

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:

23097-19-20

Child's Name:

H.L.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Angela Uliana-Murphy Esq.
106 N. Franklin St., Suite 2
P.O. Box 97
Pen Argyl, PA 18072

Local Education Agency:

Tri-Valley School District
110 West Main Street
Valley View, PA 17983-9705

Counsel for the LEA

Karl Romberger Jr. Esq.
Sweet, Stevens, Katz & Williams, LLP
331 E. Butler Ave.
New Britain, PA 18901

Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

05/01/2020

PROCEDURAL HISTORY

Parents (Parents), filed the instant due process hearing complaint alleging the District failed to offer free appropriate public education (FAPE) and then implement the Student's individualized education program from the 2017-2018 school year to the present.¹ In October of 2019, after the completion of an Independent Educational Evaluation (IEE), by agreement of the Parties, the Student was placed at an out of district placement. During an IEP meeting at the private placement in December 2019, Parents expressed concerns about the level of academic instruction being provided to the Student. To remedy these alleged violations, the Parents request compensatory education. The District contends at all times relevant they provided a FAPE. Hearing sessions were held on February 10, 2020, and March 9, 2020. After a careful review of the extrinsic and intrinsic evidence, for all of the following reasons, I now find in favor of the District and against the Parents.²

¹ The Parents claims arise under 20 U.S.C. §§ 1400-1482 and Section 504. 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). The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

² After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issue(s) in dispute.

STATEMENT OF THE ISSUES

1. Did the District provide the Student with a free appropriate public education during the 2017-2018 school year, if not, should the Student be awarded compensatory education?
2. Did the District provide the Student with a free appropriate public education during the 2018-2019 school year, if not, should the Student be awarded compensatory education?
3. Did the District provide the Student with a free appropriate public education during the 2019-2020 school year, if not, should the Student be awarded compensatory education?
4. From 2017 through October 2019, did the District implement the Student's individual education program (IEP), if not, should the Student be awarded compensatory education? (N.T. pp.19-24).

FINDINGS OF FACT

1. On August 3, 2015, parents obtained a private psychological evaluation. (S-4). The private examiner determined the Student did not meet the specific criteria for Attention Deficit Hyperactivity Disorder (ADHD), but nonetheless diagnosed the Student with Other Specific ADHD because of attention issues. (S-4 pp.11-12). The private evaluator also diagnosed Student with Oppositional Defiant Disorder (ODD). (S-4 p.12, N.T. p.28).
2. The private evaluator also recommended family treatment. (S-4 p.12).
3. Parents did not seek family treatment. (N.T. p.92).
4. Initially, the Student saw a private counselor in 2015 but stopped because Student did not work well with her. (N.T. pp.94-96).

5. Even before completing its own evaluation, the school district provided the Student with counseling services at parent's request. (S-5; N.T. pp.115-16).
6. On September 9, 2015, the school district completed an Evaluation Report (ER), identified Student under Other Health Impairment (OHI) and determined the Student was otherwise eligible for specially designed instruction (SDI) and related service of social worker support. (S-5).

[Redacted]: The 2017-18 School Year

7. During [redacted], Student had no discipline referrals. (S-10 p.12).
8. The IEP Team met on September 22, 2017, developing an IEP with behavior, writing, and vocabulary goals, and included a substantial amount of specially designed instruction related to behavior management and self-regulation. (S-10 pp.23-28).
9. The behavior goal was a maintenance goal because Student made progress with behaviors and did not receive disciplinary referrals. (N.T. pp.445-46). The IEP contained only one behavioral goal which was measured by the number of discipline referrals the Student received. (S-10, p.23).
10. During the 2017-2018 school year, the Student received Itinerant learning support services two times per month for thirty minutes per session; and social work service one time per month for a thirty-minute session. (S-10, p.13).
11. From [redacted] through [redacted] grade the Student also had the support of an aide. The aide would assist the Student with taking breaks when needed. (N.T at 126).

12. Social skills services, from the social worker, were provided to the Student two times per month for thirty minutes each session in [redacted] grade (2017-2018 school year); once per month for thirty minutes in [redacted] grade (2018-2019 school year); four times per month for thirty minutes each session by October of 2019 in [redacted] grade (2019-2020 school year); and six times per month for thirty minutes each session from January of 2019 until the Student's placement at out of District placement (2019-2020 school year). (N.T. pp.203-204). Six times per month was the maximum amount of time allocated for social work services by the District. (N.T. p.229) Social work services were not provided in the classroom. (N.T. p.225).
13. Parents signed approval on the Notice of Recommended Educational Placement ("NOREP") and consented to the implementation of the IEP. (S-11. N.T. pp.93-94).
14. The September 2017 IEP provided Itinerant Learning Support two times a month, 30 minutes per session, and individual counseling 30 minutes a month. (S-10 p.31). Student did not want to receive more counseling as the Student did not want to look different than the other students in the JR/SR High School. (N.T. p.203, pp.239-41, p.491).
15. Sometime in April 2018, the Student began seeing a private counselor (N.T. pp.94-97), but the counselor stopped providing service because Student needed a more qualified counselor. (N.T. pp.94-97).
16. Student started with a different private counselor in the summer 2019. (N.T. p.97).
17. Parents did not provide information to the school district from any of the private counselors. (N.T. pp.97-98).

The 2018 Reevaluation Report

18. On May 18, 2018, the Student's triennial reevaluation report (RR) was completed by the District. (S-12) The reevaluation contains teacher input which details the Student's ongoing behavioral and self-regulation difficulties. Teacher input from Student's regular education teacher, revealed that Student did not work well with others and bothered others. For example, the teachers commented that the Student rushed through work, displayed difficulty with anger management and did not control emotions in school. The RR also notes the Student became angry and rude with other students and aides. At times the Student was oppositional and defiant. When oppositional and defiant the Student would be disrespectful to staff, refused to participate in work, was easily distracted and lacked organizational skills. Overall, the Student was not able to self-regulate and maintain appropriate behavior in structured and un-structured environments. The conclusion of the RR was that the Student continued to be eligible for special education services under the disability category of OHI. (S-12 pp.6-7; S-16 pp.10-12).
19. Student was at or close to grade-level for reading, math, language (writing), and spelling instruction. (S-12 pp.4-5).
20. The RR included current information about Student from teachers, guidance counselor, social worker, librarian, and Parents. (S-12, S-13, S-14, S-15, S-16, N.T. p.279).
21. Teachers described Student as having some behavioral issues in the classroom. (N.T. S-12 pp.6-11).
22. The RR continued to find Student as eligible with an Other Health Impairment identification. (S-12 p.13).

[Redacted] 2017-2018 IEP

23. Heading into the May 2018 IEP meeting, Parents were concerned about the Student moving up to the junior-senior high school and the need to move from teacher to teacher. Parents were also concerned that there would not be an aide to assist the Student and the Student's social skills in a large (N.T. p.99, N.T. p.38).
24. On May 29, 2018, the IEP Team met and developed a new IEP to take Student into the Junior/Senior High School. (S-18).
25. The IEP addressed the fact that Student did not like being pulled out of regular education for itinerant support. (S-18 p. 11, N.T. p.452). The IEP team, including the Parents, agreed to make a special education teacher available during Student's study hall and decided against pull-out social skills instruction (S-18 pp.11-12; N.T. p. 99, p.443).
26. The IEP Team also discussed, and concluded, that Student's behaviors were an isolated few that did not impede his or others' learning, (N.T. p.446, S-18 p.18), and parents agreed (N.T. p.41).
27. The IEP Team agreed the transition between classes in the Junior/Senior High School would provide Student with beneficial movement breaks. (S-18 p.19).
28. The IEP Team also viewed the few behaviors exhibited as generally isolated to the bus, (N.T p.441), so parents' requested a shorten bus ride, (N.T. pp.116-17), and the District agreed to make changes to the bus route to accommodate Parent's request. (S-18; N.T. p.117, p.441, pp.447-448).
29. Based on the frequency and severity of the Student's behavior the IEP Team determined a behavior plan was not necessary and Parents agreed. (N.T p.41, S-18 p.18).

30. The May 2018 IEP provided Student with Itinerant Support on a consultative basis and counseling 30 minutes per month. (S-18 p.33).
31. The May 2018 IEP included a goal contained in the IEP to reduce the number of disciplinary referrals. (S-18 p.27). The IEP also called for the Student to receive social work services one time per month for thirty minutes per session. (S-18 page 33).
32. The IEP team offered to provide the Student with access to the resource room for tests, homework completion, and other support, (S-20; N.T. pp.300-01, p.443, p.454), but parents did not agree. (S-20 p.4; N.T. pp.58-59, N.T.pp.454-55).
33. The learning support teacher was otherwise available during the entire day if Student wanted support and the Parents approved. (S-19, N.T. p.442).
34. The social worker, indicated that the Student continued to struggle with peer relationships. The social worker noted that improvements need to be made regarding positive interactions, communication skills, taking accountability for choices, learning self-regulation, coping strategies and organizational strategies. (S-12 p.7, S-15).
35. During 2017-2018, [redacted], the Student had no discipline referrals for the first two marking periods; one referral during the 3rd marking period. Then during the 4th making period the Student received multiple disciplinary referrals between March 8, 2018 and May 18, 2018 (two bus violations, and two not following directions in the classroom). (S-12 p.5,S-55, p.1) These disciplinary referrals were received prior to the development of the May 29, 2018 IEP. The referrals were made for bus violations and disobedience. (S-55, p.1).

The [Redacted] 2018-19 School Year

36. During the first week of Student's [redacted], the 2018-19 school year, Parents were concerned Student was not getting on the bus home from school and requested the school staff escort Student to the bus. (S-37, N.T. p.298). The Student did not want the escort, (N.T. pp.298-99, 329), and so, not very long after it started, Parents requested that the escort stop. (N.T. pp.469-70).
37. In September 2018, Student had an intake meeting at a private outpatient community based behavioral health provider. (N.T. p.469) and was also seeing an outside counselor (N.T. p.469). Because Student was seeing an outside counselor and reportedly doing otherwise well with that counselor, the school district limited school counseling. (N.T. p.469). The IEP Team met again on October 5, 2018, to discuss Student's behavioral since the beginning of the school year. (S-20, N.T. p.300, p.454).
38. During the IEP meeting the team discussed the Student's completion of home and in school self-regulation of behavior, the District proposed rather than take a study hall, the Student should attend the resource room for assistance with homework, and other support. (N.T. S-20, N.T. pp.300-01, p.454).
39. Although the IEP Team offered additional skills, (S-20 p.6, 8; N.T. pp.303-04), the Parents did not agree to place Student in a social skills class. The Parents were concerned the Student would pick-up bad social skills or shut down. (S-20 p.6, p.8; N.T. pp.303-04, p.456). The IEP Team again decided not to pursue social skills class. (N.T. p.304, p.456).
40. The IEP Team also discussed providing Student with a mentor, but Student refused. (N.T. p.455).

41. Student did not like after school detentions, so Parents asked to change to lunch detentions. (N.T. p.456), the school district agreed to try it. (N.T. p.456).
42. The IEP Team increased counseling sessions to one time per week. (N.T. p. 203).
43. At times the Parents raised concerns that the teachers were not aware about Student's IEP. (S-20 p.7, N.T. pp 302-03). Student's case manager explained to parents that all staff members are required to review IEPs. (N.T. p.303). The case manager also emailed staff with every IEP revision and staff were required to view the revisions in the guidance office and sign that they viewed the document. (N.T. p.303). The case manager also met with each teacher to explain the IEP. (N.T. p. 330).
44. At the October IEP Team meeting, the participants also discussed, and agreed to do, a functional behavioral assessment (FBA). (N.T. pp.289-90, p.33). After the meeting, Parents requested that the intermediate unit (IU) complete the FBA and the school district agreed. (N.T.pp.460-463).
45. The District sent Parents a permission to reevaluate request in order to asses socialization, the inability to regularly follow school rules, and the FBA. (S-21, N.T. p.457).
46. In early December 2018, Parents requested, and the District agreed, that Student stop going to the resource room for assistance during study halls. (S-31 p.10).
47. On December 20, 2018, the school district completed the reevaluation report (RR). (S-23).
48. The intermediate unit (IU) completed the FBA using observational data collected over four different days and recommended a positive

behavior support plan (PBSP). (S-23 pp.17-18, S-24, S-23 p.18). The FBA examiner concluded that the Student needed to “improve upon communication skills, the ability to complete tasks, the ability to self-regulate skills and improve social skills.” The FBA examiner recommended the team develop a Positive Behavior Support Plan (PBSP). However, no recommendations regarding the content of the plan were included in the FBA. (S-23, N.T. p.59).

49. The guidance counselor, principal, social worker, teachers, and parents provided input for the December 2018 RR. (S-25, S-26, S-27, S-28).
50. The RR determined Student remained eligible as a person with an OHI identification in need of specially designed instruction. (S-23 p.18).
51. The District with Parental input then carried out a positive reinforcement survey. (S-29, S-30, N.T. pp.306-07). Teachers would use the information in the survey to alter reinforcements to see what worked best to have student participate and follow classroom procedure. (N.T. p.307).
52. On January 7, 2019, the IEP Team met to discuss the RR, although the Student attended part of the meeting, the Student would not participate, instead showing an unwillingness to even be present by turning away from the group. (N.T. p.308, S-31).
53. Student disliked attending the social skills group and for the daily check ins/self-monitoring. S-31 p.14, P-5 p.8, N.T. p.242, p.244). School staff attempted to encourage the Student to go and to keep the opportunity to attend the resource room in the IEP, but Parents instead wanted it removed from the IEP. (S-31 p.10, N.T. pp.308-09). As a compromise the IEP Team agreed to keep one resource room per day during study hall. (N.T. pp.310-11, N.T. pp.343-44).

54. Early on according to the school psychologist running the social skills group, Student would attend and participate, and was compliant, cooperative, and pleasant. (N.T. pp.289-290).
55. During the same time frame, the Student demonstrated more behavior difficulties in some classes than others. (N.T. p.291, N.T. p.359).
56. The positive behavior plan included a "safe pass" permitting Student to go to the guidance office or special education office to discuss any situation or to regroup before returning to class. (S-31 pp.37-39).
57. The IEP also provided the Student with individual counseling six 30-minute sessions per month. (S-31 p.46, N.T. pp.203-04, N.T. pp.226-27, N.T. pp.243-44).
58. On or about January 17, 2019, the Parents agreed to the IEP, including the "safe pass" and the PBSP and signed the NOREP. (S-32).
59. After the January 2019 IEP meeting, the case manager and others met with Student's teachers to train them on the contents of the PBSP (displaying the PBSP on a white board screen and explaining the contents, and on Student's disabilities. (S-31 p.47, N.T. pp.314-35, pp.464-65, N.T. p.502, N.T. p.465).
60. The case manager also explained how to complete the data chart by describing the SDI that helped with Student's behaviors and the teachers provided a structured environment for Student. (S-36, N.T. N.T. p.315).
61. From January 2019 to May 2019, Student would visit the special education teacher per the behavior plan. (N.T. p.382).

62. Student used the safe pass during to visit with the learning support teacher, who used to keep candy in her room for the Student. Many times, the Student would enter the room and sit head down. (N.T. pp.409-410).
63. Although the school staff would remind Student about using the "Safe Pass," but almost always the Student refused to consistently use the Pass. On one occasion the Student told the counselor the passes were stupid and did not want to use it. (S-40 at 24, N.T. p.183, p.222, pp.234-35, p.324, pp.375-77, p.408). To work-around Student's dislike for the "Safe Pass," the counselor would use different terminology to see the Student. (N.T. p.252, p.324).
64. The special education teacher would inform the teachers when Student was having a bad day. (N.T. p.382).
65. Although the "Safe Pass: was used no specific data was collected regarding the antecedents, the Student's behaviors or the consequences leading up to the use of the "Safe Pass." (N.T. p.343, p.408, S-31).
66. On or about January 19, 2019, the District issued, and the Parents approved NOREP offering itinerant learning and emotional support in the District. (S-32).
67. Throughout the 2018-2019 school year, the Student continued to struggle with organization particularly in classes where he was having trouble. The Student required prompting from Parents in order to complete work. The Student also missed a significant amount of instruction due to behavioral dysregulation. (N.T. pp.66-67).

68. During the 2018-2019 school year, there was a steady increase the frequency, severity and intensity of the behavioral incidents of the Student's cursing and inappropriate behaviors in the classroom. (N.T. p.366, N.T. p.367).
69. The PBSP allowed Student to earn time on the cell phone as a positive reinforcer in school. (N.T. p.335, pp.362-63). Parents sometimes wanted phone privileges, incorporated into the PBSP as a consequence, others times not. (N.T. pp. 470-72). For example, on March 27, 2019, Parents called to ask for Student's phone privileges to be reinstated, although phone privileges was in Student's PBSP as a consequence. (S-37 pp.10-11, N.T. pp.470-71).
70. Whether the Student earned a positive reinforcer was determined by the data sheets. (N.T. pp.337-380). Each week, Student's case manager would send the completed charts to Parents. (N.T. p.322).
71. If the case manager saw Student's SDI were not working for a teacher to curtail Student's behaviors, she would meet with the teacher and develop other ideas. (N.T. p.322).
72. At some point in the school year the Parents came to believe the Student's life science teacher was not implementing the PBSP. (N.T. pp.477-78).
73. When the concern was brought to the case manager's attention the case manager would meet with Student's life science teacher to discuss antecedents she used and what she could try to implement the PBSP. (N.T. p.323).
74. The life science teacher was not resistant to implementing the PBSP; instead, she continued to try new things to curtail Student's behaviors. (N.T. p.323).

75. District personnel would tell parents what Student's life science teacher would try and requested suggestions from Parents, however the Parents did not give any further definite input. (N.T. p.478, S-52 emails, S-1, S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-9, N.T. p.478).
76. At times the Student would go to the resource room, however at the same time, the Student would not bring any work or, if the Student did have work, the Student was not willing to do it. (N.T. N.T. p.312).
77. The case manager would encourage the Student to complete work in the resource room. (N.T. pp.312-13).
78. As the year went on, from January through April, the teachers would not force the Student to follow through on the SDI because it became an antecedent for a shut down or the Student would become more of a distraction in the classroom. (N.T. p.364).
79. At the same time, as the year went on, from January through April, the Student refused to check in with the case manager. By April, when the Student saw the case manager at the end of the day, the Student would either ignore her, name call or walk away from her. (S-33 pp.2-8, N.T. pp.345-46).
80. After a[redacted] at home, the Parents placed the Student in a behavioral health inpatient program for an evaluation. The Student was inpatient from April 8, 2019, to April 19, 2019. (S-34) A psychiatric evaluation was completed which indicated diagnoses of Disruptive Mood Dysregulation Disorder (DMDD) and Attention Deficit Hyperactivity Disorder (ADHD) Combined type. (S-34, p.10).

81. The Student's emotional and behavioral difficulties continued in school after the hospitalization. When the Student returned to school, even though the Parents' asked, the building principal refused, and the Student was required to serve detentions and suspensions that had been incurred before the inpatient hospitalization. (N.T. at 73).
82. After receiving the information from the behavioral health inpatient treatment and based on Parents' concerns about discipline, the school district attempted to hold an IEP Team meeting; based on Parties' schedules, the meeting was scheduled to occur on May 30, 2019. (N.T. pp.463-64).
83. Although the IEP meeting was scheduled the meeting never occurred because, in the interim, the Parents' requested, and the District granted the Parents request for an independent educational evaluation (IEE) at public expense. (N.T. p.464, N.T. pp.473-74).

THE 2019-2020 [redacted] SCHOOL YEAR

84. In August 2019, the Student emailed the case manager, stating that the Student would no longer do check-ins anymore. The teacher, however, would find the Student each day. (S-39, N.T. pp.375-76, N.T. p.382). At the start of the year, the Student had no ongoing behavioral issues. (N.T. at 377-378).
85. At the start of [redacted], the building principal changed and the District focused Student's behavior plan on restorative practices for the 2019-2020 school year. (N.T. p.395).
86. Restorative practices include implementing a positive behavior plan and encourage positive teacher/student relationships to decrease discipline issues. (S-49; N.T. p.395). The case manager developed computerized on-task behavior tracking and charting protocol. (S-41, N.T. p.384).

87. Early in the school year, the Student showed disruptive and non-compliant behaviors in English class: walking in front of the teacher during PowerPoint presentations; making noise, touching other students; getting into arguments with the teacher; non-compliant avoidance, which usually started when Student was held responsible for work and quizzes that Student did not want to do. (N.T. pp.423-424).
88. In September 2019, the parties held an IEP Team meeting via phone to discuss Student's behaviors; the IEP Team recommended a trial placement in the learning support classroom with the then-current case manager to ensure the Student was receiving English instruction. (N.T. p.389 N.T. S-43). A week later, the parties made another IEP revision because Student did not want a Reading class with the English teacher. (S-44, N.T. pp.391-92). At one point, the Student made comments about [redacted]. (N.T. pp.427-28).
89. As the year went on, the Student became more dysregulated, disrespectful and disobedient to the case manager during learning support English. [redacted]. (N.T. pp.425-26). If the Student did not want to do something, the Student would not do it. (N.T. p.431).
90. New goals were added to this IEP, focusing on compliant behaviors in the classroom and a clear expectation of classroom goals. (S-44 p.11, N.T. pp.392-93).
91. Student's behaviors did not change depending on who the principal was. (N.T. pp.435-36). For the remainder of the year, the IEP Team would continually make changes and implement new SDI to assist Student – at least until another round of refusals. (N.T. p.325).

92. Using the computerized on-task behavior tracking system, the case manager would see after each class how the Student did in that class. (N.T. pp.378-86). The charts identified the Student's behaviors and the antecedents observed. (S-41, N.T. N.T. p.420).
93. If the case manager spotted an issue, she would speak to Student, review the antecedents and/or the consequences and then speak with the teachers. (N.T. p.421).
94. If the behavior charts required a formal meeting with Student, the case manager would log the concern. At the same time, the teacher maintained a Student preference log. (S-47, N.T. pp.442-423).

The IEE Results And IEP Revisions

95. The private examiner completed his report on September 21, 2019. (S-40, N.T. N.T. pp.74-75).
96. The IEE included a Woodcock-Johnston Fourth Edition Test of Cognitive Ability a Woodcock-Johnson Fourth Edition Test of Achievement, a neuropsychological battery of testing, a Conners Continuous Performance Test-2nd Edition, a Delis-Kaplan Executive Function system, a Beery Buktenica Developmental Test of Visual-Motor Integration 6th Edition, a Behavior Assessment System for Children-3rd Edition, a Behavior Rating Inventory of Executive Function-Second Edition, a Functional Behavioral Assessment, a comprehensive review of the then existing data and an observation of the Student in the District. (S-40).
97. The examiner noted that the Student's previous testing in 2015 yielded an average IQ score of 96 and average achievement test results ranging from a low standard score (SS) of 63 in written expression to a high of 103 in Math concepts and Applications. On the Kauffmann Test of Educational Achievement of a battery of 17, subtest

- the Student had 14 scores in the "Average" range, and one "Below Average" score in Witten Expression Composite and "Low Extreme" score for Written Language Composite. (S-40 p.3)
98. The Parents' BASC-2 ratings for Adaptive Skills Composite, Adaptability, Social Skills and Activities of Daily Living, fell in the "At-risk," range. At the same time, the Student's Externalizing Problems composite scores relating to Hyperactivity, Aggression and Conduct Problems fell in the "Clinically Significant" range. In reviewing the then existing data, from 2015, notes the Student "eats things that are not food," threatens to hurt others, says things like "I want to die," or "I wish I were dead," wets the bed, and often bullies others. Like the Parents, the teacher's BASC-2 ratings rated the Student "At-risk" and "Clinically Significant." (S-40 p.3).
 99. An analysis of the Student's September 2019 WJ-IV cognitive IQ scores suggests that Student's overall intellectual functioning was in the upper end of the "below average" range. The Student's "General Intellectual Ability" SS of 74, at the 4th percentile, fell in the "Well Below Average" range. In contrast, the Student's overall composite SS of 88, at the 22nd percentile, fell in the "Below Average" range. The Student's "Comprehensive Knowledge" fell in the "average" range, Fluid Reasoning and Cognitive Process Speed fell in the "Below Average" range. In contrast, the Student's Cognitive Efficiency and Short-Term Working Memory fell in the "Well Below Average" range. (S-40 p.6)
 100. Various subtests of the WJ-IV in reading, math and writing indicated "Average" to "Below Average" performance. (S-40 p.8).
 101. The Student's Parents and teacher-rated the Student's executive functioning, attention, language, motor skills and sensory-perceptual

- skills. The Parents' and the teachers' scores were remarkably consistent. The ratings indicate that sustained attention, impulse inhibition, cognitive efficiency, tendency to underestimate and/or under allocate the amount of mental effort required to complete tasks. (S-4-pp.8-16).
102. The Parents and the teachers BASC-3 ratings yielded scores in the "Clinically Significant" range for acting out, aggression and conduct problems. (S-40 pp.20-21).
 103. The private examiner observed the Student in the classroom and saw teachers redirecting Student after some behaviors. (S-40, N.T. pp.143-44).
 104. The IEE examiner commented the teachers were properly "picking their battles" with the Student, especially with low-level behaviors, to alleviate triggering more significant behaviors and to maintain control of the classroom. (N.T. pp.157-58, N.T. pp.182-83).
 105. Teachers had little options for consequences other than ignoring the behavior when Student refused to leave the classroom for a break. (N.T. p.184).
 106. The private examiner determined at times the Student's dysregulation was done willingly and knowingly to acquire a desired outcome. (S-40; N.T. N.T. pp.150-52). The private examiner participated in the October 1, 2019 IEP meeting. (S-45; N.T. p.144).
 107. The private examiner told the IEP Team that the existing PBSP consequences have little to no meaning to the Student. (N.T. p.147).

108. Overall the IEE evaluation yielded results consistent with a significant number of behaviors, characteristics related to ADHD, and DMDD. The IEE examiner recommended a variety of SDIs, all of which in the examiner's opinion should be provided in a full-time behavioral/emotional support classroom with clear consequences. (S-40 pp.27-29).
109. The private examiner recommended, and the IEP team and the Parents agreed that the Student needed a highly structured educational placement designed to address attention deficits, executive functioning deficits, noncompliance, and dysregulation behaviors throughout the school day. (N.T. p.122, N.T. p.145).
110. The Parents requested and the District agreed to place the Student at a private school facility "since it had an outdoor component which can motivate [Student] to follow rules, and there was immediate behavior modifications built into the program due to a point system." (S-45 p.6. N.T. p.396)

The Student's Current Program And Placement

111. In October 2019, Student started at the out of District placement in at a private academic school licensed by the Commonwealth of Pennsylvania. (S-51, N.T. p.82). The private school includes an experiential education model that encourages hands-on learning in the classroom and interactive experiences outside of the classroom. The curriculum at the private school includes an adventure program in conjunction with experiential activities. *Id.*
112. At the December 2019 IEP Team meeting, N.T. S-50, Parents raised a concern about the Student's math class. (N.T. p.475). Parents have expressed concerns that the Student's homework from the private placement is too basic. For example, homework in English involves

cursive writing. Overall, the Parents expressed concerns that the homework received by the Student resembles work previously completed in third grade. (N.T. p.83).

113. The IEE examiner and the Parents believe that the Student requires a comprehensive curriculum-based assessment in Math and in English and Language Arts. (N.T. pp.197-198).
114. The private school representative at the IEP conference told parents they follow the state standards for math as if the Student was in the District. (N.T. pp.475-76).
115. The private school IEP notes that upon entering the school, the Student was given the Common Core State Standards assessment in math. The IEP goes on to state that out of a possible 30 questions, at the eighth-grade level, the Student earned a score of 33%. The math present level statement also provides that the Student's math assessment scores ranged from 33% to 43%. Although the Student earned low scores, the team decided the Student did not need a math goal. (S-50). *Id.*
116. Likewise, in Language Arts, which includes reading comprehension, reading fluency, and writing, the Student's scores are somewhat scattered. In reading fluency and comprehension, the Student's scores were between 60% and 76%, while in writing, the Student's scores ranged from 85% to 90%. Again, after reviewing the data, the team decided not to include an English and Language Arts (ELA) goal. (S-50).

APPLICABLE LEGAL STANDARDS

Credibility And Persuasiveness Of The Witnesses' Testimony

The burden of proof in an IDEA dispute is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the court held that the burden of persuasion is on the party that requests relief; in this case, the Parents. A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). This hearing officer at all times relevant applied the preponderance of evidence standard when reviewing all claims of a denial of a FAPE or the failure to implement the IEP. Whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.* During a due process hearing, the hearing officer is also charged with the responsibility of 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.³

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact); 22 Pa Code §14.162 (requiring findings of fact).

Therefore, all of the above Findings of Fact and Conclusion of Law below are based on a careful and thoughtful review of the transcripts, the non-testimonial and extrinsic evidence, along with a careful reading of all of the exhibits. While some of the relevant evidence is circumstantial, this hearing officer now finds he can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events. This hearing officer also found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student's program. That said, I will, however, as explained below when and if necessary, give more or less persuasive weight to the testimony of certain witnesses when the witness either failed to or in the alternative provided a clear, cogent and convincing explanation of how he/she provided and/or participated in the evaluation, reevaluation IEP and day-to-day teaching assignment. I found the testimony of the school staff, particularly persuasive.

Each witness demonstrated detailed knowledge of the Student's disability, the then-current IEP, the Student's overall mood, the Student's discipline profile, the SDIs and/or the PBSP. Second, while I found the Parent's testimony credible, the testimony, however, lacked sufficient supporting factual basis to advance the individual claims. For example, while the Parents believe the teachers did not implement the IEP and/or the PBSP,

that underlying belief was not corroborated by the record.⁴ Likewise, while the Parents believe the school work during the day and the homework from the agreed-on private placement are insufficient, the Parents did not produce any homework sheets or call a witness from the placement to corroborate their personal beliefs. Therefore, on these two points and others described herein, I now find the Parents' testimony was not persuasive.⁵ Accordingly, I now find when the intrinsic and extrinsic record is viewed as a whole, I can now conclude that I can derive facts and inferences of fact from the testimony needed to make an impartial decision.⁶

IDEA FAPE Standards

The IDEA and state and federal regulations obligate local education agencies (LEAs/districts) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is

⁴ See, *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways local staff who are more familiar with the student and the local curriculum, at times, can be better-qualified than third parties to gauge needs, individual circumstance and progress).

⁵ It is a well settled practice that a finding fact based upon generally uncorroborated unobjected statements, cannot satisfy moving parties contentions, burden of production or persuasion. See *A.Y. v. Dep't of Pub. Welfare*, 537 Pa. 116, 641 A.2d 1148 (Pa. 1994), *J.S. v. Manheim Twp. Sch. Dist.*, No. CM 8-04246, 2019 Pa. Dist. & Cnty. Dec. LEXIS 2346 (C.P. Feb. 25, 2019).

⁶ See, *Marshall Joint School District No. 2 v. CD by Brian and Traci D.*, 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010) (decisions about SDIs, goals, related services, aids, accommodations, or supplemental aids are best left to a team of knowledge persons); *District of Columbia Public Schools*, 111 L.R.P. 76506 (SEA D.C. 2011).

met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures outlined in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through the development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the Supreme Court considered the application of the *Rowley* standard anew, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S., 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials but also by the input of the child’s parents or guardians. The *Endrew* Court explained that “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351.

The determination of meaningful benefit is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances." *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. The *Endrew* standard is not inconsistent with the long-held interpretations of *Rowley* by the Third Circuit. See, *Dunn v. Downingtown Area Sch. Dist.* 904 F.3d 248 (3d Cir. 2018).

Compensatory Education As Appropriate Relief

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.⁷ Compensatory education should place the child in the position they would have been in but for the IDEA violation.⁸ Compensatory education accrues from the point that the school district either knows or should have known of the injury to the child.⁹ A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. *Id.* With these fixed principles in mind, I will now turn to the analysis of the instant dispute over the Student's FAPE.

⁷ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

⁸ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to "conform[] to ... [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job."

⁹ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

DISCUSSION AND CONCLUSION OF LAW

The Student's Claims

The Parents contend the initial evaluation was insufficient, which in turn lead to a series of inadequate IEPs. For all of the following reasons, I disagree. In late May early June 2015, the Parents obtained a private evaluation, after sharing the evaluation with the District by September 15, 2015, the District completed its evaluation. The District's evaluation supported the private evaluator's conclusions, which then lead to the Student being identified as a person with an OHI who required specially designed instruction. The record is preponderant that the initial evaluation, identification and offer of a FAPE were all completed in a timely fashion.

In May 2018, the District did a reevaluation. The reevaluation included a review of the then existing data, updates from the Parents, the teachers, and the social worker. The updates noted while the Student was working close to or on grade level, the Student's overall profile indicates the Student was making incremental progress in math, written language, and reading. As for self-regulation, the RR notes that for the most part up to April 2018, things were going well with one (1) disciplinary referral for the first three quarters of the school year. As the year ended, the Student had an uptick ending the year with five (5) disciplinary referrals, in the fourth quarter, for talking back and bus infractions.

The following IEP contained a statement of the Student's present levels, notations about the previous school year discipline and a direction to provide positive praise and reinforcement to improve self-regulation. While the goal statement is awkwardly worded calling for the Student to "increase" self-regulation by "decreasing" disciplinary referrals, when placed in the context of the then-current circumstances, I now find the goal is otherwise appropriate. The goal statement is supported by 23 SDIs targeting self-

regulation, organizational skills, along with suggestions for multiple forms of positive reinforcement and social skills modeling. Based on the then-current data, the goal and the SDIs were ambitious. Therefore, I now find applying *Rowley* and *Endrew* the reevaluation was comprehensive, and the September IEP was otherwise appropriate. The Parents' denial of a FAPE claim for the 2017-2018 year is denied.

The 2018-2019 IEP And School Year

By October 5, 2018, the Parents and the District held a brief IEP meeting to review the Student's present levels of performance, the SDIs, the related services and the Student's placement. The team discussed the Student's transition to high school and the current difficulties in completing homework. The District offered rather than go to a regular education study hall the Student could instead go to the resource room for additional homework support, after much discussion the Parents decided to forego the offer and leave things as is. After that, on October 24, 2018, the District offered, and the Parents consented to an FBA evaluation. On or about December 20, 2018, the Parents and the staff met to review the FBA data. The FBA noted from November 5, 2018, to December 11, 2018, the Student received 12 disciplinary referrals. Consistent with the testimony, the FBA notes that inappropriate behaviors and acts of non-compliance were being addressed through redirection, positive reinforcement and planned ignoring.

After that, on January 7, 2019, the IEP team met and suggested a revised goal statement calling for improved self-regulation with the expectation that the Student would not earn any disciplinary referrals. The goal statement included baseline data, social work support changed from one time a month for 30 minutes, to six (6) times a month for 30 minutes and the SDIs now included 32 positive reinforcement, social skills, self-regulation and organizational strategies. After that, the District provided the

Parents with a NOREP describing the placement options considered and the reasons for rejection. Ultimately the team, including the Parents, decided that the Student would benefit from itinerant learning and emotional support with the related service of social work and counseling.

Based on the then-existing data, including the disciplinary referrals, the PBSP baseline data and the SDIs, I now find the District offered the Student a FAPE. The present levels and the goal were measurable. The SDIs supported the Student's changing circumstances identified in the FBA. The increase in social worker support was a significant commitment of resources. When these individual components are viewed as a whole, based on the then-existing data, I now find the IEP and placement were reasonably calculated to yield meaningful progress. I also find the record is preponderant that during all times relevant any changes to the IEP, the SDIs, including the increase in social work services and the PBSP, were regularly communicated to the staff. Accordingly, I now find the District made a good faith effort to provide a FAPE; therefore, I now find the Parents failed to meet their burden of proof regarding the denial of a FAPE.

The Out Of District Placement Claims

I share the Parents genuine concerns if the academic program at the out of District program is academically challenging. In support of this contention, the Parents point to an English class homework assignment that called for the Student to write in cursive. They also contend the Student is not advancing in math. In particular, they contend while in the District, the Student was working on pre-algebra and is now taking a basic general education math class. While the Parents agree the Student needs the structure of the out of District placement, they fear the academics are watered down. The record about the Student's experiences at the private placement is thin. Neither Party called anyone from the current private

placement. Neither Party offered any tangible proofs about the private school's curriculum or examples of homework. Therefore, I will rely exclusively on the private school IEP, the limited testimony about the private school and the statements of the IEE examiner about calibrating the Student's academic and behavioral goals in deciding the final issue.

The private school IEP notes that upon entering the school, the Student was given the Common Core State Standards assessment in math. The IEP present levels in Math and English and Language Arts are somewhat at odds with the IEE results. The math present level of performance states that although the Student's math assessment scores ranged from 33% to 43%, the IEP Team decided the Student did not need a math goal. Likewise, in language arts, which at the private school includes reading comprehension, reading fluency, and writing, the Student's scores are scattered. In reading fluency and comprehension, the Student's scores were between 60% and 76%, while in writing the Student's scores ranged from 85% to 90%, again after reviewing the data, the team again decided not to include an ELA goal. Other than these three core subjects, neither the record nor the IEP describes what the Student does for the remainder of the school day. Equally curiously, the private school IEP does not mention the IEE results and SDI recommendations. Accordingly, I now find based on this limited record, I do not have sufficient facts to determine if the regular education academic program is otherwise inappropriate. Therefore, absent preponderant proof, I will now deny the Parent's claim as stated.

That said, and understanding that the following is dicta, the Parties may well want to consider the IEE examiner's suggestion that additional data like a curriculum-based assessment be collected in all relevant subjects. The curriculum-based assessment will enable the District and the private school's IEP Team to satisfy the IDEA requirement that the Student should continue to participate, in the general education curriculum, to the maximum

extent possible, although in another setting. As this is a short-term placement and given the fact that the Student is transition age, the regular education curriculum at the current placement and in the District should support ambitious goals and challenging objectives advancing the Student's behavioral, academic and transition IEP goals.

SUMMARY

At all times relevant, the District made a good faith effort to adjust the Student's IEPs to the then existing circumstances and needs. The evaluations were performed in a timely fashion and the IEPs were otherwise appropriate. The record, when viewed as a whole, is preponderant that at all times relevant, all staff implemented the program as designed. Accordingly, for all of the above reasons, I now find in favor of the District and against the Parents. An appropriate Order now follows.

ORDER

And now, this 1st day of May 2020, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parents, and the Student on all claims for a denial of a FAPE.
2. I now find in favor of the District and against the Parents and the Student on all other claims that the District failed to implement the Student's IEPs as deigned. Likewise, other claims and/or all affirmative defenses are dismissed with prejudice.

Date: May 1, 2020

Charles W. Jelley, Esq. LL.M.

ODR FILE #23097-19-20