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Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: G.M.

Date of Birth: [redacted]

ODR No. 16767-1516KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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

Carbondale Area School District
101 Brooklyn Street
Carbondale, PA 18407

William J. McPartland, Esq.
P.O. Box 3118
Scranton, PA 18505

Dates of Hearing: 12/11/2015, 02/02/2016, 02/24/2016, 03/15/2016

Record Closed: 03/31/2016

Date of Decision: 04/14/2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

This special education due process hearing was requested by the Guardian¹, against the Carbondale Area School District (District), raising claims on behalf of the Student, arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Specifically, the Guardian asserts that the District denied the Student a free appropriate public education (FAPE) during the 2013-14 school year through the present by failing to provide appropriate special education services through individualized education programs (IEPs). The Guardian also asserts that the District denied the Student FAPE by not implementing the Student's IEPs, regardless of their defects. The Guardian demands compensatory education to remedy that denial, as well as modifications to the Student's IEP in accordance with recommendations from private evaluators.

Issues²

1. Was the Student denied FAPE during the 2013-14, 2014-15 and 2015-16 school years?
2. Must the Student's IEP be modified in accordance with private evaluations in order to ensure the Student receives a FAPE?

Procedural History

On September 9, 2015, the Guardian requested this due process hearing, raising the claims described above.

On December 11, 2015, the hearing convened. The parties presented opening statements, clarifying the issues. There had been some confusion as to whether the Guardian was demanding placement at a private school. The Guardian clarified that she was not seeking private school placement but rather was seeking changes to the Student's IEP. The Guardian's position was (and is) that if the District cannot implement those changes, the District must place the Student into a private school to receive necessary services. With that clarification on the record, a recess was taken and the parties ultimately moved for a contingent dismissal order pending settlement. NT at 25.

On January 19, 2016, the matter was reinstated after the settlement failed. The hearing then reconvened, and I accepted evidence over three hearing sessions on February 2, 24 and March 15, 2016. The record then closed upon my receipt of closing briefs from both parties on March 31, 2016.

¹ Except for the cover page of this decision, identifying information about the family is omitted to the greatest extent possible. There is no dispute that the Guardian is a "parent" for purposes of 20 U.S.C. § 1401(23).

² The issues are phrased differently by the parties across various documents. The issues that I will address are those articulated on the record at NT 21-24.

Findings of Fact

Events Prior to the 2013-14 School Year

1. There is no dispute that the Student is a “child with a disability” as defined at 20 U.S.C. § 1401(3). The Student carries several medical diagnoses, including Tourette’s Disorder, Post Traumatic Stress Disorder (PTSD), Social (Pragmatic) Communication Disorder, Communication Disorder, Developmental Coordination Disorder, Anxiety Disorder (NOS), Dysthymic Disorder and Disorder of Written Communication. P-1, S-12, S-14, S-15.
2. For educational purposes, the Student received a primary disability category of Other Health Impairment (OHI) resulting from Tourette’s Disorder, and secondary categories of Emotional Disturbance and Autism since September 2013. S-3.
3. For medical purposes, there is some question about whether the Student should be diagnosed with Autism. NT at 286. The Student’s treating, board-certified psychiatrist has provided a “rule out” diagnosis for Autism, meaning that there is a question about whether that diagnosis is appropriate. Regardless, the treating psychiatrist treats the Student as if the Student has been diagnosed with Autism, believing that the Student’s “symptoms warrant that diagnosis”. NT at 287.
4. In March 2013, the Student received a Neuropsychological Learning Evaluation, facilitated by a third-party agency. S-2. That evaluation was comprehensive in scope, including multiple behavior ratings scales, and standardized, normative tests of cognitive ability and academic achievement. S-2.
5. Through the evaluation, the Student was diagnosed with PTSD, Dysthymic Disorder (a mild but persistent depression), Disorder of Written Expression, and Developmental Coordination Disorder.³ S-2. The evaluation also concluded that the Student had several weaknesses in reading skills, and recommended academic interventions for reading, but did not offer any diagnoses in regard to reading. S-2.
6. The evaluation also recommended Occupational Therapy (OT) in school, and accommodations in school for a specific learning disability (SLD) in the area of written expression.⁴ The evaluation also recommended counseling, but is not clear about whether that should be a school-based service. The report also recommended Physical Therapy (PT), but outside of the school setting. S-2.

³ It is more likely than not that the Student had been diagnosed with these conditions previously, but the record is somewhat ambiguous on this point. Documents indicate that the Student had a Tourette’s diagnosis since 2011, and may have had an IEP since that year as well. See S-4 at 6.

⁴ The evaluation did not make an educational SLD diagnosis, but rather a medical Disorder of Written Expression diagnosis. Regardless of the phrasing, the report specifically commented on the Student’s writing and coordination difficulties, and made recommendations based on what was observed and reported. S-2.

7. Specific recommendations for school included: study guides at the Student's reading level, copies of textbooks at home, extra time and a quiet, distraction-free environment for reading, phonics instruction, reading comprehension instruction, writing accommodations and programs to improve written expression, testing accommodations, and tools and assistance to improve the Student's organizational skills. S-2.
8. The Student's IEP team met on May 22, 2013. S-4. The meeting resulted in an annual IEP, the purpose of which was to address the Student's emotional and behavioral functioning. Academics were not addressed, except a statement that "[a]cademics are not a concern. [Student] does well in all [Student's] general education classes." S-4 at 7. However, the IEP notes that the Student's lack of coping and problem-solving skills impede the Student's ability to access the general education curriculum without accommodations. *Id.*
9. The IEP included two goals. The first was for the Student to answer questions based on a social skills curriculum. The social skills curriculum was also provided in the IEP. The Student was expected to achieve 80% accuracy (answering 4 out of 5 questions correctly) without teacher assistance. According to the IEP, achieving this goal would indicate improvement in anger management and coping skills. S-4 at 13.
10. The second IEP goal called for the Student to improve scores on a School Functional Assessment from 75% to 85% "in the areas of locker organization, utilizing/maintaining school materials/belongings, personal care awareness, following social conventions, and task/behavior compliance". S-4 at 14.
11. For modifications and specially designed instruction (SDI), the IEP provided OT to improve the Student's distractibility and organizational skills – particularly regarding the Student's locker, a "break card" so that the Student could return to the Student's home room to deescalate, social skills instruction, and encouragement/positive reinforcement for desired behaviors (staying on task, participating in class). S-4.
12. The IEP provided an itinerant level of emotional support (outside of an ES classroom), under which the Student would remain in the regular education classroom 97% of the school day. S-4.
13. The Guardian approved the IEP, via a NOREP, on May 23, 2013. S-5 at 3.

The 2013-14 School Year (8th Grade)

14. The Student started the 2013-14 school year under the IEP of May 22, 2013.
15. On September 9, 2013, the Parent presented the Neuropsychological Learning Evaluation to the District. This prompted the District to conduct its own reevaluation of the Student, yielding a Reevaluation Report (RR) of September 13, 2013. S-3. The District used some of the same tests and rating scales that were administered just six months prior, and in one case used an older version of an achievement test. The record does not explain why these tests were repeated, whether the older

version of a test is considered valid after a newer version is published, or whether the evaluator considered the impact, if any, of a practice effect. According to the RR, the Neuropsychological Learning Evaluation (described as an “independent evaluation”) was considered. S-3 at 6.

16. On average, the normative tests scores between the Neuropsychological Learning Evaluation and the RR were not significantly different, although there was variability. That variability placed the student in different statistical categories in some tests and composite scores, but those scores were close to each other even if the grouping changed. For example, the Neuropsychological Learning Evaluation reported a Full Scale IQ of 89 in the “low average” range while the District’s RR reported a Full Scale IU of 95 in the “average” range. While the tests reported the Student in different “ranges”, the difference between an 89 and 95 is less than one standard deviation, and just one point outside of the test’s margin of error.⁵ S-2, S-3.
17. The most significant difference between the Neuropsychological Learning Evaluation and the RR were in the domains of reading and written expression. While the Neuropsychological Learning Evaluation concluded that the Student had needs in both domains, the RR placed the Student in the average range. S-2, S-3. However, as with IQ, the actual results of normative tests in these domains are strikingly similar, given the differences in recommendations. The RR concluded that the Student reads and writes at least as well as peers, if not better, no specific recommendations about reading and writing were made, and the RR explicitly concluded that the Student does not have any SLD. S-3.
18. The greatest similarities between the Neuropsychological Learning Evaluation and the RR concerned the Student’s behaviors and emotional functioning. Both identified social, emotional, and behavioral concerns, and concluded that the Student needed assistance to deal with frustration, comply with directions, improve social skills, and improve interactions and conflict resolution with both peers and adults. S-2, S-3.
19. After the RR was drafted, the District made several attempts to convene a meeting to discuss the RR and revise the Student’s IEP. S-3 at 32-37.
20. The Student’s IEP team reconvened on October 15, 2013. Sometime prior to that meeting, the Guardian retained a non-attorney educational advocate, who attended the IEP team meeting. S-5 at 6.
21. At the time of the IEP team meeting, the Student was performing very well (above 90%) in all academic classes, but could only answer 3 out of 5 questions correctly based on the social skills curriculum. S-5 at 10. The OT goal was also not yet met. S-5 at 12.

⁵ The FSIQ score was obtained using the WISC-IV on both tests, and the slightly higher score on the second test could be the result of a practice effect, although the record does not yield any conclusions about that question.

22. The Student's IEP was not changed during the October 2013 meeting. Rather, the District issued a NOREP proposing to continue the Student's placement and review records. S-6. The Guardian, acting upon the advice of the non-attorney advocate, neither approved nor disapproved the NOREP and refused to sign it.⁶
23. Along with the NOREP, the District issued a Positive Behavior Support Plan (PBSP) based on a Functional Behavioral Analysis (FBA) that it completed as part of its RR. The PBSP had no goals of its own, but rather adopted the IEP's goals. S-6. Moreover, the behavioral interventions offered through the PBSP are indistinguishable between the modifications and SDI provided in the IEP.
24. The October 2013 PBSP hypothesized that the function of the Student's behavior was to gain attention and to escape activities. S-6.
25. The record is ambiguous as to whether the District understood that it could implement the PBSP because the Guardian did not reject the NOREP within 10 days of its issuance (it could have).⁷ Regardless, the record as a whole supports a finding that the PBSP did not result in any changes to the Student's program.
26. Shortly after the October 2013 meeting, the Guardian retained a doctoral-level Developmental Neuropsychologist to conduct a Neuropsychological and Psychoeducational Assessment. The Developmental Neuropsychologist observed the Student in school November 13, 2013, and evaluated the Student in her office on December 9 and 10, 2013. S-7.
27. The evaluation resulted in a report dated January 22, 2014. The Guardian gave a copy of the report to the District on January 24, 2014. S-7.
28. As with prior testing, the Neuropsychological and Psychoeducational Assessment revealed some variability in the Student's academic abilities and achievement, but revealed no significant problems. S-7.
29. During the school observation, the evaluator observed behaviors that she attributed to anxiety. Teachers mentioned that the Student could become fixated, or ask questions with inappropriate frequency. S-7.
30. As with prior testing, the Neuropsychological and Psychoeducational Assessment revealed emotional and behavioral concerns, particularly with pragmatic language, social skills, and coping skills (relative to anxiety). It is notable that when summarizing the results of the evaluation, the Developmental Neuropsychologist

⁶ The IDEA and Pennsylvania law enabled the Guardian to delay signing the NOREP while considering the District's proposal, and then either accept or reject it. Affirmatively choosing to do nothing is different, and the logic of this advice is beyond my understanding. Regardless, the record establishes that the Guardian was acting on the advice of a non-attorney advocate – which makes the Guardian no less responsible for this choice.

⁷ See Footnote 6.

addressed emotional and behavioral concerns in the home setting, but not in the school setting. S-7 at 16-17.

31. The summary section of the Neuropsychological and Psychoeducational Assessment notwithstanding, the report did make school-based recommendations. Specifically, the report recommended continuation of special education under the Student's current eligibility categories, Speech/Language therapy (to address pragmatics), social skills instruction, and programming to accommodate and remediate the Student's executive functioning deficits (organization and study skills). S-7 at 17-18.⁸ Testing accommodations and chunking assignments were also recommended. S-7.
32. The evaluator noted that the Student's pragmatic language deficits and poor organization and planning skills negatively impacted upon the Student's reading comprehension and writing ability, a comparative weakness relative to the Student's average to above-average academic skills. S-7.
33. Regarding anxiety and peer interactions, the Developmental Neuropsychologist concluded that the Student "struggles with peer teasing and bullying". To address this, in addition to social skills instruction, the evaluator recommended weekly, 30-minute counseling sessions with a school psychologist or trained counselor. S-7.
34. The Neuropsychological and Psychoeducational Assessment does not present a clear basis for the evaluator's conclusion that the Student was a victim of teasing and bullying at the time of the evaluation. The in-school observation does not support this conclusion, but the Student's self-reporting on behavioral rating scales may. The report of the assessment does not say whether the evaluator conducted a clinical interview. S-7.
35. Other than setting a specific, minimum amount of counseling, and adding Speech/Language Therapy (S/LT) to address social pragmatics, the Neuropsychological and Psychoeducational Assessment makes no significant recommendations beyond what was already written into the Student's IEP in terms of programming. The use of break cards and other modifications already drafted into the IEP were specifically recommended. S-7.
36. In terms of placement, the Neuropsychological and Psychoeducational Assessment recommends continuation of instruction in regular education, but also advised that the Student "will do best in a small classroom environment with a low student-to-teacher ratio. Further, it is recommended that [Student's] teachers have a background and/or experience with children/adolescents with pragmatic language difficulties, executive difficulties, fine motor delays, and emotional disturbance". S-7 at 17.

⁸ Assistive technology is also recommended, but the basis of that recommendation is unclear, as is what type of assistive technology was being recommended.

37. On March 19, 2014, the District revised the Student's PBSP and presented the revised document as a draft to the Guardian. S-8. This document is remarkable in that it included both behavioral and educational accommodations. Behaviorally, the revised PBSP includes a self-advocacy goal and weekly, 20-minute counseling sessions (with the option for more time, initiated by the Student, if needed). Academically, the PBSP offered the chunking and test accommodations similar to what is recommended in the Neuropsychological and Psychoeducational Assessment. S-8.
38. Also on March 19, 2014, the District issued a NOREP. On the face of the NOREP, it is not possible to determine what the District was seeking consent to do. Literally, the type of action that the District was proposing was "Prior Written Notice" and the description of the action was: "The IEP Team and other qualified professionals reviewed existing data and determined that additional data is necessary". S-9. It is strange that the District was sending *prior* notice for something that occurred in the *past*. Other sections of the NOREP may suggest that the District may have been seeking an evaluation, but a NOREP is not the proper form for that. Still other sections of the NOREP imply that the District was seeking consent to review the Neuropsychological and Psychoeducational Assessment that it received over a month prior from the Guardian.
39. While the NOREP was both confusing and vague, the Parent refused to approve or disapprove it, and refused to sign it, on the advice of a non-attorney advocate.⁹
40. On April 17, 2014, the IEP team reconvened and the District offered an IEP with a PBSP (S-10) via a NOREP (S-11).
41. The present educational levels sections of the April 2014 IEP were updated to reflect the testing that occurred since the prior IEP, as well as the Student's academic progress. S-10.
42. Transition goals were added, relative to the Student's desire to obtain post-secondary education after high school. S-10.
43. Testing accommodations, including extended time and small group administration, were added. S-10.
44. The social skills goal from the prior IEP was updated in the April 2014 IEP to reflect the addition of a particular social thinking program that the District had recently implemented. The actual goal (correctly answering 4 out of 5 questions based on the curriculum) remained the same. S-10 at 26.
45. A guidance counseling goal was also added, which called for the Student to complete worksheets from the social thinking program delivered over 30 lessons

⁹ See Footnote 6.

with 80% accuracy. These lessons were to be provided during weekly, 20 minute counseling sessions, which were also written into the IEP as a SDI. S-10 at 30.

46. The OT goal from the prior IEP remained the same, and progress towards that goal was not reflected in the April 2014 IEP. S-10 at 28.
47. An additional OT goal was added to improve the Student's handwriting and fine motor skills. The goal was for the Student to write correct size, spacing and orientation in 8 out of 10 trials over 3 sessions. S-10 at 29.
48. Other than the addition of the social thinking program, the modifications and SDIs in the April 2014 IEP remained substantively the same as in the prior IEP. S-10 at 32-39. Related services, however, were both increased and more explicitly detailed. Under the April 2014 IEP, the Student was to have 100 minutes per month of OT in individual sessions, 100 minutes per month of S/LT in individual sessions, and two, 20-minute sessions of counseling per week. S-10 at 40.
49. The PBSP offered with the April 2014 IEP substantively provides the same accommodations as in prior PBSPs, but this version included no goals of its own. The PBSP included one, 20-minute session of counseling per week – but this was part of, not in addition to, the counseling offered in the accompanying IEP. S-10 at 53-61.
50. The April 2014 PBSP hypothesized that the function of the Student's behavior is to escape activities. S-10
51. The Parent refused to either approve or disapprove the April 2014 IEP via a NOREP, and refused to sign the NOREP, on the advice of a non-attorney advocate, who also attended the IEP team meeting.¹⁰
52. Prior to the IEP team meeting, the Guardian arranged for a private FBA. The Student was observed by a clinician on April 10 and 16, 2014, and the clinician drafted the FBA, which was reviewed by a Board Certified Behavior Analyst (BCBA) within the same company. The BCBA also attended the April 2014 IEP team meeting. The FBA was presented to the Guardian on May 13, 2014. S-12. The Guardian shared the FBA with the school shortly thereafter.
53. The FBA included a review of existing evaluations and IEPs, and the two in-school observations. The report of the in-school observations was generally consistent with the reports of prior observations. One incident of teasing was observed. After that incident, the Student asked to see the school counselor and was given permission to do so. The Observation also highlighted the Student's organizational problems (the Student came to class without required materials). S-12.
54. The private FBA recommended that the Student's team develop a PBSP that addressed items in the Neuropsychological and Psychoeducational Assessment,

¹⁰ See Footnote 6.

specifically: strategies for resolving conflicts instead of disengaging or withdrawing, use of appropriate language when upset, to assert [Student's self]/standing up for [Student's] self when [feeling] wronged or treated unfairly, how to join an activity, start conversations with peers, improve interactions with peers, tolerate peers when they engage in behaviors that make [Student] uncomfortable." S-12 at 5.

55. The private FBA recommended developing performance-based goals to assess the Student's progress, and suggested instructional materials. S-12.
56. The Guardian obtained a private OT evaluation for the Student, yielding an OT Evaluation Report. S-14. It is not clear when the report was provided to the Guardian or District, but the Student was evaluated on May 20, 2014 and June 19, 2014. *Id.* The May 20 evaluation included an in-school observation.
57. The OT evaluation found that the Student was hypersensitive to environmental stimuli (sounds, tactile sensations). The report, like every other, remarked upon the Student's social skills deficits and executive functioning/organizational deficiencies.
58. The OT evaluation made several recommendations to improve the Student's hypersensitivity. The OT evaluation also recommended a minimum of one hour of direct OT per week to improve self-modulation, strength and motor coordination, organization, social, coping and problem-solving skills, and alternatives to handwriting (mostly typing instruction). S-12.
59. The OT evaluation said that the Student would benefit from a placement in which the Student has no prior history of bullying. S-12.
60. On June 10, 2014, the Student's treating psychiatrist wrote a letter to the Guardian at the Guardian's request, outlining "diagnostic considerations and recommendations" for the Student. S-15.
61. The psychiatrist's letter outlines the Student's diagnoses and history of treatment and medication, and reiterated the Student's long-standing social problems and history of anxiety. The psychiatrist concurred with the recommendations in the private Neuropsychological and OT evaluations, and opined that the District's IEP and PSBP were insufficient for the Student.
62. The psychiatrist concurred with a recommendation in the Neuropsychological evaluation for "an alternative educational placement providing a small classroom and school setting, a low teacher-to-student ratio, and staff that can provide a social skills curriculum that is part of the day-to-day curriculum of the school". S-15 at 3. This concurrence misstates the Neuropsychological and Psychoeducational Assessment. While the Neuropsychological Assessment recommends a low student-to-teacher ratio, and integrated social skills curriculum, and teachers who have experience with students like the Student, the Neuropsychological Assessment does not say that the Student should be educated in an alternative school. In fact, the Neuropsychological Assessment recommends continuation of placement in regular education classes. See FF 36, above.

63. During the summer of 2014, the Student attended a private program focused on post-secondary and vocational training, and social skills development. S-22.

The 2014-15 School Year (9th Grade)

64. The Student started the 2014-15 school year under the IEP of April 2014.

65. Almost no documentary evidence was presented regarding the 2014-15 school year through April of 2015.¹¹

66. An additional copy of the April 2014 IEP was entered into evidence at S-25. This is an updated copy that includes reports of progress under each goal. No progress data or reports were submitted as evidence, other than what is summarized in S-25. As such, it is not clear how the data was collected, analyzed, and reported, which makes the summaries contained in S-25 less meaningful and reliable. However, the summaries all indicate that the Student made progress, and the progress reported at S-25 was used to develop baselines for goals in the Student's next IEP. Those baselines are reported below, relative to revised IEP goals.

67. The Student's IEP team met on April 15, 2015. During that meeting, a draft IEP was presented and revised based on discussions that occurred during the meeting. S-17.

68. The April 2015 IEP was updated to state the Student's progress under the prior IEP. Although no progress monitoring data was presented as evidence, the present levels section of the April 2015 IEP generally indicates that the goals of the April 2014 IEP were met. See S-17 at 7-15.

69. The goal for the Student to respond correctly to questions based on the social thinking curriculum remained in the April 2015 IEP, but now under the umbrella of S/LT, and with an increase to 90% accuracy on three separate biweekly probes. The baseline at the time that the IEP was drafted was 85%. S-17.

70. The Organizational OT goal was continued, but increased to 95%, as the Student was currently at 90%. Again, no documentation was presented to support the baseline. S-17.

¹¹ The Student's academic report cards were entered into evidence at S-20, showing the Student's academic progression throughout. With the exception of a low mark in Health during the 2013-14 school year, the report card shows strong academic accomplishment in regular education classes. Academics are not a concern in this hearing. Similarly, evidence and some testimony concern the Student's involvement with school activities throughout. See, e.g. S-21. Testimony about these activities is so convoluted that it is unusable for fact-finding. For example, it is impossible to tell if the Student was elected to [a position] by peers – which would evidence good peer relationships, or whether the Student was appointed to that position by adults who prompted the Student to effectively run unopposed – only indicating the Student's willingness to say yes to adults.

71. The fine motor/handwriting OT goal remained unchanged, as it was not yet met. The IEP reported that the Student's baseline at that time was 7 out of 10. S-17.
72. An OT goal to improve core strength was added. S-17 at 29.
73. The Guidance Counseling goal for the Student to complete worksheets and participate in the social thinking curriculum remained. S-17. No baseline was reported for this goal, despite the fact that it had been in place for a year.
74. The SDIs and modifications in the April 2015 IEP are substantively the same as those in the April 2015 IEP. S-17 at 32-42.
75. Related services in the April 2015 IEP for OT and counseling are the same as in the April 2015 IEP. S/LT, however, was changed and reduced to 15 hours of group sessions per 180 school days (an average of once per week). S-17 at 42.
76. The April 2015 IEP was issued with a NOREP on April 23, 2015. S-19. The Guardian neither approved nor rejected the NOREP, and refused to sign it.¹²

The 2015-16 School Year (10th Grade)

77. On August 31, 2015, the Student's treating psychiatrist wrote a letter as an update to his prior letter of June 10, 2014. P-1. Therein, the psychiatrist reiterated the Student's diagnoses and treatment history.
78. The psychiatrist also explained that the Student was experiencing anxiety about returning to school for 10th grade. The Student reported feeling isolated from peers, bullied, and unsupported by staff. P-1.
79. The psychiatrist went on to state that the Student's IEP and PBSP were insufficient relative to the Student's social deficits and, despite the IEP and PBSP, the Student was targeted by both peers and staff. Consequently, the psychiatrist reiterated his agreement with the other private evaluators the Student requires an alternative school. Again, as with the June 10, 2014 letter, that is a misstatement of the private evaluation reports. P-1.
80. The Student started the 2015-16 school year under the April 2015 IEP.
81. On September 15, 2015, the high school principal replied to the Student's treating psychiatrist. The principal's letter is so striking in its overt hostility that I would include it as an appendix to this decision, were it not for the privacy concerns that would raise. The letter, which is not printed on District letterhead, addresses the psychiatrist by first name only. The purported purpose of the letter was to "correct non-truths" in the psychiatrist's letter. The following are excerpts:

¹² See Footnote 5.

As an educated man, I am confident that you understand that just because someone says something happened, it doesn't make it automatically true. For example, if someone told me a particular doctor was a "quack", it doesn't make it automatically true.

For you [the psychiatrist] to say, "[Student] has developed a label as a troublemaker with certain school administrators", is completely false. To state that as fact without ever talking to me is irresponsible.

I keep extensive records of every complaint made to me about a student being bullied and what action I took to end it. Neither [Student] nor [Guardian] ever made a complaint to me that [Student] was being bullied last year. That does not mean it did not happen; it simply means I can't help [Student] if I am not made aware of the situation.

If you would like to talk to me personally before drawing unsubstantiated conclusions, please feel free to contact me at [phone number provided].

82. The angry tone and intentional insults notwithstanding, the principal's letter reveals an ignorance of the private reporting, nearly all of which documents a history of bullying that the District did not deny up until this point. Consequently, I find as a matter of fact that the principal was not familiar with the documentation described above in September 2015.
83. Moreover, the principal's letter reveals a complete misunderstanding of the Student's needs. Even if the Student was not bullied or labeled, the Student had that perception. This, combined with the Student's well-documented anxiety and depression concerned the treating psychiatrist enough to write the August 31, 2015 letter. Rather than addressing this concern, the principal choose to negate it and attack the psychiatrist.
84. In January of 2016, the Student's treating psychiatrist wrote a prescription for homebound instruction. The psychiatrist wrote the prescription because the Student did not feel safe in school. The Student has remained on homebound instruction since that time. The type and amount of instruction that the Student receives at home were not specified on the record. See, NT 293-296 and *passim*.
85. Apart from the psychiatrist's letter just prior to the start of the school year, and the principal's letter in September of 2015, no documentary evidence was presented concerning the 2015-16 school year.

Student's Testimony

86. The Student testified at length. NT 32-138.

87. Regarding services that the IEP called for, the Student testified that the only OT services provided were for locker organization. The Student also testified that counseling sessions were not regularly provided, and the counselor was frequently unavailable. *See id.*
88. Regarding bullying by peers, the Student testified that Student is the victim of bullying, and recounted specific incidents. The Student also testified that whenever bullying was reported, the principal became involved. The principal routinely would not believe the Student, or would conclude that the Student was the aggressor. *See id.*
89. At the time of the hearing, the Student was on homebound instruction. The Student testified that, with supports, the Student could return to school even though the peer bullies would be present. However, I find as a matter of fact that the Student is terrified of the high school principal and has anxiety about returning to school for that reason. The following is excerpted from the Student's examination by the Guardian's attorney at NT 123; it is one of several sections of the transcript that could be excerpted to reach the same conclusion:
- Q. If those kids left you alone, would you be willing to come back to school?
A. No.
Q. Why?
A. Because I'll still see [Principal], and he scares me.
Q. Why does [Principal] scare you?
A. Well, like because he won't listen to me, and he's really tall and he scares me. It's like, yeah.
Q. When you say he won't listen to you, what do you mean?
A. Like when he would call me in, I would try to explain my side of the story and he wouldn't listen to me. He told me like he didn't want to hear it.
Q. And what incident [did] he said that to you?
A. I feel like all of them that he called me down for [regarding incidents of alleged bullying or incidents where other students reported the Student's inappropriate behavior].
90. As explained below, I am obligated to make credibility determinations. I do not give weight to the Student's testimony concerning IEP implementation. While the Student testified to the best of the Student's ability, it is not clear that the Student was aware of all of the services that the District provided, or knew what the District was supposed to provide. Further, I find the testimony of nearly every individual who worked with the Student to be more precise and compelling.
91. I do not make any findings of fact as to whether the Student was actually bullied. However, it is an absolute certainty that the Student felt bullied by peers and is frightened of the high school principal.

Credibility

Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Except as noted, all witnesses testified credibly as they recalled facts to the best of their abilities and none attempted to obfuscate the evidence. To whatever extent the Student and Guardian’s testimony differed from the District’s teachers and therapists, that difference flowed from perceptions that are at odds with each other, not from deception.

The high school principal was not credible in this case, and his testimony is afforded no weight. The principal’s attempts to sugar coat the letter of September 15, 2015, and his blanket refusal to consider the Student’s perspective make his testimony unusable. The principal’s outright denial of the Student’s perceptions is remarkable. While the principal may have every reason to conclude that the Student was not actually bullied, his failure to acknowledge the Student’s perceptions (regardless of whether they are accurate) illustrates the insensitivity if not outright meanness that the Student testified to, and a complete lack of understanding of the Student’s conditions – which surely contribute to the Student’s perceptions, be they right or wrong. While any student’s individual perceptions alone cannot form the basis of liability, the overt negation of and hostility towards the Student’s perceptions which, in this case, are directly tied to the Student’s disabilities, are alarming and have undoubtedly exacerbated the Student’s problems.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place

disabled children in the same position that they would have occupied but for the school district's violations of the IDEA").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

"... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. However, if a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. In the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the

position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

There is no evidence in the record to suggest that the May 2013 IEP was inappropriate at the time it was drafted. It was responsive to information reported in the Neuropsychological Learning Evaluation, and targeted symptoms of the Student's disabilities defined therein. While the IEP's goals were not a model of clarity, the document complied with the IDEA's procedural mandates. More importantly, the District had every reason to believe that the Student would derive a meaningful educational benefit from the IEP at the time it was drafted.

At the time of the October 2013 IEP team meeting, it is not surprising that the Student had not met the May 2013 IEP's goals, as the IEP had only been in place for roughly two to three months (split by the summer). Similarly, it is not surprising that the October 2013 PBSP resulted in no changes to the Student's program, as the services and accommodations provided through the PBSP were indistinguishable from those already in place in the Student's IEP. Functionally, the October 2013 IEP and the addition of the PBSP were simply a continuation of the May 2013 IEP.

After the October 2013 IEP meeting, the Guardian obtained the Neuropsychological and Psychoeducational Assessment. The crux of the Guardian's case is seen in what the Guardian characterizes as the District's failure to implement recommendations from that assessment and the other private evaluations.

The District's initial response to the Neuropsychological and Psychoeducational Assessment in March of 2014 was confusing to say the very least. See FF 37-39, *supra*. However, the rift between the Guardian and District started in earnest with the IEP of April 2014. Here, the parties' perceptions could not be more different. The Guardian views the April 2014 IEP and all that followed it as fundamentally divergent from the Neuropsychological and Psychoeducational Assessment and its recommendations. The District, however, views the Neuropsychological and Psychoeducational Assessment (and most of the other private evaluations) as confirmation that it is on the right track.

The Neuropsychological and Psychoeducational Assessment, private OT evaluation, and private FBA all are consistent with each other, with the District's own evaluations, and with the initial Neuropsychological Learning Evaluation. The District is correct in that none of the private evaluations include information about the Student that was either completely novel, or that the District was ignorant to (the high school principal notwithstanding). Moreover, on paper, it is hard to distinguish the recommendations in the private evaluations from the services offered in the April 2014 IEP or the April 2015 IEP. In fact, the only specific recommendation in the private evaluations that the Guardian points to as something that the District refused to consider is an "educational

placement providing a small classroom and school setting, a low teacher to student ratio, and staff that can provide a social skills curriculum that is part of the day-to-day curriculum of the school". (S-15, page 3).

In reality, however, there is a world of difference between the accommodations that the District offered and the intensive programs recommended in the private evaluations. For example, the private evaluations indicate a need for counseling, and the District provided counseling – but what happened during the counseling was not in line with the intensive social skills development that the Student unambiguously needed. The same is true for OT. While the Student needed help organizing a locker, this misses the bigger picture. Helping the Student organize a locker is certainly a necessary accommodation, but remediating the Student's executive functioning deficits so that the Student could organize a locker without assistance is what was truly needed. In short, simply accommodating the Student without teaching skills to compensate for the Student's disabilities is necessary but insufficient.

Perhaps District personnel were going above and beyond what the IEPs called for. If so, that only suggests the insufficiencies of the IEPs. Either way, the near absolute lack of documentation concerning the services that the District claims were provided is astounding. The lack of progress data and monitoring reports outside the Spartan summaries within an IEP is completely unacceptable. Granted, it is the Guardian's burden to prove what did not happen, but the absence of documentation supports the Guardian's claims.

For purposes of compensatory education, under the facts of this case, it makes little difference whether the IEPs were not implemented or were simply insufficient. The denial of FAPE is evidenced by the Student's lack of meaningful progress. Even assuming that the Student made progress towards IEP goals, the record clearly indicates that the Student's actual abilities did not change from the start of 8th grade to the time that the Student went on homebound in January of 10th grade. No evidence suggests that the Student's executive functioning improved in any meaningful way, and OT was still working on skills that were targeted in 8th grade. The same is true for the Student's social skills. Other than moving through a social thinking curriculum, no evidence suggests that the Student's actual social skills improved.

It is not at all surprising that failure to address the Student's pragmatic language deficits, which are intertwined with the Student's social skill deficits, resulted in the Student's increased anxiety in and about school. The Student's perceptions are a function of the Student's disability. The District's unwillingness to acknowledge, let alone address those perceptions undoubtedly contributed to the Student's current need for homebound instruction.

It is true that IEPs are not judged in hindsight. *Fuhrman v. E. Hanover Bd. of Educ.*, 993 F.3d 1031 (3d Cir. 1993); (It is not appropriate to "Monday morning quarterback" a district's offer of FAPE.) See also, *In Re the Educational Assignment of J.A., a Student in the Chester County Intermediate Unit*, Special Educ. Op. No. 1064; *In Re the Educational Assignment of A.R., a Student in the Bethlehem Area School District*,

Special Educ. Op. No. 1152. In this case, it took the District from January 24, 2014 until April 17, 2014 to convene an IEP team meeting. Then, with no progress monitoring and no appreciable change in the Student's needs, the District failed to alter the Student's IEP in any meaningful way from April of 2014 though the Student's homebound placement. Even now, the District fundamentally proposes more of the same should the Student return, although it acknowledges that additional services must be put in place to facilitate the Student's return to school. This is insufficient relative to the Student's needs, and constitutes an ongoing denial of FAPE.

For the foregoing reasons, the Student was denied FAPE and compensatory education is owed. The Guardian has not presented a demand for any specific quantity or form of compensatory education, and evidence was not presented to establish what is now required to put the Student in a position that the Student would be in but for the denial. As such, under the standard articulated above, I will award compensatory education equal to the amount of time of FAPE that was denied. Even under that standard, calculating the compensatory education owed is difficult. The private evaluations, on the whole, do not recommend a specific quantity of service. Given the totality of the record, I find that the Student was denied FAPE in four related domains: pragmatic language, social skills, executive functioning, and coping skills. I will, therefore award four hours of compensatory education for each week that school was in session between February 24, 2014 and the day that the Student started homebound instruction. The compensatory education accrues starting in February instead of January, as case law (above) requires a reduction of a reasonable period of time following receipt of the evaluation for the District to take action. From the start of homebound instruction forward, I will award five hours of compensatory education, as both parties have acknowledged that the Student will require more services to return to school, and because I have determined that the Student's current need for homebound instruction is a result of the denial of FAPE. Compensatory education shall continue to accrue at a rate of five hours per week for each week that school is in session until such time as the District offers an appropriate plan to transition the Student back to school.

Beyond compensatory education, the second issue in this matter concerns whether the District must incorporate the recommendations of the private evaluators into the Student's IEP. Resolving this issue is exceedingly difficult. As a threshold consideration, the reports were not drafted to be copied into IEPs to form goals and SDIs. Rather, the reports propose recommendations for a full IEP team to consider. They represent each evaluator's understanding of the Student's needs, the basis of that understanding, and recommendations ranging from general suggestions to various instructional materials.

Similarly, incorporation of the private evaluations is impossible to the extent that the evaluations make conflicting recommendations. Technically, the letters from the treating psychiatrist are not evaluations, but they do recommend placement in an alternative school. In contrast, other evaluations make recommendations about how the Student should be educated in the public school setting. The Neuropsychological and Psychoeducational Assessment sit somewhere in the middle, outlining an appropriate placement consistent with an alternative school without actually making that

recommendation.¹³ While the private evaluations are more consistent with each other than not, I will not compel the District to resolve inconsistencies that it did not create in order to comply with this decision.

Finally, both parties agree that the Student's needs may have changed since going on homebound instruction. This is not at all surprising. Removing a student with social skills deficits from social situations cannot be helpful, and putting an anxious student back into school after a long break is surely anxiety-producing. None of the private evaluations, therefore, account for the Student's current needs, particularly in regard to transitioning back to school.

Hearing Officers are empowered to craft case-specific relief to ensure the provision of FAPE. *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010). I do so in the order below to ensure that the Student will receive FAPE going forward, even though I will not compel the District to conform the Student's IEP to the private evaluations. The order below will constitute pendency in the event that the parties cannot come to an agreement about what should happen next. I am quite reluctant to push this question back to the IEP team. In this case, I see no better option. The order below operates as a failsafe should the team fail to craft a mutually-agreeable IEP.

An order consistent with the foregoing follows.

¹³ The Guardian is not seeking an order to place the Student in an alternative school. However, after considering the Guardian's testimony and the record as a whole, it is clear that is what the Guardian wants. The record does not support a finding that the Student cannot be educated in the District. Nothing in this decision, however, prevents the Student's IEP team from considering alternative placements if that is required for the provision of FAPE.

ORDER

Now, April 14, 2016, it is hereby **ORDERED** as follows:

1. The Student is awarded four (4) hours of compensatory education for each week that school was in session from February 24, 2014 and the day that the Student started homebound instruction.
2. From the day that the Student started homebound instruction, compensatory education will continue to accrue at a rate of five (5) hours per week that school is in session until the District evaluates the Student and offers a transition plan in accordance with paragraphs 5, 6 and 7 of this order.
3. In accordance with the above Decision, the following (a. through i.) shall apply unless the Guardian and District agree in writing to the contrary. Compensatory education shall stop accruing if such an agreement is made.
 - a. Within five (5) school days of this Decision and Order, the District shall propose an evaluation to assess what SDI, modification, and/or accommodations the Student requires to transition back to school. Unless the parties agree otherwise in writing, the District shall conduct the evaluation in the Student's home.
 - b. The District shall complete the evaluation and issue a report within fifteen (15) school days of this Order.
 - c. Within twenty (20) days of this Decision and Order, the District shall complete the evaluation and convene the Student's IEP team to draft a transition plan, enabling the Student to gradually return to school.
 - d. Nothing in this order prohibits the District from completing the evaluation and offering a transition plan in less time than what is required above. Compensatory education shall continue to accrue at a rate of five (5) hours per week for each week that school is in session until such time a transition plan is offered.
 - e. If the Guardian refuses consent for the transition evaluation, compensatory education shall stop accruing on the day that the District proposes the evaluation.
 - f. If the Guardian causes a delay with the District's evaluation or the development of the transition plan, compensatory education shall stop accruing.
 - g. If the Guardian and District agree that the transition evaluation should be completed by a third party, compensatory education shall stop accruing when that agreement is made in writing.

- h. After the Student returns to school, the District shall propose a comprehensive evaluation to assess all of the Student's needs, including but not limited to pragmatic language, social skills, executive functioning, and coping skills. To the extent practicable, those domains shall be assessed using standardized, normative assessments. The evaluation shall otherwise comply with all aspects of 20 U.S.C. § 1414 and applicable Pennsylvania regulations.
 - i. Upon completion of the comprehensive evaluation, the District shall convene the Student's IEP team to develop an annual IEP. The Guardian may invite one private evaluator to the IEP team meeting at the District's expense, at a rate not to exceed \$175 per hour, for a duration of not more than three hours. The Guardian may invite other private evaluators at the Guardian's own expense.
- 4. The Guardian may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP.
 - 5. Compensatory education may not be applied against private school tuition. However, nothing herein prohibits the parties from agreeing to reduce any or all awarded compensatory education to a fund, and further agreeing to the acceptable uses of said fund. Any such agreement shall be in writing.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER