

*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: 23134-19-20**

**Child's Name:** I.B.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

*Counsel for Parent*  
Pro Se

**Local Education Agency:**  
Agora Cyber Charter School  
1018 W. 8th Avenue  
King of Prussia, PA 19406

*Counsel for the LEA.*  
Maria C Ramola Esq.  
McKenna Snyder LLC  
350 Eagleview Boulevard, Suite 100  
Exton, PA 19341

**Hearing Officer:** Charles W. Jelley Esq.

**Date of Decision:** 08/14/2020

## PROCEDURAL HISTORY

Parent (Parent), filed the instant due process hearing complaint alleging the charter school/local education agency (LEA) failed to offer a free appropriate public education (FAPE) from June 2019 through the closing of the school, due to the pandemic, on or about March 13, 2020.<sup>1</sup> The Parent further contends the LEA, over her objection, violated the “stay-put” rule by changing the last agreed-upon individual education program and placement (IEP). The Parent finally contends the IEPs as offered and implemented denied the Student a FAPE. To remedy these alleged violations, the Parent requested appropriate relief.<sup>2</sup> The LEA is a cyber school within the meaning of 22 PA Code 711. The LEA argues that at all times relevant times, they provided a FAPE. They further argue that at all relevant times, they did not violate the “stay-put rule.”

By agreement of the Parties, all hearing sessions were held virtually. Exhibits were electronically disclosed and shared between the Parties, and the hearing officer. During the hearing sessions, the exhibits were electronically screen shared with all witnesses, the Parties and the hearing officer virtually. As the Student was enrolled in a cyber charter school, the Parties did not object to proceeding virtually. At the request of the Parties, the Decision Due Date (DDD) was extended, for a good cause. The record was closed upon receipt of each Parties well-written closing arguments.

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<sup>1</sup> The Parents claims arise under 20 U.S.C. §§ 1400-1482The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (N.T.), 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.

<sup>2</sup> When the public and charter schools closed due to the pandemic the mother modified the request to include compensatory education, in lieu of a private placement.

Several exhibits were objected to and, therefore, not considered in the final Decision.

For all of the following reasons, after a careful review of the extrinsic and intrinsic evidence, I now find in favor of the LEA and against the Parent and Student.<sup>3</sup>

### **STATEMENT OF THE ISSUES**

1. Did the District provide the Student with a free appropriate public education from June 2019 through the close of school, on or about March 13, 2020? If not, should the Student be awarded compensatory education and other appropriate relief? (NT pp.42-56).

### **Findings of Fact**

1. On or about April 26, 2019, the Parties met to formulate an IEP for the remainder of the last few months of the 2018-2019 school year and the 2019-2020 school year. (S-3, NT pp.216-228).
2. The IEP included AIMS web baseline data describing the Student's present levels of education and functional performance in math, reading, written expression and includes input from the Student's then-current teachers. (S-3, NT pp.216-228).
3. As the Student had completed all of the requirements for graduation, the IEP notes the team agreed the Student needed to attend school for a 13<sup>th</sup> year. (S-3 p.16, NT pp.446-447).
4. The present levels included updated test results from the speech therapist. (S-3).
5. The Student has hearing loss. According to the most recent audiological evaluation, conducted at Children's Hospital of

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<sup>3</sup> 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 factual and legal issue(s) in dispute.

Philadelphia (CHOP, 10/1/18), the Student has a fluctuating hearing loss in the left ear, which has remained in the mild conductive hearing loss range since 2015. The Student has normal hearing in the right ear. The most recent Speech, Language, and Fluency Evaluation (Children Hospital Philadelphia (CHOP) 11/20/18) reportedly indicated a diagnosis of "moderate receptive and expressive language disorder with a history of hearing loss as well as learning and memory concerns. The Student presents with speech patterning that is not indicative of a stuttering disorder, but appears related to language formulation deficits and overall cognitive-linguistic profile. At that time, the Student's "receptive language skills span the 11-15 year age level...expressive skills span the 6-11 year age level." The Student's overall Language Content Index score on the *Clinical Evaluation of Language Fundamentals-5<sup>th</sup> Edition (CELF-5)* was in the Borderline range (SS=78, 7<sup>th</sup> %ile). (S-4).

6. Based on the Student then-current present levels, the speech and language teacher made the recommendation to change the Student frequency and duration of services from 45 minutes 1 time a week to 30 minutes 2 times a week. (S-4).
7. The Student receives audiology services one (1) time a month for 45 minutes. The Student is very reliable, remembering to log into the sessions or sending an email when the Student cannot make it. At the time of the April 2019 IEP, the audiologist noted that the Student makes up all missed sessions. The audiologist IEP input states the Student can carry on a conversation with minimal difficulty, yet at times will ask for some words to be repeated. The Student is also able to answer questions easily and questions others when the Student doesn't understand a word or directions. (S-3 p.17).

8. The IEP notes the LEA recommended a virtual Behavior Support Consultant (BSC), for up to one (1) hour weekly to collect data to determine if the Student needs more support to be successful. The Parent disagreed with this recommendation, and the services were not provided; however, the LEA continued to offer the BSC support. (S-4).
9. The present levels note updated anecdotal statements about the Student's participation in the "Transition 12 Course" and requested permission to share data with the Office of Vocational Rehabilitation (OVR) the Mother declined. (S-3, p.22, NT pp.423-427).
10. The detailed present levels of performance state that the Student's academic, developmental and functional needs are in the areas of reading fluency, reading comprehension, written expression, math applications, math computations, executive functioning, speech and language and sound amplification to address the hearing loss. (S-3 p.23). The Student's proposed course of studies aligned up with the Student's needs. (S-3 pp.24-26, NT pp.428-431).
11. The IEP includes a reading comprehension goal, a reading fluency goal, a written expression goal, a math calculations goal, a math computation goal, an executive functioning goal, along with a hearing and speech and language goal. (S-3 pp.30-38). The goal statements were linked up to 29 different forms of specially-designed instruction (SDI) like chunking of assignments and graphic organizers. To address the hearing impairment, the SDIs provided that the teachers should allow the Student to ask questions after receiving instructions to ensure the Student has all the information to complete the assignment. (S-3 pp.38-39, NT pp. 348, NT p.385, NT pp.429-430).

12. The related service of audiology was scheduled for face-to-face instruction/remediation, while speech and language therapy was web-based, conferencing calling and email. (S-3 p.39, NT pp.485-488).
13. After looking at the available data, the IEP determined that the Student was not eligible for Extended School Year (ESY) services. (S-3 p.40, NT pp.561-564).
14. The team proposed that the Student participate in general education classes with appropriate adaptation, modifications and specially designed instruction. The IEP team also proposed that the Student meet with the special education teacher, in a small group or individual web-based conference for 300 minutes/weekly for math fundamentals, 300 minutes/weekly for reading fundamentals, 120 minutes/weekly for math resource, 120 minutes/weekly for reading resource, 60 minutes/weekly for reading horizons, 60 minutes/weekly for writing resource, and 60 minutes/weekly for speech and language support and audiology 45 minutes/monthly. (S-3 p.40, NT pp.345-346).
15. The IEP then proposed that the Student receive Learning Support, along with Deaf or Hearing Support and Speech and Language services. (S-42, NT p.561).
16. On or about June 3, 2019, the LEA provided the Parent with a Notice of Recommended Educational Placement (NOREP) and prior written notice. The NOREP states, "This notice has been issued due to a lack of participation on behalf of the above-named student's parent or guardian. [Redacted] has obtained written consent to conduct an evaluation or re-evaluation procedures with this student; however, despite multiple efforts to coordinate these procedures, there has been no response or cooperation from the parent or guardian." The

NOREP goes on to state that the Parties agreed to an independent Neuropsychological evaluation. (S-1, NT pp.364-368).

17. On or about June 7, 2020, the Mother signed the NOREP approving the proposed program, affirmed her previous consent to the evaluation, along with the recommendations for SDIs, IEP goals and placement in Learning Support, along with Deaf or Hearing Support and Speech and Language services. (S-1 p.6 hereinafter the June 2019 IEP, NT pp.368-369).

### **PREVIOUS TESTING AND THE INDEPENDENT EDUCATIONAL EVALUATION**

18. In February 2012, while in 5th grade, the Student Reevaluation Report (RR), from the [redacted] School District, indicated that the Student was a person with a Specific Learning Disability (SLD) and Other Health Impairment (OHI-hearing loss). At that time, the Student's Full-Scale IQ score was 76 (Borderline range), and the Pennsylvania System School Assessment (PSSA) scores were Below Basic in reading and math. Academic screening tests indicated that, although in 5<sup>th</sup> grade, the Student's reading and math skills were at a mid-2<sup>nd</sup> grade level. Teachers described the Student as a hard-working. (S-3, NT pp.116-163).

19. The Student's April 2015 IEP from the [redacted] School District; [redacted], reviewed the Student's then-current Speech/Language test results. At that time in 2015, the Student's receptive vocabulary was in the Borderline range (Peabody Picture Vocabulary Test (PPVT-4 SS=77), as was the overall Core Language score on the Clinical Evaluation of Language Fundamentals (CELF-5) (SS=72, 3<sup>rd</sup> %ile). The Student's most recent evaluation at this school took place in

2018. Results indicated that the Student's intellectual abilities were just within the Low Average range (SS=80, 9<sup>th</sup> %ile). (S-3, NT pp.116-163).

20. On or about June 21, 2019, the Student, the Mother and the independent examiner met to begin the individual assessments of the Student's needs and circumstances. After taking a family history and reviewing the provided Student educational records, from the LEA and previous school districts, the examiner over two sessions administered the following individual assessments: the Clinical Interview; the Behavior Assessment System for Children-3<sup>rd</sup> edition (BASC-3; completed by Student); Adaptive Behavior Assessment Scale-3<sup>rd</sup> Edition (ABAS-3; completed by Mother); Test of Memory Malingering (TOMM); Wechsler Adult Intelligence Scale-4<sup>th</sup> Edition (WAIS-IV); Woodcock-Johnson Tests of Achievement-4<sup>th</sup> Edition (WJ-4); Trail-Making, Verbal Fluency, and Color-Word Interference subtests of the Delis-Kaplan Executive Function System (D-KEFS); Peabody Picture Vocabulary Test-4<sup>th</sup> Edition (PPVT-4); California Verbal Learning Test-3<sup>rd</sup> Edition (CVLT-3); Wechsler Memory Scale-4<sup>th</sup> Edition (WMS-4; Designs and Logical Memory subtests); Sentence Memory subtest of the Wide Range Assessment of Memory and Learning-2<sup>nd</sup> Edition (WRAML-2); Developmental Test of Visual-Motor Integration – 6<sup>th</sup> Edition (Beery V.M.I.); Lateral Dominance Exam; Purdue Pegboard. (S-4, NT pp.116-163).



21. Throughout the assessment, the Student presented as polite, maintained eye contact, spoke in a conversational style, with direct fluent, coherent, articulate and goal-directed responses to questions. The examiner noted no evidence of a speech impediment, word-finding problems, or word-substitution errors. The examiner opined that receptively the Student understood and followed oral directions with little repetition or simplification necessary. Finally, as part of his observation, the examiner also noted that hearing and vision appeared normal on informal observation. (S-4 p.3, NT pp.116-163).

22. When it came to an assessment of behavior, the examiner reported that since the Student attends a cyber school, it was not possible to provide routine mood and behavior rating scales to the teachers. Also, the Mother declined to complete any routine parent rating scales and was upset when she learned that the Student had been administered a self-rating scale. The examiner reported that without the benefit of any parent or teacher input, it is not possible to validate the presence or absence of any mood or behavior problems that the Student may be experiencing. (S-4 p.5, NT pp.116-163).

23. The Student did, however, complete a self-rating scale assessing current mood and behavior status (Behavior Assessment System for Children-3<sup>rd</sup> Edition, (BASC-3)). For the *BASC-3*, scores in the Clinically Significant range suggest a high level of maladjustment; scores in the At-Risk range identify either a problem that may not be severe enough to require formal treatment or a potential of developing a problem that needs careful monitoring. The Student's overall score on the *BASC-3* fell well within the normal range. Examining the individual subscales comprising the *BASC-3*, the Student rated a mild, At-

Risk elevation on a subscale assessing feelings associated with attention problems (e.g., I have attention problems, people tell me I should pay more attention, I forget to do things, I am easily distracted, etc.). The *BASC-3* also contains ratings of the adolescent's day-to-day adaptive skills, at home or in the classroom. The Student self-rating yielded a Clinically Significant low self-reliance score (e.g., others never ask me to help them, I am only sometimes dependable, I can sometimes solve problems by myself, I am sometimes good at making decisions, etc.). Subscales assess thoughts and feeling associated with anxiety, depression, social stress, feelings of inadequacy, somatic complaints, low self-esteem, etc. all fell well within the normal range for Student's age and gender. (S-4, NT pp.116-163).

24. The Student's levels of adaptive behavior were assessed via the Adaptive Behavior Levels of Assessment Scale-3<sup>rd</sup> Edition (*ABAS-III*), with Mother as the informant. Adaptive behavior is defined as the performance of the day-to-day activities necessary to take care of oneself and get along with others, compared to other individuals of the same age. Specific areas evaluated included the Student's communication skills, ability to function at school and in the community, self-care and safety skills, and capacity for self-direction. (S-4, NT pp.116-163).

25. The Mother's *ABAS-III* scale indicated overall adaptive skills in the Borderline range *ABAS- II* General Adaptive Composite  $SS=76$ , at the 5<sup>th</sup> percentile. There was some variability amongst subscale areas, with scores in the Conceptual Domain and Practical Domain falling within the Borderline range, and the Social Domain score falling within the Low Average range. At the

subscale level, the Mother rated the Student's social skills, self-care skills, capacity for self-direction, home living skills, capacity to manage the Student's health and safety needs, the ability to independently and safely access the community in the Low Average range. The Mother rated the Student's functional communication skills and functional academic skills in the Borderline range. Finally, she rated the Student's ability to manage leisure skills in the Extremely Low range. (S-4, NT pp.116-163).

26. The Student's intellectual functioning was assessed using the Wechsler Adult Intelligence Scale-4<sup>th</sup> Edition (WAIS-IV). The WAIS-IV is a comprehensive measure that assesses a wide range of cognitive functions and yields four separate IQ indices (*Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed*) as well as an overall Full-Scale IQ score. Consistent with previous evaluations, the Student's current Full-Scale IQ score falls within the Borderline range. These scores are also consistent with the Mother's current ratings of the Student's functional day-to-day adaptive abilities. (S-4 p.4, NT pp.116-163).

27. The Student's performance on the *WAIS-IV* was generally consistent, with performance across the previous individual IQ indices ranging from Extremely Low to Average. The Student performed at the lower end of the Average range on subtests assessing rapid visual-motor processing speed (*Processing Speed Index: PSI*) while performing squarely in the Borderline range on subtests assessing core nonverbal reasoning and visual-spatial processing (*Perceptual Reasoning: PRI*). As for language comprehension and expression, recall of school-

learned information, verbal reasoning and problem solving (Verbal Comprehension: *VCI*). The Student scored at the highest end of the Extremely Low range on IQ subtests assessing auditory working memory (Working Memory Index: *WMI*). (S-4 p.5, NT pp.116-163).

28. Comparison of the Student's current and previous IQ test results (2012, 2018, and 2019) indicates that the Student's intellectual abilities have progressed at a very stable pace over time. The IEE examiner noted that while a direct comparison of the ability tests was not possible, as the Student has been administered two different versions of the Wechsler IQ test battery since 2012. The examiner was able to compare the data patterns across multiple IQ testing. The IEE examiner stated that the decreases in Student's data patterns, were not clinically significant (i.e., not more than 1 standard deviation or a 15 point difference between scores) (S-4 p.5 and IQ Comparison of the 2012 WICS-IV, WAIS-IV 2018, and WAIS-IV 2019 Table, NT pp.116-163).

29. When the examiner compared and contrasted the Student's three previous IQ test batteries, he noted a small but steady decline in Student's verbal intellectual comprehension abilities over time (*VCI*). The examiner opined that this scoring pattern is not unexpected, as this *VCI* Index is closely linked to academic performance. In describing the Student's visual-spatial skills, the examiner again noted some variability in perceptual reasoning over time (*PRI*). The examiner also noted that the testing pattern displayed a small, yet concerning the decline in working memory skills over time (*WMI*). The Student's graphomotor processing speed (*PSI*) did, however, improve

significantly between 2012 – 2018. The examiner then explained that despite these small changes, the Student's overall Full-Scale IQ score remains essentially unchanged since the previous testing in 2012. For example, the Student's Full-Scale IQ from 2012 to 2019 decreased by two points. While Working Memory decreased by 11 points from an 80 to a 69, as did the VCI and PRI index score by seven points. (S-4 pp.4-6, and Score Comparison Table S-4 p.6). Viewing all the IQ assessment findings, as a whole, the IEE examiner concluded that the changes in the Student's standard scores were essentially unchanged when compared to the Student's 2012 assessment. (S-4, NT pp.116-163).

30. The Student had little difficulty maintaining attention throughout several hours of testing on two different days. Overall performance varied on formal tests of attention. The Student's attention for simple auditory information was in the Low Average range. The Student had more difficulty when a working memory component was added and needed to either recall digits in *reverse* order (up to 3 digits; Borderline range) or in *sequential* order (up to 4 digits; Borderline range). Student performed at the same Borderline level on the test of auditory attention that involved language processing. Specifically, when asked to simply repeat sentences of increasing length and complexity verbatim after hearing them just once (*WRAML2, Sentence Memory*). When initially presented with a list of 16 words to recall, Student learned a total of 4 words; Low Average range. (*CVLT-3, Trial 1*, NT pp.116-163).

31. The Student's expressive and receptive language skills are a well-documented area of weakness. On formal testing, the Student performed in the Borderline range when defining single words (*WAIS-IV, Vocabulary*). The Student's ability to simply repeat increasingly lengthy sentences was also in the Borderline range (*WRAML-2 Sentence Repetition*). Regarding fluency, the Student's performance was Low Average when asked to rapidly generate words beginning with a specific letter (phonemic fluency) but Average when rapidly generating words within a specific semantic category (D- KEFS, Letter Fluency; Category Naming). This pattern of weaker *phonemic* versus semantic fluency skills is common among students with early reading disorders. Qualitatively, there were no indications that the Student had any trouble understanding task directives. When the Student was asked to select pictures that best represented a concept or description spoken by the examiner, the Student's performance was in the Borderline range (*PPVT-4*). The Student's performance on this same receptive vocabulary test is similar to prior evaluations. (S-4, NT pp.116-163).

32. The IEE assessment also included measures of the Student's memory and learning of sequential skills. Students in an online school must attend to new incoming information, process it 'online' using working memory, store it, and then retrieve it later. If there is a problem at any one of these steps, the individual will exhibit memory deficits, which may inhibit future learning. Memory and learning also occur in both visual and auditory domains; therefore, the examiner assessed both. The Student's retrieval of general 'school learned' facts was in the Low Average range (*WAIS-IV, Information*). (S-4, NT pp.116-163).

33. On a 16-item repeated list-learning test, the Student's performance improved over almost each learning trial. That is, the same list is repeated five (5) times, and the Student recalled 4, 9, 12, 13, and 11 items over repeated trials (*CVLT-3*). The drop to 11 on the final trial was likely due to a lapse in attention. The Student recalled an Average number of items overall, but the overall learning slope was Average. (S-4, NT pp.116-163).
34. The Student's memory for new verbal information presented within a context was also assessed. The Student's immediate recall of two orally-presented stories was Extremely Low (*WMS-IV, Logical Memory*). After a 30-minute delay, the Student's recall of the stories declined by half; in the Extremely Low range. Finally, when details from the stories were then presented within a more structured multiple-choice recognition format, the Student's performance also remained Extremely Low. These scores are lower than expected, given the Student's receptive and expressive language delays. (S-4, NT pp.116-163).
35. In the visual domain, the Student's immediate recall for abstract designs and their unique positions on a grid was Low Average overall (*WMS-IV, Designs*). The Student's performance improved to the Average range after a 30-minute delay. The Student's visual recognition memory was much weaker; in the Extremely Low range. The examiner opined that the Student might have become confused by the choices on this task since it is rare to get such a lower score on this simpler and more structured recognition memory test. (S-4, NT pp.116-163).
36. To assess the Student's fundamental reading, writing, and mathematical abilities, the examiner used the Woodcock-Johnson

Tests of Achievement-4<sup>th</sup> Edition (WJ-4). The Student's reading skills were consistent with the Full-Scale IQ score. The Student's scores fell uniformly in the Borderline range on tests assessing sight word vocabulary, phonetic decoding and ability to apply phonic and structural reading skills to nonsense words (Word Attack) and reading comprehension. The Student's scores in reading speed and rate, called for the Student to read and comprehend either single words or simple sentences under time constraints (Word Reading Fluency and Sentence Reading Fluency), were also in the Borderline range. The Student's overall Broad Reading Skills also fell within the Borderline range. All these reading skills fall within ranges predicted by the updated current Full-Scale IQ score. This scoring pattern indicates that the Student does not currently meet criteria for the diagnosis of a Specific Learning Disability in Reading. (S-4, NT pp.116-163).

37. On tests assessing core written language abilities, the Student's overall Broad Written Language score fell within the Borderline range. The Student attained an Extremely Low score on a test assessing the ability to create and write sentences rapidly using provided words (Sentence Writing Fluency). The Student attained a Low Average score on a test measuring the ability to convey ideas through writing meaningful complete sentences in response to a variety of task criteria (Writing Samples). The Student's performance on a single word spelling test (Spelling) was Borderline. Except for weak Sentence Writing Fluency, all of the Student's written language skills fell within ranges predicted by the current Full-Scale IQ score. The IEE examiner then opined that the Student does not currently meet criteria for the



diagnosis of a Specific Learning Disability in Written Expression. (S-4, NT pp.116-163).

38. On tests assessing core mathematical abilities, the Student's overall Broad Mathematics score fell within the Extremely Low range. The Student also performed at an Extremely Low range on untimed tests assessing written math calculation skills (Calculation), the ability to apply mathematical concepts across a broad range of content areas (Applied Problems), and the ability to rapidly solve simple addition, subtraction, and multiplication problems (Math Fluency). The examiner concluded that the Student's the Student may currently meet criteria for the diagnosis of a Specific Learning Disability in Mathematics. (S-4 p.8, NT pp.116-163).

39. Overall the test results indicated that that Student's current overall intellectual functioning falls within the Borderline range. The examiner, after reviewing the Student specific data, concluded, within a reasonable degree of professional certainty, that given the current and previous IQ test results, the Student's intellectual abilities have progressed at a very stable pace over time. Taking into account the decline in the Student's verbal intellectual abilities, the decline in working memory skills, along with the improvements in the Student's graphomotor processing speed and the variability of the Student's visual-spatial skills the examiner concluded, within a reasonable degree of professional certainty that the Student's overall Full-Scale IQ score remained essentially unchanged since 2012. (S-4 pp.8-12, NT pp.116-163).

### **THE OCTOBER 2019 REEVALUATION REPORT**

40. On or about October 9, 2019, during a phone interview, the LEAs contracted school psychologist solicited the Parent's input for the RR (S-5 p.2, NT pp. 86-88).
41. On or about October 14, 2019, the LEA provided the Parent with a copy of its RR. The IEP team reviewed the results of the IEE and updated the RR noting the IEE test results. (S-5). The RR included teacher and therapist input. The reevaluation report (RR) tracked the Student's testing profile while attending public and charter schools. The RR includes updated classroom, speech therapy, audiology, progress monitoring data along with statewide test scores. (S-4 pp.4-9).
42. As a result of the review of the then existing data, the IEP team suggested three additional SDIs. The new SDIs call for a 50% reduction in the number of test questions as compared to the rest of the class, additional time to take the test on the following day, provided that the Student completed the test by the end of the semester, chunking of assignments over a period of days into smaller, manageable parts and a limit on the number of test questions that should be presented each day. (S-5 pp.9-11, NT pp.328-328).
43. The team also concluded that the Student would benefit from an assistive technology evaluation and that the Mother should contact OVR to discuss future educational or vocational services. (S-6 p.16, NT pp.375-377).

### **THE NOVEMBER 2019 IEP.**

44. After reviewing the IEE data, or about October 31, 2019, the LEA sent the Parent an invitation to participate in an IEP conference. The mothered signed and returned the invite on November 11, 2019. (S-7).
45. On November 11, 2020, the parties meet to revise the last agreed-upon June 2019 IEP Unlike the June 2019 IEP, the November 2019, IEP included recent baseline data collected from the AIMS web Plus probes collected at the beginning of the school year. The Student's AIMS web Plus Oral Reading Fluency score fell in the Below Average range at the 6<sup>th</sup>-grade level, while the Student's Reading Comprehension MAZE score fell in the Below Average range at the 8<sup>th</sup>-grade level. The Student's Math Concepts and Application score fell in the Average Range at the 5<sup>th</sup>-grade level. The IEP states that the Student's earned a grade of 65% in Written Expression using the Pennsylvania Writing Assessment Domain rubric. While on the AMS web Plus, the Student earned an Average score, at the 5<sup>th</sup>-grade level, in Number Sense Fluency. (S-8 pp.3-8, NT pp.381-391).
46. In the fall of 2019, the AIMS web progress monitoring data collection probes and scoring changed from AIMS web Complete to AIMS web Plus. During the 2018-2019 school year, the LEA used the AIMS web Complete. The AIMS web Complete called for the instructors to use eighth-grade probes to collect data about the Student's performance in reading and seventh-grade probes to collect data in Math. When it came time to write the June 2019 goal statements, the IEP team used the AIMS web Complete twelfth-grade normed tables to set the

expected level of performance in the Student's IEP goal statements. (S- 3, NT pp.355-361, NT pp. 385-388, NT pp.531-535).

47. The upgrade from AIMS web Complete to AIMS web Plus changed the numerical scoring standards/rubric used to describe the Student's present level/baseline and expected level performance stated in the annual goal. When the teachers recorded the Student performance using AIMS web Complete, they administered eighth-grade probes. When the Student returned to school for the 2019-2020 school year, the teachers readministered the probes, this time, however, when it came time to set the criterion for performance for the annual goals, the teachers compared the Student's performance to the eighth-grade AIMS web Plus normative tables. The use of the eighth-grade norms changed the criteria for achieving the goal. For example, while the Reading Comprehension goal in the June 2019 statement called for the Student to be "... given a bi-weekly 12th-grade level, three minute timed reading comprehension probe, [redacted] will increase [redacted] reading comprehension from 18 correct responses to 28 correct responses on three consecutive probes," Using the same June 2019 8<sup>th</sup> grade probes, when the data was plotted using the suggested 8<sup>th</sup>-grade norm tables the goal statement called for the Student to be ". . . given an 8th grade level, 3-minute timed Reading Comprehension probe; [Redacted] will increase [redacted] reading comprehension skills from a score of 16 points to at least a score of 28 points on three consecutive probes every two weeks." Although the goal statement reads as if the Student's expected level of performance was reduced, from 12<sup>th</sup> to 8<sup>th</sup> grade, the Student continued to work on the same 8th-grade material as set out in the June 2019 IEP. The changes in the wording of the annual goal statements do not reflect a lack of

progress or learning. (NT pp.355-361, NT pp.381-389, NT pp.531-535).

48. Like the June 2019, IEP the November 2019 IEP goes on to state that while the Student, at the close of the 2019 school year, had earned enough credits to graduate, the team, including the Mother, determined that the Student should continue on for the 13<sup>th</sup> year of schooling. (S-8 p.8).
49. After reviewing the IEE, along with the then-existing AIMS web Plus data, the IEP team determined that the content area of reading fluency, reading comprehension, written expression, math applications, math computations, hearing/audiology and speech and language support from the June 2019 IEP, stayed the same in the November 2019 IEP. The IEP team did however determine and the LEA agreed that the Student should receive the following additional services/supports: (1) the LEA would complete an assistive technology evaluation, (2) the LEA would provide the Student with "Audio Books (Learning Ally) via a supplemental online program, (3) the LEA would provide a personal care assistant for up to 10 hours a week to support one-on-one academic instruction, and (4) the LEA would provide "Text to Speech support" through "Google Speak it." (S-8 pp. 11-12, NT pp.389-393).
50. The November IEP present levels included Parent and teacher input, progress monitoring data, along with goal statements from the speech therapist and the audiologist. (S-8 p.12).
51. The present levels also included a series of well-developed and detailed performance statements addressing progress in the twelfth-grade transition class. (S-8 pp.15-17).
52. For the most part, the Student's IEP strength and needs statements the annual goals and the schedule for providing the Parent with

progress reports remained unchanged. Except for several new SDIs, the SDIs from the June 2019 IEP stayed the same. (S-8, NT pp.416-423).

53. On November 10, 2019, the LEA after reviewing six different options, provided the Parent with a NOREP, proposing to implement the November 2019 IEP, and place the Student in the same Supplemental Learning Support class, with the same amount of Speech and Language Support, Hearing Support, along with the new services of PCA services and the SDIs. (S-10, NT pp.).
54. On November 12, 2019, the LEA provided the Parents with Prior Written Notice (PWN) of its intent to complete the Assistive Technology evaluation. The Mother rejected the proposed action, refused to consent to the new evaluation, checked the box requesting a due process hearing and returned the form on November 24, 2019. (S-9, NT pp.416-425).
55. On November 20, 2019, the Mother returned a different NOREP, rejecting the November 2019 IEP, along with the recommendation that the Student continue to receive the same amount of time in Learning Support, Speech and Language Support, Hearing Support, and the 600 minutes a week of PCA services. The Mother's stated that the Student's test data, from the IEE and the school records, indicated a lack of progress. The Mother also checked the box indicating that she would file a request for a due process hearing. (S-10 NT pp.416-425).
56. The NOREP/PWN returned by the Parent to the LEA contained the model Pennsylvania Department of Education (P.D.E.) NOREP/PWN language which reads as follows:

PARENTAL CONSENT: Directions for  
Parent/Guardian/Surrogate: Please check one of the  
options, sign this form, and return it within 10

calendar days. In circumstances when this form is NOT completed, and parent consent is NOT required, the school will proceed as proposed after 10 calendar days.

- I request an informal meeting with school personnel to discuss this recommendation.
- I approve this action/recommendation.
- I do not approve this action/recommendation.

\* My reason for disapproval is:

I request (Contact the Office for Dispute Resolution at 800-222-3353 for information on Mediation and Due Process Hearing):

- Mediation
- Due Process Hearing

\*\*\*Except for placement in an [IAES] . . . if you do not approve the action/recommendation, your child will remain in the current program/placement only if you request a due process hearing or mediation through the Office for Dispute Resolution. If you do not request Due Process or Mediation through the Office for Dispute Resolution, the LEA will implement the action/recommendation. (Emphasis in original). (S-10).

57. On December 12, 2019, the LEA, after receiving notice that the Student had been referred for a Community Based Work Assessment, issued a Permission to Reevaluate (PTRE). The PTRE proposed an evaluation of the Student's strengths, areas of improvement, response to the work environment, transportation options. On December 17, 2019, the Mother returned the form and refused to consent the reevaluation and requested a due process hearing. (S-11).

58. Unlike the NOREP, the model PTRE form states as follows:

**PARENTAL CONSENT FOR A SPECIAL EDUCATION REEVALUATION**

Upon receipt of parental consent, an evaluation team will conduct the additional assessments and evaluations. As the parent(s), you are a member of the evaluation team and will be included in the reevaluation process and receive a copy of the Reevaluation Report. The reevaluation procedures do not require a meeting prior to receipt of the Reevaluation Report.

Consent must be requested before the evaluation team can begin the reevaluation. However, please be aware that after reasonable attempts, *if the LEA has not received a response from you, the school (LEA) is permitted by law to proceed with the reevaluation.*

The evaluation team will determine whether your child continues to be a child with a disability and the educational needs of your child. The results of the reevaluation will be included in a *Reevaluation Report (RR)*. If your child continues to be eligible for special education, you will be invited to participate in an *Individualized Education Program (IEP)* team meeting. The IEP will outline the special education and related services that will be provided to your child.

### **TIMELINE FOR A SPECIAL EDUCATION REEVALUATION**

The *Reevaluation Report* must be completed within 60 calendar days from the date of the school's (LEA's) receipt of a signed *Prior Written Notice for Reevaluation and Request for Consent form*, excluding summer break. Reevaluations must re-occur every 3 years, or 2 years for students with intellectual disability, from the date of the *Evaluation Report*, *prior Reevaluation Report*, or *Agreement to Waive Reevaluation*.

Please read the enclosed *Procedural Safeguards Notice* that explains your rights, and includes state and local advocacy organizations that are available to help you understand your rights and how the special education process works.

**Keep a copy of this form for your records.**

**DIRECTIONS FOR PARENT/GUARDIAN:** Consent is voluntary for reevaluation. Please consider the following options:

1.  I would like to schedule an informal meeting with school (LEA) personnel to discuss this action.
2.  I give consent to the proposed reevaluation.

—



3.  I do not give consent to the proposed reevaluation.\*\*\*

\*\*\*If you selected option 3, you may request an informal meeting with school (LEA) personnel, mediation or a due process hearing.

I would like to request:

- Informal Meeting with School (LEA) Personnel
- Mediation\*\*
- Due Process Hearing\*\*

\*\*To initiate mediation or a due process hearing, as the parent you must submit your request to the Office for Dispute Resolution (ODR). To learn more about this process, contact the Special Education ConsultLine at 800-879-2301 or visit the ODR website at [www.odr-pa.org](http://www.odr-pa.org).

I object to the proposed reevaluation and my reason is (not required):

Sign here

\_\_\_\_\_  
Parent/Guardian/Surrogate Signature      Date (mm/dd/yy)      Daytime Phone"  
(S-11).

59. On or about December 17, 2019, the Mother returned the PTRE, refused consent and checked the box indicating a desire to have a due process hearing. (S-11).

60. On January 24, 2020, the LEA sent the Mother an Invitation to Participate in an IEP Conference on January 31, 2020. The Mother returned the form on January 25, 2020, indicating she would attend an IEP conference provided that the meeting occurs on May 24, 2020. (S-19). The purported

reason for the delay in the meeting was the Mother was securing updated third party evaluations. (S-##22-24).

61. In February 2020, after a series of emails with the LEA, the Mother informed the LEA that she was not in agreement in allowing the LEA to implement various types of interventions and supports listed in the November 2019 IEP. In particular, the Mother told the LEA the Student should not receive the following SDIs, (1) assistive technology in the form text to speech reading software, 600 minutes a week of PCA supports each week, IXL math intervention program, and reading horizons intervention program. (S-#33-35).

62. By late February 2020 and into early March 2020, the Parties' positions hardened with the LEA taking the position that the November 2019 IEP was the pendent IEP, while the Mother took the position that the June 2019 IEP was the pendent IEP. Sometime in late February 2020, the Mother emailed the LEA stating that the PCA and IEP supports, like text to speech, the PCA presences in the online breakout rooms, the ongoing progress monitoring, the XL math and the reading interventions were intimidating the Student. The Mother also informed the LEA that the school work and the school staff were causing the Student undue stress. The Mother stated that she believed that the LEA and the teacher's actions in implementing the contested IEP/interventions were retaliatory. The LEA reissued the NOREP, noting the Mother's input and reoffered the PCA and progress monitoring supports. (S-35, S-36). Like before, the Mother rejected the services, listed in the NOREP, requested a due process hearing and stated that the Student's medical concerns and

the progress monitoring were part of the due process hearing. (S-37). After that, the LEA did not progress monitor the Student's performance or implement the rejected SDIs. (S-37, Parent Supplemental Exhibit # 14, NT pp.472-475).

63. On March 5, 2020, the Mother made a "Right to Know" request asking about the number of students in the Student's classes. the LEA granted the Mother's Right to Know request and informed her about class size numbers in each of the Student's classes. (S-38).

64. On or about March 6, 2020, the LEA granted the Mother's request to add additional medical information about the Student's anxiety/stress. The LEA added the Mother's input that in December 2019, the Student saw a doctor in the emergency room of a local hospital. The Mother provided the LEA with a doctor's note stating that the Student was diagnosed with Student with premature ventricular contractions. The Mother also provided the LEA with a second doctor's note stating that on February 19, 2020, the Student was diagnosed with an irregular heart rhythm. The note stated that the Student showed symptoms that indicate "unusual physical or emotional stress." (S-39 p.16).

### **THE FILING DATE OF THE DUE PROCESS COMPLAINT**

65. The Mother signed the November 2019 NOREP, requesting a due process hearing, on November 20, 2019. The LEA received the NOREP on November 21, 2019. (S-10).

66. The Mother filed her due process Complaint with the Office of Dispute Resolution (ODR) on Monday, December 16, 2019. The ODR intake information states as follows "From: contact@odr-

pa.org To: Office for Dispute Resolution Subject: A Due Process Complaint Notice has been submitted Date: Monday, December 16, 2019, 12:36:13 PM A new Due Process Complaint has been submitted. (<http://odr-pa.org/due-proces> (REDACTED TO PROTECT PRIVACY @yahoo.com): If you require special accommodations to participate in the due process hearing, you must notify the LEA (ODR Filing and Time Stamped Due Process Complaint).” (ODR Records, December 16, 2020).

67. After the Mother filed the due process complaint, the LEA decided to continue the November 2019 IEP until the Mother signed and returned a NOREP, discontinuing the progressing monitoring, the PCA, the text-to-speech software and the reading interventions. (S-30, NT pp.431-439).

### **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 US 49 (2005), the court held that the burden of persuasion is on the party that requests relief; in this case, the Parent. 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 regarding the “stay-put” dispute, and the denial of a FAPE. 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.<sup>4</sup> 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 perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student's program. While I find the Mother's testimony credible, I also find the testimony lacked sufficient supporting facts to fully advance her complete theory of the alleged violations and the requested relief.<sup>5</sup> Each witness, including the Parent, demonstrated detailed knowledge about the Student's disability, circumstances and needs. Although subtle differences between the June 2019 and the November 2019 IEP exists, the testimony is preponderant that the Student's overall program, placement, strengths,

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<sup>4</sup> *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).

<sup>5</sup> 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 the student's needs, individual circumstance and progress).

weaknesses, needs, goal statements, and the SDIs remained virtually unchanged.<sup>6</sup> Therefore, for all of the following reasons, I now find the testimony of the school staff to be persuasive, clear and cogent on the material facts in dispute. Accordingly, I also 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 of both parties otherwise needed to make an impartial decision.

### **IDEA FAPE Standards**

The IDEA and state and federal regulations obligate local education agencies (LEAs/districts) to provide a FAPE to children who are eligible for special education. 20 U.S.C. §1412. IDEA also requires that the special education services provided to qualifying students afford students with “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017). This progress is achieved “through the development of an individualized education program (“IEP”) for each child with a disability.” *Id.* The IEP is crafted annually by a team that includes a representative of the local educational agency, the child’s teacher and parents, and, in appropriate cases, the child. 20 U.S.C. § 1414(a)(5).

IDEA violations may be procedural or substantive. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 US 176 (1982), the US Supreme Court held that the IDEA’s substantive requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction,

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<sup>6</sup> It is a well settled practice that a finding fact based upon generally uncorroborated unobjected statements, cannot satisfy the 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).

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. NE*, 172 F.3d 238, 247 (3d Cir. 1999). Simply stated 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. The court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S. Ct. 988, 999. The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The IDEA 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.

The determination of meaningful benefit is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The court then 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. *Dunn v. Downingtown Area Sch. Dist.* 904 F.3d 248 (3d Cir. 2018).

It is also possible for the school district/LEA to deny a FAPE by failing to comply with the IDEA's extensive and carefully drafted procedural safeguards. *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010) "While some procedural violations can be harmless, procedural violations that substantially interfere with the parents' opportunity to participate in the IEP formulation process, result in the loss of educational opportunity, or actually causes a deprivation of educational benefits 'clearly result in the denial of a [free appropriate public education.]" *Amanda J. ex. rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001)). Second, a substantive violation occurs when a school district drafts an IEP "that is not reasonably calculated to enable the child to receive educational benefits." *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

### **THE IDEA TWO YEAR STATUTE OF LIMITATIONS**

The IDEA contains two interlocking provisions detailing the time frame, the elements of a due process complaint and what parties must do to request a due process hearing. According to 20 U.S.C. §1415 (b)(6)(B), the due process complaint must set forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. Later at 20 U.S.C. §1415 (f)(3)(C) IDEA establishes a filing deadline to request a due process hearing. 20 U.S.C. §1415 (f)(3)(C) requires that parents have the same two years from the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint to request a hearing. *See GL v. Ligonier Valley Sch. Dist. Auth.*, 66 IDELR 91 (3d Cir. 2015); 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e). Practically speaking, the filing of the due process complaint notice triggers the stay-put provision and tolls the statute of limitations. *Id*



The IDEA filing deadline permits parents to request a hearing "in such time as the State law allows," "if the State has an explicit time limitation for requesting such a hearing." 20 U.S.C. § 1415(f)(3)(C).<sup>7</sup> Pennsylvania has not yet passed a specific statute or regulation with a shorter time frame to file a due process complaint notice. Instead, Pennsylvania adopted the IDEA two-year filing deadline in its entirety. In *DK v. Abington Sch. Dist.*, 696 F.3d 233, 244 & n.2 (3d Cir. 2012), the court held that Pennsylvania follows the IDEA 2-year filing deadline. See, 22 Pa. Code § 14.102(a)(2)(xxix)-(xxx) (wherein Pennsylvania incorporates by reference the two (2) year filing requirements of 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. § 300.511(e); 20 U.S.C. §1415 (b)(6)(B); 34 C.F.R. §300.507(a)(2), and 22 PA, Code 711.3 Incorporation of IDEA Regulations.

#### **THE "STAY PUT" "THEN-CURRENT PLACEMENT" RULE**

The IDEA expressly provides that "during the pendency of any proceedings conducted under this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child [.]" 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a)(emphasis added). This language is "unequivocal" and is "an absolute rule in favor of the status quo." *Drinker v. Colonial School District*, 78 F.3d 859, 864 (3d Cir. 1996)(citations omitted). The stay-put protective purpose is often invoked by a child's parents to maintain a placement where the parents disagree with a change proposed by the school district. *MR v.*

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<sup>7</sup> See also, Comments to IDEA Regulation, 71 Fed. Reg. 46,697 (2006) "A State choosing to adopt a time limit for requesting a hearing, other than the two year time limit in the Act, must comply with the public participation requirements in Sec. §300.165 and section 612(a)(19) of the Act, which require that prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to such policies and procedures), the State must ensure that there are public hearings, adequate notice of the hearings, and an opportunity for public comment. However, if a State already has an explicit time limit in statute or regulation, and has met the requirements in Sec. 300.165 and section 612(a)(19) of the Act in establishing that requirement, new public hearings and public comment periods are not required."

*Ridley School District*, 744 F.3d 112, 124 (3d Cir. 2014) (quoting *Susquenita School District v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996)).

As courts have recognized, often “[t]he relevant inquiry ... becomes the identification of the ‘then-current educational placement.’” *Drinker, supra*, at 865 (citation omitted); See also *Susquenita, supra*. The Third Circuit has explained that “the dispositive factor in deciding a child’s ‘current educational placement’ should be the Individualized Education Program ... actually functioning when ‘stay-put’ is invoked.” *Drinker, supra*, at 867 (citations omitted). In other words, the critical question is what is “the operative placement actually functioning at the time the dispute first arises.” *Id.* (quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-26 (6th Cir. 1990) (emphasis added). “The operative placement is [] determined by ... the date the dispute between the parents and the school district ‘first arises’ and proceedings conducted pursuant to the IDEA begin.” *MR, supra*, at 124 (emphasis added).

### **THE CHARTER SCHOOL 10-DAY TO IMPLEMENT THE IEP REGULATION**

Once the IEP is completed, the applicable charter school regulations require as follows; “The IEP of each student shall be implemented as soon as possible but no later than ten (10) school days after its completion.” 22 PA Code 22 PA Code 711.41(c). Absent filing of a due process complaint the word “shall” places an affirmative duty on the LEA to implement the proposed IEP absent the filing of a due process complaint or the removal of the student from IDEA protections.

### **PRIOR WRITTEN NOTICE**

Generally speaking, a legal notice requirement is fairly self-explanatory: one party, here the LEA, is legally required to provide the parent with certain information. In the context of the IDEA, the LEA must provide prior written notice (PWN) to parents of children with disabilities in certain circumstances when the LEA proposes to take action. The IDEA has two

interrelated notice requirements, (1) prior written notice and (2) notice of procedural safeguards 34 C.F.R. §300.503 (a); and 34 C.F.R. §300.504 (a). An LEA must provide parents with prior written notice (PWN) whenever it proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." 34 C.F.R. §300.503 (a)(1) through 34 C.F.R. §300.503 (a)(2). PWN must be sent "a reasonable time" before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. 34 C.F.R. §300.503 (a).

In Pennsylvania, the Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) form, functions as the state-approved model PWN form. The NOREP/PWN states that parents have 10-calendar days to review and return the NOREP/PWN to the LEA.<sup>8</sup> The Office of Special Education Programs (OSEP) explained in *Letter to Chandler*, 59 IDELR 110 (OSEP 2012), that PWN must be provided so that parents have enough time to fully consider the change and respond to the action before it is implemented. PWN must be sent after the team decision is made to propose or refuse a change, not before the team meeting. 71 Fed. Reg. 46,691 (2006).<sup>9</sup>

### **COMPENSATORY EDUCATION AS APPROPRIATE RELIEF**

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<sup>8</sup> Pennsylvania Notice of Recommended Education Placement/Prior Written Notice <http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=5463aad5150ba00f2f8b457b>

<sup>9</sup> Prior written notice must include the following: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action. (4) a statement that the parents have protection under Part B's procedural safeguards and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of Part B; (6) a description of other options that the IEP team considered and the reasons why those options were rejected; and, (7) a description of other factors relevant to the district's proposal or refusal. 34 C.F.R. §300.503 (b).

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.<sup>10</sup> Compensatory education should place the child in the position they would have been in but for the IDEA violation.<sup>11</sup> Compensatory education accrues from the point that the school district either knows or should have known of the injury to the child.<sup>12</sup> 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.

## **DISCUSSION AND CONCLUSION OF LAW**

### **OVERVIEW OF THE STUDENT'S STAY PUT AND FAPE CLAIMS**

The Parent contends that the LEA violated the "stay put" rule when, after waiting ten days and not yet having received the due process complaint, the LEA implemented the November 2019 IEP. Relying on the two-year filing deadline, the Parent argues the Student suffered a substantive FAPE violation when the LEA disregarded "stay-put" and proceeded to implement the November 2019 IEP. The Mother next contends the LEA's actions interfered with the Parent's procedural due process right to participate in the IEP process. Essentially, the Mother argues that the failure to maintain the stay-put placement/program is a standalone substantive IDEA violation that necessitates a finding of a denial of a FAPE and appropriate relief. Finally, she argues, putting aside the "stay put" irregularities, pointing to the progress monitoring and the IEE testing data, the Mother contends that the

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<sup>10</sup> *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)).

<sup>11</sup> *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." *Id.*

<sup>12</sup> *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).

June and November 2019 IEPs as drafted, implemented and progressed monitored were substantively flawed. Again assuming *arguendo* a standalone substantive violation, she contends the Student was denied a FAPE. To remedy these alleged violations, the Mother seeks all other appropriate relief.

The LEA, on the other hand, the filing of the due process complaint, some 25 or more days later on December 16, 2019, not the return of the NOREP triggered "stay put" event. Supporting this argument, the LEA points to the language on the PDE NOREP form language and insists, if a "stay put" violation occurred, under these unique facts, the hearing officer could find the violation was a harmless error. In support of its "stay-put" arguments the LEA points to *HW, et. al., v. Mechanicsburg Area School District*, 1:18-cv-00147-JEJ (M.D.Pa. March 20, 2018) an unpublished "stay-put" memorandum opinion and the due process decision in *BL v. Owen J. Roberts SD*, ODR No. 18443-16-17-AS (January 9, 2017) as persuasive authority.

As for the alleged substantive denial of FAPE claims associated with the June 2019 and/or November 2019 IEPs, the LEA avers that at all times relevant, each IEP was reasonably calculated to provide a meaningful benefit.

After analyzing the facts and applying the law, I now agree with the LEA; the record lacks preponderant proof that the LEA actions or inactions are synonymous with either a procedural or substantive denial of a FAPE.

### **THE SUBSTANTIVE STAY-PUT CLAIM AS STATED IS MISPLACED**

The Mother's nuanced statute of limitations and "stay put" arguments do not override the plain language in the IDEA that the filing of due process complaint, not the NOREP, triggers "stay-put."

In this case, the parties ask that I consider one question of law -- whether checking the box on a NOREP requesting a due process hearing invokes the IDEA's stay-put injunction clause at 20 U.S.C. § 1415(j) or is the filing of the due process complaint the operative event that triggers stay-put. Under these facts, I now find the filing of the due process complaint, not the NOREP is the operative "stay put" trigger. Let me explain.

The Mother's argument fails to factor in the applicable rules of statutory construction that all provisions of the statute should be read together in context. *GL v. Ligonier Valley Sch. Dist. Auth.*, 66 IDELR 91 (3d Cir. 2015).

The *pro se* Mother's argument overlooks when certain IDEA substantive and procedural due process protections come into being and when they legally attach to form a substantive or procedural right.

The status of limitations at 20 U.S.C. §1415(b)(6) and 20 U.S.C. §1415(f)(3)(c) sets the outer limits when a due process complaint can be filed. There is no doubt that the Mother's due process complaint was timely filed. That undisputed fact, however, does not end the analysis as suggested. 20 U.S.C. §1415(b)(6) and (7) provides specific guidance on the essential elements of the due process complaint, service of and the filing of a due process complaint. The record is also clear that the complaint met the minimum pleading, filing and service requirements at 20 U.S.C. §1415(b)(6) and (7). The Mother's argument falls short, however, as she fails to acknowledge when the "stay-put" protections at 20 U.S.C. §1415(j) attaches. 20 U.S.C. §1415(j) provides that once the IDEA due process complaint is filed, under 20 U.S.C. §1415(b)(6)-(7), the Student's pendency rights attach, thereby preserving the *status quo* "then-current" program/placement. The IDEA's mission to provide a timely FAPE would be lost in the shuffle if the LEA once on notice of a parent's intent to file a due process complaint, in a NOREP, waited two years for the parent to file the complaint. Moreover, a delay in implementing an otherwise completed yet

objected to IEP of more than ten (10) days places the LEA in noncompliance with the mandatory "shall" language at 22 PA. Code 711.41(c).<sup>13</sup>

The applicable IDEA due process regulations further confirm this plain reading of the Act. Informal complaints or statements of intent to proceed about the student's identification, evaluation, placement, or services will not trigger "stay-put" protections. See 34 C.F.R. § 300.508 and § 300.514 (filing of a request for a due process hearing invokes the stay-put). Section 300.507 details the essential elements of a complaint, explains how and where to file a due process complaint, how to file a motion to challenge the sufficiency of a complaint. It also describes how the filing of the complaint then triggers the procedures involved in a formal due process hearing and operation of pendency. See 34 C.F.R. §300.518 (a) (noting that stay-put protections apply during any administrative or judicial proceeding arising out of the filing of a due process complaint). While pendency often arises when the LEA unilaterally changes a placement and program, upon the filing of a complaint, like in *H.W., et. al., v. Mechanicsburg Area School District*, 1:18-cv-00147-JEJ (M.D. Pa. March 20, 2018). The facts here differ considerably from those in *H.W.* In *H.W.*, the LEA, knew that the parent's counsel needed the weekend to complete the complaint. When the parent's counsel filed the due process complaint on the eleventh day, the LEA assumed the risk when they ignored the filing and changed the "then-current" *status quo*. Moreover, unlike here, the Mechanicsburg LEA redid the goal statements in the Student's "then-current" IEP. Nothing like that happened here.

Instead, here the Mother returned two different NOREPs in November, rejecting the LEA's FAPE offer and request to evaluate. Although she stated

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<sup>13</sup> See, e.g., *Dep't of Transp. v. McCafferty*, 563 Pa. 146, 758 A.2d 1155, 1165 n.13 (Pa. 2000) (the term "shall" is mandatory for statutory construction purposes when the statute is otherwise unambiguous). See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012) ("The traditional, commonly repeated rule is that shall is mandatory and *may* is permissive.");

her intent to proceed to a hearing in both NOREPs, she filed the due process Complaint in December, some 25 days later. In the interim, the LEA relying on the PDE form language as a reasonable time to proceed and the mandatory “shall” language at 22 PA Code 711.41(c), implemented the same basic individualized program, that was otherwise in effect from June 2019 through November 2019. Simply stated, nothing substantive changed. Let me be clear, I reach this result knowing that the Student’s time in the Learning Support classroom, the annual goals, the time in regular education classroom, the progress monitoring schedule, the transition services and related services all stayed the same, but for the addition of several SDIs and the 600 minutes of PCA support. Hence, regardless of which IEP the District implemented, June or November the Student did not suffer either a loss of services or a change in the “then-current” IEP. Therefore, based on these unique facts, the Student’s “stay put” argument is misplaced.<sup>14</sup> *AB Great Valley School District*, ODR #18698 / 16-17-KE (PA SEA 2017) (stay put is triggered on the filing of the complaint). See also, *Troy Area School District*, 102 LRP 11159 (PA SEA December 13, 2000). Accordingly, the LEA, after waiting ten days, relying on the language in the PDE model form and bound by the mandatory language at 22 PA Code 711.41(c), was, in this particular instance, required to implement the November 2019 IEP.

Understanding the delicate balance of the rights at stake, and assuming *arguendo*, that the LEA’s actions did somehow violate the “stay-put” rule, I now find the record is preponderant that the Parent failed to produce preponderant proof that the implementation of the November 2019 IEP, caused the Student to suffer a loss of a FAPE, a change in placement or

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<sup>14</sup> Traditionally, “stay-put” arises in disputes revolving around a reduction in services, or a change in the “last agreed upon” location/placement or the elimination of a related service, modification or accommodation. This hearing officer could not find any case law applying “stay-put” when the LEA offered additional SDIs and individualized services and the Student stayed in the last agreed upon placement. Therefore, I need not decide and do not decide, if or how “stay-put” applies when the LEA’s action is to provide more rather than less specially-designed instruction. Also, I need not decide if the ten (10) day language in the NOREP is an impermissible filing deadline.



interfered with the Mother's procedural or substantive rights. Therefore, the "stay-put" claim is denied. The "stay-put" analysis, however, does not end the inquiry, I must still determine if each IEP offered a FAPE.

### **THE TWO IEPS AND THE PROVISION OF A FAPE**

The Mother next argues that when you review the Student's testing profile, over time, the Student has not made any progress. After studying the complete record and both Parties' exhibits, this argument is now rejected. The IEE examiner used 14 different nationally recognized assessment tools to gauge the Student's overall cognitive ability, achievement, behavior, social, emotional, perceptual needs, strengths and weaknesses. Granted, while several of the Student's sub-test scores, across the measures, fluctuated up and down the Student's overall ability and achievement standard scores remained relatively steady. The examiner explained that despite the variations in the sub-test scores or, for that matter, changes in the overall scores, none of the fluctuations in the scores were statically significant at the 95<sup>th</sup> percentile level of confidence. For example, the Student's overall Full-Scale IQ score remained virtually unchanged when compared to the 2012 scores. Likewise, the examiner explained that the Student's overall achievement, over time, was otherwise consistent with the Student's overall testing profile. The stability of the scores across time indicates the Student is learning. Regrettably, the Mother did not offer any expert testimony to counter the IEE examiner's conclusions about the Student's cognitive or achievement profile, therefore, this unchallenged fact stands. Furthermore, the record is equally preponderant that the Student's overall achievement scores, over time, are consistent with the Student's overall ability. Accordingly, based on this record, I now find when the Student's assessment history and progress monitoring are viewed as an integrated whole, the Mother's lack of progress argument fails. See, *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir.

2009) (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’”). This conclusion, however, does not end the analysis as the Mother next claims that the IEPs were flawed. I disagree.

### **THE IEPs WERE CALCULATED TO PROVIDE MEANINGFUL BENEFIT**

Each of the Student’s IEPs included all eight essential IEP elements. First, the IEP included a statement of the Student’s present level of educational performance. The statements of present levels of educational performance considered the Student’s current unique needs/circumstances, established a baseline for the new goals, contributed to the progress monitoring schedule, and incorporated updated parental input/participation throughout the entire IEP process.<sup>15</sup> Second, the IEPs contained a statement of measurable annual educational goals that were linked to the most recent evaluation and the Student’s present levels. Third, the IEPs included an explanation of how the Student’s progress in meeting those goals would be measured and reported to the Parent. Fourth, the IEPs contained a statement of the specific educational and related services to be provided. Fifth, the IEPs contained an explanation of the extent that the Student would be educated in the regular education classroom. Sixth, the IEPs contained a statement of necessary accommodations, modifications and SDIs needed to gauge, support and advance the Student’s overall performance. The IEPs set out the date the services would begin as well as the expected duration, location, and frequency of all related services, including transition supports. Eighth, the IEPs were in effect at the beginning of the school year, the IEPs were

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<sup>15</sup> See, e.g., *Friedman v. Vance*, 24 IDELR 654 (D. Md. 1996); and *Portland Pub. Schs.*, 24 IDELR 1196 (SEA ME 1996). See also *Conemaugh Twp. Sch. Dist.*, 23 IDELR 1233 (SEA PA 1996). See *id.* § 300.350 (requiring States to make a good faith effort to meet the goals stated on the child’s IEP).

updated regularly and the IEPs included necessary Student specific transition services. 20 U.S.C. § 1414(d)(1). Therefore, the IEPs offered a FAPE.

### **THE IEPs INCLUDED PARENTAL PARTICIPATION**

In Pennsylvania, the group responsible for preparing a student's IEP is the IEP team. The Student's IEP team, including the Mother, reviewed the Student's IEP periodically, but not less than annually. At each IEP review, the Parties first discussed and then disagreed over whether the annual goals for the Student were being achieved. The Parties also disagreed about the SDIs, the extent the Student's medical condition was related to school and the use of the PCA. These ongoing disagreements led to multiple IEP revisions to address (1) the Parent's perceived lack of expected progress and the LEA's contrary position about progress in meeting the annual goals described in 34 C.F.R. §300.347(a), and in the general curriculum, (2) the results of the IEE/reevaluation conducted under 34 C.F.R. §300.536; (3) information about the Student provided to, or by, the Parents, as described in 34 C.F.R. §300.533(a)(1), *i.e.*, the medical information; (4) the Student's anticipated needs/circumstances, in reading, writing and math instruction; and (5) other matters like the transition from school to work.

After reviewing the transcripts and rereading the IEPs, I now find, in light of this Student's profile and individual circumstances, that each IEP, when offered, included challenging, ambitious and reasonably calculated goals, related services and support to provide meaningful benefit and significant learning. Accordingly, I now find in favor of the LEA and against the Parent's an appropriate Order follows.

## **ORDER**

**And now**, this 14 day of August 2020, it is hereby **ORDERED** as follows:

1. I now find in favor of the LEA and against the Parent, and the Student on all substantive and/or procedural due process claims for violations of the IDEA's "stay-put" rule, any substantive or procedural due process claims of a denial of FAPE or any other substantive or procedural due process claims that the LEA interfered with the Parent's right to participate in the IEP process are denied.
2. All other claims and defenses are now exhausted.

Date: August 14, 2020

s/ Charles W. Jelley, Esq. LL.M.  
ODR FILE #23134-1920 KE