

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

## **Pennsylvania Special Education Hearing Officer** **Final Decision and Order**

### **CLOSED HEARING**

#### **ODR File Number:**

26591-21-22

#### **Child's Name:**

J.B.

#### **Date of Birth:**

[redacted]

#### **Parent:**

[redacted]

#### **Counsel for Parent**

Pro Se

#### **Local Education Agency:**

Quakertown Community School District  
100 Commerce Drive  
Quakertown, PA 18951

#### **Counsel for the LEA**

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#### **Hearing Officer:**

Charles W. Jelley Esq.

#### **Date of Decision:**

10/31/2022

## **PROCEDURAL HISTORY**

The Parents filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act ("IDEA").<sup>1</sup> The Parents contend the District failed to offer and provide the Student a Free Appropriate Public Education ("FAPE") during the 2020-2021 school year. The District, however, argues that it always complied with the Act. The Parents now seek an award of reimbursement for out-of-pocket expenses and an undetermined sum of money for future services.

For the reasons below, I find the Parents failed to establish preponderant proof of a procedural or substantive violation that caused a denial of a (FAPE). Therefore, I must deny the Parents' request for reimbursement and monetary damages. A Final Order denying relief follows.

## **STATEMENT OF THE ISSUES**

Did the District offer and provide the Student with a free appropriate public education during the 2020-2021 school year? If not, is reimbursement appropriate relief?

Did the District fail to evaluate the Student in a timely fashion? If yes, what, if any, appropriate relief is due and owing?

## **FINDINGS OF FACT**

1. The Student is a former resident of the District. S-1
2. The Student enrolled in the District in kindergarten, the 2020-2021 school year. S-1
3. Before entering the District, the Student was found eligible for and received early intervention ("EI") services from the Bucks County Intermediate Unit

<sup>1</sup> All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (N.T. p.), Parent Exhibits (P- p.) followed by the exhibit number. Finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

(BCIU) due to a developmental delay. S-1.<sup>2</sup> The BCIU is a local education agency within the meaning of the IDEA.

### **THE BUCKS COUNTY INTERMEDIATE UNIT PRESCHOOL PROGRAM**

4. Student received five (5) hours of early intervention (EI) services per week during the 2019-2020 year in the form of specialized instruction and speech therapy. NT. 65; S-3 p.3.
5. The BCIU delivered those services when the Student attended an inclusion preschool classroom with regular education peers, with a special instructor pushing into the classroom. N.T. 65, 85.
6. The Student did not have a positive behavior support plan ("PBSP"), the BCIU never conducted a functional behavioral assessment ("FBA"), and the Student never received emotional support services while attending the BCIU preschool program. N.T. 80.
7. In February 2020, to plan for the Student's transfer from the BCIU preschool program to the District's school-age program, the District issued prior written notice (PWN) of its intent to reevaluate the Student's IDEA eligibility. S-3 pp.11-14. As part of the data collection surrounding the move from one LEA to another LEA in the same state, the District staff reviewed the Parents' input found in the "Early Intervention Transition Questioner." When the Parents were asked to respond to the question, "Is your child able to calm down in a typical amount of time when upset or frustrated? If not, what does that look like for your child?" The Parent's handwritten note states, "no reports of any concerns." S-2 p.2. Next, when asked, "Does your child have any sensory seeking or avoiding behaviors? Crowds, loud noises, crave movement, etc." The Parents wrote, "sometimes noises but not many concerns." S-2 p.2. When asked, "What are your biggest concerns about your child transitioning to kindergarten? The Parents responded, "sit and focus IEP for social and emotional needs." S-2 p.2.

<sup>2</sup> "S-#" and "P-#" refer to School District Exhibits and Parent Exhibits, respectively.

8. In January 2020, the Student was reevaluated while attending the BCIU early intervention program. As part of the LEA transfer process, the District issued an intent to reevaluate. The intent to reevaluate included a plan to conduct cognitive testing, and achievement testing, complete a preschool classroom observation, undertake a review of existing data/records, conduct a speech and language evaluation, and issue and score various teacher and Parent behavioral rating scales. *Id.* at 13. On February 14, 2020, the Parents consented to the District's request for a reevaluation. S-3 p.14.
9. On March 13, 2020, all Pennsylvania schools were ordered to close due to the COVID-19 pandemic. As a result, of the shutdown, the District completed a portion of its proposed testing. S-3 pp.2, 7, 13, N.T. 80.
10. On April 21, 2020, the District issued a somewhat incomplete reevaluation report. After reviewing the EI records, the District adopted the BCIU's January 2020 EI reevaluation results without observing the Student or the proposed speech testing. The BCIU EI reevaluation reports that on the Developmental Assessment of Young Children-Second Edition (DAYC-2) used to determine cognitive development functioning; the Student earned a standard score of 89 in the area of cognitive skills, scores between 90 and 110, considered to be within the Average range. The Student's score indicated slightly below-average skills. The Student was able to: identify objects that do not belong in a group, build a pyramid with six (6) blocks, imitate a drawing of a face with three features, predict what may happen next in a story, distinguish between real and make-believe and living and nonliving, understands the concept of zero, and able to identify "half and "whole" objects. The Student was unable to: retell a story from a picture book, draw a stick figure, copy a name, or understand print concepts such as reading from left to right, top to bottom, or name 20 letters. S-3.<sup>3</sup>

<sup>3</sup> The District examiner in reporting the scores interchanged this Student's name with the sibling's name. While typically a fatal flaw, I found after reading the document as a whole in comparisons with the Parents, the teachers and the outside report found at Parents' Exhibit 16, and the present level data found at S-11, the test results in S-3 are otherwise, corroborated. Recognizing the error out of an abundance of caution I will now give these facts medium weight in determining if a procedural or substantive violation occurred.

11. As part of the District reevaluation, the Student's Mother completed the *Behavior Assessment System for Children, Third Edition* ("BASC-3"). Mother rated the Student as "Average" in the areas of problem behavior, functional impairment, presence of internalizing symptoms and acting out. S-3 p.4. The Mother's input did not describe any clinically significant behaviors. S-3 pp. 56.
12. The District's reevaluation report adopted the BCIU's detailed findings describing the Student's deficits in speech articulation skills. The District reevaluation team determined the Student was eligible for school-aged special education due to a Speech and Language Impairment. S-3 pp.8-9. Recognizing the limitations in the existing data set, the District proposed, and the Parents agreed, due to the presence of delays in articulation, that the Student would be identified for IDEA services under the IDEA disability category of a Speech and Language Impairment. S-3.
13. Based on the then-current circumstance, *i.e.*, COVID school closure, the Parties proposed that the IEP team adopt Student's then-current early intervention IEP as an interim IEP for entry into kindergarten. The Parties further agreed that once the Student began to attend school, the District would reissue a Permission to Reevaluate and collect the originally planned assessment data. The reevaluation notes the absence of teacher input, observations, and assessment data. S-3 p.9.
14. On May 12, 2020, the District proposed an initial IEP for the upcoming kindergarten year. S-4. The District's IEP adopted the goals and specially designed instruction ("SDI") from the EI IEP. S-4; S-5 p.6, N.T. pp.81-82. The District proposed that, as in preschool, the Student should participate in a general education kindergarten classroom with the support of a special education teacher, a speech therapist, and classroom-based instructional aides. S-4, N.T. 84-85. The District also proposed that the Student would attend the neighborhood school. S-4 p. 27.
15. The initial May 2020 IEP was rejected by Parent, and the District held another IEP meeting in July 2020 to discuss family concerns. S-4 p.33, S-5 p.2. In July 2020, the Parent expressed concerns that the Student had sensory processing

issues. Upon learning of the Parents' concerns, the District agreed to conduct an occupational therapy (OT) evaluation once the COVID shutdown ended. S-5 p.6. As a result of Parent concerns, SDIs were added, including regular check-ins with a school counselor to build rapport and trust with an adult in school. S-5 p.25, N.T. 99.

16. The proposed placement remained the neighborhood elementary school with an itinerant level of speech and language support. S-5 pp.35-38. The District then issued prior written notice and a Notice of Recommended Educational Placement (NOREP). The July 20, 2020, NOREP explained that the District intended to resume the Student's reevaluation once school reopened. *Id.* at 36. Parent approved the NOREP that same day. *Id.* at 38.

### **THE KINDERGARTEN SCHOOL YEAR STARTS LATE**

17. Due to the lingering effects of the COVID-19 pandemic, the Student's kindergarten school year started late on September 14, 2020. N.T. 89-90.

18. On September 25, 2020, less than two weeks after the start of school, the District reissued a Permission to Reevaluate ("PTRE"). The PTRE proposed assessments of Student's cognitive ability and pre-academic skills, occupational and speech therapy, a classroom observation, and teacher and Parent behavioral rating scales. S-6. Shortly after the Parents approved the PTRE, the Student began to display multiple instances of behavioral dysregulation. The behavioral dysregulation included the following behaviors, name-calling, elopement, hitting, kicking, and destruction of materials, such that staff elected to restrain the Student physically. On more than one occasion, the teacher told the Parents that when the Student acted out, the teacher would take the other students in the class to another room. Removing the other students created a safe space and allowed the staff time to dedicate one-on-one attention to the Student. N.T. 91-92, S-10, 11, S-15. Within 10-days of using physical restraint, the IEP team met and reviewed each incident of restraint. S-14.

19. On October 9, 2020, the District issued another PTRE proposing a functional behavioral assessment (FBA). S-6.

20. On or about October 11, 2020, the Parties participated in an IEP meeting to address Student's behavior. N.T. 92-93, S-6, S-7 p.9. The team discussed, and the Parties agreed to add new forms of specially-designed instruction (SDI). The new SDIs included movement breaks, a token economy board, and continuous positive feedback. Additional SDIs like daily communication between home and school and participation in a mask desensitization protocol was also added. S-7 p.9.
21. Follow-up IEP meetings were held on October 27 and November 23, 2020, and new SDIs added for a sensory processing diet and scheduled breaks with the school counselor. S-8 pp.2-3, 27-28.

### **THE REEVALUATION REPORT IS SHARED WITH THE PARENTS**

22. On December 4, 2020, the District issued its reevaluation report. The reevaluation report included updated curriculum-based measures in reading, and math, a direct observation by the school psychologist, an assessment of overall intelligence, teacher and Parent behavioral ratings, an autism spectrum rating, and the FBA results. The Student displayed average intelligence and basic knowledge of school concepts needed for early formal education. (S-10).
23. The Parents new behavioral ratings indicated that the Student's functional skills, problem behavior, presence of internalizing symptoms, and acting-out/ problem behaviors all fell within the "Average range." The teacher rated, Aggression, Withdrawal, Social Skills, Anger Control and Developmental Social Disorders at the Clinically Significant level. Hyperactivity, Atypicality, Adaptability, Functional Communication, Bullying, Emotional Self-Control, and Executive Functioning were scored at the "At Risk" level. (S-10).
24. Due to the divergent scores, the teacher and the Parents completed the Autism Spectrum Rating Scales (ASRS). The teacher's score in the area of Social/Communication. Atypical Language, Sensory sensitivity, and Attention/self-Regulation were rated as "Slightly Elevated" or "Very elevated." From the Mother's perspective, the Student did not display behaviors often associated with Autism. S-10 pp.12-14).

25. The FBA results indicate low-level interfering behaviors like placing the head on the table, to scribbling on papers, and desks, to more disruptive behaviors like throwing, ripping, or breaking objects, climbing on furniture, hiding under desks, to unsafe behaviors like running out of the class or engaging in aggressive behaviors like kicking or punching adults. (S-10).
26. The FBA was completed by a Board Certified Behavioral Analyst ("BCBA"). The results of the FBA indicated that the BCBA recommended that the Student receive instruction in coping skills and social skills and that the District develop a positive behavior support plan (PBSP). S-10 pp. 18, 24-36. After reviewing the report, the team, including the Parents, concluded that the Student continued to be eligible for special education but proposed changing the primary disability category from Speech and Language Impairment to Emotional Disturbance. S-10 pp. 1, 17.

### **THE REVISED JANUARY 2021 IEP**

27. After accepting the reevaluation teams' recommendations, the BCBA, the Parents, and the teachers developed a revised IEP. On January 21, 2021, the District offered a revised IEP. The proposed IEP included supplemental emotional support and speech and language support. The IEP added multiple PBSP goals. The revised IEP also included speech and occupational therapy goals. The SDIs included access to a sensory diet, daily rewards, a functional communication system, a designated break area, a procedure to manage transitions from one topic to another along mindfulness strategies to create psychological flexibility. The IEP described the frequency and duration of time the Student would spend in speech services. S-11. The PBSP included a series of "if the Student does this, react with this positive strategy." The IEP included regular opportunities for the regular education staff to receive speech and language, OT, and ongoing behavioral support. (S-11).
28. The IEP goals were measurable. The IEP goals included a progress monitoring schedule. The IEP goal statements included measurable baseline data. The SDIs were designed to advance the Students' mastery of the goal statements.



The present levels clearly understood the Student's needs, weaknesses, and disability-related circumstances that affect learning. (S-11).

29. The IEP called for the Student to spend 77% of the day in the general education kindergarten classroom. The IEP included multiple supports, aids, and supplemental services to enable the Student to participate in the regular education setting. S-11 p.49.
30. On January 27, 2021, the District issued and the Parents approved the IEP and signed the proposed Notice of Recommended Educational Placement (NOREP). S-11 pp.51-54.

### **THE MARCH 2021 IEP REVISIONS**

31. On March 25, 2021, and March 29, 2021, the Parties met and revised the IEP. The revised IEPs added three new SDIs. The new SDIs further described how the staff would provide positive reinforcement, redirection, or corrective feedback. The IEP modified the Student's dismissal and bus routine. To make dismissals go smoothly, the SDIs also included the use of sensory tools, like the use of headphones during dismissal, were added. S-12.
32. On April 28, 2021, the IEP team met. The IEP team updated the present levels and added one new SDI. The updated present levels included additional academic and behavior progress monitoring data. The District added new social skills and coping SDIs. The IEP states that from April 28, 2021, to December 15, 2021, the Student would receive 120 -15 minute sessions targeting social and coping skills. S-13 p.21.
33. While the record is somewhat unclear, on or about April 27, 2021, the Student participated in a private OT evaluation. While the results appear in the record at P-16, the record is uncertain if the Parents shared the results with the District before the end of the school year. P-16.

### **AT EACH IEP MEETING, THE DISTRICT ADDED NEW SDIS**

34. In July 2020, the District, after reviewing the Parents' input, added six new SDIs to address sensory, communication, and academic support. In October 2020, the District added five new SDIs to address sensory concerns. In November 2020, the District added one new SDI. (S-8 pp.23-28).

## **THE PARENTS' ATTORNEY ATTENDED ONE IEP MEETING**

35. Legal counsel represented the Parents at the November 2020 IEP meeting. S-8 p.2.

## **THE PARENTS MOVED OUT OF THE DISTRICT**

36. Before the start of the 2022-2023 school year, the Parents moved to a new district. N.T. p.12.

## **APPLICABLE LEGAL PRINCIPLES**

### **BURDEN OF PROOF**

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case, the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005), *Ridley S.D. v. M.A.*, 680 F.3d 260 (3rd Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. There were no instances of conflicting testimony where credibility and persuasiveness determinations were made to establish a fact. Some witnesses were, however, more persuasive on some points than others. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

### **PERSUASIVENESS**

During a due process hearing, the hearing officer is responsible for judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony, and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. In the course of doing so, hearing

officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.

All of the above findings are based upon the preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony, and the record as a whole is preponderant. On balance, despite inconsistencies, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events. *David G. v. Council Rock School District*, 2009 WL 3064732 (ED. Pa. 2009), *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014).

### **FREE APPROPRIATE PUBLIC EDUCATION**

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1). FAPE is "special education and related services" at public expense that meets state standards and is delivered following the IEP. 20 USC §1401(9).

School districts must provide FAPE by designing and administering individualized instruction programs in an IEP. 20 USC §1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg' l High Sch. Bd. of Ed. v. P.S.* 381 F.3d 194, 198 (3rd Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3rd Cir. 1988)). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. NE.*, 172 F.3d 238, 247 (3d Cir. 1999). To provide FAPE, the child's IEP must describe specially-designed educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-82 (1982). An IDEA-eligible student is denied FAPE if his or her program is not likely to produce progress or if the program affords the child only a "trivial" or "de minimis" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996).

A school district is not required to provide a student with the best possible program or maximize the student's potential. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012). An IEP is not required to incorporate every program, related services or support parents' desire for their child. *Id.* Instead, an IEP must provide a "basic floor of opportunity" for the child. *May Courtney T. v. School District of Philadelphia*, 575 F.3d at 251. The appropriateness of an IEP must be determined as of the time it was made, and the reasonableness of the program should be judged only based on the data known or data that should have been known to the school district at the time the offer was made. *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995) (appropriateness is not judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.), *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3rd Cir. 2010), *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

### **TRANSFER IEPS AND INTERIM IEPS**

The IDEA regulations also identify how schools must provide FAPE to Students who transfer from one – local education agency (LEA) - to another LEA. Until the new LEA conducts its own reevaluation pursuant to 34 C.F.R. §§300.304-300.306, the new LEA must provide "comparable services" like those described in the student's transfer IEP. The Office of Special Education and Rehabilitative Services, U.S. Department of Education (OSERS) interprets the word "comparable" according to its "plain meaning," which is "similar" or "equivalent." Therefore, "comparable services" means services that are "similar" or "equivalent" to those that were described in the child's transfer IEP." Fed. Reg. Vol. 71, No. 156 at 46681 (August 14, 2006). The Office of Special Education Programs (OSEP) has also opined that the requirement to provide "comparable services" can include a duty to provide "temporary goals aligned with the annual goals in the student's prior IEP" *Letter to Finch*, 56 IDELR 174 (OSEP August 5, 2010).

After the reevaluation, the new LEA must, with parental input, develop, adopt, and implement a new IEP. Or, in the alternative, with parental input, the new LEA may continue to implement the agreed transfer IEP. 34 C.F.R. §300.323.; 20 USC 1414(d)(2)(C)(i)(2), Fed. Reg. Vol. 71, No. 156 at 46682 (Aug. 14, 2006). In

summary, a school district may choose to temporarily provide comparable special education services, as written in the existing transfer IEP, while it pursues an initial reevaluation. After that, when the reevaluation is completed, the IEP must meet and offer a new IEP. Oddly, the IDEA does not establish a specific time frame to adopt the IEP developed by the old district. Instead, the new district must take such action "within a reasonable period of time" to avoid any undue interruption in the student's services.

While the IDEA generally requires the completion of an evaluation/reevaluation prior to the formulation of an IEP and placement, there may be some limited circumstances in which a student may receive services under an interim IEP before the normal process is completed. *Letter to Boney*, 18 IDELR 537 (OSEP 1991) (Part B neither requires nor forbids the use of Interim IEPs for children with disabilities). Transitional IEPs are a slight variation of Interim IEPs. But for the provision of "comparable" service IEPs, all other IEPs, Interim, Transitional, or otherwise, must meet the IDEA's substantive and procedural FAPE requirements. See *Briere v. Fair Haven Grade Sch. Dist.*, 25 IDELR 55 (D. Vt. 1996), *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

### **PRIOR WRITTEN NOTICE**

School districts must issue Prior Written Notice (PWN) when a district acts to initiate or change the identification, evaluation, education, or educational placement. 34 CFR 300.503 (a). The PWN must include the following components: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take action; (3) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action; (4) if the notice is not associated with the initial referral for evaluation, the district must provide notice how a copy of a description of the procedural safeguards can be obtained.

### **WHEN IS A PROCEDURAL VIOLATION A DENIAL OF A FAPE**

A purely procedural violation of the IDEA can result in prospective injunctive relief in the form of a direction to the district to remediate the violation and ensure future compliance

with IDEA's procedural requirement. The hearing officer may not award compensatory education, tuition reimbursement, or reimbursement for a pure procedural violation. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir.2010). A procedural violation may rise to a substantive violation, justifying compensatory education, tuition reimbursement, or reimbursement. Procedural violations become substantive when parents show that the procedural defects caused substantial harm, meaning that FAPE was denied.

To prove such substantive harm, Parents must prove by a preponderance of the evidence that "procedural inadequacies (i)[i]mpeded the child's right to FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit." Accordingly, not all procedural due process violations give rise to a substantive denial of FAPE. When parents fail to prove substantive harm, the procedural violation may be found "harmless." *Robert B. ex rel Bruce B. v. W. Chester Area Sch. Dist.*, 04-2069, 2005 U.S. Dist. LEXIS 21558, 2005 WL 2396968, at \*9 (E.D. Pa. September 27, 2005) (although "no regular education teacher was present at the IEP meeting, the Court finds no evidence in the record that Robert has been denied any necessary service . . . as a result of the flaw"). Hearing officers are authorized to direct districts to remedy procedural violations. *Id.* Therefore, simple noncompliance with IDEA procedures is not enough to find a denial of FAPE. *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

### **APPROPRIATE RELIEF**

In this instance, both Parties seek appropriate relief within the meaning of the IDEA. *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)). Here the Parent seeks appropriate relief in the form of reimbursement for out-of-pocket expenses and an underdetermined monetary relief for past, present, and future service needs. The Third Circuit tells us that monetary damages are not appropriate relief under the IDEA. *Chambers v. Sch. Dist. Of Phila. Bd. of Educ.*, 587 F.3d 176, 185-86 (3d Cir. 2009). Therefore, as a matter of law, the Parents' request for monetary relief is now exhausted and otherwise denied as stated.

On the other hand, assuming a denial of a FAPE occurs, reimbursement is one possible form of appropriate relief. *See, See, G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (make whole compensatory education is appropriate relief), *M.C. ex rel. J.C. v. Cent. Reg. Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) ( hour for hour

compensatory education is appropriate relief), *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 556 IDELR 389 (U.S. 1985)(private school tuition reimbursement is appropriate relief), *Clark County School District Nevada State Educational Agency* 78 IDELR 86,121 LRP 3959 (December 18, 2020) (reimbursement for private tutoring and payment for the student's private occupational therapy during COVID shutdown is appropriate relief).

From the District's perspective, a declaratory finding that at all times relevant, they offered a FAPE, implemented the IEP, and otherwise complied with all substantive and procedural requirements is appropriate relief.

### **THE PARTIES HAVE A RIGHT TO APPEAL THE HEARING OFFICER'S DECISION**

In Pennsylvania, when disagreements arise about a FAPE, a due process hearing is held before an impartial hearing officer whose final decision is binding on the parties. 22 Pa. Code Chapter 14 et seq.. Under the IDEA, parents who believe their child has been denied a FAPE have a right to an impartial due process hearing held by a state or local educational agency. 20 U.S.C. § 1415(f) and (g). At the same time, districts can also request a hearing. *Id.* In Pennsylvania, the "due process hearing" is conducted before an impartial hearing officer from the Office for Dispute Resolution who is trained in special education law. 20 U.S.C. § 1415, 22 Pa Code Chapter 14, *et seq.* Following exhaustion of this administrative process, the hearing officer's Decision may be appealed to a court of competent jurisdiction. 20 U.S.C. § 1415(i)(2). The IDEA empowers courts and hearing officers to "grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

### **ANALYSIS, LEGAL PRINCIPLES, AND CONCLUSIONS OF LAW**

The Parents first allege that due to the 2020 COVID school shutdown, the District failed to evaluate the Student properly. Based on the alleged faulty evaluation, they allege that the District failed to educate the Student in the least restrictive setting appropriately. In particular, they allege the first IEP lacked many supports. After reviewing the early intervention records, the District either knew or should have known the Student needed. The Parents next assert that the failure to provide sensory, behavioral, and emotional support, the missing supports, caused the Student to suffer emotional distress. They claim that from September 2020 through May 2021, a series of procedural and substantive violations proximately

caused the Student to act out, which in turn caused the Parents to spend unstated sums of money on educating the Student. Finally, they assert that the procedural violations substantially interfered with their standalone right to participate in the IEP process meaningfully. After reviewing the record, all exhibits, and closing statements, I find that the Parents have not provided preponderant proof of a substantive or procedural violation that requires me to award reimbursement, monetary or other relief. My reasons follow.

### **THE DEVELOPMENT OF THE TRANSFER IEP AND THE REEVALUATION**

When a student transfers from one LEA – here BCIU- to a new LEA – the District- the new district has several procedural options. First, with parental involvement, the new LEA – the District - may implement the student’s transfer IEP as written, provided that the services are “comparable.” Second, the new LEA, again with parental involvement, may create an interim IEP, building onto the “transfer IEP” with added SDIs and goals while they await the results of its initial reevaluation. Or third, the district can complete its reevaluation and develop and implement an entirely new district-created IEP. *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

Initially, the District chose option three to complete a reevaluation and offer a new IEP. The March 2020 COVID school closure upended the District’s two-stage plan. Although the District was officially closed, the staff continued to provide transfer/transitional services. When it became apparent that the District could not complete a new reevaluation with fresh testing, the psychologist prepared a reevaluation report based on the existing January 2020 data collected by the BCIU. 34 CFR §300.305.

The April 2020 reevaluation included updated input from the Parents, the preschool teacher, and the BCIU staff. The April 2020 reevaluation report included an objective measure of overall ability, behavioral ratings, and updated speech and language data from the BCIU staff. The reevaluation conspicuously notes the District planned, and the Parents agreed, to delay additional testing until face-to-face instruction would occur in September 2020. The record is clear that neither



the Parents nor the BCIU input noted ongoing behavioral needs or sensory processing troubles. At the same time, the District advised the Parent of their procedural due process rights. Therefore, I now find that the reevaluation was appropriate. I reach this conclusion for multiple reasons.

First, the Parents do not challenge the BCIU's January 2020 results, recommendations, or conclusions; therefore, they cannot now claim the data was incomplete or inaccurate. Second, the Parents' written responses to the District transition questionnaire establish another form of Parental participation that otherwise negates the Parents' participation claim. Third, the Parents' assertion that the District overlooked behavioral and sensory needs is negated by the fact that the Parents, BCIU's, and the preschool teacher's written input fails to note sensory processing, self-regulation, or behavioral dysregulation as a unique need. Finally, once the Parents consented, the District completed the April 2020 reevaluation in a reasonable time.

All of the above facts lead me to make the following legal conclusions. Based on these circumstances, the District's reevaluation was appropriate. Next, neither the Parental input nor the BCIU records contained data that would cause the District to pause the process to collect additional data. Furthermore, I now find that based on the Student's April 2020 data profile, the District had no reason to suspect a second IDEA disability. Accordingly, I now find the reevaluation was sufficient, comprehensive, and appropriate.

For all the following reasons, I find that the record is preponderant that the Parents failed to meet their burden of proof that the Student, based on the existing data, needed something more than a "comparable services" IEP.

#### **THE JULY 2020 TRANSFER IEP WAS APPROPRIATE**

In May 2020, the Parties met and developed an IEP, adopting in part the transfer BCIU IEP goals and services. Rather than continue the five (5) hours of EI classroom services, the District offered 25 hours per week of regular education in a regular kindergarten. The May 2020 IEP team followed the evaluation team's lead and identified the Student as a person with a speech and language impairment in need of SDI. The proposed transfer IEP included similar speech goals, SDIs, and supplemental services. Although the IEP tracked the

previously approved BCIU IEP, the Parents rejected the District's initial offer of a FAPE. This timeline tracks applicable standards.

While the record indicates the Parents expressed a desire to include sensory processing supports, from an OT, in the IEP, the BCIU records and the Parents' written input did not reflect sensory issues. To resolve the first-time sensory processing concern, not mentioned in the previous Parental input, the District offered, and the Parents agreed to collect OT and speech data. After weighing the Parents' input, the District revised the SDIs, and service, which set the stage for a July 2020 IEP meeting. After participating in the July 2020 IEP meeting, the Parents agreed to include several new SDIs and the proposed regular education placement with speech supports. The District then reissued PWN, noting the need to collect additional data, after which the Parents agreed to the bundle of services outlined in the IEP and NOREP.

In summary, after completing the reevaluation, the Student's transfer IEP now included 25 hours a week of regular education services, 900 minutes a year of speech services, additional SDIS, along with a speech teacher consultation with the regular education teacher 2x per month for 10 minutes or as needed/requested, and supports from the special education teacher in consultation with the regular education staff. After reviewing the events and exhibits sequence, I now find that the transfer IEP more than meets the IDEA "comparable services" requirements. Applying the Third Circuit "snapshot rule," I next find the July 2020 IEP was reasonably calculated to provide meaningful benefit and significant learning.

#### **THE START OF THE SCHOOL YEAR DID NOT GO WELL**

Two weeks into the school year, the Student began to display atypical challenging misbehaviors like hitting, kicking, and throwing objects. Several of the incidents resulted in the staff physically restraining the Student. On or about that time, as face-to-face instruction returned to full swing, the District issued the previously promised "permission to reevaluate." The permission to reevaluate included a speech reevaluation and a first-time-ever OT evaluation. Based on the level of the Student's behavioral dysregulation, the permission to reevaluate was expanded to include a functional behavioral assessment (FBA). The District's action in issuing PWN and offering to complete fresh testing is consistent with applicable standards.

#### **THE DEVELOPMENT OF THE INTERIM - TRANSITIONAL IEPS**

On October 11, 2020, October 27, 2020, and November 23, 2020, the Parties met to

revise the current July 2020 “comparable services” IEP. During each IEP meeting, while awaiting the reevaluation report, the District offered, and the Parents agreed to add new SDIs like a token economy board, a home, and school communication book, and additional sensory breaks. Because the October and November IEPs included new SDIs and offered more support, I now find that these IEPs fall into the gray area of “interim” or “transitional” IEPs. I make this distinction for two reasons. First, the changes evidence Parental participation and compliance with applicable procedural safeguards. Second, unlike “comparable service IEPs,” “interim” and “transitional” IEPs are reviewed under *Rowley* and *Endrew’s* reasonably calculated standard. Applying that standard, I now find the record is preponderant that at all times relevant from October 2020 through January 2021, the Student’s IEPs were otherwise appropriate. Accordingly, I now find that the District offered and provided a FAPE in the least restrictive setting.

#### **THE DECEMBER 2020 REEVALUATION REPORT AND THE JANUARY 2021 IEP**

By December 2020, consistent with applicable timeline standards, the District completed its second reevaluation report. The second reevaluation included a variety of updated academic, social, behavioral, sensory, and speech assessments. Oddly, although the school year got off to a rocky start, the Mother rated the Student’s overall behavioral/social skills in the “Average” range. On the other hand, the teacher disagreed and rated Aggression, Withdrawal, Social Skills, Anger Control, and Developmental Social Disorders at the “Clinically Significant” level. While, Hyperactivity, Atypicality, Adaptability, Functional Communication, Bullying, Emotional Self-Control, and Executive Functioning were scored at the “At Risk” level. The rating scale disagreement caused the psychologist to expand the reevaluation to consider a possibility of an underlying Autism diagnosis. The Parent and the teacher completed Autism rating scales, which did not support an additional area of disability when scored. Therefore, after ruling out the Autism disorder, the evaluation team concluded the Student also qualified for special-designed instruction as a person with an emotional disturbance. When the January 2021 IEP team met, they accepted the evaluation team’s recommendations and changed the Student’s primary IDEA eligibility from Speech and Language Impairment to a primary disability of Emotional Disturbance with a secondary Speech and Language disability. This series of events leads me to conclude that throughout the reevaluation process, the District heard, weighed, and acted on the Parents’ input. Therefore, the Parent participation procedural violation claims are denied.

The proposed January 2021 IEP included social, behavioral, and OT goals. The IEP detailed multiple SDIs, and supplemental services. This bundle of services enabled the Student to participate in both the regular and special education classrooms. The IEP also included a PBSP. The PBSP incorporated a series of "if the Student does this, react with this positive strategy" statements. The IEP also included regular opportunities for the regular education staff to receive speech and language, OT, and ongoing behavioral support. The January IEP enabled the Student to spend 77% of the day in the general education kindergarten classroom. Finally, the proposed IEP included targeted standalone social and emotional support.

Again, after the District issued PWN, the Parents approved the IEP and signed the NOREP. The now revised full-fledged IEP incorporated regular access to a sensory diet, daily rewards, a functional communication system, a designated break area, and a procedure to manage transitions from one topic to another, along with mindfulness strategies to create psychological flexibility. Therefore, I now find that the January 2021 IEP was a step up from the previously provided July 2020 "comparable services" IEP and the October and November 2020 "interim IEPs. These findings lead me to conclude that the January 2021 IEP was procedural and substantively appropriate.

While I understand the Parents' genuine belief that this Student's misbehavior was directly related to anxiety over the sibling's behavioral troubles, in the associated case, the record here does not include preponderant proof to establish that firmly held belief.

Finally, the January 2021 IEP was revised in March 2021 and April 2021. These revisions added 120 - 15 minute one-on-one sessions of social skills and coping instruction. The addition of these services further supports my finding that the District, at all times relevant, offered and provided a FAPE in the least restrictive setting. Accordingly, the record is preponderant that the March and April 2021 revisions offered a FAPE.

## **SUMMARY**

From May 2020 to April 2021, the Parties participated in seven IEP meetings. As a result of those meetings, the IEP team revised, developed, and implemented multiple Student specific goals, SDIs, related services, and a PBSP. Applying the "snapshot rule," the record

is clear that each IEP complied with the procedural and substantive requirements of the IDEA. Therefore, a Final Order follows against the Parents and in favor of the District.

### **FINAL ORDER**

**And Now**, this October 31, 2022, the District is hereby **ORDERED** as follows:

1. The District is directed to develop a checklist of when to provide prior written notice.
2. The District is directed to provide the teaching staff and the building-level local education agency representatives additional in-service training on how to use the prior written notice checklist.
3. The District is directed to provide the teaching staff and the building-level LEAs additional in-service training on when to issue prior written notice before implementing "trialing" strategies or interventions.
4. The Parents' request for reimbursement is **DENIED**.
5. The Parents' request for monetary damages is **DENIED**.
6. All other Student and Parent claims and District proffered affirmative defenses are now exhausted and otherwise **DENIED**.

It is so **ORDERED**.

s/ Charles W. Jelley, Esq. LL.M.  
Special Education Hearing Officer  
**ODR FILE #26591 21-22**  
October 31, 2022