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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 28267-22-23

Child's Name:
J.G

Date of Birth:
[redacted]

Parent:

Counsel for Parent
Pro se

Local Education Agency:
North Penn School District
401 E. Hancock Street
Lansdale, PA 19446

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Hearing Officer:
James Gerl, CHO

Date of Decision:
December 14, 2023

BACKGROUND

The parent filed a due process complaint alleging a number of violations of IDEA. The parent contends that the school district conducted a reevaluation of the student without parental consent, and that the evaluation proposed by the school district was not appropriate. In addition, the parent argues that the school district denied a free and appropriate public education to the student because of both substantive and procedural violations. The parent also asserts that the school district failed to implement the student's IEP. Finally, the parent argues that the school district violated the least restrictive environment principle of IDEA. The school district denies all of the parent's allegations. I find in favor of the parent with regard to the issue of failure to obtain consent. I find in favor of the school district with regard to all other issues.

PROCEDURAL HISTORY

The distinguishing feature of the prehearing phase of this matter was the fact that the parent and counsel for the school district were unable to cooperatively work together in any reasonable manner. It is obvious that the parties have a toxic relationship and that, as a result, the hearing and decisional process in this matter was unnecessarily protracted. The best example of the parties' failure to cooperate in presenting their evidence involves the hearing exhibits. The unrepresented parent requested help in terms of placing the parent's exhibits into the dropbox exhibit folders for the official record. The hearing officer asked counsel and/or the school district to assist the parent with this problem, but they declined to do so. This is the only case that this hearing officer has had in which a party or an attorney would not help another unrepresented party with technological issues in uploading the exhibits to the dropbox folders. As a result of this lack of

cooperation, it was necessary to convene a second prehearing conference for this case during which a large amount of time was taken up with the hearing officer explaining to the parent in great detail how to upload the parent's exhibits to the dropbox folder. Despite this assistance, the parent still did not upload the parent's exhibits to the dropbox folders in a timely manner. As a result, the parent's dropbox exhibit folders were not usable during the first hearing session. This resulted in an inordinate amount of hearing time being taken up trying to figure out which parent's exhibit was which and what they were. Even when the parent was later ordered to label the parent's exhibits with the correct exhibit tag numbers, the parent failed to do so by the second hearing session. After the second hearing session, the parent was given the choice of either correctly labeling the exhibits and putting them into the dropbox folders or correctly labeling the exhibits and mailing them to the hearing officer and counsel for the school district by U.S. mail. Only then did the parent upload the exhibits with the correct tag numbers to the dropbox folders. All of this wasted time and effort was the result of both parties failing to work together cooperatively to present their evidence.

Continuing the pattern of failing to work cooperatively, the parties failed to agree to any stipulations of fact. As a result of this additional failure to be reasonable, the hearing was unnecessarily protracted, and the decisional process was delayed.

The due process hearing was conducted in two virtual hearing sessions. Seven witnesses testified at the hearing. Parent exhibits P-1 through P-13, P-15 through P-16, P-18 through P-26, P-28, P30 through P-34, P-37 through P-40, P-43 through P-45, P-48 through P-49, P-52 through P-54, P-62, P-64 through P-65, P-73 through P-75, P-77 through P-78, P-80 through P-83, P-85 through P-90 were admitted into evidence, except that some documents

had writing or markings on them or highlighting by the parent, and only the document itself and not the writing or highlighting was admitted into evidence. The following parent exhibits were excluded based upon relevance: P-14, P-17, P-27, P-29, P-31, P-41 through P-42, P-46 through P-47, P-50 through P-51, P-60, P-66, P-76, P-79, P-84 and P-91. The following exhibits were not offered or not in the exhibit folders: P-36, P-55 through P-59, P-61, P-63, P-67 through P-72. School district exhibits S-1 through S-31, and S-33 through S-40 were admitted into evidence. School district exhibit S-32 was withdrawn.

After the hearing, each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

The due process complaint, as explained and clarified at the two prehearing conferences for this matter, presents the following issues:

1. Whether the parent has proven that the school district violated IDEA by conducting a reevaluation of the student without obtaining consent from the parent first?

2. Whether parent has proven that the school district violated IDEA by proposing a reevaluation that was not appropriate?

3. Whether the parent has proven that the school district denied a free and appropriate public education to the student?

4. Whether the parent has proven that the school district failed to implement the material provisions of the student's IEP?

5. Whether the parent has proven that the school district violated the least restrictive environment provisions of IDEA?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact: [1]

[1] (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

1. The student is a likeable person who enjoys computer activities. (NT 533 – 534)

2. The student is [redacted] years old with a birth date of [redacted]. (S-7)

3. The student is a graduate of the school district, having received a diploma on [redacted]. The student had earned 23.05 credits. Twenty-three credits are required to graduate. (S-40; NT 387, 594 – 595)

4. The student attended the school district until [redacted] grade during the 2018 – 2019 school year, when the parent unilaterally placed the student in a private school. The student remained out of the school district for the 2019 – 2020, 2020 – 2021, and 2021 – 2022 school years. (S-7; NT 469)

5. In August 2022, a meeting was held with school district staff and the parent where the parent's request that the school district provide post-12 programming to the student for the 2022 – 2023 school year was discussed. The parent had concerns regarding the student's executive functioning skills. (S-7; NT 531)

6. Post-12 services are offered by the school district only to students with special education eligibility. (NT 496 – 501, 658)

7. Because the student had met graduation requirements, the school district issued a Notice of Recommended Educational Placement (hereafter sometimes referred to as "NOREP") on September 7, 2022 recommending either graduation or a reevaluation of the student to determine eligibility and need for post-12 programming. (S-5; S-40; NT 378 – 381, 476 – 480, 553-554)

8. On September 6, 2022, the school district issued a Permission to Reevaluate (hereafter sometimes referred to as "PTRE") requesting

permission to conduct a reevaluation of the student to include assessments of cognitive ability, academic achievement, a speech language evaluation, a review of records, parent input, teacher input, social/ emotional/ behavioral rating scales, an occupational therapy evaluation and a classroom observation. The school district reissued a PTRE on September 21, 2022 and October 13, 2022. The parent did not return the PTRE. (S-4; NT 292, 297, 381, 553 – 555)

9. On September 16, 2022, the parent rejected the September 7, 2022 NOREP, disagreeing that graduation of the student was appropriate. (S-5)

10. On September 27, 2022, the parent re-registered the student in the school district. (S-40; NT 555)

11. On October 20, 2022, an IEP team meeting was convened to review the student's prior 2019 IEP and to discuss the implementation of that IEP, along with consideration of post-12 services. Present at the meeting were the student's mother, the student, a regular education teacher, a special education teacher and an LEA representative. The parent did not provide any documentation concerning the student's needs and/or progress prior to or during the IEP team meeting. The student and the parent asked questions and raised concerns during the meeting. (S-7; NT 557 – 559, 765)

12. At the IEP team meeting, the team discussed the student's historical needs in the area of executive functioning, coping skills, self-advocacy skills and proposed goals in the areas of task completion, executive functioning, study skills, coping skills and self-advocacy. The team also discussed the student's participation in transition classes, job training at a community worksite and counseling. The team discussed post-secondary transition goals and developed a transition plan. (S-7; NT 557 – 564, 756 – 760)

13. The October 20, 2022 IEP included a post-secondary transition plan and goals in the areas of assignment completion, executive functioning, study skills, coping skills, and self-advocacy skills. (S-7; NT 756 – 758)

14. The student's IEP contained twenty specially designed instruction and modifications to support the student's needs, including visual cues and written directions to accompany verbal directions; teacher check-ins; copies of completed and/or skeletal notes; study guides; preferential seating; extended time; chunking of assignments; test questions read aloud; remediation for skills and concepts; positive and frequent reinforcement; sensory breaks; hierarchical prompting; instruction in coping strategies, self-advocacy; and opportunities to understand social cues and social stimulation. The IEP also included weekly counseling sessions and monthly occupational therapy consultation. (S-7; NT 375 – 376)

15. At the IEP team meeting, the parent requested a functional behavioral analysis of the student. The parent also raised concerns about the rating scales in the proposed reevaluation. The parent stated that she did not give consent for the proposed reevaluation. A member of the school district staff told the parent at the meeting that "we can evaluate (the student) without your consent." (S-7; NT 450-455, 535 – 536)

16. Based on some of the parent concerns expressed at the IEP team meeting, the school district revised the PTRE for the reevaluation to include the Autism Diagnostic Observation Schedule (ADOS-2) and a functional behavioral assessment. (S-8; NT 567 – 568)

17. The school district sent the PTRE for the reevaluation by certified mail to the parent three more times. The parent did not return the PTRE. (S-8; S-9, S-10; NT 174 – 175, 555)

18. On November 8, 2022, the parent sent the school district staff an email stating that the parent had a few more questions concerning the proposed reevaluation before the parent could give permission to evaluate. (P-39)

19. Also on November 8, 2022, the parent sent the special education supervisor an email attaching an addendum to a 2021 private, independent evaluation of the student and therapy notes and recommendations from a private therapist that the student had seen from April through June of 2022. Access to the emailed documents expired on November 15, 2022. The recipient of the email was not permitted to forward, share, print or download the email or the attached documentation. As a result of the restrictions placed on the attachment and the email, the supervisor and other team members were unable to review the documentation and the documentation could not be placed in the student's file. The school district has never received the information attached to the email in a usable form. (S-12; NT 536 – 540; 571 – 572)

20. The student began attending school in the district again on November 9, 2022. In the morning, the student's class schedule included post-12 transition classes, including independent living and an occupational seminar. At 11:30 am each day, the student was transported by bus to the job training site at a local business. (S-17)

21. The independent living class focused on the student's independent living goal. The course included topics such as finding an apartment, maintaining a clean home, personal hygiene, paying bills, nutrition and communication with family and community. (NT 562, 751 – 752)

22. The occupational seminar focused on job-related activities, including professional communication, researching, finding, maintaining and leaving job sites; disclosing disabilities to employers; using job search

platforms; creating resumes; interviewing skills and handling job site conflict. The student required minimal support in the class. (NT 660 – 664, 752)

23. In addition to the transition classes, the student attended a group dynamics class for development of coping and self-advocacy skills. (NT 731)

24. At the local business job training worksite, the student worked under the supervision of a job coach. At the job training site, the student did well and worked independently without the need of one-on-one support. The employer feedback noted that the student was a good worker. The student also independently arranged additional employment with the same employer outside of school hours. The student performed the independent job without a job coach or any other special education supports. (NT 186, 664 – 668, 676 – 677)

25. The parent never consented to a reevaluation. (NT 174 – 175, NT 450-455, 535 – 536; P-39, P-31; S-7, S-18; record evidence as a whole)

26. On November 18, 2022, nine days after the student had begun attending school in the district again, the school district sent a letter to the parent stating that she had not signed previous PTREs and that if the parent did not return the PTRE form within 10 days the school district would move forward with conducting the reevaluation, including testing and assessments of the student. (S-13; NT 572 – 573)

27. The parent did not return the PTRE within 10 days of the letter. The school district then proceeded with the reevaluation of the student, including testing. (NT 293, 574)

28. An IEP team meeting was convened on January 3, 2023. At the meeting, the team reviewed teacher input concerning the student's progress. The student was meeting and/or making progress on all of the student's IEP goals. (S-18)

29. The parent provided input at the January 3, 2023 meeting. At the January 3, 2023 meeting, the parent stated that the parent did not give consent to reevaluate because of concerns about some assessments. (S-18, S-25; P-31; NT 576 – 582)

30. On January 12, 2023, the revised IEP and NOREP were sent to the parent. The revised January 3, 2023 IEP included updated present levels and progress monitoring but was otherwise the same as the previous IEP. (S-18, S19, S-21, S-40; NT 576 – 581)

31. On January 12, 2023, the student refused to undergo testing by the school district's school psychologist for the reevaluation. On January 17, 2023, the school psychologist advised the parent of the student's decision. The school psychologist also requested parental input for the reevaluation and enclosed parent input forms and certain rating scales for the parent to complete. The parent never returned the parent input forms or the rating scales. (S-22, S-25; NT 298 – 299)

32. The school psychologist also sent the parent a release seeking consent for the school district staff to contact the student's most recent evaluators and service providers. The parent never returned the release. (S-22; NT 312)

33. On January 17, 2023, the student refused to undergo testing for the speech language evaluation portion of the reevaluation. (S-25)

34. On January 17, 2023, the parent emailed school district staff reiterating that the parent had not given consent for the reevaluation. The school district stopped conducting assessments for the reevaluation on January 17, 2023 (P-31; NT 574)

35. The school district never considered filing a due process complaint or exercising other procedural safeguards to override the refusal of the parent to consent to the reevaluation. (NT 652 – 653)

36. On January 24, 2023, the school district's special education supervisor repeated a request for hard copies or emailed PDF versions of the outside evaluations and reports that the parent had previously sent in unusable form. The special education supervisor included a release to allow direct communication with the evaluators. The parent did not provide copies of any evaluations or reports and did not return the release granting permission to speak to the evaluators. (S-25, S-40; NT 276, 298, 312, 581 – 582, 765)

37. The school district issued a reevaluation report on January 27, 2023. (S-25)

38. Beginning in February 2023, the student's IEPs included a behavioral intervention plan. The functional equivalent of the behavioral intervention plan had been included in the specially designed instruction and modifications portions of the October 20, 2022 IEP. (S-7; NT 641 – 647)

39. An IEP team meeting to review the reevaluation report was held on February 7, 2023. Additional IEP team meetings were held on February 23, 2023 and March 16, 2023. A continuation of the IEP team meeting was scheduled for March 30, 2023 but continued to May 22, 2023. (S-27, S-28, S-29, S-40; NT 586 – 592)

40. The school district again issued the PTRE on April 26, 2023 and May 31, 2023. (S-30, S-40; P-43)

41. The student and the parent attended the May 22, 2023 meeting with an advocate. The student had met all graduation requirements, had met

all of the student's IEP goals, was able to self-advocate, was employable and was prepared for post-secondary life. (S-40; NT 587 – 588; 696 – 697, 767)

42. On June 9, 2023, because the student had mastered or made substantial progress toward the student's IEP goals, the school district issued a NOREP indicating that the student had met all requirements to receive a regular education diploma and there was no identifiable need for post-12 services. The school district recommended that the student graduate and be exited from special education. (S-26, S-31; NT 388 – 390, 594 – 596, 651 – 653)

43. The student attended the district graduation ceremony on June 14, 2023 and accepted a regular education diploma from the school district. The student's name was displayed on the district's marquee. (S-33, S-38; S-40; NT 386 – 387, 594 – 596)

44. Because the student had met the student's IEP goals and received a diploma, the student was not eligible for extended school year services after the 2022-2023 school year. Throughout the school year, the student's IEP team had found the student ineligible for extended school year services. (NT 389, 593, 633)

45. Four days after the student accepted the student's diploma, on June 18, 2023, the parent returned the NOREP noting disapproval of the student graduating and being exited from special education. (S-31)

46. The parent and student attended and actively participated in each IEP team meeting. All required members of the IEP team attended the meetings. At some meetings, the parent and student were accompanied by an advocate. Procedural safeguards were provided to the parent at all IEP team meetings. Prior written notice was issued to the parent after all meetings. (Record evidence as a whole)

47. The school district implemented the student's IEPs. (S-24, S-39; NT 177 – 178, 186 – 192; 222 – 223, 660 – 665, 678 – 680, 720 – 722)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education. IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. A school district must obtain informed parental consent prior to conducting a reevaluation of a child with a disability. 34 C.F.R. § 300.300(c)(1)(i). If a parent refuses to consent to a reevaluation, the school district may, but is not required to, pursue reevaluation by using the consent override procedures, such as a due process hearing. 34 C.F.R. § 300.300(c)(1)(ii). Informed parental consent need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent, and the child's parent has failed to respond. 34 C.F.R. § 300.300(c)(2).

3. "Consent," for purposes of IDEA, means that the parent has been informed of all relevant information, and that the parent understands and agrees in writing to the activity and that the parent understands that the granting of consent is voluntary. 34 C.F.R. § 300.9.

4. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. The child must be assessed in all areas related to the suspected disability in an initial evaluation. The evaluation must be comprehensive. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14-123.

5. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. 386, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

6. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, supra; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

7. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58

IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

8. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, supra; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

9. Where a student with a disability has behaviors that impede the student's learning or the learning of others, the student's IEP team must consider the use of positive behavioral interventions and supports and other strategies to address those behaviors. IDEA § 614(d)(3)(B)(1); 34 C.F.R. § 300.324(a)(2)(i); 22 Pa. Code § 14-133; Sean C. by Helen C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Penna. 2017); Lathrop R-II Sch. Dist. v. Gray ex rel. DG, 611 F. 3d 419, 54 IDELR 276 (8th Cir. 2010).

10. The mandatory members of an IEP team are the following: the parent; a regular education teacher (if the child participates in regular education classes); a special education teacher or provider; a representative of the local education agency; an individual who can interpret evaluation results (who may be the same person as one of the previously listed members) and the student (if transition age). 34 C.F.R. § 300.321(a) and (b). In addition to the mandatory team members, the parent or the agency may invite other individuals who have knowledge or expertise concerning the student to IEP team meetings. 34 C.F.R. § 300.321(a)(6) and § 300.321 (c).

11. IDEA requires that a parent of a student with a disability be afforded meaningful participation in the IEP process and in the education of the student. DS & AS ex rel DS v. Bayonne Bd of Educ, 602 F.3d 553, 54 IDELR 141 (3d Cir 4/22/10); Fuhrmann ex rel Fuhrmann v. East Hanover Bd.

of Educ., 993 F.2d 1031, 1036, 19 IDELR 1065 (3d Cir. 1993); MP by VC v Parkland Sch Dist, 79 IDELR 126 (ED Penna 2021); 34 C.F.R. § 300.501. See, Deal v. Hamilton County Bd of Educ, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); JD v. Kanawha County Bd of Educ, 48 IDELR 159 (S.D. WVa. 2007).

12. To prevail on a claim of failure to implement an IEP, a parent must show that the school district failed to implement substantial or material provisions contained in the IEP. MP by VC v. Parkland School District, 79 IDELR 126 (E.D. Penna. 2021); see, Van Duyn v. Baker School District, 481 F 3d 770, 47 IDELR 182 (9th Cir. 2007).

13. A school district must "...to the maximum extent appropriate, (ensure that), children with disabilities... are educated with children who are non-disabled and that special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code § 14.195)

14. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (n. 11) (2009); Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch Dist, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010); School District of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area School District, 71 IDELR 87 (N.D. Penna. 2017). See Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Education, Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a

Disability, 52 IDELR 239 (SEA W.V. 2009). The conduct of the parties is always relevant when fashioning equitable relief. CH by Hayes v. Cape Henlopen Sch Dist, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010). See, Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. 2005).

15. Compensatory education is one remedy that may be awarded to parents when a school district violates the special education laws. In general, courts, including the Third Circuit, have expressed a preference for a qualitative method of calculating compensatory educational awards that addresses the educational harm done to the student by the denial of a free and appropriate public education. GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority, 802 F. 3d 601, 66 IDELR 91 (3d Cir. 2015); Gwendolynne S by Judy S and Geoff S v West Chester Area Sch Dist, 78 IDELR 125 (ED Penna 2021); see Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005). In Pennsylvania, in part because of the failure of special education lawyers to provide evidence regarding harm to the student caused by the denial of FAPE, courts and hearing officers have frequently utilized the more discredited quantitative or "cookie cutter" method that utilizes one hour or one day of compensatory education for each day of denial of a free and appropriate public education. The "cookie cutter" or quantitative method has been approved by courts, especially where there is an individualized analysis of the denial of FAPE or harm to the particular child. See, Jana K. by Kim K v. Annville Sch. Dist., 39 F. Supp. 3d 584, 53 IDELR 278 (M.D. Penna. 2014).

16. The parent has proven that the school district violated IDEA by reevaluating the student without first obtaining parental consent.

17. The parent has not proven that the school district's proposed evaluation was inappropriate.

18. The parent has not proven that the school district denied a free and appropriate public education to the student.

19. The parent has not proven that the school district failed to implement material provisions of the student's IEP.

20. The parent has not proven that the school district violated the least restrictive environment requirements of IDEA.

DISCUSSION

I. Merits

1. Whether the parent has proven that the school district failed to obtain consent from the parent before conducting a reevaluation of the student?

The parent contends that the school district conducted a reevaluation of the student without obtaining the required consent from the parent before doing so. The school district contends that the parent gave implied consent to the reevaluation by not signing and returning numerous forms giving permission to evaluate the student. The school district argues that it began to conduct the reevaluation until later when it contends that the parent revoked consent.

The record evidence supports the parent's position concerning this issue. The evidence is very clear that the parent did not simply fail to respond to the school district's proposal to reevaluate the student. The parent's testimony in this regard is supported by the October 20, 2022 IEP document itself which states that the parent requested that a functional behavioral

analysis be included in the reevaluation and that the parent requested that an autism assessment be included in the reevaluation. Based upon some of the parent's concerns, the school district revised the proposed reevaluation to include these assessments. The IEP also states that the parent expressed concerns about the rating scales that were being proposed by the school district for the reevaluation. The parent clearly raised questions and concerns about the proposed reevaluation. At the IEP team meeting, a member of the school district's staff told the parent "we can evaluate (the student) without your consent." On November 8, 2022, the parent sent an email to the district stating that she had questions concerning the reevaluation. Near the end of the January 3, 2023 IEP team meeting, the parent explicitly stated that she refused consent for the proposed reevaluation. The parent reiterated that she had refused consent for the reevaluation in an email sent to the district on January 17, 2023.

Thus, it should be noted that the parent did not, as the school district contends, simply fail to respond to the school district's proposed reevaluation of the student. Instead, the parent did respond by expressing concerns about the proposed reevaluation and later by refusing to consent to the reevaluation. The distinction is legally significant. Because the parent did not simply fail to respond, the implied consent provision of the regulations cited by the school district is inapplicable. Where, as here, a parent refuses consent or otherwise responds to a request for permission to evaluate, a school district cannot imply consent. Thus, the evidence in the record supports the parent's contention that the school district conducted a reevaluation of the student without obtaining the required informed consent from the parent first.

The school district's argument that it promptly discontinued the reevaluation when the parent revoked consent is flawed. Since the parent had

never given consent in the first place, the parent could not "revoke" consent. The argument is rejected.

It should be noted that the school district was not without a remedy here. The regulations specifically provide that when a parent refuses to consent, as opposed to merely failing to respond to a request for consent, the school district may, but is not required to, utilize the procedural safeguards of IDEA, including filing a due process complaint to override the lack of consent for reevaluation. School district staff testified that although they believed that a reevaluation was important for the student, it had not occurred to them to file a due process complaint or otherwise exercise their procedural safeguards to obtain consent.

It is apparent from the evidence in the record that the parent is very difficult to work with. Nonetheless, the conduct of the school district in beginning a reevaluation, including attempted testing of the student, without the required consent of the parent is inexcusable. A school district cannot, simply because the parent is difficult to deal with, bulldoze its way into a reevaluation of a student where it has not first obtained informed consent from the parent.

The testimony of the student's mother and the student is more credible and persuasive than the testimony of the school district witnesses concerning this issue. This conclusion is made because of the demeanor of the witnesses, as well as the fact that the documentary evidence supports the parent's testimony. In addition, the testimony of the special education supervisor was inconsistent and evasive regarding why the school district did not file a due process complaint to attempt to override the parent's refusal to consent. Moreover, the demeanor of school district witnesses concerning their assertion

that the parent had "revoked" consent was very uneasy and this testimony seemed rehearsed.

It is concluded that the parent has proven that the school district violated IDEA by failing to obtain consent before conducting a reevaluation of the student.

2. Whether the parent has proven that the school district's proposed evaluation was inappropriate because it failed to evaluate the student in all areas of suspected disability?

The parent contends that the school district's proposed reevaluation was inappropriate. The school district contends that its proposed reevaluation was appropriate.

The evidence in the record supports the school district position that the proposed evaluation was appropriate for the student.

The record evidence shows that the proposed reevaluation of the student was comprehensive in nature. The evaluation would evaluate the student in all areas relating to suspected disabilities and would use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the student.

The parent's post-hearing brief is somewhat unclear, and it cites no case law to support the parent's argument concerning this issue. It appears that

the gravamen of the parent's contention is that the school district should have done additional types of assessments because of outside evaluations obtained by the parent. However, the parent failed to share copies of the outside evaluations that could be used in any meaningful way by school district staff. When the parent sent the evaluations to the special education supervisor, there was a short time period within which the supervisor could open the email and review the documents. After that time period, the documents disappeared. In addition, the documents sent by the parent were not capable of being forwarded, downloaded, printed or shared with other school district staff. The extensive and unreasonable conditions that the parent placed upon the school district staff viewing the outside evaluations was tantamount to not sharing the information with the school district.

Where a parent does not share information with the school district in any meaningful way that can be reviewed, studied and considered by staff members of the school district, the parent cannot then complain that the school district did not utilize the contents of the documents in determining whether additional assessments were appropriate. The obstructionist behavior by the parent in refusing to share copies of the documents or to provide access to the providers made it impossible for school district staff to consider the outside evaluations. The parent's argument is rejected.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the parent and the student with regard to this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the documentary evidence supports the testimony of the school district witnesses. In addition, the student's mother was difficult and evasive during cross-examination and the student's mother placed so many conditions upon the outside evaluations that there was no

serious attempt by the parent to share the outside evaluations with the school district.

It is concluded that the parent has not proven that the reevaluation proposed by the school district was inappropriate.

3. Whether the parent has proven that the school district denied a free and appropriate public education to the student?

The parent alleges that the school district denied FAPE to the student because the student's IEPs were substantively inappropriate and because there were procedural violations. The school district contends that it provided FAPE to the student at all times.

The parent first alleges that the student's October 20, 2022 IEP, and subsequent revisions, were substantively inappropriate. The parent's post-hearing brief, however, cites no case law and does not make any argument that the IEPs were not reasonably calculated to confer meaningful educational benefit in light of the unique circumstances of the student.

Specifically, the parent asserts that the IEPs were substantively inappropriate because they did not address the student's needs; the goals were inappropriate; the services were inappropriate; there were not sufficient related services; that the IEPs did not provide for extended school year services and that the school district inappropriately graduated the student, rendering the student ineligible for special education. The parent's factual allegations in this regard are not supported by the evidence in the record. The main thrust of the parent's argument appears to be that the student's IEP did not sufficiently reflect outside evaluations that the parent had obtained. The

evidence reveals, however, that the parent failed to share the outside evaluations, or access to the providers who conducted them, to the school district staff members of the student's IEP team in any reasonable way. See discussion in previous section. The parent's argument is rejected.

Concerning extended school year services, the student had already graduated, and therefore was not eligible for extended school year services. Moreover, the IEP team found the student ineligible for ESY. Concerning graduation, the student had earlier met all of the requirements for graduation and was eligible to graduate, but the IEP team agreed that the student would participate in post-12 services for a year after that point. It is clear that graduation was appropriate at the point that the student received a diploma.

The parent has not made any serious argument that the IEP was not reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances. Moreover, while actual progress is not guaranteed under IDEA, in this case, the student made excellent progress toward the student's IEP goals. In particular, the student was very successful at the job site, both under the supervision of the school district job coach and also when the student had obtained a job at the same employer, performing that work without a job coach or any other special education supports. It is clear from the evidence in the record that the student made substantial progress during the post-12 program. It is concluded that the student's IEP was reasonably calculated to confer meaningful educational benefit in view of the student's circumstances, and therefore was substantively appropriate.

The parent also alleges three procedural violations. The parent argues that a behavioral intervention plan was omitted from the student's IEP prior to February of 2023; that mandatory members of the IEP team were not

present at meetings and that the parent and the student were denied meaningful participation in the process.

Concerning the behavioral intervention plan, the record evidence does show that it was not included in the student's IEP before February 2023, but the specially designed instruction portion of the student's IEP before that date contained the functional equivalent of the contents of the prior behavioral intervention plan. The IEPs included appropriate interventions, supports and strategies to address the student's behaviors. Accordingly, there is no procedural violation. Moreover, even assuming, *arguendo,* that the failure to include a specific behavioral intervention plan in the IEP was a procedural violation, it was clearly harmless, as it did not adversely impact the student's successful post-12 educational program or substantially impair the parent's right to participate in the process. This argument is rejected.

Concerning the IEP team membership, the parent argues that the job coach did not attend meetings. The job coach is not a legally required member of an IEP team. The parent's argument is not supported by the law. Moreover, the parent had the right to invite to IEP team meetings the job coach or any other person who has knowledge or special expertise regarding the student. The parent did not do so. The parent's argument is not consistent with the facts. The argument is rejected.

Concerning the parent's argument regarding meaningful participation, it is clear that the student and the student's mother actively participated in the process. They were invited to and attended all relevant meetings and participated actively. After all meetings, the parent was provided with procedural safeguards and prior written notice when required. It is also clear that with the exception of the consent to the reevaluation, the input provided by the parent and the student was duly considered by the student's IEP team.

Although the student's mother withheld evaluations and information from the IEP team, the input that was provided by the parent was duly considered by the IEP team. The parent has not proven that the student or the student's mother was denied meaningful participation in the process.

A large portion of the parent's post-hearing brief is devoted to the argument that the school district predetermined the student's program. Predetermination is not one of the many issues that the parent had identified as being presented by the complaint. It should be noted that a substantial portion of one of the two prehearing conferences that were convened in this matter was devoted to determining the issues that were presented by the due process complaint. Each issue was confirmed on the record at the hearing. Predetermination was not among those issues, and, therefore, that issue is not properly before the hearing officer. 34 C.F.R. § 300.511(d) Even assuming, *arguendo*, that the issue of predetermination is properly before the hearing officer, however, as discussed in detail above, the record evidence reveals that both the parent and the student were afforded meaningful participation in the IEP process. Meaningful participation negates any claim of impermissible predetermination. Accordingly, even if the hearing officer were to reach the issue of predetermination, the factual evidence in the record does not support it.

To the extent that the parent has alleged procedural violations, they are not supported by the evidence in the record. Even assuming, *arguendo*, that any procedural violation had been stated by the parent, it is clearly harmless inasmuch as it has not had an adverse impact upon the student's education or seriously impaired the parent's participation in the process.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the parent and the student with regard to

this issue. This conclusion is made because of the demeanor of the witnesses, as well as the fact that the testimony of the school district witnesses was supported by the documentary evidence. Also, the student's testimony contradicted the testimony of the student's mother regarding whether or not the post-12 job placement was a job that the student liked; the student not only liked the job placement but also independently secured employment outside of the post-12 program with the same employer. In addition, the student's mother was difficult and evasive during cross-examination and the student's mother pretended to share evaluations and information from outside providers while not actually sharing any useable information.

It is concluded that the parent has not proven that the school district denied a free and appropriate public education to the student.

4. Whether the parent has proven that the school district failed to implement material portions of the student's IEP?

The parent contends that the school district did not implement the student's IEP. The school district argues that it implemented the student's IEP in all material aspects.

The parent has not proven that the school district failed to implement the student's IEP. There is some isolated testimony from the student and the mother that some portions of the IEP were not implemented, but, even if accepted as true, these were not material IEP components. The documentary evidence in this case supports the credible and persuasive testimony of the

school district witnesses that all material portions of the student's IEP were implemented with fidelity.

It should be noted that the parent's post-hearing brief contains no citations to the testimony in the transcript of the proceedings at the due process hearing. Accordingly, the parent has not cited any examples of testimony that supports the parent's contention that the student's IEP was not implemented. There is no factual basis for the parent's claim and the argument is rejected.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the student concerning this issue. This conclusion is made based upon the demeanor of the witnesses, as well as the factors set forth in the credibility discussion in the previous section above.

It is concluded that the parent has not proven that the school district failed to implement the student's IEP in any material respect.

5. Whether the parent has proven that the school district violated the least restrictive environment provision of IDEA?

The parent contends that the school district violated the least restrictive environment provision of IDEA by not placing the student in regular education classes upon the student's return to the school district. The school district denies the allegation.

The parent argues that the school district should have placed the student in regular education classes when the student returned to the school

district. The record evidence is undisputed, however, that the post-12 services that the student received are only available to special education students. Accordingly, there were no regular education classes that the student could have attended upon return to the school district. The parent cites no case law or other legal authority in support of the parent's argument that the school district violated the LRE provision. The parent's argument is without any basis in logic or the law.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student and the student's mother concerning this issue. This conclusion is made because of the demeanor of the witnesses, as well as the factors set forth in the credibility discussion in the previous sections above.

It is concluded that the parent has not proven that the school district violated the least restrictive environment provision of IDEA.

II. Relief

In this case, the only violation proven by the parent is a consent/evaluation violation specifically involving the school district conducting a reevaluation, including testing, of the student without obtaining consent from the parent first. The period of the violation proven by the parent was from November 28, 2022, which is when the school district began conducting the reevaluation without consent, through January 18, 2023, when the school district stopped the reevaluation. The relief that the parent requests in the parent's post-hearing brief includes many items to which the student is clearly not entitled based upon the violation that has been proven,

including ordering that the school district pay money damages into the student's special needs trust fund and requiring that the school district to hire an educational consultant. Such relief is clearly beyond the scope of the violation proven and is not appropriate.

Compensatory education is generally a remedy for denial of FAPE. The parent has not proven a denial of FAPE in this case. The violation proven is a consent/evaluation violation. The school district's conduct, however, in starting to conduct an evaluation, including testing of the student, without first obtaining proper consent was outrageous. The gravity of the violation renders compensatory education an appropriate remedy for this specific consent violation. In view of the fact that the school district cavalierly disregarded the law in beginning to conduct the reevaluation of the student, full days of compensatory education from November 18, 2022 through January 18, 2023 is the appropriate remedy in this case. It should be noted that the hearing officer is aware that the student has already graduated from the school district, but this relief is needed to remedy a past IDEA violation while the student was still enrolled in the school district. It is noted in particular that the student was twice brought in for assessments for which the parent did not give consent. It is true that the student did not actually participate in the assessments, but the student's experience in having to refuse to participate was significant. The unique circumstances of this case require that compensatory education be awarded in order to remedy the violation.

Because all relief under IDEA is equitable relief and should be flexible, and because special education under IDEA requires a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have

the option to agree to alter the relief awarded herein so long as both parties and their lawyers, if any, agree to do so in writing.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The school district is ordered to provide one full day of compensatory education to the student for each school day during the period of the violation of IDEA, as set forth above. The award of compensatory education is subject to the following conditions and limitations:

a. The student's parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device for the student's educational and related services needs;

b. The compensatory education services may be used at any time from the present until the student turns age twenty-two (22); and

c. The compensatory services shall be provided by appropriately qualified professionals selected by the parent. The cost to the school district of providing the awarded days of compensatory education may be limited to the average market rate for private

providers of those services in the county where the district is located; and

2. The parties may adjust or amend the terms of this order by mutual written agreement signed by all parties and counsel of record; and

3. All other relief requested by the instant due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: December 14, 2023

James Gerl

James Gerl, CHO
Hearing Officer