

*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: 21401-18-19**

**Child's Name:** G.H.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

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

**Date of Decision:** 08/30/2019

## PROCEDURAL HISTORY

The Student<sup>1</sup> is a rising fifth (5<sup>th</sup>) grade soon to be sixth (6<sup>th</sup>) grade school-aged child residing in the District. As a consequence of the instant disagreement, the Student currently attends a private school. At the current time, the Parents are seeking appropriate relief in the form of compensatory education, tuition reimbursement and recovery of costs for a private evaluation. The Parties agree the Student is a person with an “other health impairment” (OHI) within the meaning of the Individuals with Disabilities Education Act (IDEA). The Parties further agree that as a result of the OHI disability, the Student is otherwise eligible to receive a free appropriate public education (FAPE) through an individualized education program (IEP) including specially-designed instruction (SDI) in the least restrictive setting (LRE).<sup>2</sup> While the Parties agree the Student is IDEA eligible, the Parties disagree if the Student should also be identified as a person with a specific learning disability (SLD) and/or a person with a severe emotional disturbance (SED). The Parents also make denial of FAPE claims under Section 504 of the Rehabilitation Act of 1974.<sup>3</sup>

<sup>1</sup> In order to provide confidentiality and privacy, Student’s name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2). 2 20 U.S.C. §§ 1400-1482.

<sup>2</sup> 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 Parent’s Section 504 claims arise under the Section 504 FAPE regulations found at 34 §§ C.F.R. §§ 104.30-36. The applicable Pennsylvania regulations implementing Section 504 are set forth at 22 Pa. Code Chapter 15. References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Due to multiple schedule conflicts the hearing exceeded the typical 75-day timeline. The Parties made multiple requests to extend the Decision Due Date, finding a good cause this hearing officer granted the Parties’ joint requests.

<sup>3</sup> Although the Parents make denial of FAPE claims under the IDEA and Section 504, the essential elements of proof for each denial of FAPE claim, in this particular instance, under both statutes and regulations directly overlap. Therefore, the Parents’ theory of liability under the IDEA and Section 504 for liability purposes and for appropriate equitable relief are *sub silentio* combined as one claim for appropriate relief for each school year at issue, in the Statement of Issues and Findings of Fact set forth herein. Before this hearing officer, the Parents did not make any Section 504 discrimination claims; therefore, this hearing officer will not undertake a traditional discrimination deliberate indifference legal analysis. See, *Blunt v. Lower Merion Sch.*

Believing the Student was not learning, the Parents withdrew the Student from the District and made a unilateral placement at a nearby out of state private school. Prior to the withdrawal, the District made an offer of a free appropriate public education (FAPE). In August 2018, the Parents once again notified the District of their intent to continue the Student's unilateral placement. The Parents contend as a result of multiple procedural and substantive violations, each offer of a FAPE from third grade to the present is not otherwise appropriate. The District at all times argues it complied with all substantive and procedural provisions of the IDEA and/or Section; therefore, the District argues that the Parents' denial of FAPE claims, compensatory education and tuition reimbursement claims must be denied. After reviewing all of the testimonial and non-extrinsic exhibits I now find for the Parents and against the District.<sup>4</sup> A Final Order granting each Party's request for appropriate relief follows.<sup>5</sup>

### ISSUE

1. Whether the District's proposed offer of a free appropriate public education for the 2016-2017 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to an award of compensatory education and/or other appropriate relief?
2. Whether the District's proposed offer of a free appropriate public education for the 2017-2018 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to tuition reimbursement for each school year at issue and/or other appropriate relief?
3. Whether the District's proposed offer of a free appropriate public education for the 2018-2019 school year was appropriate? If the District failed to offer a free appropriate public education is the Student entitled to tuition reimbursement for each school year at issue and/or other appropriate relief?
4. Are Parents entitled to reimbursement for the costs of an independent evaluation?

*Dist.*, 767 F.3d 247, 275 (3d Cir. 2014) (quoting *Ridley Sch. Dist. v. M.R.* 680 F.3d 260, 283 (3d Cir. 2012). See also, *Fry v. Napoleon Community Schools*, 137 S. Ct. 988 (2017). To the extent claims for legal relief exist those claims are otherwise exhausted as this hearing officer cannot grant any relief for said claims.

<sup>4</sup> After carefully considering the entire record, including the testimonial and non-testimonial exhibits, of this hearing in its entirety I now find that I can now draw relevant factual inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issues and relevant law in dispute.

## FINDINGS OF FACT

### History of Medical and Behavioral Circumstance and Diagnoses

1. The Student is currently diagnosed with Specific Learning Disability (“SLD”), Attention Deficit Hyperactivity Disorder (“ADHD”), Unspecified Impulse Control and/or Conduct Disorder, and Anxiety Disorder. In addition to the IDEA specific disabilities, the Student has multiple medical conditions that adversely affect the Student’s education. Specifically, the Student is diagnosed with Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections (“PANS” or “PANDAS”), debilitating migraines, and suffered four (4) concussions in the past two years. (P-1, P- 4 through P-12, P-19 through P-28, P-32). The PANS and the PANDAS health conditions substantially limit the Student’s major life function of learning, concentration and thinking (N.T. *passim*).
2. PANS/PANDAS is an autoimmune response that brings on acute or sudden changes in behavior or functioning subsequent to a streptococcal infection or other infection (N.T. 640-641, 670, 671).<sup>4</sup> An acute onset of PANS/PANDAS can cause involuntary motor tics, symptoms of Obsessive-Compulsive Disorder (“OCD”), separation anxiety, general anxiety, symptoms of Oppositional Defiant Disorder (“ODD”), changes in handwriting and math skills, and otherwise exacerbate symptoms of ADHD, among many others (P-5; N.T. at 640-641).
3. The primary difference between PANS and PANDAS is the latter is associated with streptococcal infections, while the former is associated with broader spectrum infections. (N.T. at 642). For the past several years, the Student has traveled to a PANS/PANDAS specialist in a nearby state for medical treatment (N.T at 635-640, 646). The specialist is nationally known for her work with persons with PANS/PANDAS (N.T. *passim*). The expert's testimony will be given great weight (N.T. *passim*).
4. PANS/PANDAS is an autoimmune response that brings on acute or sudden changes in behavior or functioning subsequent to a streptococcal infection or other infection. (N.T. 640-641, 670, 671).
5. An acute onset of PANS/PANDAS can cause changes in handwriting and math skills, and symptoms of ADHD (P-5; N.T. p.640-641). An acute onset of PANS/PANDAS will significantly exacerbate preexisting conditions such as Anxiety, Conduct Disorders, and ADHD. Such behavioral changes caused by PANS/PANDAS as a general rule are not

subject to self-regulations or self-control (N.T.pp.671-672).

6. During a PANS/PANDAS flare-up, the intertwined behavioral, social, emotional and attention concerns, behaviors and circumstances associated with the flare can exacerbate the underlying social, emotional and behavioral triggers associated with the Student's other conditions including anxiety, lack of focus, inattentiveness, hyperactivity, tics, anxiety, etc., will be significantly exacerbated and it would be very difficult if not impossible for the Student to control many of the behaviors/reactions (N.T. pp.648-650, 671-672).
7. Seasonal changes can contribute to PANS/PANDAS flares. For example, in winter, students are at higher risk of the viral infections that can trigger a PANS/PANDAS reaction. Similarly, stressors can trigger infections that, in turn, trigger a PANS/PANDAS reaction (N.T. pp.650-651).
8. At all times relevant the Parents have acted consistently with the specific and general medical advice in regard to the interdisciplinary treatments for the Student's medical, educational and overall behavioral health, including, when necessary medication management trials (N.T. at 652).

**Background Kindergarten Through The End Of 2nd Grade  
The 2015-2016 School Year**

9. The Student initially enrolled in the School District for kindergarten at the start of the 2012-2013 school year. At that time, the Student was transitioning from Early Intervention (EI) programming through the Intermediate Unit (IU) to school-age programming through the School District. The School District's initial evaluation of the Student, dated May 21, 2013, identified Student as a student with Autism and emotional disturbance (S-2, p.11; N.T. p.40).
10. In the fall of 2013, Parents unilaterally withdrew the Student from the District and placed Student at catholic school where the Student repeated kindergarten and then attended 1st grade (N.T. pp.233- 34; S-2 p.11).
11. At the start of the following school year, the District initiated and the Parents consented to a reevaluation of the Student. A reevaluation report (RR) was issued on November 13, 2015. The reevaluation included the administration of Wechsler Intelligence Scale for Children, 5<sup>th</sup> Edition (WISC-V), the Wechsler Individual Achievement Test, 3<sup>rd</sup> Edition (WIAT-III), the Behavior Rating Inventory of Executive Functioning (BRIEF), the Behavior Rating System for Children, 2<sup>nd</sup> Edition (BASC-II), the Autism Diagnostic Observation Schedule, 2<sup>nd</sup> Edition (ADOS-2), the

Social Responsiveness Scale, 2<sup>nd</sup> Edition (SRS-2), and the Revised Children's Manifest Anxiety Scale, 2<sup>nd</sup> Edition (RCMAS-2). The initial evaluation also included a Functional Behavior Assessment (FBA) (P-1).

12. On or about August 25, 2015, the District and the Parents met to develop an interim IEP. The interim IEP called for the Student to receive itinerant learning support (LS), direct instruction in social skills through the emotional support (ES) teacher 1 time per week for 30 minutes, and occupational therapy (OT) 1 time per week for 30 minutes, Student further received direct instruction in coping skills and resiliency to help generalize skills across school settings. The core subjects of math and English Language Arts (ELA) assessments in the LS classroom were also included, The SDIs called for the Student to work on test-taking strategies, following directions, self-monitoring and coping skills (S-2).
13. On November 13, 2015, the District issued a RR which included a Functional Behavior Assessment ("FBA") (S-11). The Student continued to be found eligible with Other Health Impairment ("OHI"). The FBA recommended the implementation of a positive behavioral support plan ("PBSP") (S-11 p.42).
14. The results of RR standardized testing revealed that the Student demonstrated average to high average intellectual abilities, obtaining a Full-Scale Intelligence Quotient ("FSIQ") of 112, and mostly average to above-average academic achievement, except for spelling, where Student obtained a below-average score. Many of Student's average scores on the WIAT-III were at the lower end of average and at times somewhat discrepant, meaning the comparative difference between the FSIQ standard scores (SS) and the WIAT-III SS were more than 10 points from the FSIQ (P-1)
15. On the BRIEF, the Student 2<sup>nd</sup>-grade teacher indicted the Student earned clinically significant ratings in Inhibit, Shift, Emotional Control, Behavioral Regulation, Working Memory, Monitor, Metacognition, and the Global Composite Score. Plan/Organize was in the elevated range, and Organization of Materials was in the average range. The special education teacher rated the Student in the elevated range for Inhibit, Behavioral Regulation, and Initiate; and in the clinically significant range for Monitor. (P-1).
16. On the BASC-II, the teachers each rated the Student in the clinically significant or elevated range in most areas including hyperactivity, aggression, conduct problems, depression, somatization, attention

problems, withdrawal, social skills, anger control, emotional self-control, and executive functioning. Many of the Parents' ratings were consistent with one or both of the teachers' ratings (P-1 pp.26-27).

17. The overall results of the ADOS-2 did not meet the threshold necessary for a classification of Autism. However, results of the SRS-2 revealed mild to severe social concerns, and the RCMAS-2 indicated that the Student experienced above-average levels of anxiety (P-1 pp. 27-30).
18. The Student was also observed in the classroom on several occasions as part of the November 2015 RR. During these observations, the observer noted the Student was off-task as much as 47% of the time (P-1 pp.5- 9).
19. On or about December 10, 2015, the District and Parents met to develop an Individualized Education Program ("IEP"). The IEP included two goals related to occupational therapy (fine motor and sensory processing and near and far point text), a goal related to identifying a replacement behavior for inappropriate or negative behaviors, a goal related to problem solving, a goal related to coping strategies, a goal related to completion of tasks, and a goal related to following directions. The December 2015 IEP also included some accommodations and supports under the topic area of specially designed instruction (SDI), occupational therapy (OT) one time per week for 30 minutes, and a Positive Behavior Support Plan (PBSP). Overall, the IEP provided for Itinerant Learning Support (LS), where the Student would receive 30 minutes per week of instruction in social skills and emotional support in a special education classroom. The remainder of the day was spent in the regular education classroom. At no time did the District consider or recommend an assistive technology evaluation as part of the IEP process. (P-2; S-3).
20. Despite the fact that the diagnosis of PANS/PANDAS circumstances can either cause or exacerbate the identified IDEA behaviors of concern, which the PBSP listed as non-compliance, elopement, aggression, inappropriate comments/verbal behavior, and calling out, neither the IEP present levels, the baseline data for the PBSP or the December 2015 PBSP goals mentioned or considered the known medical conditions are possible antecedent triggers to Student's behaviors of concern. The goals and SDI listed in the December PBSP are the same as those listed in the December 2015 IEP (P-3).
21. Given the high frequency of behaviors, the PBSP recommended the use of a token system, with the opportunity to earn a reward after each class period (S-3 at 44; S-42 at 29; N.T. at 804-05; 845). The Student

- completed a behavior chart in order to self-monitor and begin to learn how to recognize how to record the antecedent behaviors and when necessary to utilize coping strategies (N.T. p.806-07; S-3 p.31, p.43.
22. The December 2015 IEP provided for board-certified behavior analyst (“BCBA”) support in the development, and implementation of the PBSP (N.T. p.792).
  23. On December 22, 2015, Student was disciplined for [aggression towards] another student on multiple occasions (N.T. p. 243-44). Before any formal disciplinary actions were taken, the principal consulted with the Supervisor of Special Education, the Student’s teachers and guidance counselor (N.T. pp.772- 74).
  24. When the Principal and Parents spoke in regard to the disciplinary action, Parents did not report that Student was experiencing any PANS/PANDAS related reactions or illnesses during this time (N.T p.778).
  25. On February 12, 2016, the Student’s IEP team convened to revise the December 1, 2015. IEP (S-5 at 12. It was reported that since the implementation of the PBSP Student had shown a decrease in physical aggressions and verbal outbursts (NT *passim*).
  26. On February 18, 2016, Parents signed the proposed Notice of Recommended Educational Placement (NOREP). After the initiation of the disciplinary action on December 22, 2015, there were no further incidences of aggression (N.T. pp.246-48, N.T. pp.794-95).

### **The Student’s PANS/PANDAS and Anxiety Interferes with School**

27. On or about May 31, 2016, the Parents reached out to the District to discuss concerns over the Student’s programming and whether the Student would continue in the public school setting for the 3<sup>rd</sup> grade (P-40, at 10).
28. On August 25, 2016, prior to the start of the school year, the Parents sent another email to the District, this time indicating their intent to withdraw the Student from the District and inquiring into any additional steps the Parents needed to take. (P-40, at 13-14). In response to the Parents’ August email, the District requested to meet with the Parents to discuss their concerns (P-45).
29. On August 31, 2016, the Parties participated in an IEP meeting to discuss the Parents’ concerns about the Student’s medical condition and the proposed program with the District. During the meeting, the Parents mentioned that although they would like the Student to remain in the

School District, the Student was displaying and expressing significant anxiety regarding a return. Intertwined with the anxiety flare the Student's health-related needs comorbid with PANS/PANDAS and other diagnoses were also flaring. The Parents told the District they would enroll the Student in the Pennsylvania Leadership Charter School (PALCS). During the meeting the District offered and the Parents consented to an evaluation by the local intermediate unit's (IU) ATTEND Program. The District continued to offer the same itinerant level program (P-45, p.9; N.T. pp.7-58).

30. The then-current IEP included six annual goals, targeting sensory needs, social skills, and academics. The IEP also included 25 SDIs, and the related service of occupational therapy (P-2). The IEP called for the Student to receive itinerant learning support services for upwards of 20% of the school day. For all practical purposes, the Student was scheduled to be with the special education teacher for more than one hour each day (P-2). The IEP included a stand-alone PBSP targeting, aggression, elopement, calling out and making inappropriate comments. The PBSP identified two specific behavioral goals and included 25 SDIs and recommended the use of a token economy to control the behaviors interfering with learning (P-2).
31. The Mother reported the Student was experiencing higher than anticipated levels of anxiety about returning to school and that she recently took Student off Zoloft, which was prescribed to manage the Student's anxiety. At the August 31, 2016 IEP meeting, the District offered to conduct a comprehensive assessment including a home FBA through the ATTEND program. The Parents signed consents for the District to be permitted to contact Student's outside specialist (S- 8 at 11).
32. Also at the August 31, 2016 IEP meeting, the District discussed the option of Student participating in the District cyber program part-time, and attending school part-time, in order to receive special education services, however, the District felt it was most appropriate for Student to attend the District full time and issued a NOREP to that effect (S-8).
33. On September 5, 2016, the District issued an invitation to an IEP meeting for September 8, 2016 (S-10 p.2).
34. On September 9, 2016, Parents returned the August 31, 2016 NOREP indicating their disagreement with the District's offer for full-time programming in the District and included that they were interested in Student participating in the District's cyber program (S-10).

35. Later on September 9, 2016, the IEP team, including the Parents, met again to discuss the Student's participation in the School District's cyber program. The Parties ultimately agreed that the Student would attend the District's cyber program for regular education classes, and would also attend the local elementary school. The proposed IEP called for the Student to attend school two times per week for 30 minutes of instruction in social skills. The IEP called for the Student to receive emotional support from a special education teacher in either a one-to-one or very small group special education setting, and attend lunch and recess on those same days. Finally, the IEP called for the Student to receive individual occupational therapy (OT) one time per week for 30 minutes (P-45, at 7-8).
36. The September 9, 2016 IEP meeting was held to address the fact that Parents had yet to withdraw Student from the District and had not yet enrolled Student in PALCS (S-10 at 1).
37. After the September 9, 2019 meeting, the District issued a PTRE for the ATTEND evaluation (S-10 at 11).
38. The Student's online cyber courses included Language Arts, Math, Science and Social Studies. S-10 at 11.
39. On September 13, 2016, Parents were issued a NOREP; however, they never signed and returned it. (NT *passim*).
40. On September 16, 2016, an IEP revision meeting was held to add an SDI for live lessons in Student's cyber courses (S-12 at 7).
41. On September 30, 2016, the IEP team held a revision meeting. At the meeting, the team discussed a recess plan to help Student when Student returned to the District for recess (S-14 p.10).
42. On September 30, 2016, the District issued a NOREP and the Parents approved the NOREP, signed and returned it on October 18, 2016 (S-15 p.3).

#### **THE IU SCHOOL ATTEND EVALUATION**

43. When the Student's attendance became erratic, the District proposed and the Parents consented to an evaluation by the IU ATTEND program. The evaluation by IU/ATTEND consisted of a psychological evaluation and a functional behavioral assessment (FBA). The psychological evaluation consisted of a review of the then existing records, a clinical interview with the Student and the Parents, teacher input, "testing" observation, and behavior rating scales. The Student and

the Parents traveled to the IU for the clinical interview and completion of rating scales. The ATTEND evaluator noted the Student was “very hyperactive” throughout the entire time, and that it was “challenging” to direct the Student to pay attention to the examiner and answer questions. Parent, Student, and teacher ratings all continued to reveal at-risk/elevated and clinically significant scores in many areas including hyperactivity, aggression, conduct problems, externalizing problems, anxiety, attention problems, school problems, and social skills, to name a few. Additional rating scales also indicated concerns with depression and anxiety. While the psychological report does include some recommendations for school, as it relates to attendance, it notes that the primary reason is the Parents’ concern that the District is not able to provide appropriate supports, (S-17, pp.1- 12).

44. The FBA conducted by IU-ATTEND evaluation consisted of a Parent interview, a single home observation, and a single school observation during lunch/recess and social skills. Again, while the functional behavioral assessment (FBA) does include some recommendations for school, as it relates to attendance, it notes that the primary reason is the Parents’ concern that the School District is not able to provide appropriate supports and offers no recommendations other than to send Student to school (S-17, pp.13-18).
45. Although the testing was later used to design the Student’s program the District did not issue prior written notice, schedule a team meeting to review the existing data prior to the testing or issue an evaluation report (N.T. *passim*).
46. Throughout 3<sup>rd</sup> grade, Student continued to experience significant social-emotional and behavioral difficulties that were not appropriately addressed /programmed for by the School District (N.T. p.53, pp.57-58. pp.71-73).
47. On or about December 13, 2016, the District and Parents met for the Student’s annual IEP meeting. With the exception of a modified social skills goal related to perspective-taking, the remaining social-emotional goals were present in the 2<sup>nd</sup> grade IEP the IEP was nearly identical. The SDIs, Positive Behavior Support Plan (PBSP), and related service support of occupational therapy (OT) also remained virtually unchanged, with the exception of some minor updates to the PBSP SDIs (compare P-2, and P-30). Five of the IEP goals included baselines, while one goal called for baseline data to be collected during the first two weeks of school. Each goal included a date certain when the Parents

would receive progress monitoring data (P-30).

48. The IEP team met again on March 7, 2017, and April 26, 2017, minimal updates were made to the present educational levels while in April 2017, the District updated the SDIs (P-30, p.). The special education teacher for 3<sup>rd</sup> grade, noted during testimony other than the addition of social studies and math to the schedule in March of 2017, none of the IEP revisions during 3<sup>rd</sup> grade resulted in any substantive change in how the Student was otherwise instructed, redirected, reinforced or otherwise supported (N.T. pp.212-220).
49. Although Student was scheduled to attend school twice per week for lunch, recess, and social skills, and once per week for OT, due to PANS/PANDAS flare-ups the Student missed a significant amount of time through 3<sup>rd</sup> grade (N.T. pp.63-64, 73).
27. As a consequence of the Student's progress reports, on January 18, 2017, the Student was discharged from physical therapy supports (S-28 p.1).
28. In mid-March 2017, the District offered and the Parents agreed to attempt to slowly increase the Student's time in school by including some participation in social studies and math. However, due to PANS/PANDAS flares, the Student continued to miss a significant amount of school. As such, progress monitoring data for 3<sup>rd</sup>-grade small group 30 minute social skills instruction is limited in both frequency, quantity and quality of data points (N.T. pp.196-200, p.316).
29. On March 7, 2017, Student's IEP team convened in order to revise the IEP. The Parents shared a report from the Student's PANDA/PANS specialist with suggested IEP recommendations were reviewed (S-22; N.T. *passim*).
30. The March 14, 2017, proposal initially suggested that the Student would follow a shortened schedule but thereafter return to school 5 days per week as follows:
  - 11:55 to 12:40 lunch and recess
  - 12:40-1:25 Content (1 day per week OT for 30 minutes, 2 times per week social skills, LS room when [the Student] did not have OT or Speech for a 15-minute break, then the Student would join content)
  - 1:25 at 2:40 Math (S-22 pp.7-8).

31. On March 7, 2017, the District issued a NOREP to the Parents proposing itinerant learning support service for upwards of 20% of the school day. The Parents never signed and returned the NOREP (S-22).
32. On April 18, 2017, the District received a letter authored by a certified registered nurse practitioner (CRNP) associated with the Student treating physicians group at the out of state medical facility. The letter reported that Student had suffered a concussion on April 5, 2017 (P-21, S-26).
33. On April 24, 2017, the District received another letter from another physician providing additional recommendations for programming given the concussion (P-22).
34. On April 26, 2017, an IEP team meeting was held to revise the IEP in order to include the recommendations from the two letters provided from the treating physicians (S-22 at 7; S-26 p.13).
35. On April 26, 2017, Parents were issued a NOREP. On June 8, 2017, Parents signed and returned the NOREP (S-27 p.3).

#### **4th Grade- The 2017-2018 School Year and the Private Placement**

36. On August 10, 2018, Parents submitted their 10-day notice of intent to seek public funding of the Private School (S-36 at 1). The new supervisor of special education did not receive the letter until August 14, 2018(N.T. pp.892-93).
37. On or about August 10, 2018, prior to the start of the 5<sup>th</sup> grade, the Parents sent a letter to the District again notifying them of their intent to continue the Student's placement at the private school unless or until the District is able to offer the Student an appropriate program.
38. At the August 31, 2017, IEP team meeting, Student's IEP team proposed the following schedule:

8:50 to 9:10 Unpack and meet with the 4th grade learning support teacher to discuss the day and any anxieties

9:10 - 9:55 Content-social studies, science

10:00 - 10:25 Multi-Tiered Support

10:25 - 10:35 During natural breaks, check-in with 4th-grade Learning Support teacher to discuss any anxieties, see how the day is going, etc.

10:35 - 10:55 Math whole group

10:55 - 11:40 Math small group

11:40 - 11:45 Discuss upcoming Encore class, expected behaviors, any anxieties, etc.

11:45 - 12:25 Encore

12:25 - 12:30 Check in with Student and discuss upcoming lunch/recess, expected behaviors

12:25 - 1:10 Lunch/recess

1:10 - 1:20 Deescalate from lunch/recess if needed, discuss upcoming reading class

1:20 - 1:55 English language arts (ELA) whole group

1:55 - 2:40 ELA small group

2:40 - 3:25 ELA – Writing

End of Day Routine: Review of de-escalation techniques, discuss positives that happened throughout the day (S-33).

39. The August 31, 2017 revisions to the previous December 13, 2016 IEP (August 31, 2017, IEP) called for the Student's IEP team to be trained on the signs and symptoms of PANDAS/PANS (S-33 p.27).
40. The August 31, 2017. IEP included measurable annual goals to address fine motor skills, social skills, behavior, positive peer interactions, following directions, time on task (S-33 p.34-38).
41. The August 31, 2017, IEP included individualized SDIs like the use of social stories, verbal encouragement, prompting and modeling, a quiet space when needing a break, snacks and unlimited drinks, use of a token system and self-monitoring strategy, sensory input strategies, direct instruction in social

skills, a home and school communication log, direct instruction in coping skills, a concussion protocol, periodic check-ins with the special education teacher and adult support during recess (S-33 pp.39-44).

42. The August 31, 2017, IEP included 3 direct social skills instruction sessions (S-33 pp.44).

43. The August 31, 2017, IEP included direct instruction from an OT one time per week as well as consultation between the OT and Student's teachers (S-33 pp.44- 46).

44. To reduce the frequency of the behaviors that were impeding learning like elopement, inappropriate comments/verbal behavior, and physical aggression the IEP team proposed an additional third-social skills session which would take place during lunch with other 3rd grade peers (S-33 p.13).

45. On September 1, 2017, the District issued a NOREP. On September 12, 2017, the Parents returned the NOREP rejecting the District recommendation for itinerant learning support (NT *passim*, S-34)

46. [redacted]

47. In response to the Parents' letter, the supervisor of special education reached out to the Parents and spoke with Parents sometime during the week of August 20, 2018. The father acknowledged during his testimony that due to the multiple topics being discussed during that call, he inadvertently forgot to mention the Neuropsychological Evaluation by the private evaluator. However, an IEP meeting was scheduled for September 4, 2018; the Parents provided the District with a copy of the private evaluator's report several days in advance of that meeting. The Parents fully participated in and cooperated with the September 4, 2018 IEP meeting. (P-34 p.8; N.T. pp.79-81).

48. At the September 4, 2018 IEP meeting, the private evaluator's report was reviewed and considered by the IEP team. Upon review of the report, the September 2018 IEP was in many respects unchanged (N.T. *passim*).

49. The September 2018 IEP included a brief update to the present educational levels and that the team reviewed the private report. The present levels also indicated that the team was proposing to change the location of services from the Student's neighborhood school to another

elementary school, in the District. The IEP continued to recommend an itinerant level of support, although the type of support changed from learning support to emotional support. The IEP also proposed to increase social skills instruction from three times per cycle to four times per cycle and added executive functioning instruction two times per cycle (P-34).

50. No new goals related to the addition of executive functioning skills or the recently identified SLD were added to the IEP, the remaining IEP goals were essentially the same as in the previous year's IEP. Similarly, the SDIs, related services, and PBSP remained virtually unchanged. The IEP did not include a plan on how the District intended to transition/move the Student from the private setting to a large regular education school building (P-34).
51. The offer of a FAPE called for the Student to participate in an emotional support class, with daily access to social skills instruction, coping instruction, executive functioning (N.T. p.902). The IEP included six annual goals, 33 SDIs and the related service of OT. The PBSP included three annual goals and the same 33 SDIs included in the IEP. If needed in the emotional support classroom, the Student would have the extra support of two paraprofessional teacher aides (S-36).
52. The emotional support class also included a designated space if and when the Student needed to take a sensory break during the school day (N.T. p.902).
53. The District also recommended additional support to address written expression, including re-teaching of written expression in conjunction with the regular educational curriculum, until completion of the RR (S-36 p.48; N.T. pp.906-907). The IEP also provided for re-teaching of math fluency for 10 minutes three times per cycle (NT *passim*).
54. At the September 4, 2018 IEP meeting, the District offered and the Parents some 20-days later toured, the proposed emotional support class (N.T. pp.946-47).
55. At the September 4, 2018, the Parents were provided with another PTRE (N.T at 899; S-38 at 1). On September 27, 2018, when the Parents did not return the first PTRE, the District issued a 2nd PTRE. The District sent a third PTRE, not realizing the PTRE was not returned, the Parents sent back the 2<sup>nd</sup>, October 2018 PTRE (S- 38 p. 6-11. N.T. pp.593-95, pp.899-90). After receipt of the Parents' second 10-day notice, the then-current director of special education tried to contact

the family (S-36 p.2; N.T. pp. 891-93).

56. On or about September 25, 2017, the then-current supervisor of special education sent Parents an email in response to their 10-day notice. The email requested the Parents contact the District at a time and in the event they were interested in seeking District programming in the future (S-46 at 1; N.T. pp.887-889).

57. Although some updates were made to the present education levels and SDIs, the goals, the SDIs offered were substantially similar in substance, intensity and form. The proposed IEP including a continued offer of an itinerant level of emotional support. The proposed IEP also included a targeted social skills lesson, three times per week for 30 minutes and OT one time per week for 30 minutes, with the remainder of the school day in regular education. Under the proposed IEP, the Student would be included in large group regular education classes for 93% of the school day (P-30).

58. On November 4, 2018, Parents filed for due process (N.T. pp.900-01, S-45).

### **The Private Independent Evaluation**

59. The private evaluation assessed the Student's ability in cognition, verbal functions, visuospatial functioning, attention and executive control, processing speed, learning and memory functions, fine motor, academics, and social-emotional and behavioral functioning. The evaluation procedures also included a comprehensive review of Student's available educational records, school observation, and input from the Parent and Student's current teachers. The results revealed overall cognitive functioning in the average to the above-average range. At the same time, the Student demonstrated significant struggles with attention regulation, self-monitoring skills, and impulsivity; as well as weaknesses in social/reciprocal interactions, though Student did demonstrate some self-awareness. The Student also demonstrated weaknesses in inhibition, planning and organization. Although many of the academic skills were well developed, the evaluation revealed a SLD and areas of need related to reading fluency/ accuracy and reading comprehension due mostly to issues related to executive dysfunction. The Student's spelling, sentence construction, and essay writing skills emerged as notable academic weaknesses as the Student struggled to retrieve spelling patterns, showed a lack of application of writing mechanics, and exhibited disorganization. (P-32, at 21; N.T. at 468-490).

60. Realizing the Student was previously retained in kindergarten, the examiner calculated the Student's standard scores using grade and age level norms. Based upon the then-current testing profile, using both grade and age-based norms, the examiner diagnosed the Student as an IDEA eligible student who needed specially-designed instruction to address a SLD in spelling and written language delays along with delays associated with the Student's OHI of ADHD. The examiner also noted a variety of Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) diagnoses including but not limited to an Unspecified Disruptive Impulse Control and/or Conduct Disorder and an Anxiety Disorder (P-32). The private examiner made a variety of targeted recommendations for SDIs, accommodations, supports, supplemental aids and services needed to support the Student's academic, social, language and behavioral learning needs and circumstance (P-32, at 22-26; N.T. pp.486-488).

61. Based upon the review of the Student's then-current educational profile, testing portfolio and academic record, the examiner reached several conclusions. First, the examiner opined that the Student was benefiting and learning at the private placement. Second, the examiner concluded that the placement at the private school was appropriate. Third, the Student was also a person with a SLD who because of the SLD required SDI and an IEP (P-32, p.22; N.T. pp.488-490). Fourth, the examiner noted improvements in the Student's BASC-3 self, teacher and Parent ratings (N.T. *passim*).

#### **The District's September 2018 Reevaluation and the January 2019 IEP**

62. Once aware of the Parents' private evaluation, at the September 2018 IEP meeting the District proposed completing its own reevaluation. The Parents provided the necessary consent for that evaluation, including providing a release to obtain records and speak with staff at [redacted] School and consent to complete multiple observations at [redacted] School. The District issued its RR on or about December 10, 2018, after the Parents filed their Due Process Complaint. (S-38, at 6-10, S-39, S-40, S-43, at 1).

63. The District's evaluation, like the Parents and previous evaluations, revealed overall average cognitive functioning, average academic achievement on standardized testing, and continued social-emotional, behavioral, and executive functioning difficulties. (S-40). Of particular note, the Student's self-reporting on rating scales showed an overall decrease in concerns related to most areas including attitude towards school and teachers, social stress, anxiety, and depression (N.T. pp.40-41).

Similarly, while significant social-emotional and behavioral concerns continued to be reported by Parents and teachers, again noted, the Student's anxiety levels as reported by teachers at the private school had decreased significantly to average range (NT p.39). The RR examiner, after reviewing the BASC-3 and similar behavioral data, the IEP team concluded the Student was a person with a severe emotional disturbance (N.T. *passim*).

64. Observation at the private school revealed attention and focus levels consistent with those recorded while the Student attended school in the District, and ranged from as high as 100% on- task/engagement to as low as 45% (N.T. p.33, 73).

65. As part of the December 10, 2018 RR, the District's BCBA completed another FBA. The FBA included a review of records, three sixty-minute classroom observations, a review of additional classroom observations, interviews with Student teachers and the administration of Functional Analysis Screening Tool (FAST). The FAST screener identifies factors that may influence problem behaviors. The FAST is a screening tool and may be used as part of a comprehensive functional behavior assessment. When the FAST interview and checklist scores are added up they are then placed into four likely categories of function, socially mediated reinforcement (positive/negative) and automatic reinforcement (sensory stimulation/pain reduction) (N.T. at 85; S-32, S-33, S-40).

66. During the classroom observations, on and off-task behaviors were tracked using the Behavioral Observation of Students in the School (BOSS) (S-40 p.33).

67. After reviewing the FBA data, the team recommended that the Student needed a PBSP. The recommended rate of reinforcement was based on an applied behavior analysis (ABA) identified schedule of reinforcement - Differential reinforcement of low (DRL) rate behavior or the DRL (N.T. p. 846, pp.864-65). With the DRL, reinforcers are delivered after a specified time interval if response rates are at or below a specified rate (S-4 p.57). DRL was recommended because Student's behaviors were high-frequency, low intensity (N.T. p.860). Student's IEP team convened on January 18, 2019, to review the RR, FBA and develop a new annual IEP (S-41 p.1).

68. After reviewing the data collected in the RR and FBA, the team concluded the Student then needed a more intensive level of ES (N.T. *passim*). Thereafter, the Student's January 18, 2019, IEP team revised the Student's proposed placement from itinerant level of emotional support (ES) to a supplemental level emotional support for upwards of 20% but not to exceed 80% of the school day (S-36 p.53, S-41 p.40).

69. The proposed supplemental ES classroom is staffed with a classroom teacher and two paraprofessional teacher aides. The classroom size is approximately nine students with three adults; therefore, the Student would have a 3:1 student to teacher staff ratio (N.T. pp.914-15).

70. The Student's January 18, 2019, IEP called for Student to participate in speech and language for two thirty-minute sessions per 6-day cycle, OT for 1 thirty-minute session per cycle. Direct instruction in social, coping and executive functioning for 45 minutes per day. Student will also be provided sensory breaks and check-ins throughout the school day with the special education teacher for a minimum of 70 minutes per day. Student will also have access to the special education classroom to complete independent work and will take all tests and quizzes in the special education setting. The Student will participate in general education for all academic courses, with additional adult support (S-41 p.39; N.T. pp.910-915).

71. The Student's January 18, 2019, IEP included a plan to assist Student with the transition from the Private School to the District (S-41 p.35; N.T. p.926).

72. The Student's January 18, 2019, IEP included measurable goals to address social skills, self-regulation, coping strategies, pragmatic speech and language skills including initiating and conversation exchange, understanding figurative language, inferential comprehension questions, fine motor skills, including using legible handwriting and maintaining an organizational system (S-41 p.23-30).

73. While the January 2019 IEP represents significant changes to the goals, SDI, and PBSP in comparison to the earlier IEPs, it does not contain an appropriately detailed transition plan describing how the Student with significant disabilities, including PANS/PANDAS, would make the shift from a small private school of 150 students to a large regular education school building. Moreover, while the proposed IEP increases Student's level of support from itinerant to supplemental emotional support, Student would still be included in a large school and in large regular education classes for large blocks of time of the day (S-41; N.T. pp. 84-86).

74. The January 18, 2019, IEP included individualized accommodations and SDIs to address Student needs, including but not limited to: check-ins after each period, team meeting within 30 days to assess transition, direct instruction in social skills and emotional regulation, structured class environment with clear expectations, strategies to support attention and on-task behavior, PBSP, direct instruction in strategies to improve executive function and study, and organizing, opportunities for review and repetition,

chunking of multiple-step directions, preferential and flexible seating, movement breaks, review of expected and unexpected behaviors, check-in and check-out systems, review of daily scheduling, use of graphic organizers, check-ins to assist with organizing information for problem solving, strategies to assist with generation of ideas for the writing process, and implementation of a sensory diet with tools appropriate for Student (S-41 pp.1- 36; N.T. pp.917-18).

75. The Student's January 18, 2019, IEP also included the support of BCBA (N.T. p. 915; S-S-41 p. 37). The BCBA helped to develop the behavior plan, will consult and train the staff and assist with implementation of the PBSP. The BCBA will continue to support the team, and meet with them on a weekly basis and, if necessary, more frequently (N.T. pp.933-34).

76. The Student's January 18, 2019, IEP called for the Student to participate in the SETT (assistive technology) process. The process would help identify appropriate applications that would be specific to Student to assist with support in written expression and to help reduce any frustration contributing to writing assignments (N.T. p.917, S-41 p.35).

77. Student's IEP included for the Student to receive additional adult support in the inclusion setting, N.T. at 934, S-41).

78. The Parents ultimately rejected the District's proposed program and maintained the Student's placement at the private school for the entirety of the 5<sup>th</sup> grade.

### **The Private School Setting**

79. The private school provides the Student with a student to staff ratio of 5 to 1 ratio. The overall environment is supportive (N.T. *passim*).

80. The school as a whole provides students, like this Student, with average intelligence, who have a variety of disabilities, an individualized independent day school environment (N.T. *passim*).

81. Total enrollment at the school is approximately 150 students, and the Student's average class is made up of six students (N.T. *passim*).

82. The private school is accredited by the Middle States Association of Colleges and Schools and is licensed and approved by the States of Delaware and New Jersey (N.T. *passim*).

83. The private school provides this Student tangible supports in reading, writing, math, and executive functioning skill development (N.T. *passim*).

84. The private school also provides this Student with a targeted, individualized program that incorporates a diagnostic prescriptive strategy

that utilizes ongoing observation, data collections, and analysis of the Student's academic strengths and weaknesses to craft an individualized education (N.T. *passim*).

85. The curriculum at the private school provides the Student with equal access to core subjects like reading, math, writing, science, social studies, spelling, mathematics, speaking skills, and listening skills (N.T. *passim*).

### **CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer*, *supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer 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. 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 failed to provide a clear, cogent and convincing explanation of how he/she evaluated the Student's eligibility, designed the Student's IEP, implemented the IEP or designed and participated the preparation of the prior written notice, or the NOREPs proposed actions.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. Based upon a variety of factors, I will now give the Parent's expert testimony on recommended changes to the Student's IDEA eligibility persuasive weight<sup>6</sup>. On the intertwined topic, about the

<sup>6</sup> In this particular instance, based upon testimonial and non-testimonial record as a whole I gave persuasive weight to the testimony of the certain individuals who demonstrated the ability to

appropriateness of each IEP when offered and the design of future IEPs I gave the Parents' expert's comments more persuasive weight than District's witnesses testimony on the development of the goals, the design of the PBSP, the selection of the SDIs, the FBA, the related services supports, and the provided/suggested supplemental aids and services. On the issue of the Student's' identification as a person with a SLD, and the associated testing/scoring dispute regarding the Student eligibility as a person with an ED and/or a SLD, I will also give the private evaluator's testing profile and testimony more persuasive weight than the District examiner. More specifically, I did not find the District's examiner testimony regarding the SLD testing dispute and her analysis of the Student BASC-3 and similar behavioral rating scales cogent, persuasive, or otherwise compelling. On a similar note, for all of the following reasons, I gave the District's BCBA opinions about the most recent FBA, the classroom observation and the design of the PBSP less persuasive weight. Based upon the Student's treating psychiatrist's superior knowledge of the PANDA/PANS health condition and its intertwined effects on the Student's IDEA and Section 504 present levels of educational and functional learning and performance, I gave her testimony significant weight.

### **FREE APPROPRIATE PUBLIC EDUCATION**

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs or 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 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 set forth 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). Districts meet the obligation of providing FAPE to eligible students through development and

cogently and clearly describe Student specific facts like: (1) the witness's understanding of the Student's educational, health, behavioral, academic needs, present levels and the then current and available data profile/sets; (2) the witness's understanding of the Student's intertwined behavioral, attention, self-regulation, health and social skills needs, circumstances and deficits; (3) the witness's understanding of the Student's differentiated reinforcement needs based on the Student's then current behavioral and integrated health related circumstances all of which impact the IDEA and Section 504 disabilities; (4) the Student's behavior in the school, the home and the community; (5) the Student's testing, assessment and health profile/data, and (6) any individual Student specific circumstances discussed herein like the Student's behavioral and health related circumstances prior to and upon enrollment at the private school.

implementation of an IEP that 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 U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then 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. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* 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.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. The *Endrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Endrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Endrew F.*. In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE,

as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

A school district may violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); *Andrew F.*, 137 S. Ct. at 999.

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, e.g., L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* 137 S. Ct. 1001, but the IDEA does not guarantee "the absolute best or 'potential-maximizing' education." *See, Rowley, Andrew F., The Student K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

### **THE BURLINGTON AND CARTER TUITION REIMBURSEMENT TEST**

To determine whether parents are entitled to reimbursement for their unilateral placement in a private school after refusing a public school's offered FAPE, courts apply the three-part *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) (hereafter *Burlington-Carter*) test. Under the *Burlington-Carter* test, the party seeking reimbursement relief must show: (1) The public school did not provide a FAPE; (2) Placement in a private school was proper; and (3) The equities weigh in favor of reimbursement. The parent must establish each of the three prongs of the *Burlington-Carter* test to prevail.

Thus, failure on any one of the prongs is fatal to a demand for reimbursement. Indeed, if the plaintiff fails to establish the first prong of the test, then the reviewing court may immediately end its analysis. *See, e.g., Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at \*15 (E.D. Pa. Aug. 14, 2017)*(applying the "Burlington-Carter test" to private school tuition reimbursement case)(stopping analysis after concluding that aggrieved student/parents had not established the first prong of the *Burlington-Carter* test). *See also, N.M. v. Central Bucks Sch. Dist., 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014)*(same). To prove the first prong of the test—that the public school did not provide a FAPE—the party seeking relief must show that the public school failed to "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew*. With these principles in mind, I will now turn to an analysis of the testimonial, non-testimonial evidence, the facts and applicable law.

### **THE DISTRICT'S CHILD FIND DUTY**

School Districts have a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statute." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c). Even if parents do not cooperate fully with a district's efforts to identify a student, districts still have a responsibility to identify students who are in need of IDEA protections. *Taylor*, 737 F. Supp. at 484. The IDEA child find duty does not demand that schools conduct a formal evaluation of every struggling student. A school's failure to identify a disability at the earliest possible moment is not *per se* actionable. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). However, once school districts have a "reasonable suspicion" the student is otherwise IDEA eligible, the district is required to fulfill their child find obligation within a reasonable time. *Id.* Failure to conduct a sufficiently comprehensive evaluation is a procedural and substantive violation of the district's "child find" obligation. Substantive child find violations can cause a denial of a FAPE. *D.K.*, 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). Therefore, an evaluation, when offered and completed, must be sufficiently comprehensive to assess all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Simply stated, the child find trigger or starting point occurs when the school district has a reasonable suspicion that the child may be eligible under the IDEA. Once the child find duty is triggered, the district must initiate a comprehensive evaluation of the child within a reasonable period of time.

## **IDEA ELIGIBILITY CRITERIA AND ASSESSMENT PROCESS**

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c). Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially-designed instruction.

## **EMOTIONAL DISTURBANCE IS AN IDEA DISABILITY**

In order to qualify as a "student with a disability" under the IDEA, a student must meet the definition of one or more of the categories of disabilities. 34 C.F.R. § 300.8(a)(1). Pursuant to the IDEA Part B regulations, 34 C.F.R. § 300.8(c)(4)(i) "emotional disturbance" means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance"(A)An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B).An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C)

Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

A student needs to exhibit only one of the five criteria under the definition of an emotional disturbance to potentially qualify for special education and related services under the ED classification, but the student must exhibit the criteria to "a marked degree" over "a long period of time." 34 C.F.R. § 300.8(c)(4)(i). While 34 C.F.R. § 300.8(c)(4)(i) states that a student with an emotional disturbance must manifest at least one of the identified characteristics described in subsections (A) through (E) "to a marked degree" for "a long period of time," neither the IDEA statute nor its regulations define how long a qualifying "long period of time" must be.

In *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989) OSEP stated that a generally acceptable definition of "a long period of time" can range from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. *See also R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007) (because a child made significant improvements in her classroom behavior once she adjusted to her placement, her inability to maintain peer relationships did not persist for a long period of time.). As for the "to a marked degree" criteria, OSEP has taken the position that it generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

### **A SPECIFIC LEARNING DISABILITY IS AN IDEA DISABILITY**

Pursuant to 34 C.F.R. §300.309(a), assessment team described at 34 C.F.R. §300.306 may determine that a child has an SLD, as defined in 34 C.F.R §300.309 (c)(10), if:

- (1) The child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards:
  - (i) Oral expression.
  - (ii) Listening comprehension.
  - (iii) Written expression.
  - (iv) Basic reading skill.

- (v) Reading fluency skills.
  - (vi) Reading comprehension.
  - (vii) Mathematics calculation.
  - (viii) Mathematics problem-solving.
- (2) (i) The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in 34 C.F.R. 300.309 (a)(1) when using a process based on the child's response to scientific, research-based intervention; or
- (ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD, using appropriate assessments, consistent with 34 C.F.R. §300.305 and
- (3) The group determines that its findings under 34 C.F.R. §300.309 (a)(1) and 34 C.F.R. §300.309 (a)(2) of this section are not primarily the result of:
- (i) A visual, hearing, or motor disability;
  - (ii) An intellectual disability;
  - (iii) Emotional disturbance;
  - (iv) Cultural factors;
  - (v) Environmental or economic disadvantage; or
  - (vi) Limited English proficiency.

**AT TIMES COMPENSATORY EDUCATION CAN BE  
APPROPRIATE RELIEF**

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.<sup>7</sup> Compensatory education should place the child in the position they would have been in but for the IDEA violation.<sup>8</sup>

<sup>7</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>8</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.”

Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child.”<sup>9</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 firmly established applicable IDEA AND SECTION 504 legal principles in mind, I will now turn to an analysis of the Parents’ claims, applicable defenses and the multiple requests for appropriate relief.

### **THE PARENTS’ CLAIMS AND THE DISTRICT’S RESPONSE**

The Parents contend as a result of multiple procedural and substantive violations, the District’s multiple offers of a FAPE were not appropriate. In particular, the Parents argue that the District does not understand the Student’s multiple health conditions that are inexplicably intertwined with the Student’s other IDEA and Section 504 disabilities of record. Furthermore, they argue that the District’s academic evaluations are fundamentally flawed as the same fail to take into account the fact that the Student was retained in kindergarten. The Parents contend the evaluation team misunderstood the nature of the Student’s academic profile when they misapplied the applicable SLD age-based eligibility and testing criteria. Next, they argue that the District’s IEPs, PBSP and data collection strategies do not accurately distinguish the differences between the Student’s OHI-ADHD like behaviors that can be self-regulated versus the Student’s autoimmune and neurologically-related medical conditions, which by definition cannot be self-regulated. As a consequence of this misunderstanding, the Parents contend the IEPs and the stand-alone PBSP are not otherwise ambitious in light of the Student’s unique learning needs and unique circumstances. Finally, they argue that the proposed action to identify the Student as a person with an emotional disturbance is misplaced. The District, on the other hand, contends that at all times relevant it complied with all applicable substantive and procedural evaluation, assessment and IEP regulations and requirements. They further contend the private evaluator misapplied the relevant eligibility/testing criteria and therefore erred when she identified the Student as a person with a SLD. Simply stated, the District contends the Parents’ FAPE/IEP, assessment claims, private program, private placement, compensatory education and tuition reimbursement claims arising are misplaced. Finally, the District argues that even if its offer of FAPE is not appropriate and the private school is appropriate; the equities favor the District; therefore on the equities alone prong, assuming the Parents met the burden on

<sup>9</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).

prongs one and two, the District asserts the tuition reimbursement claim should be denied.

For all of the following reasons, after reviewing all of the testimonial and non-testimonial extrinsic evidence proffered on both sides, I now find in favor of the Parents and against the District. A Final Order granting appropriate relief in the form of compensatory education, tuition reimbursement and reimbursement for the costs of the private evaluation now follows.<sup>10</sup>

### **THE *BURLINGTON, ENDREW AND ROWLEY* FAPE LEGAL BENCHMARKS**

In a *Burlington-Carter* dispute, like this, provided the District offered a FAPE the *Burlington-Carter* tuition reimbursement analysis stops. While the District is required to provide disabled students a FAPE, it is not required to, and the IDEA does not guarantee any particular outcome or any particular level of academic success. See, *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Dorros v. District of Columbia*, 510 F. Supp. 2d 97, 100 (D.D.C. 2007). In *Endrew F.*, the court held when a child is not fully integrated into the regular classroom and not able to achieve on grade level; the IEP need not aim for grade-level advancement. "But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. While the student-specific IEP goals may differ, every child should have the chance to meet challenging objectives. *Id.*" "Now, as a result of *Endrew F.*, each child's educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives." *Questions and Answers on U.S. Supreme Court Case Decision Endrew F. v. Douglas County Sch. Dist.*, 71 IDER 68 (2017).

### **THE THIRD AND FOURTH GRADE OFFER OF A FAPE MISS THE MARK**

The then-current third-grade IEP included six annual goals, targeting sensory needs, social skills, and academics. The IEP also included 25 SDIs and the related service of OT. At the same time, the IEP called for the Student to receive itinerant learning support services for upwards of 20% of the school day; which for all practical purposes calls for the Student to be with the special education teacher for slightly more than one hour each day.

Therefore, assuming the best school day possible, the Student would spend 20 minutes a day working on each individual goal. In light of the Student's then-

current academic, behavioral and emotional profile 20 minutes a day was not reasonably calculated to achieve meaningful benefit. At the time of the offer of a FAPE, due to disability-related behavioral, health, emotional and social circumstances the Student was not otherwise able to participate in a full school day program. As designed and when offered the overall level of itinerant learning support and/or emotional support, the related services, the IEP goals, PBSP supports and the SDI's were insufficient, inadequate and inappropriate.

To expect a Student who was eloping, making random sounds, who everyone agrees is highly distractible and is otherwise noncompliant to make progress in either the regular education or special education class with one hour of targeted support was ill-advised.

Although the IEP included a stand-alone PBSP targeting aggression, elopement, calling out and making inappropriate comments, the PBSP lacked a clear working hypotheses about the level, intensity and frequency of support the Student needed to the reduce, manage and respond to the overall high rates of off-task and inappropriate behavior. Granted while the PBSP identified two specific behavioral goals and also included the use of a token economy; the existing data set, that neither Party disputes, indicates the Student was not responding to the level of support, the SDIs, or the PBSP contingencies, and the then-existing goals.

The PBSP failed to address the fact that the Student's health conditions of PANS/PANDAS were inextricably intertwined with the OHI related disabilities. The PANS/PANDAS contributed to and at all times relevant intensified the frequency, duration and intensity of the interfering behaviors. The overall PBSP and IEP failed to have adequate present levels linked to clear discernable behavioral, attention and academic interventions, reinforcers and SDIs.

When the Mother reported that the Student was experiencing anxiety about returning to school, the District, rather than issue a permission to reevaluate to review the existing data and offer procedural safeguards turned to the IU ATTEND program for a school refusal assessment. Rather than do a piecemeal evaluation, the District should have initiated a comprehensive evaluation of the Student in all areas of suspected disability. *See*, 34 C.F.R. §§300.305 (a)(1), 300.305(a)(2)(i)(A) and §300.304(b)(1).

While the ATTEND program may work well for other students; in this instance, I now find the ATTEND evaluation was an incomplete assessment in all areas of unique need, circumstances, and suspected disability.

First, the ATTEND examiner and the staff failed to cogently explain why the examiner administered a full intelligence assessment when the Student's

cognitive potential was not at issue. Second, the staff failed to explain why, aware of the two underlying medical conditions, the examiner did not factor in the PANS/PANDAS health condition into the working hypothesis when he collected the FBA data set. Third, the FBA fails to include a clear operational definition of the differences in the antecedent behaviors and supporting consequences associated with the ADHD versus the PANS/PANDAS flare. Fourth, the staff and the examiner failed to explain why they did not contact the nationally recognized out of state treating PANS/PANDAS psychiatrist for support in evaluating Student in the throes of a flare. Fifth, while the ATTEND report included behavioral checklist data the examiner, although aware of the PANS/PANDAS diagnosis, made blanket recommendations about implementing a positive support plan, yet at the same time, failed to distinguish how or what antecedent, consequence or reinforcement strategies would differ based upon a PANS/PANDAS flare versus general noncompliance associated with the Student's ADHD diagnosis. Sixth, the examiner and the staff failed to factor in or rule out how the reduction in and or side effects of Student's behavioral medication, *i.e.*, Zoloft, which is generally known to cause anxiety in young children contributed to the flare. Seventh, all of the above actions, omission and inactions occurred at a time when the Parent and the treating psychiatrist corroborated the fact that the Student had a flare. Eighth, the District never explained why it waited until August 2017 to provide training to the IEP staff about how to detect, differentiate or program for the Student during a PANS/PANDAS flare. Since the August 2017 IEP was never implemented it is reasonable to infer that the staff never received any training on PANS/PANDAS; the omission of this support for personnel impeded the development of future offers of a FAPE. For these and other reasons, set forth herein, I now find, for the most part, with minor cosmetic changes, the annual goals stayed the same, the level of learning support stayed the same, the SDIs stayed the same, the OT support stayed the same the PBSP stayed the same; while at the same time, the Student's present social, emotional, academic and behavioral present levels were trending in a downward direction.

The progress monitoring data for 3<sup>rd</sup>-grade small group 30 minute social skills instruction is limited in both frequency, quantity and quality of data points. The special education teacher for 3<sup>rd</sup> grade, noted during testimony other than the addition of social studies and math into the daily school schedule in March of 2017, none of the IEP revisions during 3<sup>rd</sup> grade resulted in any substantive change in how the Student was otherwise instructed, redirected, reinforced or otherwise supported. In May 2017, the out of state medical staff treating the PANS/PANDAS told the District, during a phone call, that the Student should not be expected to extend the school day, yet the staff persisted. Taken as a

whole, the 3<sup>rd</sup>-grade progress monitoring data set yields a finding that the Student was not making progress.

Attendance at school and not individualization based upon need, circumstance and present levels became the driving factor. In this particular instance, the underlying working hypothesis that the Student's anxiety was grounded in fear of school rather than the PANS/PANDAS flare was misguided. Therefore, I now find that the IEP revisions on August 2016, September 2016, November 2016, December 2016, February 2017, March 2017, and April 2017 were built upon the same poorly designed IEP ATTEND FBA platform. Therefore, I now find that each IEP when offered was not reasonably calculated to provide a FAPE. An appropriate equitable Order granting compensatory education for the 2016-2017 school year follows.

When the District learned, ten days before the unilateral placement, about the withdrawal, rather than issue a new permission to evaluate to assess, understand and analyze the then current present levels the supervisor of special education sent an email to the family, stating if you want services in the future please contact me, after which the file for all intent and purposes was closed. The decision not to issue a permission to evaluate delayed subsequent reasonably calculated offers of a FAPE.

### **The First and Second Year Private School Experience**

The private school provides the Student with a student to staff ratio of 5 to 1. The overall environment is supportive. The school as a whole provides students, like this Student, with average intelligence, who have a variety of disabilities, an individualized independent day school environment. Total enrollment at the school is approximately 150 students, and the Student's average class is made up of six students. The private school is accredited by the Middle States Association of Colleges and Schools and the school is licensed and approved by the States of Delaware and New Jersey.

The private school provides this Student tangible supports in reading, writing, math, and executive functioning skill development. The private school also provides this Student with a targeted, individualized program that incorporates a diagnostic prescriptive strategy that utilizes ongoing observation, data collections, and analysis of the Student's academic strengths and weaknesses to craft an individualized education. The curriculum at the private school provides the Student with equal access to core subjects like reading, math, writing, science, social studies, spelling, mathematics, speaking skills, and listening skills.

Since enrolling at the private school, the Student has made steady demonstrable upward social-emotional, academic and behavioral gains. While the Student continues to exhibit significant IDEA disability-related social deficits, attentional and behavioral needs, all of which are intertwined with the PANS/PANDAS medical conditions, the Student's steady improvements in year one outweigh any rate of progress or alleged rate of learning deficits.

Since enrolling the Student has made friends and most importantly has been able to more consistently attend school during medical flares. A prime example of positive growth, at the private school, is found in the District's most recent reevaluation. During 2<sup>nd</sup> and 3<sup>rd</sup> grades, the Student's behavioral self-ratings yielded scores in the clinically significant or at-risk range for attitude towards teachers, attitude toward school, school problems, anxiety, depression, sense of inadequacy, attention problems, and self-esteem. Yet now, after two full school years at the private school, when asked to complete the same or similar self-rating scales, for consideration in the December 2018 RR, the Student self-rated in the average range as opposed to the at-risk or clinically significant. Given where the Student was in third grade, the District's ratings are one objective indicator of meaningful growth, learning and change that has occurred since enrollment. Another positive indicator is the fact that at the current time, it is no longer necessary for the Parents to keep the Student home, during PANS/PANDAS flare-ups. These intertwined positive developments have resulted in yet another positive improvement in overall school attendance which in turn fosters growth and learning. These changes while impressive, at the same time, a review of the then existing data set indicates that the underlying IDEA disability-related deficits in attention, hyperactivity, concentration, self-regulation, executive functioning, social skills and language continue to need supportive specially-designed and direct instruction.

Although the evidence as to time on task between the District and the private school is variable, the data set from the private school when compared to the data set prior to leaving the District indicates the Student is trending upward (S-40, pp.33-35, pp.73-74). The Student's treating psychiatrist convincingly explained how this particular Student's intertwined health and IDEA circumstance of variability, in task performance, unless resolved medically, will remain a consistent circumstance that consistently interferes and impedes this Student's learning (P-5, p.1; N.T. pp.648-650, pp.671-672).

Therefore, when the evidence is viewed as a whole, for the first year the Student was at the private school, I now find that the program placement met the Student's unique needs and circumstances. The record is preponderant that

during year one, the private school offered and ultimately provided the Student with ambitious learning outcomes.

An appropriate Order granting tuition reimbursement for the 2017-2018 school year follows. This year one finding, however, is not dispositive as to the Student's claims for the 2018-2019 school year.

### **The Private Evaluation Report and the IDEA Eligibility Dispute**

Once on notice of the Parents' intention to maintain the unilateral placement in year two and upon receipt of the private evaluation, the District undertook a series of procedural actions to once again offer a FAPE. While the Parents object to my review of each offer of a FAPE, my understanding of *Rowley* and *Endrew F.* standards now requires me to review each offer of a FAPE

The private evaluator's August 2018 report helped shed new descriptive light about the extent and severity of the Student's IDEA disabilities. Comparing the private report to the District's previous evaluations and the ATTEND reports it is readily apparent that the District's team of evaluators/examiners failed to notice and factor in the kindergarten retention as a unique assessment circumstance. Each District evaluation that used grade-based normative data, for this particular Student, understated the Student's academic deficits in spelling, written language, reading fluency math fluency (compare results of the private evaluation at P-32 with the District's assessment results at S-46 and N.T. pp.599-620 and N.T. 589-708 and N,T.pp.446-564).

The District's contention that the use of grade-level normative data, to identify the particular Student as a person with a SLD, in this instance, is rejected. The private evaluator cogently and carefully explained the meaning, the use and the basis of each otherwise discrepant age and grade-based standard score. The District's argument against the use of grade equivalent scores, which the private evaluator did not use to reach her conclusions, ignores the simple truth that the IDEA definition of a SLD calls for the examiner to utilize age-based normative data, in assessment circumstances like this, when determining SLD eligibility is rejected.

The plain language of the applicable SLD qualifying regulations requires the examiner/evaluator to consider if "(1)The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards." See, 34 C.F.R. §300.309(a)(1).

First, in this instance, the District failed to properly consider the Student's age in calculating the Student's achievement profile. Second, the District's examiner

also failed to properly consider the Student's performance on state-approved grade-level standards in rejecting the private evaluator's finding of a SLD. Therefore, in this instance, the District's use of grade-based normative data, without factoring in the Student's age, retention and performance on state grade-level standards, to assess the Student is contrary to the IDEA's plain SLD eligibility language. See, 34 C.F.R. §300.309 *et seq.* Accordingly, I now find the District's rejection of the private evaluator's determination of a SLD is misplaced.

The District's conclusion that the Student is a person with an emotional disturbance is equally misplaced. The IDEA definition of emotional disturbance provides that "emotional disturbance" occurs when a student exhibits "a condition exhibiting one or more of the following characteristics" described above, "over a long period of time" and "to a marked degree that adversely affects a child's educational performance." The regulations caution districts to avoid the SED classification when the Student's ". . . inability to learn cannot be explained by intellectual, sensory, or health factors." See, 34 C.F.R. § 300.8 *et seq.*

To reach its conclusion that the Student was a person with an emotional disturbance, the District's psychologist relied heavily upon the Student's and other informants' ratings on the BASC-3 and similar scales. A comparison of the BASC-3 data and similar ratings from third through fifth grade contradicts a factual finding of emotional disturbance (compare S-46 with S-17, S-21, and S-35).

The Student's self-ratings, along with the teachers' and the Parents' BASC-3 ratings improved over time. For example, while in third grade the Student self-ratings were in the clinically significant or at-risk range for attitude towards teachers, attitude toward school, school problems, anxiety, depression, sense of inadequacy, attention problems, and self-esteem. Yet, the Student's December 2018 self-ratings squarely fell in the at-risk range for attention, hyperactivity, and self-esteem. Notably, absent are any Student ratings in the clinically significant range (S-40 vs. S-46, S-17 and S-35). The same is true for the Parents and the then-current teachers' ratings (S-17 versus S-42-P-32). In third grade, the Mother reported more clinically significant BASC-3 ratings than in fifth grade. As for the teachers, the District's reevaluation fails to discuss the July 2018 across the board private school teacher ratings in the Average range on the BASC-3 with the December 2018 variable BASC-3 scores. When all is said, the variation in the BASC-3 scores over time do not reach the applicable IDEA criteria that the Student exhibit a "condition," "over a long period of time" and "to a marked degree that adversely affects a child's educational performance."

While the data is variable for the most part it is trending in a positive direction; therefore, the District's proposed action to identify the Student as a person with SED is rejected.

In summary, as to the difference of opinion related to the age versus the grade based assessment data the District's psychologist failed to persuasively or clearly explain, why in this instance, given the retention in kindergarten, the use of the grade based normative data was appropriate. The District psychologist also failed to persuasively describe how she factored out the overlap of the two health conditions in her reaching her SLD or ED eligibility conclusion. Accordingly, the District's proposed action to identify the Student as a person with an emotional disturbance is rejected. The Parents request to identify the Student as a person with an SLD is accepted; therefore, the District is now Ordered to reimburse the Parents for their out of pocket assessment-related costs.

### **The District's December Reevaluation and the January 2019 IEP**

The December RR formed the basis for the District's 2019 IEP which included social, language and behavioral goals along with related services of OT, speech and a PBSP. As a result of the District's rejection of the Student's SLD, the IEP lacks goals and SDIs to address the Student's written expression, spelling and math deficits. To the extent, the January 2019 IEP lacks SLD related goals the IEP is fundamentally flawed.

The BCBA utilized the FAST screener assessment to assemble a behavioral profile and the BOSS to collect on task data related to classroom performance as a basis for the PBSP. The FAST was used as a screening tool to determine the functions of the Student's behaviors. The FAST, scores were then added up and placed into four likely categories of function, socially mediated reinforcement (positive/negative) and automatic reinforcement (sensory stimulation/pain reduction). At the time of the FBA, the BCBA examiner was not aware of the fact that the author of the FAST, as recently as 2013, concluded "That is, although the FAST's reliability and validity compared well with what has been reported for other rating scales, it cannot be considered adequate for the purposes of treatment development." The FAST author later counsels BCBA examiners that the "FAST is not an approximation to an FA [functional analysis] of problem behavior; it is simply one way to gather information during an interview."<sup>11</sup>

<sup>11</sup> Reliability and validity of the Functional Analysis Screening Tool, Brian Iwate, Iser Deleon and Eileen M. Roscoe, *Journal of Applied Behavior Analysis*, NUMBER 1, Volume 46, 271–284 (SPRING 2013). Functional analysis methodology involves observation of behavior under a series of test and control conditions and is regarded as the benchmark standard for assessment of problem behavior in both clinical research and practice.

In this instance, the FAST was the single tool used to formulate the working hypothesis about the two motivators of the Student's behaviors, *i.e.*, attention and escape. Furthermore, while the BOSS data is indicative of the Student's variable attention, concentration and self-regulation, the BOSS data and the private school teacher comments did not filter out or address the effects of the intertwined health-related conditions that either exacerbate or overstate the underlying IDEA disability-related behaviors. The record is preponderant that the Student's health conditions, IDEA OHI disability and Section 504 DSM-5 disabilities are intertwined and collectively impede this Student's learning. Accordingly, given the lack of recognition of the FAST shortcomings and the BOSS data inadequacies when the FBA and the resulting stand-alone PBSP are viewed as an integrated whole, the goals in the PBSP are not ambitious and the PBSP as a whole is not reasonably calculated to foster significant learning.

Since BASC-3 data was a focal point of the basis for the conclusion that the Student was a person with an emotional disturbance the rejection of the BASC-3 conclusion undermines the recommendation that the Student should receive supplemental emotional support for up to 80 percent of the school day. Taken as a whole, absent SLD goals and a working PBSP, I now find the January 2019 IEP is inappropriate. These above conclusions of law and findings of fact, however, do not end the analysis, as this hearing officer has concerns, as results of one private school teacher's input into the RR, about the appropriateness of the 2018-2019 private school placement.

### **The 2018-2019 Private School Year**

Leading up to the 2018-2019 school year, the private school staff openly supported the Student's enrollment and attendance. By all objective reports, the Student was advancing in the curriculum and making friends. By December 2018, however, one teacher in the written input into the RR actively questioned the Student's progress at the private school. In one breath the teacher made a blanket statement that nothing at the school was working and in another breath, the same teacher and others at the private school made contrary comments about significant improvements in attention, academics, self-regulation and behaviors in private school environment (compare P-42 with S-40 and S-43). The inconsistency in the teacher's statements regarding the Student's present levels is entirely consistent with the testimony of the treating psychiatrist that extreme variability is associated with the Student's PANS/PANDAS and OHI disability. The District argues unconvincingly that the teacher's assertions absent a cogent explanation of the same makes the private school placement improper and otherwise inappropriate. While the teacher's assertions have not gone unnoticed, a cogent explanation of the same exists in the testimonial and non-testimonial evidence.

When the record is viewed as an integrated whole, the factual record is preponderant that the private school placement during the 2018-2019 school year was meeting the Student's disability-related learning needs/circumstances. (Compare S-43, with S-40, S-41 and P-32).

The December 2018 RR notes that the Student's individualized program, since enrollment at the private school, has resulted in positive learning gains in the core areas of academic, behavioral and social needs. The RR beginning on page 11 and continuing through page 29 notes progress in reading, math, written expression, spelling, speech and language, conduct in class, improved behavior while walking in the hallways to and from class, along with improvements in speech, OT and PT related areas. At several points, the RR includes objective and anecdotal data gleaned from the review of the Student's 135-page private school record, which clearly supports positive to near grade-level performance on the Test of Written Spelling, the 4<sup>th</sup> grade Math Diagnostic and Placement Test, the Stanford Achievement Test. This otherwise positive data profile includes objective report card grades all of which contradict the single teacher's written RR input (compare S-43 and S-40). Although the private school records were admitted without objection and have been given its natural probative weight, absent other substantial competent corroborating evidence in the record supporting the single teacher's input, the remaining records do not support a factual finding that the private placement is neither proper nor appropriate.<sup>12</sup> Accordingly, as the record before me currently stands, I now find that the placement at the private school during the 2018-2019 school year was appropriate and otherwise proper; an Order granting the appropriate relief of tuition reimbursement now follows.

### **The Equities favor the Parents**

Consistent with applicable procedures, the Parents provided the District with notice prior to each unilateral placement. That said although the NOREPs, consent forms and permission to evaluate were slow-walked back to the District, the delays in the record do not support an equitable finding of prejudice. Taking into account the outcome-determinative IDEA and Section 504 substantive and procedural errors, over the three year period at issue, I now find the equities favor the Parents.

<sup>12</sup> 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); *K.D. v. Midd-West Sch. Dist.*, 2009 Pa. Commw. Unpub. LEXIS 87, 2009 WL 9097069, at \*2 (Pa. Cmwlth. Jan. 30, 2009) (citing *Walker v. Unemployment Comp. Bd. of Review*, 27 Pa. Commw. 522, 367 A.2d 366 (Pa. Cmwlth. 1976); *Furnari v. Workers' Comp. Appeal Bd. (Temple Inland)*, 90 A.3d 53, 73 (Pa. Cmwlth. 2014).

Therefore, I now find the District has failed to produce sufficient evidence to merit an equitable adjustment in the award of the tuition reimbursement or compensatory education.

### **APPROPRIATE RELIEF OF COMPENSATORY EDUCATION**

The Student is entitled to compensatory education for a period equal to the period of deprivation, excluding the time reasonably required for the school district to rectify the problem. In this particular instance, the District believing it offered a FAPE did not proffer any affirmative testimony as to the reasonable rectification period. In light of the fluid nature of the Student's present levels, I now find the rectification period is equal to 20 school days; realizing that the traditional school year is 180-days long, I will now reduce the compensatory education award to 160-days. Ever mindful of the holding that compensatory education is an equitable remedy, in light of the existing facts, violations and circumstances discussed herein, the Student is now awarded 800 hours of compensatory education.

### **Conclusion**

In this dispute aware of the Parents' concern about the Student's health, behavioral, emotional and academic rate of progress, the District either failed to or omitted to undertake a series of procedural and substantive actions/protections necessary to offer a diagnostic prescriptive plan of attack that would support a redesign its offer of a FAPE. Understanding the push-pull dilemma facing the Parties and taking into account the *Rowley* and *Endrew F.* FAPE standard, all the while mindful of the *Burlington* three-pronged test, I now find the proposed third, fourth and fifth grade IEPs and the actions taken, in real-time, to revise, redesign and then implement the same were not individually and/or collectively reasonably calculated to provide a FAPE. Simply stated, the Parents met their burden and the District failed to cogently explain its offer of a FAPE.

Therefore, the Student is awarded 800 hours of compensatory education for denials of FAPE in third grade. Next, the Student and the Parents are also awarded reimbursement for the out of pocket tuition changes for all of the fourth and fifth grade school year. Finally, the District is now Ordered to reimburse the Parents for the out of pocket expenses associated with the private evaluation.

Accordingly, in this instance, after reviewing the existing data and after giving careful consideration to the testimonial and non-testimonial extrinsic evidence, ever mindful of the *Rowley* and *Endrew F.* FAPE standard, I now find for the Parents and against the District. The following Order for appropriate relief for all IDEA violations described herein includes equitable relief for any and all Section 504 FAPE violations.

## **Order**

**And now**, this 30th of August 2019, it is hereby **ORDERED** as follows:

1. I now find in favor of the Parent and against the District on all IDEA denial of FAPE claims for the 2016-2017, 2017-2018 and 2018-2019 school year. Hence, the Student's claims for compensatory education and tuition reimbursement are granted.
2. The School District is **ORDERED** to reimburse the Parents for the cost of the private school tuition reimbursement provided to the Student during fourth and fifth grade school years.
3. As appropriate relief for the third-grade denial of a FAPE, the Student is awarded 800 hours of compensatory education.
4. The Parent is free to select any provider they deem necessary to provide the compensatory education services. The Parent has up to 100 calendar days, from the date of this Order, to notify the District who will provide the **ORDERED** compensatory education services. Once notified about the name of compensatory education provider, the District is Ordered to pay the full market rate costs/charges, within 30 days of receipt of any invoice or demand for payment, for the Student to participate in the compensatory education services.
5. The compensatory education service(s) may take place in either in the Student's county of residence or surrounding counties, in Pennsylvania or [redacted state]. The Parents, in their sole discretions, are free to identify or substitute additional future providers of compensatory education services as they deem necessary to implement this Order.
6. The compensatory education hours may also be used for any regular education, special education, transition services, related service, supplemental aid or service, modification, or accommodation as defined in any past, current or future IDEA regulations.
7. All costs and charges, including transportation to and from the compensatory education provider, shall be paid within 30-days of receipt of an invoice, demand or proof of service, from the provider or the Parent at the prevailing market rate in the community where the services are provided. The prevailing full market rate cost of the compensatory education services, shall not exceed, the prevailing rate, as charged by the service provider, in the community where the services are provided.

8. The Parent is free to identify or substitute additional future providers of compensatory education services as she deems necessary to implement this Order.
9. To prevent any error in the balance of hours remaining after payment for compensatory education services, the District is **ORDERED** to notify the Parents four times a year about the number of remaining unused hours.
10. All other claims for violations of the IDEA and requests for appropriate relief including any other affirmative defenses not otherwise addressed herein are dismissed with prejudice.

Date: August 30, 2019

s/ Charles W. Jelley, Esq. LL.M.  
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