagnosed the Student with Bipolar I Disorder. *Id.*
126. The 2022 ER included a summary of the testing that included summations of the Student's history of oppositional behavior, current treatment for Bipolar I Disorder, academic progress, conflict with teachers, difficulty resisting impulses, and lack of self-awareness. However, taken as a whole, evaluator described the Bipolar I manic episode as something markedly different from the Student's prior difficulties. See S-40 at 46-47.
127. The District concluded that the Student is a child with an Emotional Disturbance in need of special education and qualified the Student to receive special education on that basis. S-40 at 47-48.
128. The 2022 ER included both psychiatric recommendations and school-based recommendations. S-40 at 48-49.

129. Following the completion of the 2022 ER, the parties participated in several meetings. Ultimately, the District proposed an IEP. P-50, P-51, P-52, P-53; S-40, S-41.
130. The District proposed the IEP on March 17, 2022 (2022 IEP). The 2022 IEP calls for a full-time Emotional Support placement. S-41.
131. The 2022 IEP includes a detailed summary of the 2022 ER. S-41 at 7-23.
132. The 2022 IEP includes several transition goals related to the Student's desire to go to college and obtain competitive employment. All those goals are related to academics, specially designed instruction (SDI), and related services provided through the IEP itself. S-41 at 24-25.
133. The 2022 IEP provides extended time and separate seating for Keystone exams. S-41 at 26.
134. The 2022 IEP includes a coping skills goal that calls for the Student to use coping skills in response to self-identified social stressors and triggers. This goal, as written, is measurable and objective. This goal is not baselined but includes a statement that baselines would be derived from the 2022 ER within two weeks of IEP implementation. S-41 at 31.
135. The 2022 IEP includes a social problem-solving goal that calls for the Student to increase respectful interactions and compliance with staff directives. This goal, as written, is measurable and objective. This goal is not baselined but includes a statement that baselines would be derived from the 2022 ER within two weeks of IEP implementation. S-41 at 31.
136. The 2022 IEP includes an executive functioning goal that calls for the Student to use executive functioning skills and available resources to improve assignment completion. This goal, as written, is measurable and objective. This goal is not baselined but includes a statement that baselines would be derived from the 2022 ER within two weeks of IEP implementation. S-41 at 31.
137. The 2022 IEP includes an emotional regulation goal to be implemented in counseling sessions or with teacher support. This goal calls for the Student to demonstrate an ability to identify negative emotions and potentially disordered thinking, and then identify appropriate coping

strategies for those situations. This goal, as written, is measurable and objective. This goal is not baselined but includes a statement that baselines would be derived from the 2022 ER within two weeks of IEP implementation. S-41 at 31.

138. The 2022 IEP includes extensive, individually tailored SDI and program modifications, nearly all of which are directly and explicitly linked to the IEP's goals. The location for all SDI and modifications was "To Be Determined" as the District lacked information about whether or where the Student would be able to attend school at the time of the IEP team meeting. S-41 at 36-40, 45.
139. The 2022 IEP included 30 minutes of individual counseling per day, 30 minutes of group counseling per day, and check ins/check outs with a counselor three times per day. S-40 at 40.
140. The 2022 IEP recommended full-time emotional support (meaning that the Student would be in a regular classroom for less than 40% of the school day) in a non-residential public facility. The specific budling placement was listed as To Be Determined for the same reasons as the SDIs and modifications. S-40 at 45.
141. Despite ambiguity about literal placement, the District concluded that the Student requires intensive therapeutic, emotional, behavioral, and social supports. *Passim, see e.g.* S-41; NT 666.
142. The District sent referral packets to several potential placements. All but one rejected the Student. The placement that accepted the Student is a private, licensed, nationally accredited academic school in a therapeutic setting (the Private School). NT 690.
143. The Private School does not offer Advanced Placement classes but has had success educating gifted students. See NT 695.
144. The Private School is designed to provide Emotional Support consistent with the Student's needs. S-40, NT 700-702.
145. For reference, on March 24, 2022, the Parents requested this due process hearing. I bifurcated the matter to address the disciplinary issue on the IDEA's expedited timeline and issued the expedited decision and order on April 28, 2022. ODR No. 26270-2122-KE.

### **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 (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.

## **Applicable Legal Principles**

### ***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 [WHAT] is the party seeking relief and must bear the burden of persuasion.

### ***The IDEA's Statute of Limitations***

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.

The date that the Parents knew or should have known about the alleged action is called the KOSHK date. If parents raise a complaint within two years of the 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).

IDEA case law explains how to determine the KOSHK date. See *E.G. v. Great Valley Sch. Dist.*, No. 16-5456, 2017 U.S. Dist. LEXIS 77920 (E.D. Pa. May 23, 2017). The KOSHK date is not simply the date when the Parents knew or should have known of the action forming the basis of their complaint. It is not the point in time when the Parents knew what the school was doing. Rather, under *E.G. v. Great Valley*, 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. Hearing officers are required to make a fine-grained analysis to 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. 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 can conclude that their child's needs are unmet.

### ***Free Appropriate Public Education (FAPE)***

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 is 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.

### ***Least Restrictive Environment (LRE)***

The IDEA requires LEAs to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). That continuum must include “instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. § 300.115(b)(1); see also 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. See 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. See *id.*

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive place

## ***Compensatory Education***

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also embraced the *Reid* method in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* to explain that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

*Jana K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, \*7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, \*9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence establishing the position that the student would be in but for the denial, or evidence establishing the amount and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met.

In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

### ***Tuition Reimbursement***

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the "Burlington-Carter" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

### **Discussion and Analysis**

#### ***The Statute of Limitations***

Evidence that the Parents were keenly aware of the Student's behaviors in school, and the Districts responses to those behaviors, at all times pertinent is beyond preponderant. The Parents were involved in the 2016 RR. The 2018 RR was completed at their request. The record is replete with conversations between the parties about the Student's behaviors and academic progress. The Parents were, quite understandably, concerned about both for years.

Despite these concerns, and despite receiving RRs in 2016 and 2018 in which the District acknowledged the Student's problems and diagnosed disabilities but offered no help, the Parents took no action but approving the District's NOREPs. The District made no effort to hide the Student's problems, or its willful refusal address those problems.<sup>7</sup> The Parents cannot now claim that they did not know, or had no reason to know, that the Students needs were unmet.

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<sup>7</sup> In the absence of the IDEA's statute of limitations, even a cursory analysis of the 2016 and 2018 RRs would reveal very serious problems. The shockingly conclusory analysis in those evaluations, ascribing the Student's difficulties to a social maladjustment, is indefensible. The IDEA's statute of limitations, however, precludes my FAPE analysis for the period of time from the 2016 RR through most of the 2019-20 school year.

I find that the Parents' claims before March 24, 2020 are time-barred.

***Denial of FAPE: March 24, 2020  
to the End of the 2019-20 School Year***

March 24, 2020, was the latter part of the Student's 2019-20 [redacted] school year. At that time, school had closed as part of the Commonwealth's COVID-19 mitigation strategy. Prior to the shutdown, the Student was successful academically and had no serious attendance problems. Teachers noticed some unusual that did not impact upon academic performance, and the District monitored those behaviors.

There is no preponderant evidence in the record of this case concerning the Student's behaviors after school closure order. The Student's attendance, however, remained positive and the Student was very successful academically.

There is no preponderant evidence that the Student was denied a FAPE from March 24, 2020 through the end of the 2019-20 school year.

***Denial of FAPE: 2020-21 School Year***

The 2020-21 school year was a step backwards. There is no preponderant evidence that the District denied the Student a FAPE before January 2021. By January 2021, the Student's attendance was declining and at least one professional employee of the District, the Math teacher, literally reported that "something isn't right here" on January 22, 2021. As a whole, the District ignored the concern.

Whether or not the Math teacher submitted a START referral is irrelevant. The teacher was sounding an alarm bell. There is no evidence that the District did anything at all in response. This persisted through at least March 2021, when the Math teacher tried to follow up on his concerns.

The Student's D+ in Honors English 2 and failing grade in Pre-Calculus are not in line with any cognitive or academic testing prior to that point. Those grades may be entirely attributable to the Student's attendance but might also be attributable to the Student's disabilities. It is impossible to know because the District failed its Child Find obligation which was triggered by the teacher's concerns.

The District's lack of action in this case is a procedural violation of the Student's right to a FAPE. That procedural violation resulted in substantive educational harm, as evidenced by the Student's grades. Giving the District



a reasonable period of time to do anything at all in response to alarming reports from teachers, compensatory education for the period from February 1, 2021, through the end of the 2020-21 school year.

A difficulty in this case is that there is no evidence at all to calculate a make-whole remedy for that period of time, and almost no evidence to calculate the amount of special education that the Student should have received. To overcome this problem, I focus on the equitable nature of compensatory education. The educational harm was limited to two classes, and so I award 90 minutes of compensatory education for each day that school was in session between February 1, 2021 and the end of the 2020-21 school year.

The Parents may use the compensatory education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

Until the Student turns 21 years old, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.

***Denial of FAPE: 2021-22 School Year through November 19, 2021***

Problems like those that the Math teacher reported in the 2020-21 school year persisted into the 2021-22 school year and escalated. By October 8, 2021, the school counselor started the START process based on the Student's poor performance and concerning behaviors in both Math and Spanish. Despite this, there is no evidence that the START referral resulted in any substantive changes in the Student's education, let alone any consideration as to whether the Student required special education.

I find that the denial of FAPE that started on February 1, 2021, continued into the 2021-22 school year. The relatively short period of time between the school counselor's START referral and the Student's manic episode might be a mitigating factor under different circumstances. In this case, the District is not owed a reasonable response time because the counselor's START referral was not a new revelation. It is what at least one teacher had been requesting since January of the prior school year.

As in the prior school year, this procedural violation resulted in substantive harm as seen the Student's grades and behaviors in two classes.<sup>8</sup> Again, there is no preponderant evidence to enable a compensatory education calculation under either method recognized in the Third Circuit, so I rely upon the equitable nature of that remedy. As in the prior year, I award 90 minutes of compensatory education for each day that school was in session between the start of the 2021-22 school year and November 19, 2021.

The Parents may direct the use of this compensatory education with the same limitations described above.

### ***Denial of FAPE: Remote Instruction***

For a brief period between the Student's manic episode and the Student's enrollment in the 1:1 School, the District provided remote, asynchronous instruction through a third party. There is preponderant evidence of the Parents' dissatisfaction with that program, but that is not the standard.

The record as a whole, including the record of the expedited portion of this proceeding, compels a finding that the Student was simply not amenable to instruction in the immediate aftermath of the manic episode. Under the totality of the circumstances, I find that the District's actions – providing some method of instruction during a fast-moving, highly unusual, and deeply troubling period of the Student's life – were reasonable.

I find no denial of FAPE during this period of time.

### ***Tuition Reimbursement***

Under the *Burlington-Carter* test described above, the Parents pass the first prong nearly *per se*. The Parents enrolled the Student in the 1:1 School and, 11 days later, the District concluded that the Student is a child with a disability. That conclusion was based in significant part on testing that was completed before and during the Student's enrollment in the 1:1 School.

I find that the Student was a child with a disability and, therefore, was entitled to a FAPE, when the Parents enrolled the Student in the 1:1 School. The Student did not have an IEP at that time. Consequently, the District's placement offer (or, really, absence of a placement offer) was inappropriate.

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<sup>8</sup> Conclusions in the 2016 and 2018 RRs that the Student's behaviors are volitional, as evidence by their appearance only in classes that the Student does not prefer, does not alter this analysis. The Student's efforts to escape non-preferred activities through negative, disruptive behaviors and/or avoidance is evidence in favor of the Parents' position, not the Districts.

Moving to the second prong of the *Burlington-Carter* test, I find no preponderant evidence that the 1:1 School was appropriate for the Student. By and large, the Student has been academically successful. The Student's strong academic performance in a school that presents all instruction 1:1 is neither surprising nor evidence of that the 1:1 School is appropriate. There is preponderant evidence in the record that the Student can do well academically even when not receiving a FAPE. But education encompasses much more than academics, and the Student's special education needs are not academic in nature.<sup>9</sup>

The 2022 RR revealed that the Student needs a very high level of Emotional Support. No matter how academically successful the Student is, evidence that the Student requires Emotional Support and direct instruction coping skills, social skills, and executive functioning is well beyond preponderant. The Student received no special education at all in the 1:1 School. For this reason, I find that the 1:1 School was not appropriate for the Student. The *Burlington-Carter* analysis therefore ends. The Parents are not entitled to tuition reimbursement.

### ***Placement Offer***

Through the 2022 IEP and the Private School, the District offered a FAPE to the Student. I find no procedural or substantive flaw in the 2022 ER, and the 2022 IEP flows directly from, and is directly responsive to, that evaluation. It is individually tailored to the Student's needs and was reasonably calculated to provide a FAPE when it was offered.

The 2022 IEP is not perfect, but perfection is not the standard. The comments for each goal's baseline, as written, suggests that the District had sufficient information to calculate baselines but chose to wait. In this case, given the uncertainty about the location in which those goals will be implemented at the time the IEP was drafted, I find the absence of baselines does not render the 2022 IEP inappropriate. Similarly, I find that writing "To Be Determined" wherever the IEP called for a location is not a fatal flaw under the facts of this case. The District did not know, and had no way to know, which of multiple potentially appropriate schools would accept the Student.

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<sup>9</sup> Above, I cite to the Student's academic declines in two classes as evidence of a denial of FAPE. There is no suggestion that the Student's disabilities directly impact upon academics in the same way that a specific learning disability would. Rather, the Student's poor academic performance in certain classes is a symptom of unmet, non-academic educational needs.

The Parents argue that the 2022 IEP, as it would be implemented at the Private School, does not constitute placement in the least restrictive environment. Taken literally, the Parents are correct that the Private School is more restrictive than their preferred placement. But the question of whether one placement is more restrictive than another does not control. Rather, the question is: what is the least restrictive placement *for the Student*?

Discussed above, *Oberti* requires the District to consider how less restrictive placements can be modified to accommodate the Student. Importantly, however, *Oberti* does not require children to fail in inappropriate-but-less restrictive placements before moving to appropriate-but-more restrictive placements. The 2022 ER very clearly paints a picture of a child with Emotional Support needs that cannot be met in a typical high school. The level of therapeutic services that the Student requires to receive a FAPE do not exist in typical high schools, and the District is not obligated to create a school within a school for the Student. See, e.g. *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

I appreciate the Parents' perspective that the Student's needs in the immediate aftermath of a manic episode are different than what they are typically. I also appreciate the Parents' and Student's diligence and hard work to maintain the medical and therapeutic supports that the Student requires outside of school while remaining vigilant for the potential onset of a new episode. The Parents' testimony in this regard was credible, but does not outweigh the comprehensiveness and thorough considerations in the 2022 ER. Additionally, the record illustrates that the Student had emotional support needs before the manic episode that the District mostly ignored for years. A full-time, therapeutic, Emotional Support placement is appropriate for the Student.

I also take the Parents' concerns about the Private School's academic rigor seriously. The Student is highly intelligent and capable of high-level academic work. Testimony that the Private School has seen success with high academic achievers in the past was credible and not refuted, but that testimony was hardly specific in terms of how the Private School will meet the Student's academic needs. Technically, the Student does not have academic special education needs, and so the Student's academic program is beyond my authority. However, I am concerned that the Student's perception of the Private School's academics (real or perceived) will adversely impact upon the Student's Emotional Support and executive functioning needs. I will, therefore, require the IEP team to reconvene and determine whether the academics provided at the Private School are

appropriate for the Student and, if not, whether additional academics or tutoring should be provided (either by the District or a third party).

In sum, I find that the 2022 IEP was reasonably calculated to provide a FAPE when it was offered. The Parents' demand for their preferred placement is denied for that reason.

### **Summary and Legal Conclusions**

The IDEA's statute of limitations bars claims arising before March 24, 2020. All evidence shows that the Parents had contemporaneous knowledge of the violations they allege.

From March 24, 2020, through the end of the 2019-20 school year, there is no evidence of a denial of FAPE. The record of this case shows that, in the same years that schools closed for COVID-19, the Student was educationally successful by every metric – despite displaying some unusual behaviors.

During the 2020-21 school year, the Student's behaviors and attendance worsened, resulting in poor academic performance in two classes. While this was happening, a teacher attempted to warn the District that the Student needed help. That alarm was unanswered, resulting in a violation of the Student's right to a FAPE. I award compensatory education in an amount and with restricted uses detailed above to remedy this violation.

The denial of FAPE in the 2020-21 school year carried into the 2021-22 school year until the District removed the Student after the Student's manic episode. I award compensatory education in an amount and with restricted uses detailed above to remedy this violation.

After the manic episode, the District offered remote, asynchronous instruction through a third party. The Parents' dissatisfaction with that program was credible but, under the record of this case, I find that the District's offer was appropriate at the time.

Shortly after the District offered remote instruction, the Parents enrolled the Student in the 1:1 School. While the 2022 ER was not complete then, I find that the Student was a child with a disability without an IEP at that time. However, the Parents placed the Student in a school that provides no special education despite the Student's unambiguous need for Emotional Support. As a result, the Parents' demand for tuition reimbursement cannot survive the second prong of the *Burlington-Carter* test and their demand for tuition reimbursement is denied.

Ultimately, the District completed the 2022 ER and offered the 2022 IEP. While there are some flaws in the 2022 IEP, none of them are fatal. Moreover, the 2022 IEP flows directly from the 2022 ER and targets the Student's needs through appropriate goals with SDI and modifications tailored to enable the Student to satisfy those goals. The Private School in which the District offered to implement the IEP is also appropriate and does not constitute a violation of the Student's right to be educated in the least restrictive environment under the facts of this case. 2022 IEP was reasonably calculated to provide a FAPE at the time it was issued. The remainder of the Parents' claims, therefore, are denied.<sup>10</sup>

### **ORDER**

Now, August 26, 2022, it is hereby **ORDERED** as follows:

1. The Student is awarded ninety (90) minutes of compensatory education for each day that school was in session between February 1, 2021.
2. The Student is awarded an additional ninety (90) minutes of compensatory education for each day that school was in session between the start of the 2021-22 school year and November 19, 2021.
3. All compensatory education awarded herein shall be directed by the Parents, but subject to the limitations described in the accompanying order.
4. The Parents' demand for tuition reimbursement is **DENIED**.
5. The 2022 IEP was appropriate and reasonably calculated to provide a FAPE at the time the District offered it.
6. As soon as practicable, the parties shall reconvene the Student's IEP team to discuss whether the Private School's academic program is appropriate for the Student. If the IEP team concludes that the Private School's academic program will adversely impact upon the Student's special education needs, the IEP team shall determine what additional academic programming the Student requires.

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<sup>10</sup> Depending on how the issues are parsed, the Parents raise separate volitions of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* The District's compliance with the IDEA also demonstrates compliance with Section 504. For periods when the District violated the Student's IDEA rights, any Section 504 violation arising from the same facts is remediated by the IDEA remedies provided herein.

7. Nothing herein precludes the parties from reaching their own agreement concerning the Student's ongoing educational placement.

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

/s/ Brian Jason Ford  
HEARING OFFICER